

OVERRULING BY IMPLICATION AND THE
CONSEQUENT BURDEN UPON BENCH AND BAR

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For the most part, the courts, including New York’s Court of Appeals, adhere to past precedent. The Court of Appeals explained several years ago that “stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”¹ The Court added that the doctrine of “stare decisis is deeply rooted in the precept that we are bound by a rule of law—not the personalities that interpret the law.”² The Court of Appeals has adhered to precedent even on some occasions in which the only significant argument in favor of a seemingly problematic rule was that it was the settled rule.³

Of course, there have nonetheless been occasions in which the Court of Appeals found sufficient cause to expressly overrule its prior holdings. Sometimes, as in *Bethel v. New York City Transit Authority*, the Court deemed the old rule antiquated.⁴ There, the

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¹ *People v. Taylor*, 9 N.Y.3d 129, 148, 878 N.E.2d 969, 978, 848 N.Y.S.2d 554, 563 (2007) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

² *Taylor*, 9 N.Y.3d at 148, 878 N.E.2d at 978, 848 N.Y.S.2d at 563.

³ *See, e.g., Liff v. Schildkrout*, 49 N.Y.2d 622, 631, 404 N.E.2d 1288, 1290, 427 N.Y.S.2d 746, 748 (1980); *see also Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 339, 827 N.E.2d 762, 764–65, 794 N.Y.S.2d 704, 706–07 (2005) (adhering to the New York rule because it was the New York rule, even after having previously acknowledged in *In re Brandon*, that New York was one of only two states that still allowed insurers to disclaim by virtue of the insured’s failure to provide timely notice of the claim, irrespective of whether the insurer was prejudiced by the delay (citing *In re Brandon*, 97 N.Y.2d 491, 496 n.3, 769 N.E.2d 810, 813 n.3, 743 N.Y.S.2d 53, 56 n.3 (2002))).

⁴ *Bethel v. N.Y.C. Transit Auth.*, 92 N.Y.2d 348, 351, 703 N.E.2d 1214, 1215, 681 N.Y.S.2d 201, 202 (1998).

court considered a nineteenth century rule that required common carriers to exercise the utmost care for the safety of its passengers, not merely reasonable care.⁵ The *Bethel* court concluded that while that rule may have made sense “at the advent of the age of steam railroads in 19th century America” when “[t]heir primitive safety features resulted in a phenomenal growth in railroad accident injuries,” the world is now a different place.⁶

Less frequently, the court has overruled a prior holding because it was, on further consideration, ill-advised, a now acknowledged mistake. Such was the eventual fate of the court’s 1985 ruling in *Tebbutt v. Virostek*.⁷ In *Tebbutt*, the court held that a mother could not recover compensation in tort for the emotional distress of a miscarriage or stillbirth caused by the defendant’s medical malpractice.⁸ The *Tebbutt* court reasoned that such a claim did not fit within the parameters of any previously recognized cause of action and that it therefore failed.⁹ However, nineteen years later, in *Broadnax v. Gonzalez*, the court stated: “[W]e are no longer able to defend *Tebbutt*’s logic or reasoning.”¹⁰ Writing for the majority, Judge Rosenblatt added:

While we are well aware of the importance of precedent, *Tebbutt* has failed to withstand the cold light of logic and experience. To be sure, line drawing is often an inevitable element of the common-law process, but the imperative to define the scope of a duty—the need to draw difficult distinctions—does not justify our clinging to a line that has proved indefensible.¹¹

Interestingly, the dissent in *Broadnax*, by Judge Read, focused mainly on the doctrine of stare decisis.¹² She deemed the criticism of *Tebbutt* “insufficient . . . to overrule a 20-year-old precedent.”¹³

While *Broadnax* and *Bethel* overturned prior high court rulings for very different reasons, one point in common is that those decisions expressly acknowledged and definitively overturned previously binding authority. In consequence, litigants knew

⁵ *Id.* at 352–53, 703 N.E.2d at 1216, 681 N.Y.S.2d at 203.

⁶ *Id.*

⁷ *Tebbutt v. Virostek*, 65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010 (1985).

⁸ *Id.* at 932, 483 N.E.2d at 1143, 493 N.Y.S.2d at 1011.

⁹ *See id.* at 933, 483 N.E.2d at 1144, 493 N.Y.S.2d at 1012.

¹⁰ *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 153, 809 N.E.2d 645, 648, 777 N.Y.S.2d 416, 419 (2004).

¹¹ *Id.* at 156, 809 N.E.2d at 649, 777 N.Y.S.2d at 420.

¹² *Id.* at 156, 809 N.E.2d at 650, 777 N.Y.S.2d at 421 (Read, J., dissenting).

¹³ *Id.*

exactly where they now stood. *Tebbutt* and the nineteenth century standard of “utmost care” were gone, history, toast. They were now supplanted by the rulings in *Broadnax* and *Bethel*. Just as importantly, the lower courts knew that as well.

Yet, over the past decade or so the Court of Appeals has, especially in the tort context, sometimes utilized a different mechanism to overrule prior rulings. It has overruled by implication. That is to say, the court overruled its prior holdings by (a) ignoring its prior, seemingly inconsistent rulings, or (b) re-examining the prior rulings and in essence declaring that the law was *always* different than litigants, courts, and commentators supposed it to be. I shall soon examine examples of both kinds of implied overruling of precedent.

This article is not about the merits or demerits of any of the individual rulings discussed below, but instead about the practice of overruling by implication. My thesis is that when the court does overrule its prior holdings it is far more preferable that it do so expressly, as in *Broadnax* and *Bethel*, than by implication.

First, the entire point and purpose of the doctrine of stare decisis—in essence, that the court will adhere to prior precedent unless it perceives *a really good reason* not to do so—is lost if the precedent is re-interpreted or ignored when it conflicts with the current ruling. Put differently, the constraining force of precedent is minimized.¹⁴

¹⁴ Chief Judge Lippman made that very point earlier this year when dissenting from the ruling in *Groninger v. Village of Mamaroneck*. 17 N.Y.3d 125, 133, 950 N.E.2d 908, 913, 927 N.Y.S.2d 304, 309 (2011) (Lippman, C.J., dissenting). The Court had previously ruled that municipalities could require prior written notice of a defect as a prerequisite to imposition of tort liability only, per the terms of General Municipal Law Section 50-e, at “streets, highways, bridges, culverts, sidewalks or crosswalks.” *Walker v. Town of Hempstead*, 84 N.Y.2d 360, 368, 643 N.E.2d 77, 80, 618 N.Y.S.2d 758, 761 (1994). The majority ruled in *Groninger* that municipalities could also require prior written notice as a prerequisite at publicly owned parking lots because parking lots *were* highways. *Groninger*, 17 N.Y.3d at 128, 950 N.E.2d at 910, 927 N.Y.S.2d at 306. Writing for himself and two other dissenters, the Chief Judge observed:

Obviously, *Walker* was not, as the majority suggests, an appeal simply about whether the Town could rely on the lack of prior written notice as a defense to a paddleball court accident. Such a characterization trivializes the appeal’s scope of concern and ignores the analysis and findings upon which the Court’s particular conclusion—that a town paddleball court was not among the locations to which a prior written notice requirement might apply—was based. . . .

. . . .

Our construction of General Municipal Law § 50-e (4) in *Walker* is entitled to be viewed as authoritative. The majority declines to give it effect, not because after close consideration and attention to the principles of stare decisis it has concluded that the construction is wrong or unworkable—manifestly, it is not—but because the intermediate appellate courts of this State have, in a handful of dubiously reasoned

Second, and specifically with respect to what I here term “re-interpretive” overruling, it does not promote “the evenhanded, predictable, and consistent development of legal principles”¹⁵ when bench and bar are told that what they thought was always the rule was always wrong.¹⁶ What is more, because many other rulings (high court and otherwise) were likely based in whole or in part upon the rulings that have now been revisited and re-interpreted, such re-interpretation can produce uncertainty and confusion, as well as significant and not necessarily intended consequences. Nor does the realization that any ruling can be effectively overruled without being expressly overruled foster “reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process.”¹⁷

Third, disregard of ostensibly conflicting precedent—the other way in which prior rulings can be impliedly overruled—can create uncertainty and confusion of a different kind. If the court now renders a ruling that *seems* inconsistent with its prior ruling in *Jones v. City*, does that mean *Jones* is thereby overruled and no longer good law? Or was the instant case instead distinguishable in some respect? Absent any acknowledgment of the very existence of the *Jones* ruling, let alone the respect in which *Jones* was distinguishable or overruled, bench and bar are left to their own devices. This problem, as I will soon show, has been especially pronounced with respect to tort actions premised upon alleged violations of the statutes governing construction site safety.

I. OVERRULING BY OMISSION

A. To “Cause” and Yet Not “Cause”—How a Long Settled Rule was Overturned Without Being Overturned

What does it mean exactly to “cause” or “create” a hazard? More to the point, when a municipality is protected by a prior written notice provision that requires receipt of written notice of the subject

decisions perpetuated the pre-*Walker* notion that a parking lot is a kind of “highway” as to which the prohibition of General Municipal Law § 50-e (4) does not apply. *Id.* at 132–33, 950 N.E.2d at 912–13, 927 N.Y.S.2d at 308–09 (Lippman, C.J., dissenting).

¹⁵ *People v. Taylor*, 9 N.Y.3d 129, 148, 878 N.E.2d 969, 978, 848 N.Y.S.2d 554, 563 (2007).

¹⁶ To be sure, there are occasions in which deeper consideration of conflicting lines of precedent or conflicting constructions of precedent can clarify the law. See, e.g., *Walsh v. Super Value, Inc.*, 76 A.D.3d 371, 372, 904 N.Y.S.2d 121, 123 (App. Div. 2d Dep’t 2010) (reexamining liability of property owners who have created a dangerous condition). But there is, I think, a distinction between that situation and the situation treated in the main text.

¹⁷ *Taylor*, 9 N.Y.3d at 148, 878 N.E.2d at 978, 848 N.Y.S.2d at 563.

condition as a prerequisite for tort liability, when can liability be imposed in the absence of such notice on the ground that the municipality “caused” the defect? Still more to the point, where the municipality negligently takes some action that *later* results in a defect (e.g., negligent repair of a pothole, negligent installation of a sign, or negligent construction of a sidewalk) does that obviate the need for prior written notice of the subject defect?

As of, say, 2005, there was a Court of Appeals ruling and a number of appellate decisions that dictated an answer to those questions. There is today, as a result of several very recent Court of Appeals decisions, a different answer. Yet, the first ruling was never expressly overruled. It was, instead, ignored.

1. Historical Background

Speaking generally now, and not necessarily about *municipal* tort liability or prior written notice laws, it has always been the rule, and is still the rule, that the plaintiff need not prove that the tort defendant *had actual or constructive notice* of the purportedly dangerous condition where the proof indicates that it was the defendant (or his or her agents or delegees) who *created* the condition.¹⁸ Such was the rule more than a hundred years ago.¹⁹ It is still the rule today.²⁰

¹⁸ *Lewis v. Metro. Transport. Auth.*, 99 A.D.2d 246, 249, 472 N.Y.S.2d 368, 371 (App. Div. 1st Dep’t 1984), *aff’d*, 64 N.Y.2d 670, 474 N.E.2d 612 (1984).

¹⁹ *Pratt, Hurst & Co. v. Tailer*, 186 N.Y. 417, 421, 79 N.E. 328, 329 (1906) (“[I]t is perfectly plain that the landlords would not be relieved of liability for leakage occasioned by their own action or that of their agents in actually making holes It could not have been intended that they were to receive written notice in order to charge them with responsibility for their own personal misconduct”); *Wilson v. City of Troy*, 135 N.Y. 96, 102, 32 N.E. 44, 45 (1892) (“[Where] the city itself, through one of its officers or departments, caused the trench to be dug, and left it unguarded . . . the negligent act is imputable to the city, and the doctrine of actual or implied notice has no application, or, at least, is unnecessary” (citations omitted)); *Turner v. City of Newburgh*, 109 N.Y. 301, 305, 16 N.E. 344, 345 (1888) (“[I]f [highways] became unsafe without the defendant’s fault, it was not responsible unless it had notice, or the defect had existed a sufficient length of time to apprise its officers, charged with that duty, if they were diligent in its performance.”).

²⁰ *See Reilly-Geiger v. Dougherty*, 85 A.D.3d 1000, 1000, 925 N.Y.S.2d 619, 620 (App. Div. 2d Dep’t 2011) (“[W]here a worker at a job site is injured as a result of a dangerous or defective premises condition, a property owner may be held liable if he or she created the condition or had actual or constructive notice of it without remedying it within a reasonable time.” (citations omitted)); *Schnur v. City of New York*, 298 A.D.2d 332, 332–33, 750 N.Y.S.2d 267, 268 (App. Div. 1st Dep’t 2002) (“Neither actual nor constructive notice need be proven where a defendant is responsible for causing or creating a dangerous condition.” (citing *Roundpoint v. V.N.A. Inc.*, 207 A.D.2d 123, 126–27, 621 N.Y.S.2d 161, 164 (App. Div. 3d Dep’t 1995))); *Roundpoint*, 207 A.D.2d at 126–27, 621 N.Y.S.2d at 164 (“Plaintiffs . . . have created an issue of fact as to defendant’s liability with proof that defendant created the dangerous condition, thereby negating defendant’s argument regarding notice.” (citations omitted));

Although some of the cases of this ilk involved dangers that were or should have been *immediately* apparent to the person who caused them, I am not aware of any decision that held or even suggested that the *general* tort rule—that notice need not be proven as to those conditions that the defendant affirmatively caused—applied only in those instances in which the danger was “immediately apparent” as of the time the defendant acted. Indeed, I would submit that such a rule would be so profoundly and obviously wrong, both morally and as policy, as to preclude its serious consideration.

For example, an auto mechanic who negligently repaired a car’s brakes would then escape liability as a matter of law if the brakes failed the next day but looked and worked fine when the car left the shop; an elevator maintenance company that negligently repaired an elevator would then escape liability if the elevator was working well when its employee left the site.²¹

The same rule—to the effect that the plaintiff need not prove notice regarding those conditions that the defendant *affirmatively caused*—also historically applied where the defendant was a municipality that had enacted a “written notice” law specifying that its receipt of written notice of the subject defect was a condition precedent to the imposition of liability.

The earliest cases to consider whether local notice laws immunized municipal defendants even as to defects they

Gaither v. Saga Corp., 203 A.D.2d 239, 240, 609 N.Y.S.2d 654, 655 (App. Div. 2d Dep’t 1994) (“[T]he defendant’s arguments that it lacked actual or constructive notice of the condition and that it had no duty to maintain the area where Ms. Gaither fell are inapposite where, as here, liability is premised on the theory that the defendant created the dangerous condition.” (citations omitted)); Saia v. Misrahi, 129 A.D.2d 621, 621–22, 514 N.Y.S.2d 256, 256 (App. Div. 2d Dep’t 1987) (“Where, as here, a theory of liability submitted to the jury is that the appellant itself created a dangerous condition . . . notice is not an essential part of the cause of action.” (citations omitted)); Roberts v. Arrow Boat Club, Inc., 46 A.D.2d 815, 816, 361 N.Y.S.2d 213, 214 (App. Div. 2d Dep’t 1974) (holding that plaintiff need not prove notice as to condition defendant allegedly caused); Princiotta v. Materdomini, 45 A.D.2d 883, 884, 358 N.Y.S.2d 13, 14 (App. Div. 2d Dep’t 1974) (“Although there was no proof of notice to the landlords of the defective condition, such notice is not required if the condition was the result of a prior defective repair by the landlord.” (citing *Pratt, Hurst & Co.*, 186 N.Y. at 421, 79 N.E. at 329)).

²¹ Compare Swensson v. N.Y., Albany Despatch Co., 309 N.Y. 497, 505, 131 N.E.2d 902, 906 (1956) (explaining that a jury can infer negligence on the part of the defendant which had “reconditioned” the tractor *despite* the evidence that the brakes were working fine before the accident), with Griffen v. Manice, 174 N.Y. 505, 66 N.E. 1109 (1903), *aff’g per curiam* 74 A.D. 371, 374, 77 N.Y.S. 626, 629 (App. Div. 1st Dep’t 1902) (refusing to impose liability for an alleged negligently performed repair). The Appellate Division dissenters, however, would have ruled for the plaintiff on the ground that it had been informed of the postrepair malfunctions. *Griffen*, 74 A.D. at 379–80, 77 N.Y.S. at 633–34 (O’Brien, J., dissenting).

affirmatively created gave two different reasons for answering in the negative. One rationale, reflected in *Minton v. City of Syracuse*, rested on familiar principles of statutory construction.²² In *Minton*, the written notice provision had been enacted back in 1898.²³ The *Minton* court reasoned that it was, even then (1898), well known that notice was not required “where the dangerous condition is produced by the city itself.”²⁴ That being so, the court was bound to conclude “that this rule was known to the Legislature”²⁵ and that the notice law that was there in issue did “not apply to require written notice to the commissioner of public works of street defects created by employees in his department.”²⁶

The second and more simply stated rationale was that a party, even a defendant-municipality, “is presumed to know of its own negligent acts.”²⁷

Whatever the rationale, the courts held that even when a municipal defendant had enacted a written notice law, the plaintiff was not required to plead or prove that the defendant had been given written notice of the defect by some outsider where it was the defendant itself (or his/her agents or contractors) who caused the defect in issue.²⁸ And the Court of Appeals had itself consistently

²² *Minton v. City of Syracuse*, 172 A.D. 39, 41–44, 158 N.Y.S. 470, 472–73 (App. Div. 4th Dep’t 1916).

²³ *Id.* at 42, 158 N.Y.S. at 472.

²⁴ *Id.* at 44, 158 N.Y.S. at 474.

²⁵ *Id.*

²⁶ *Id.* at 45, 158 N.Y.S. at 474.

²⁷ *Taylor v. City of Albany*, 239 A.D. 217, 219, 267 N.Y.S. 903, 905 (App. Div. 3d Dep’t 1933), *aff’d per curiam*, 264 N.Y. 539, 191 N.E. 554 (1934).

²⁸ *Cabrera v. City of New York*, 21 A.D.3d 1047, 1048, 803 N.Y.S.2d 584, 585 (App. Div. 2d Dep’t 2005) (“It is undisputed that the City had no prior written notice However, prior written notice is not required if the defendant caused or created the alleged defect.” (citations omitted)); *Murphy v. City of Corning*, 302 A.D.2d 1006, 1007, 755 N.Y.S.2d 185, 186 (App. Div. 4th Dep’t 2003) (“[P]laintiff raised a triable issue of fact whether defendant created the allegedly defective condition rendering prior written notice unnecessary” (citations omitted)); *Smith v. City of Syracuse*, 298 A.D.2d 842, 843, 747 N.Y.S.2d 876, 877 (App. Div. 4th Dep’t 2002) (holding that a city can be liable if it negligently created a dangerous condition); *Gonzalez v. City of New York*, 268 A.D.2d 214, 215, 700 N.Y.S.2d 462, 463 (App. Div. 1st Dep’t 2000) (“[T]he prior written notice requirement . . . does not apply because the ‘drop off’ was created by the City’s affirmative act of resurfacing the roadway next to the deteriorated curb” (citation omitted) (citing *Cruz v. City of New York*, 218 A.D.2d 546, 547–548, 630 N.Y.S.2d 523, 526 (App. Div. 1st Dep’t 1995))); *Miller v. City of New York*, 225 A.D.2d 396, 396, 640 N.Y.S.2d 11, 12 (App. Div. 1st Dep’t 1996) (“[Prior written] notice is not required where it is shown that the municipality was affirmatively negligent in causing or creating the defective condition.” (citing *Messina v. City of New York*, 190 A.D.2d 659, 659, 593 N.Y.S.2d 72, 73 (App. Div. 2d Dep’t 1993))); *Parks v. Hutchins*, 162 A.D.2d 666, 668, 557 N.Y.S.2d 389, 392 (App. Div. 2d Dep’t 1990) (“[P]rior written notice is not a prerequisite to suit where the city has created the allegedly unsafe condition” (citations omitted)), *aff’d*, 78 N.Y.2d 1049, 581 N.E.2d 1339, 576 N.Y.S.2d 84 (1991); *Hogan v. Grand Union Co.*, 126 A.D.2d 875, 876, 511

held that written notice need not be established as to defects caused by the municipality itself.²⁹

This did not mean that the case went to a jury each time the plaintiff contended, with or without supporting proof, that the defendant caused the subject defect. Obviously, the defendant would prevail where there was insufficient basis to conclude that the prior work at the location in issue was done *negligently*,³⁰ where there was inadequate basis to conclude that it was the *defendant* who negligently performed the work,³¹ or where there was insufficient basis to conclude that the negligently performed work *proximately caused* the defect in issue.³²

N.Y.S.2d 166, 167 (App. Div. 3d Dep't 1987) (explaining that prior written notice is not necessary where a city caused or created a dangerous condition).

²⁹ *Kiernan v. Thompson*, 73 N.Y.2d 840, 841–42, 534 N.E.2d 39, 40, 537 N.Y.S.2d 122, 123 (1988); see *infra* notes 46–48 and accompanying text (discussing *Kiernan* further); *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474, 715 N.E.2d 104, 106, 693 N.Y.S.2d 77, 79 (1999) (“This Court has recognized only two exceptions to the statutory rule requiring prior written notice, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a ‘special use’ confers a special benefit upon the locality.” (citations omitted)); *Poirier v. City of Schenectady*, 85 N.Y.2d 310, 315, 648 N.E.2d 1318, 1321, 624 N.Y.S.2d 555, 558 (1995) (“[P]laintiffs failed to show that defendant created the obstructed condition by an affirmative act of negligence, another recognized exception, as to render the Charter’s prior notice provision inapplicable.” (citations omitted)); *Martin v. City of Cohoes*, 37 N.Y.2d 162, 166, 332 N.E.2d 867, 870, 371 N.Y.S.2d 687, 691 (1975) (“[E]ven where a statute applicable to a case requires prior written notice, proof of affirmative tortious conduct on the part of a municipality will suffice.” (citations omitted)); *Muszynski v. City of Buffalo*, 33 A.D.2d 648, 648, 305 N.Y.S.2d 163, 163 (App. Div. 4th Dep’t 1969), *aff’d per curiam*, 29 N.Y.2d 810, 277 N.E.2d 414, 327 N.Y.S.2d 368 (1971) (“[A]ffirm[ing] . . . on the opinion at the Appellate Division”); see *infra* notes 42–45 and accompanying text (discussing *Muszynski*).

³⁰ *Betzold v. Town of Babylon*, 18 A.D.3d 787, 787, 796 N.Y.S.2d 680, 680 (App. Div. 2d Dep’t 2005) (holding that plaintiff-bicyclist who struck a pothole failed in providing sufficient evidence to demonstrate that the town affirmatively knew of the pothole and therefore was negligent); *Filaski-Fitzgerald v. Town of Huntington*, 18 A.D.3d 603, 604, 795 N.Y.S.2d 614, 614 (App. Div. 2d Dep’t 2005) (“[P]laintiffs . . . failed to demonstrate that the allegedly defective condition was created by the Town’s affirmative negligence . . .” (citations omitted)).

³¹ *Patti v. Town of North Hempstead*, 23 A.D.3d 362, 363, 806 N.Y.S.2d 93, 94 (App. Div. 2d Dep’t 2005) (“[P]laintiff’s speculative and unsupported contention that one of the defendants must have repaired the sidewalk where the accident occurred and therefore created the allegedly dangerous condition was insufficient to raise a triable issue of fact.” (citations omitted)); *Herman v. Village of Kiryas Joel*, 19 A.D.3d 544, 545, 796 N.Y.S.2d 534, 534–535 (App. Div. 2d Dep’t 2005) (“[P]laintiff[s] . . . vague, conclusory, and speculative evidence [was] insufficient to raise a triable issue of fact as to whether the defendant created the dangerous condition that caused the injured plaintiff to fall . . .” (citations omitted)); *Pittel v. Town of Hempstead*, 154 A.D.2d 581, 582–583, 546 N.Y.S.2d 411, 412–413 (App. Div. 2d Dep’t 1989) (refusing to impose liability where *someone else* negligently paved the roadway and the defendant Town only failed to discover the defect).

³² *Cendales v. City of New York*, 25 A.D.3d 579, 580, 807 N.Y.S.2d 414, 416 (App. Div. 2d Dep’t 2006) (“Although an exception to the prior written notice requirement exists where a municipality creates the subject defect through an affirmative act of negligence, the plaintiff’s evidentiary submissions were insufficient to raise a triable issue of fact as to whether the roadway defect was created by the City’s affirmative negligence.” (citations omitted)); *Demant v. Town of Oyster Bay*, 23 A.D.3d 333, 334, 804 N.Y.S.2d 107, 109 (App. Div. 2d Dep’t 2005) (“[T]he conclusory and speculative affidavit of [plaintiffs] expert failed to raise a triable issue of fact as to whether the

Likewise, where the plaintiff's claim rested, at bottom, upon failure to repair in an expeditious manner, rather than upon affirmative causation of a defect, the "cause and create" exception would not apply.³³

One familiar example of the latter class of cases are the so-called tree root cases. These were the cases in which someone, perhaps the municipality or a third person, planted a tree that over the course of time displaced or damaged the surrounding sidewalk as the tree's roots grew.³⁴ Because the planting of a tree is not of itself negligence (otherwise we would have no trees at or near public places), the case necessarily rests on the *failure to repair* after the defect arises rather than upon any malfeasance, and for this reason, liability was not imposed where a written notice law barred

Town affirmatively created the pothole." (citations omitted)); *Glaser v. Cnty. of Orange*, 22 A.D.3d 720, 721, 803 N.Y.S.2d 669, 670 (App. Div. 2d Dep't 2005) ("[T]he plaintiffs, and the Village and Knapp failed to submit evidence sufficient to raise a triable issue of fact as to whether the County created the alleged defect." (citing *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474, 715 N.E.2d 104, 106, 693 N.Y.S.2d 77, 79 (1999))); *Cuccia v. City of New York*, 22 A.D.3d 516, 517, 801 N.Y.S.2d 771, 771–772 (App. Div. 2d Dep't 2005) ("The plaintiff [has] failed to raise a triable issue of fact as to whether the City caused or created the alleged defect." (citations omitted)).

³³ See, e.g., *Reich v. Meltzer*, 21 A.D.3d 543, 544, 800 N.Y.S.2d 593, 594 (App. Div. 2d Dep't 2005) ("A *failure to repair* is not affirmative behavior necessary to establish that the City created the defective condition." (emphasis added) (citations omitted)); *Silva v. City of New York*, 17 A.D.3d 566, 568, 793 N.Y.S.2d 478, 479 (App. Div. 2d Dep't 2005) ("They contend that this negligence consisted of a *failure to repair a water main in an expeditious manner*. A failure to repair is not not affirmative behavior necessary to establish that the City created the defective condition" (emphasis added) (citations omitted)).

[T]he plaintiff was required to demonstrate that the County did something more than stand by while a roadway joint *settled over a period of years*. The *slowly evolving* nature of the alleged defective condition through settlement of the pavement joint *over a substantial number of years* would not constitute an affirmative act of negligence . . .

Gold v. Cnty. of Westchester, 15 A.D.3d 439, 440, 790 N.Y.S.2d 675, 676 (App. Div. 2d Dep't 2005) (emphasis added) (citations omitted).

³⁴ *O'Brien v. City of Schenectady*, 26 A.D.3d 655, 657, 809 N.Y.S.2d 294, 296 (App. Div. 3d Dep't 2006) ("[T]he burying of the tree did not initially create a dangerous condition. Rather, the subsequent deterioration was caused by natural processes over a lengthy period of time, and defendant took no affirmative steps with respect to the tree after burying it, allegedly before 1926."); *Goldburd v. Cnty. of Nassau*, 307 A.D.2d 1019, 1020, 763 N.Y.S.2d 776, 777 (App. Div. 2d Dep't 2003) ("The County's alleged negligence in planting the tree from which the limb fell, and alleged failure to maintain the tree constituted nonfeasance, not affirmative negligence." (citations omitted)); *Zizzo v. City of New York*, 176 A.D.2d 722, 723, 574 N.Y.S.2d 966, 968 (App. Div. 2d Dep't 1991) ("[T]he mere planting of a curbside tree does not, in itself, constitute an affirmative act of negligence. Furthermore, the alleged failure of the City to maintain the tree in question constitutes, at best, simple nonfeasance for which there can be no liability absent prior written notice of the condition." (citations omitted)); *Zash v. Cnty. of Nassau*, 171 A.D.2d 743, 745, 567 N.Y.S.2d 299, 301 (App. Div. 2d Dep't 1991) ("Neither the County's planting of, nor its subsequent failure to maintain, the trees which allegedly caused the sidewalk defect upon which the plaintiff was injured constituted affirmative negligence rendering the County's prior written notice ordinance inapplicable." (citing *Monteleone v. Inc. Vill. of Floral Park*, 74 N.Y.2d 917, 919, 549 N.E.2d 459, 460–61, 550 N.Y.S.2d 257, 258–59 (1989))).

recovery for nonfeasance.³⁵

Yet, with those caveats there was no doubt until relatively recently that the so-called “cause and create” exception was not limited to those defects which were “immediately” apparent at the time the alleged negligence occurred.³⁶

In fact, the first case in which the Court of Appeals expressly held that written notice laws provide no defense for affirmative negligence was a case in which the defendant’s negligence *only later* gave rise to the defect.³⁷ In *Muszynski v. City of Buffalo*, plaintiff alleged that defendant had negligently placed a barrel full of salt on the public sidewalk, that defendant’s employees thereafter “negligently refill[ed] it in a manner which allowed salt to spill out onto the sidewalk,” and that the spilled salt *later* caused a number of holes in the sidewalk.³⁸ In the trial court the judge ruled that “[t]he mere placing of salt upon the public sidewalks in a barrel for use at a crosswalk is not negligence, even though over indeterminate years or months the deterioration of a sidewalk is accelerated thereby” and that the lack of prior written notice should therefore be fatal to plaintiff’s case.³⁹ Notably, even while ruling for the defendant, the trial court judge did not suggest that the “cause and create” exception was or should be limited to those conditions that are *immediately* dangerous.⁴⁰ Rather, the trial court ruled only that, in its view, the case involved an alleged failure to perform a repair rather than affirmative causation of a defect.⁴¹

The point, however, is that that ruling was reversed and the Appellate Division for the Fourth Department unanimously held that the “cause and create” exception applied *even though* the salt did not immediately create holes and instead did so only as the sidewalk “deteriorate[d],” flatly stating:

There was evidence that the city placed a barrel of rock salt

³⁵ See cases cited *supra* note 34.

³⁶ See, e.g., *Muszynski v. City of Buffalo*, 29 N.Y.2d 810, 811–12, 277 N.E.2d 414, 327 N.Y.S.2d 368 (1971) (“[A]ffirm[ing] . . . on opinion at Appellate Division”), *aff’d per curiam*, 33 A.D.2d 648, 305 N.Y.S.2d 163 (App. Div. 4th Dep’t 1969) (finding that the defendant-city placed a barrel of rock salt on the sidewalk, the defendant city’s employees filled it from time to time, and that the rock salt which spilled caused the sidewalk to deteriorate, thereby creating a dangerous condition).

³⁷ *Muszynski*, 29 N.Y.2d at 812, 277 N.E.2d at 415, 327 N.Y.S.2d at 369.

³⁸ *Id.* (Scileppi, J., dissenting).

³⁹ *Muszynski v. City of Buffalo*, 49 Misc. 2d 957, 958, 268 N.Y.S.2d 753, 755–56, (Sup. Ct. Erie County 1966), *rev’d*, 33 A.D.2d 648, 305 N.Y.S.2d 163 (App. Div. 4th Dep’t 1969), *aff’d per curiam*, 29 N.Y.2d 810, 277 N.E.2d 414, 327 N.Y.S.2d 368 (1971).

⁴⁰ *Muszynski*, 49 Misc. 2d at 958, 268 N.Y.S.2d at 756.

⁴¹ *Id.*

on the sidewalk, refilled it from time to time and that *rock salt which spilled from the barrel caused the sidewalk to deteriorate, creating a dangerous condition*. Prior written notice of a defective condition is not required where the defendant city causes or creates the condition.⁴²

The further point is that the Court of Appeals thereafter affirmed in *Muszynski* “on the opinion at the Appellate Division.”⁴³ While there was a lone dissenter to that ruling, the dissent by Judge Scileppi was basically for the proposition that the plaintiff’s factual contention rested on speculation and that the spillage was at most “one of many causes” of the sidewalk holes.⁴⁴ Indeed, while two judges (the trial judge and Judge Scileppi) thought that liability should not be imposed in the circumstances, *no one* suggested that malfeasance should be deemed actionable only when it produces an “immediately apparent” hazard.⁴⁵

Nineteen years later, in *Kiernan v. Thompson*, the Court of Appeals similarly held that the city’s negligent removal of a tree stump in 1982 obviated the need to provide written notice where, more than two years later, “the broken and defective condition of the sidewalk . . . resulted in plaintiff’s injuries.”⁴⁶ There was no suggestion that the cracks were *immediately apparent* or that such was prerequisite.⁴⁷

In the aftermath of *Muszynski* and *Kiernan*, courts repeatedly held the “cause and create” exception applicable in instances in which the hazard was not “immediately” existent or apparent.⁴⁸

⁴² *Muszynski v. City of Buffalo*, 33 A.D.2d 648, 648, 305 N.Y.S.2d 163, 163 (App. Div. 4th Dep’t 1969) (emphasis added) (citations omitted), *aff’d per curiam*, 29 N.Y.2d 810, 277 N.E.2d 414, 327 N.Y.S.2d 368 (1971).

⁴³ *Muszynski*, 29 N.Y.2d at 812, 277 N.E.2d at 415, 327 N.Y.S.2d at 369.

⁴⁴ *Id.* at 813, 277 N.E.2d at 416, 327 N.Y.S.2d at 370 (Scileppi, J., dissenting).

⁴⁵ *See id.* at 812–13, 277 N.E.2d at 415–16, 327 N.Y.S.2d at 369–70; *Muszynski*, 49 Misc. 2d at 957–59, 268 N.Y.S.2d at 753–56.

⁴⁶ *Kiernan v. Thompson*, 73 N.Y.2d 840, 841, 534 N.E.2d 39, 39, 537 N.Y.S.2d 122, 123 (1988).

⁴⁷ *See id.* at 842, 534 N.E.2d at 40, 537 N.Y.S.2d at 123.

⁴⁸ *See, e.g.*, *Abreu v. City of New York*, 14 A.D.3d 469, 470, 788 N.Y.S.2d 150, 151 (App. Div. 2d Dep’t 2005) (improper installation of catch basin); *Maggio v. City of New York*, 305 A.D.2d 554, 555, 759 N.Y.S.2d 395, 396 (App. Div. 2d Dep’t 2003) (“[T]he subject pothole was created through an affirmative act of negligence during the repaving of a roadway by the defendant only a few months before the accident.” (citations omitted)); *Harrington v. City of Plattsburgh*, 216 A.D.2d 724, 725, 627 N.Y.S.2d 838, 839 (App. Div. 3d Dep’t 1995) (involving a sidewalk built without expansion joints and reinforcing mesh); *Cruz v. City of New York*, 218 A.D.2d 546, 547, 630 N.Y.S.2d 523, 525 (App. Div. 1st Dep’t 1995) (finding that a highway that had been constructed without expansion joints eventually became dangerous after changes in temperature caused the highway surface to ripple); *Gormley v. Cnty. of Nassau*, 150 A.D.2d 342, 342, 540 N.Y.S.2d 867, 868 (App. Div. 2d Dep’t 1989) (“[Plaintiff] asserted that the

2. The Dawn of *Bielecki*

The change that effectively overruled *Muszynski* first surfaced in the First Department's 2005 ruling in *Bielecki v. City of New York*.⁴⁹ How, one might ask, did the law move from point A to point B? The change was largely the product of postdisposition interpretation of the language of a decision that had little or nothing to do with the issue. The case was *Amabile v. City of Buffalo*.⁵⁰

To put *Amabile* in context: in the years before *Amabile* was decided, two departments (the Second and Third Departments) had held that while constructive notice of a defect should *generally* not suffice where a written notice law is in place constructive notice could suffice where an employee responsible for locating and correcting that very kind of defect had inspected the area while the defect existed.⁵¹ *Amabile* rejected that extension. The *Amabile* court squarely framed the issue as being "whether constructive notice of a sidewalk defect can satisfy a statutory requirement of written notice to a municipality."⁵² The court plainly answered that question in the negative.⁵³

In *Amabile*, the defect consisted of "approximately 10 inches of what had once been a stop-sign post [that] protruded from the ground at an angle."⁵⁴ It was undisputed that the condition had been "caused by an automobile accident" that had removed all but a portion of the post.⁵⁵ The condition had then been permitted to exist "for 6 to 12 months."⁵⁶ How then did the plaintiff hope to circumvent the defendant-city of Buffalo's written notice law? "Plaintiffs produced City business records demonstrating that a now deceased City worker had been employed solely for the purpose of driving through the City in search of damaged or missing street signs. . . . [And] that this individual had driven past or near the

construction of the sidewalk in question without an expansion joint departed from reasonable engineering and construction standards If the defendant in fact created or caused a hazardous condition, there is no requirement that prior written notice of the condition be given to it in order for it to be liable." (citations omitted).

⁴⁹ *Bielecki v. City of New York*, 14 A.D.3d 301, 788 N.Y.S.2d 67 (App. Div. 1st Dep't 2005).

⁵⁰ *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 715 N.E.2d 104, 693 N.Y.S.2d 77 (1999).

⁵¹ See, e.g., *Klimek v. Town of Ghent, Columbia Cnty.*, 114 A.D.2d 614, 615, 494 N.Y.S.2d 453, 454 (App. Div. 3d Dep't 1985); *Giganti v. Town of Hempstead*, 186 A.D.2d 627, 628, 588 N.Y.S.2d 413, 414 (App. Div. 2d Dep't 1992); *Krach v. Town of Nassau*, 217 A.D.2d 737, 737, 629 N.Y.S.2d 104, 105 (App. Div. 3d Dep't 1995).

⁵² *Amabile*, 93 N.Y.2d at 472, 715 N.E.2d at 104, 693 N.Y.S.2d at 78.

⁵³ *Id.*

⁵⁴ *Id.* at 472, 715 N.E.2d at 105, 693 N.Y.S.2d at 78.

⁵⁵ *Id.*

⁵⁶ *Id.*

intersection many times.”⁵⁷

In holding that the proof was insufficient under the notice provision in issue, the *Amabile* court re-affirmed that “[t]his court has recognized only two exceptions to the statutory rule requiring prior written notice, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a ‘special use’ confers a special benefit upon the locality.”⁵⁸ Yet, in so stating, the court did not in any way suggest that it was *changing* the rule regarding affirmatively created defects or that it was now saying that only those defendant-created defects that were “immediately apparent” came within the exception. Nor was that issue in any way presented or discussed, even in dictum.

Nonetheless, the *Bielecki* court, citing *Amabile* as authority, and nothing more, now ruled: “We understand the affirmative negligence exception to the notice requirement to be limited to work by the City that *immediately* results in the existence of a dangerous condition.”⁵⁹ The *Bielecki* court added:

If we were to *extend* the affirmative negligence exception to cases like this one, where it is alleged that a dangerous condition developed over time from an allegedly negligent municipal repair, the exception to the notice requirement would swallow up the requirement itself, thereby defeating the purpose of the Pothole Law.⁶⁰

The irony with the exception, as if every highway and sidewalk defect could be traced to municipal negligence, was that the very case cited as authority for the only *immediately-arising-defects-count* rule (i.e., *Amabile*)⁶¹ had involved a defect that had been affirmatively caused *by a third person* (the driver whose vehicle had sheared off the stop sign).⁶²

3. *Oboler* and *Yarborough*

Faced with the choice of following its own ruling in *Muszynski* or

⁵⁷ *Id.* at 473, 715 N.E.2d at 105, 693 N.Y.S.2d at 78.

⁵⁸ *Id.* at 474, 715 N.E.2d at 106, 693 N.Y.S.2d at 79 (citations omitted).

⁵⁹ *Bielecki v. City of New York*, 14 A.D.3d 301, 301, 788 N.Y.S.2d 67, 68 (App. Div. 1st Dep’t 2005) (emphasis added) (“[T]he subject defect was not the creation of an affirmative act of negligence by the City within the meaning of *Amabile v. City of Buffalo*, so as to render the Pothole Law’s notice requirement inapplicable.” (citing *Amabile*, 93 N.Y.2d at 474, 693 N.Y.S.2d at 79, 715 N.E.2d at 106)).

⁶⁰ *Bielecki*, 14 A.D.3d at 301, 788 N.Y.S.2d at 68 (emphasis added).

⁶¹ *Id.*

⁶² *Amabile*, 93 N.Y.2d at 472, 715 N.E.2d at 105, 693 N.Y.S.2d at 78.

the First Department ruling in *Bielecki*, the Court of Appeals opted for the latter alternative but without acknowledging that the rule had ever been any different. The change came in *Oboler v. City of New York*.⁶³

In *Oboler*, the plaintiff purportedly “stepped on a depressed manhole cover situated in the roadway . . . and his foot struck a ‘ridge of asphalt’ encircling the cover, causing him to trip and fall.”⁶⁴ Plaintiff and his wife sued the city of New York.⁶⁵

Plaintiffs did not present any proof that the defendant-city had prior written notice of the defect.⁶⁶ However, plaintiffs intended to prove through expert testimony that the height differential had been caused by allegedly negligent repavement of the street.⁶⁷

According to the dissenters at the Appellate Division, plaintiffs’ expert had examined the area and found it to be substantially the same as was shown in photographs that had been taken on the day of the accident.⁶⁸ Plaintiffs’ expert would have testified (1) “that the asphalt where plaintiff tripped rose approximately 1½ inches above the manhole casting;” (2) that such was a “violation of the New York City Administrative Code (§ 19-147 [d]), which required that street paving be flush with manhole covers;” and (3) “that [the] height differential was created when [the street] was resurfaced.”⁶⁹

The city’s response was, apparently, that it was “speculative” that the condition arose from negligent resurfacing of the roadway and “speculative” to assume that the city was the entity that had last resurfaced the city roadway.⁷⁰ The trial court precluded the plaintiffs from adducing the “speculative” testimony and dismissed the case at the conclusion of trial.⁷¹ The Appellate Division affirmed (3–2 decision) essentially on the ground that the expert’s testimony would have been speculative.⁷²

The Court of Appeals unanimously agreed that the expert’s testimony was properly excluded but also affirmed on a second

⁶³ *Oboler v. City of New York*, 8 N.Y.3d 888, 864 N.E.2d 1270, 832 N.Y.S.2d 871 (2007).

⁶⁴ *Id.* at 889, 864 N.E.2d at 1271, 832 N.Y.S.2d at 872.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Oboler v. City of New York*, 31 A.D.3d 308, 309–10, 819 N.Y.S.2d 34, 36 (App. Div. 1st Dep’t 2006) (Saxe, J.P., dissenting), *aff’d*, 8 N.Y.3d 888, 864 N.E.2d 1270, 832 N.Y.S.2d 871 (2007).

⁶⁹ *Oboler*, 31 A.D.3d at 310, 819 N.Y.S.2d at 36.

⁷⁰ *See id.* at 310–11, 819 N.Y.S.2d at 36. Perhaps the New York City street had been resurfaced by Erie County or by a few good samaritans.

⁷¹ *Id.* at 308, 819 N.Y.S.2d at 34 (majority opinion).

⁷² *See id.* at 309, 819 N.Y.S.2d at 35.

ground.⁷³ Quoting directly from *Bielecki*, the court said: “Further, ‘the affirmative negligence exception is limited to work by the City that *immediately* results in the existence of a dangerous condition.’”⁷⁴ The only authority cited for the statement, or that could have been cited for the statement, was *Bielecki*.⁷⁵ The Court of Appeals did not say, as it had in *Bethel*, that times had changed.⁷⁶ It did not say, as it had in *Broadnax*, that its prior decision was illogical.⁷⁷ *Muszynski* was overruled by implication; it was ignored.

A year later, in *Yarborough v. City of New York*, the court repeated that “the affirmative negligence exception ‘is limited to work by the City that immediately results in the existence of a dangerous condition.’”⁷⁸ This time it cited two cases for the proposition: *Bielecki* and *Oboler*.⁷⁹

As a result of the rulings in *Oboler* and *Yarborough*, where a municipal defendant that is protected by a written notice law does an absolutely terrible job of building a bridge and the bridge collapses three months later, such does not constitute “affirmative negligence,”⁸⁰ unless the bridge looked bad the day it was finished.⁸¹ Obviously, one can applaud or criticize the rule itself and one would expect municipal defendants to feel differently on the subject than the attorneys who often sue them. I would, however, suggest that the *manner* in which the rule dramatically changed did not contribute “to the actual and perceived integrity of the judicial process.”⁸²

⁷³ *Oboler v. City of New York*, 8 N.Y.3d 888, 889–90, 864 N.E.2d 1270, 1271–72, 832 N.Y.S.2d 871, 872–73 (2007).

⁷⁴ *Id.* at 889–90, 864 N.E.2d at 1271–72, 832 N.Y.S.2d at 872–73 (quoting *Bielecki v. City of New York*, 14 A.D.3d 301, 301, 788 N.Y.S.2d 67, 68 (App. Div. 1st Dep’t 2005)).

⁷⁵ *Id.*

⁷⁶ *See Bethel v. N.Y.C. Transit Auth.*, 92 N.Y.2d 348, 353, 703 N.E.2d 1214, 1216, 681 N.Y.S.2d 201, 203 (1998).

⁷⁷ *See Broadnax v. Gonzalez*, 2 N.Y.3d 148, 153, 809 N.E.2d 645, 648, 777 N.Y.S.2d, 416, 419 (2004).

⁷⁸ *Yarborough v. City of New York*, 10 N.Y.3d 726, 728, 882 N.E.2d 873, 874, 853 N.Y.S.2d 261, 262 (2008) (quoting *Oboler*, 8 N.Y.3d at 889–90, 864 N.E.2d at 1271–72, 832 N.Y.S.2d at 872–73).

⁷⁹ *See Yarborough*, 10 N.Y.3d at 728, 882 N.E.2d at 874, 853 N.Y.S.2d at 26 (citing *Oboler*, 8 N.Y.3d at 889–90, 864 N.E.2d at 1271–72, 832 N.Y.S.2d at 872–73; *Bielecki v. City of New York*, 14 A.D.3d 301, 301, 788 N.Y.S.2d 67, 68 (App. Div. 1st Dep’t 2005)).

⁸⁰ *Yarborough*, 10 N.Y.3d at 728, 882 N.E.2d at 874, 853 N.Y.S.2d at 26.

⁸¹ *See id.* (holding that the city was not liable for plaintiff’s injuries through the affirmative negligence exception because the deterioration of the pothole developed over time due to the environment); *Oboler*, 8 N.Y.3d at 889–90, 864 N.E.2d at 1271–72, 832 N.Y.S.2d at 872–73 (declining to apply the affirmative negligence exception because there was no evidence as to when the roadway was last repaved or what the condition of the roadway was immediately after such repaving).

⁸² *People v. Taylor*, 9 N.Y.3d 129, 148, 878 N.E.2d 969, 978, 848 N.Y.S.2d 554, 563 (2007)

4. Postscript

There is, perhaps, depending on one's perspective, an amusing and ironic postscript.

Last year, the Court of Appeals was essentially confronted with the issue of whether the *Oboler/Yarborough* limitation to "immediately apparent" defects also applied when the municipality was alleged to have caused a black ice condition as a result of its negligent efforts at snow removal.⁸³ By a four-to-three vote, the Court ruled, in *San Marco v. Village/Town of Mount Kisco*, that the situation was sufficiently different from that in *Oboler* and that a different rule should apply.⁸⁴ Amongst other factors, Chief Judge Lippman's majority opinion observed that the holdings in *Yarborough* and *Oboler* were motivated in part by "the difficulty in determining, after the passage of time, whether the initial repair was negligent," a difficulty that was less acute in the different context.⁸⁵ The majority also found it easier to understand how the hazard could escape municipal detection in the case of a poorly done repair.⁸⁶

The dissent criticized the majority for *departing from precedent*, that is, from the freshly made precedents set out in *Oboler* and *Yarborough* that they had themselves departed from *Muszynski*.⁸⁷ The charge was made notwithstanding that the majority expressly acknowledged the contrary precedents in *Oboler* and *Yarborough* and expressly distinguished them (in sharp contrast to the manner in which contrary precedent had been treated in *Oboler*).⁸⁸ In criticizing the majority, the dissent acknowledged *Muszynski*.⁸⁹ *Muszynski* was, the dissenters said, "effectively overruled."⁹⁰

B. The Unlocked Extension Clips and the Chaos that Ensued

The fact that *Muczinski* had not been *expressly* overruled might, at least in theory, have created some uncertainty if the courts were

(quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); see *supra* notes 1–2, 15–17 and accompanying text.

⁸³ *San Marco v. Vill./Town of Mount Kisco*, 16 N.Y.3d 111, 114–15, 944 N.E.2d 1098, 1098–99, 919 N.Y.S.2d 459, 459–60 (2010).

⁸⁴ See *id.* at 117–18, 944 N.E.2d at 1100–01, 919 N.Y.S.2d at 461–62.

⁸⁵ *Id.* at 117, 944 N.E.2d at 1100, 919 N.Y.S.2d at 461.

⁸⁶ *Id.*

⁸⁷ *Id.* at 119, 944 N.E.2d at 1102, 919 N.Y.S.2d at 463 (Smith, J., dissenting).

⁸⁸ *Id.* at 117, 944 N.E.2d at 1100–01, 919 N.Y.S.2d at 461–62 (majority opinion).

⁸⁹ *Id.* at 121, 944 N.E.2d at 1103, 919 N.Y.S.2d at 464 (Smith, J., dissenting).

⁹⁰ *Id.* (emphasis added).

confronted with another case that was on all fours with *Muczinski*. Then again, *Muczinski* was itself a single ruling decades earlier that had not had wide repercussions beyond the matter directly in issue. So, while it perhaps would have been preferable in terms of *integrity* if the Court of Appeals had acknowledged that the law had been different and was now being changed, the court's failure to do so could hardly be said to have greatly confused matters.

The court's 2003 ruling in *Blake v. Neighborhood Services of New York City, Inc.*⁹¹ was an entirely different animal. In *Blake*, the Court rendered a ruling that was seemingly inconsistent with an entire series of recent rulings without distinguishing or expressly overruling any of them.⁹² The consequence was veritable chaos that, even today, is not fully resolved.

1. Labor Law section 240(1)

Labor Law section 240(1) is a world unto itself. Along with its sister statute, Labor Law section 241(6), section 240(1) applies to workplace accidents that may occur during the course of construction, demolition, alteration, repair, and several other listed activities.⁹³ The thing is, there are *a lot* of construction accidents. To give you some idea: every year there are anywhere from 175 to 200 appellate decisions concerning "labor law" accidents.⁹⁴ There are typically more than a hundred decisions each year just as to Labor Law section 240(1).⁹⁵

Section 240(1) requires "contractors and owners" to "furnish or erect, or cause to be furnished or erected" a list of enumerated devices including "scaffolding, hoists, stays, ladders . . . which shall be so constructed, placed and operated as to give proper protection to a person so employed."⁹⁶ The Court of Appeals ruled in 1991 that the statute applies only when the failure to provide a listed device, or to see that the device is "so constructed, placed and operated as to give proper protection," causes an elevation-related accident.⁹⁷ More recently, the court said that "the single decisive question is

⁹¹ *Blake v. Neighborhood Hous. Servs. of N.Y.C.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003).

⁹² *Id.*; see also *infra* text accompanying notes 140–50 (discussing *Blake* at length).

⁹³ N.Y. LAB. LAW §§ 240(1), 241(6) (McKinney 2011).

⁹⁴ Search of WESTLAW, Keycite Database (Nov. 1, 2011) (searching Labor Law section 240).

⁹⁵ *Id.*

⁹⁶ LAB. LAW § 240(1).

⁹⁷ *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 512–13, 583 N.E.2d 932, 933–34, 577 N.Y.S.2d 219, 221 (1991) (quoting LAB. LAW § 240(1)).

whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."⁹⁸

Based upon the assumption that the legislature deemed such accidents a particular danger, the Court of Appeals long ago ruled that violation of the statute subjects the defendant to absolute liability.⁹⁹ Liability is imposed for a breach irrespective of whether the defendant was negligent¹⁰⁰ and irrespective of whether the plaintiff or decedent-worker was comparatively negligent.¹⁰¹

It is the latter feature that presently concerns the bar. Accepting that liability will not be imposed if there was no violation and the plaintiff was the "sole proximate cause" of his or her accident, what, exactly, is the distinction between that and "ordinary" comparative negligence? And who is ultimately responsible to see that the worker works safely? If the worker herself chooses to use a poorly constructed ladder and an accident follows is there a violation for *allowing* the worker to do so?

Starting in 1978 and straight through the 1990s, the Court of Appeals rendered a long series of proworker rulings regarding those issues.¹⁰² Then, in 2003, those rulings were impliedly overruled—or not.¹⁰³

2. The World Before *Blake*

Back in 1978, the Court of Appeals considered a case in which a worker suffered a fatal fall from a ladder.¹⁰⁴ The case was *Haimes v. New York Telephone Co.*¹⁰⁵

In *Haimes*, it was undisputed that decedent himself had personally selected and placed the ladder and that he and he alone had failed to secure it against slippage.¹⁰⁶ More than this, neither

⁹⁸ *Runner v. N.Y. Stock Exch., Inc.*, 13 N.Y.3d 599, 603, 922 N.E.2d 865, 866–67, 895 N.Y.S.2d 279, 280–81 (2009).

⁹⁹ *See, e.g., Zimmer v. Chemung Cnty. Performing Arts, Inc.*, 65 N.Y.2d 513, 518–19, 482 N.E.2d 898, 899, 493 N.Y.S.2d 102, 103–04 (1985).

¹⁰⁰ *Id.* at 522, 482 N.E.2d at 901–02, 493 N.Y.S.2d at 106 (“[A] violation of section 240(1) or the first five subdivisions of section 241 creates absolute liability.”).

¹⁰¹ *Haimes v. N.Y. Tel. Co.*, 46 N.Y.2d 132, 135–36, 385 N.E.2d 601, 603, 412 N.Y.S.2d 863, 865 (1978); *see infra* notes 105–38 and accompanying text.

¹⁰² *See infra* notes 105–39 and accompanying text.

¹⁰³ *See infra* notes 140–57 and accompanying text.

¹⁰⁴ *Haimes v. N.Y. Tel. Co.*, 46 N.Y.2d 132, 134, 385 N.E.2d 601, 602, 412 N.Y.S.2d 863, 864 (1978).

¹⁰⁵ *Id.* at 132, 385 N.E.2d at 601, 412 N.Y.S.2d at 863.

¹⁰⁶ *Id.* at 134, 385 N.E.2d at 602, 412 N.Y.S.2d at 864.

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party asserted that there was a defect with the ladder itself.¹⁰⁷ What was wrong was that decedent had failed to properly *secure* the ladder.¹⁰⁸

In this setting, the defendant-owner in *Haimes* argued that it was unfair to render the building owner responsible for the injured worker's own malfeasance and that the legislature could not have intended to do so.¹⁰⁹ The Court of Appeals' answer was that such was precisely what the legislature had intended and that its entire purpose in so doing was to provide the owner with an economic incentive to *compel* the worker to work safely:

Viewed in perspective, section 240 is one of the progeny of our State's long line of legislative efforts to eliminate dangers to the health and safety of those working in hazardous occupations.

....

In calling a halt to its earlier backtracking, the Legislature minced no words. Referring expressly to both section 240 and section 241, *its stated purpose in redrafting these statutes was to fix "ultimate responsibility for safety practices where such responsibility actually belongs, on the owner and general contractor."* Whatever doubt may have remained that it had succeeded in doing so as to section 241 was laid to rest by our recent decision in *Allen v Cloutier Constr. Corp.*

....

... [T]he defendant claims it could not have been the legislative design that "every property owner who had people working on his premises in the capacity of an independent contractor, whether applying siding, painting, repairing a television antenna or a roof, or doing similar work, would be an insurer of the independent contractor's safety." In so arguing, it ignores the fact that *the Legislature apparently decided, as it was within its province to do, that over-all compliance with safety standards would be achieved by placing primary and inescapable responsibility on owners and general contractors rather than on their subcontractors who, often occupying an inferior economic position, may more readily shortcut on safety unless those with superior interests*

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 136–37, 385 N.E.2d at 603–04, 412 N.Y.S.2d at 865–66.

*compel them to protect themselves.*¹¹⁰

The *Haimes* rule was re-affirmed in other cases in which the plaintiff-worker was in fact the culprit who had misplaced the ladder or otherwise caused the accident. For example, in *Klein v. City of New York*, plaintiff was injured while standing on a perfectly fine ladder because it had been set up and placed improperly by plaintiff himself.¹¹¹ Plaintiff had placed the ladder on “gunk” and it therefore slid.¹¹² Defendant argued that it should prevail since there was nothing intrinsically wrong with *the ladder* itself.¹¹³ The Court of Appeals’ terse answer, per memorandum decision, was:

Plaintiff has established a prima facie case that defendant violated Labor Law § 240 (1) by failing to ensure the proper placement of the ladder due to the condition of the floor. Since neither the defendant nor third-party defendant has presented any evidence of a triable issue of fact relating to the prima facie case or to plaintiff’s credibility, summary judgment was properly awarded to the plaintiff.¹¹⁴

To be sure, there were instances—such as when the plaintiff fell from a ladder not because the ladder was poorly constructed or placed but instead because plaintiff was drunk¹¹⁵ or when plaintiff fell because he was trying to carry a cup of coffee while climbing the ladder¹¹⁶—that recovery was denied on the ground that inadequacy of a listed safety device was not a proximate cause of the accident.¹¹⁷ In such instances, recovery was denied not because it was *plaintiff* who selected and/or placed the ladder (or other device), but instead because the accident had nothing to do with poor construction or placement of the device and was instead caused by factor(s) *extrinsic* to the statute’s guarantee regarding such devices.¹¹⁸ The

¹¹⁰ *Id.* at 135–37, 385 N.E.2d at 603–04, 412 N.Y.S.2d at 865–66 (emphasis added) (citations omitted).

¹¹¹ *Klein v. City of New York*, 89 N.Y.2d 833, 834, 675 N.E.2d 458, 458–59, 652 N.Y.S.2d 723, 723–24 (1996).

¹¹² *Id.* at 834, 675 N.E.2d at 459, 652 N.Y.S.2d at 724.

¹¹³ *See Klein v. City of New York*, 222 A.D.2d 351, 352, 635 N.Y.S.2d 634, 635 (App. Div. 1st Dep’t 1995), *aff’d*, 89 N.Y.2d 833, 675 N.E.2d 458, 652 N.Y.S.2d 723 (1996).

¹¹⁴ *Klein*, 89 N.Y.2d at 835, 675 N.E.2d at 459, 652 N.Y.S.2d at 724 (citing *Ferra v. Cnty. of Wayne*, 147 A.D.2d 964, 537 N.Y.S.2d 418 (App. Div. 4th Dep’t 1989)) (mem.) (citation omitted).

¹¹⁵ *Tate v. Clancy-Cullen Storage Co.*, 171 A.D.2d 292, 294, 575 N.Y.S.2d 832, 834–35 (App. Div. 1st Dep’t 1991).

¹¹⁶ *Anderson v. Schul/Mar Constr. Corp.*, 258 A.D.2d 605, 607, 685 N.Y.S.2d 753, 754 (App. Div. 2d Dep’t 1999).

¹¹⁷ *Tate*, 171 A.D.2d at 296, 575 N.Y.S.2d at 834; *Anderson*, 258 A.D.2d at 607, 685 N.Y.S.2d at 754.

¹¹⁸ *Tate*, 171 A.D.2d at 296, 575 N.Y.S.2d at 834; *Anderson*, 258 A.D.2d at 607, 685

distinction seemed to be between those cases (like *Haimes* and *Klein*) in which plaintiff was injured by a *plaintiff-caused* violation (no defense) and those cases where plaintiff was injured by *factors other than a statutory violation* (e.g., that plaintiff was drunk, engaged in “horseplay,” or was inattentive).¹¹⁹ And throughout the 1990s, the Court of Appeals again and again permitted recovery where the accident was caused by the plaintiff’s own negligence, but the negligence was not extrinsic to the statutory protection.

For example, in the 1993 case, *Gordon v. Eastern Railway Supply*, the plaintiff, who had fallen off a ladder, sued defendant (the property owner) and thereafter moved for summary judgment on the theory that a ladder was the wrong tool for the job (sandblasting) and that he should have instead been provided with a scaffold.¹²⁰ Defendant opposed the motion on multiple grounds, one of which was that the plaintiff had been specifically instructed not to use a ladder and that plaintiff was thus a “recalcitrant worker.”¹²¹

The issue went up to the Court of Appeals.¹²² In resolving the matter for a unanimous court, Judge Simons reiterated that “[t]he purpose of the section is to protect workers by placing the ‘ultimate responsibility’ for worksite safety on the owner and general contractor, instead of the workers themselves.”¹²³

As for defendant’s argument that there was scaffolding at the site, that plaintiff had been previously told to use it, and that plaintiff should therefore be barred from recovering damages, the court wrote that plaintiff would be barred only if he had refused to use safety devices and that the conduct at issue had not been equivalent to a refusal:

Defendants’ claim here rests on their contention that plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railroad cars. We have held, however, that an instruction by an employer or owner to

N.Y.S.2d at 754.

¹¹⁹ Compare *Haimes v. N.Y. Tel. Co.*, 46 N.Y.2d 132, 134, 385 N.E.2d 601, 602, 412 N.Y.S.2d 863, 864 (1978) (failure to secure ladder), and *Klein v. City of New York*, 89 N.Y.2d 833, 834, 675 N.E.2d 458, 459, 652 N.Y.S.2d 723, 724 (1996) (failure to properly set up ladder), with *Tate*, 171 A.D.2d at 294, 575 N.Y.S.2d at 834–35 (plaintiff was intoxicated at work), and *Anderson*, 258 A.D.2d at 607, 685 N.Y.S.2d at 754 (plaintiff carried coffee up the ladder).

¹²⁰ *Gordon v. E. Ry. Supply, Inc.*, 82 N.Y.2d 555, 560, 562, 626 N.E.2d 912, 915–16, 606 N.Y.S.2d 127, 130–31 (1993).

¹²¹ *Id.* at 562–63, 626 N.E.2d at 916, 606 N.Y.S.2d at 131.

¹²² *Id.*, *aff’g* 181 A.D.2d 990, 581 N.Y.S.2d 498 (App. Div. 4th Dep’t 1992).

¹²³ 82 N.Y.2d at 559, 626 N.E.2d at 914, 606 N.Y.S.2d at 129 (citations omitted).

avoid using unsafe equipment or engaging in unsafe practices is not a “safety device” in the sense that plaintiff’s failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment. Evidence of such instructions does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense.¹²⁴

The Court of Appeals’s earlier holding in *Stolt v. General Foods Corp.* was even more explicit.¹²⁵ There, the subject ladder “had been broken about a week earlier, and plaintiff had been instructed not to climb it unless someone else was there to secure it for him. Nonetheless, plaintiff attempted to climb the ladder without assistance when his supervisor left the work area.”¹²⁶ The Court unanimously ruled that the mere fact that plaintiff had disobeyed instructions could not constitute a defense:

The mere allegation that plaintiff had disobeyed his supervisor’s instructions when he climbed the broken ladder does not provide a basis for a defense against plaintiff’s Labor Law § 240(1) cause of action. . . . Further, it cannot be said that plaintiff’s alleged disregard of his supervisor’s order was a supervening cause of the accident, since plaintiff’s injuries were the direct result of the failure by General Foods and C.P. Ward to supply a safe ladder or other device to give “proper protection” to workers in plaintiff’s position.¹²⁷

In *Hagins v. State*, “[c]laimant was injured when he fell from the top of an unfinished abutment wall that rose some 15 feet above a road construction site.”¹²⁸ The asserted defense was that plaintiff had been told not to walk across the abutment and had been told more than once.¹²⁹ The court’s holding was that such was of itself insufficient to defeat recovery since there had been no “refusal”—the court’s word—to use available safety devices:

Claimant was properly granted partial summary judgment on the issue of the State’s liability under Labor Law § 240(1).

¹²⁴ *Gordon*, 82 N.Y.2d at 563, 626 N.E.2d at 916, 606 N.Y.S.2d at 131 (citing *Stolt v. Gen. Foods Corp.*, 81 N.Y.2d 918, 919–20, 613 N.E.2d 556, 556, 597 N.Y.S.2d 650, 650 (1993); *Hagins v. State*, 81 N.Y.2d 921, 922, 613 N.E.2d 557, 559, 597 N.Y.S.2d 651, 653 (1993)).

¹²⁵ *Stolt*, 81 N.Y.2d 918, 613 N.E.2d 556, 597 N.Y.S.2d 650.

¹²⁶ *Id.* at 919–20, 613 N.E.2d at 556, 597 N.Y.S.2d at 650.

¹²⁷ *Id.* at 920, 613 N.E.2d at 557, 597 N.Y.S.2d at 651 (citations omitted).

¹²⁸ *Hagins*, 81 N.Y.2d at 922, 613 N.E.2d at 559, 597 N.Y.S.2d at 653.

¹²⁹ *Id.*

The State's allegations that claimant had repeatedly been told not to walk across the abutment are not alone sufficient to create a triable issue of fact under the "recalcitrant worker" doctrine that was recognized in *Smith v. Hooker Chems. & Plastics Corp.*, since that defense is limited to cases in which a worker has been injured as a result of a refusal to use available safety devices provided by the employer or owner. Furthermore, the State cannot rely on claimant's own negligence in using an unsafe route to cross the road as a "supervening cause" of his injuries, since the accident was plainly the direct result of the failure to supply guardrails or other appropriate safety devices.¹³⁰

As of 2003, we thus had an entire series of post-1977 Court of Appeals rulings—*Haimes*, *Gordon*, *Stolt*, *Hagins*, and *Klein*—that permitted or required the imposition of liability even where it was plaintiff who failed to secure the ladder (*Haimes*),¹³¹ or placed it on gunk (*Klein*),¹³² or chose a broken ladder over a good one (*Stolt*),¹³³ or chose the wrong elevation device for the job (*Gordon*),¹³⁴ or needlessly walked on top of a wall (*Hagins*).¹³⁵

There had also been one case, *Weininger v. Hagedorn & Co.*, in which the court ruled that verdict should not have been directed in the plaintiff's favor because "a reasonable jury could have concluded that plaintiffs [sic] actions were the sole proximate cause of his injuries, and consequently that liability under Labor Law § 240(1) did not attach."¹³⁶ Yet, while that might, of itself, seem inconsistent with the other rulings, the plaintiff's alleged misconduct, not mentioned in the court's opinion, was that he had purportedly tried to stand on the crossbar of an A-frame ladder and had thus, precipitated an accident notwithstanding that the ladder was

¹³⁰ *Id.* (citing *Smith v. Hooker Chems. & Plastics Corp.*, 89 A.D.2d 361, 365, 455 N.Y.S.2d 446, 449 (App. Div. 4th Dep't 1982), *aff'd*, 70 N.Y.2d 994, 521 N.E.2d 431, 526 N.Y.S.2d 424 (1988); *Stolt*, 81 N.Y.2d 918, 919, 613 N.E.2d 556, 557, 597 N.Y.S.2d 650, 651).

¹³¹ *Haimes v. N.Y. Tel. Co.*, 46 N.Y.2d 132, 134, 385 N.E.2d 601, 602, 412 N.Y.S.2d 863, 864 (1978).

¹³² *Klein v. City of New York*, 89 N.Y.2d 833, 834, 675 N.E.2d 458, 459, 652 N.Y.S.2d 723, 724 (1996).

¹³³ *Stolt*, 81 N.Y.2d at 919–20, 613 N.E.2d at 556, 597 N.Y.S.2d at 650.

¹³⁴ *Gordon v. E. Ry. Supply, Inc.*, 82 N.Y.2d 555, 563, 626 N.E.2d 912, 916, 606 N.Y.S.2d 127, 131 (1993).

¹³⁵ *Hagins v. State*, 81 N.Y.2d 921, 922, 613 N.E.2d 557, 558, 597 N.Y.S.2d 651, 652 (1993).

¹³⁶ *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 960, 695 N.E.2d 709, 710, 672 N.Y.S.2d 840, 841 (1998) (citing *Zimmer v. Chemung Cnty. Performing Arts, Inc.*, 65 N.Y.2d 513, 524, 482 N.E.2d 898, 903, 493 N.Y.S.2d 102, 107 (1985)).

constructed and placed correctly.¹³⁷

So, as of 2003, it seemed as if misconduct *extrinsic* to construction or placement of the ladder or other instrumentality *could* bar the plaintiff's recovery (*Weininger*),¹³⁸ but that plaintiff could not be barred for negligent selection, construction, or placement of the device.¹³⁹

Then came *Blake*.¹⁴⁰

3. *Blake v. Neighborhood Housing Services of New York City, Inc.*

In *Blake*, the plaintiff, who had his own contracting company, fell from an extension ladder while working on the renovation of a two-family house.¹⁴¹ The accident apparently occurred because, when setting the ladder up, plaintiff had neglected to lock the extension clips in place with the consequence that the ladder began to retract as plaintiff climbed it, thus, causing plaintiff to fall.¹⁴² At least, there was no other explanation.¹⁴³ At trial, the judge denied plaintiff's motion for a directed verdict and the case went to a jury

¹³⁷ Justice Siracuse explained what had really been afoot in *Weininger* in his own decision in *Secord v. Willow Ridge Stables, Inc.*:

[The decision in *Weininger*] does indeed seem like a break from the past, and there is nothing in the Appellate Division decision that would lead one to a different conclusion. . .

... *The record on appeal, however, shows that there was evidence before the court that plaintiff was standing on the crossbar of the ladder, a misuse of the device.* The omission of this key fact from all the written decisions is surprising, because it is the best explanation of the Court of Appeals' holding. *While the testimony was questionable, it would clearly have been possible for a reasonable jury to conclude that the accident was caused by this misuse rather than any defect in the ladder itself or its placement or operation; this issue of fact would preclude a directed verdict or summary judgment.*

Since the *ratio decidendi* of a case is not the statement of law alone but its result as applied to the facts before the court, *Weininger's* holding is unexceptional. By its unfortunate failure to set out the facts in the decision, however, the Court of Appeals inadvertently created the impression that fact questions arise in cases where it had always been assumed there were none.

Secord v. Willow Ridge Stables, Inc., 179 Misc. 2d 366, 370–71, 684 N.Y.S.2d 867, 870–71 (Sup. Ct. Monroe County 1999) (emphasis added) (footnote omitted) (citing *Weininger v. Hagedorn & Co.*, 241 A.D.2d 363, 659 N.Y.S.2d 476 (App. Div. 1st Dep't 1997), *rev'd*, 91 N.Y.2d 958, 695 N.E.2d 709, 672 N.Y.S.2d 840 (1998)).

¹³⁸ *Weininger*, 91 N.Y.2d at 960, 695 N.E.2d at 710, 672 N.Y.S.2d at 841.

¹³⁹ *Klein v. City of New York*, 89 N.Y.2d 833, 834–35, 675 N.E.2d 458, 459, 652 N.Y.S.2d 723, 724 (1996) (quoting *Zimmer v. Chemung Cnty. Performing Arts, Inc.*, 65 N.Y.2d 513, 520, 482 N.E.2d 898, 900–01, 493 N.Y.S.2d 102, 105 (1985)).

¹⁴⁰ *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003). By way of disclosure, I submitted an *amicus* brief on behalf of the New York State Trial Lawyers Association in *Blake*.

¹⁴¹ *See id.* at 283, 803 N.E.2d at 758, 771 N.Y.S.2d at 485.

¹⁴² *Id.* at 285, 803 N.E.2d at 758–59, 771 N.Y.S.2d at 485–86.

¹⁴³ *See id.*

that returned a defendant's verdict.¹⁴⁴ Plaintiff appealed.¹⁴⁵

When the case reached the Court of Appeals it held that plaintiff's own conduct had been the sole proximate cause of his accident and that recovery was properly denied in that circumstance:

Given the varying meanings of strict (or absolute) liability in these different settings, it is not surprising that the concept has generated a good deal of litigation under Labor Law § 240(1). The terms may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise. . . .

. . . .

In support of his claim, plaintiff argues that comparative negligence is not a defense to absolute liability under the statute. This is true. But we are not dealing here with comparative fault, by which a culpable defendant is able to reduce its responsibility upon a finding that the plaintiff was also at fault. That would be impermissible under section 240(1). Here, there is no comparative culpability. As the jury implicitly found, the fault was entirely plaintiff's. The ladder afforded him proper protection. Plaintiff's conduct (here, his negligence) was the sole proximate cause of the accident.¹⁴⁶

In contrast to the landmark ruling in *Oboler*,¹⁴⁷ the *Blake* court acknowledged most of the prior rulings that others may have deemed ostensibly inconsistent with the new ruling.¹⁴⁸ Although the court did not cite *Gordon*, it cited its prior rulings in *Haimes*, *Klein*, *Stolt*, and *Hagins*.¹⁴⁹ The problem for bench and bar is that it

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 284, 803 N.E.2d at 759, 771 N.Y.S.2d at 486.

¹⁴⁶ *Id.* at 289–290, 803 N.E.2d at 762–763, 771 N.Y.S.2d at 489–490 (citing *Raquet v. Braun*, 90 N.Y.2d 177, 681 N.E.2d 404, 659 N.Y.S.2d 237 (1997); *Bland v. Manocherian*, 66 N.Y.2d 452, 488 N.E.2d 810, 497 N.Y.S.2d 880 (1985)).

¹⁴⁷ *Oboler v. City of New York*, 8 N.Y.3d 888, 864 N.E.2d 1270, 832 N.Y.S.2d 871 (2007); *see also supra* text accompanying notes 63–75 (discussing *Oboler* at length).

¹⁴⁸ *See, e.g., Blake*, 1 N.Y.3d at 286, 803 N.E.2d at 760, 771 N.Y.S.2d at 487 (citing *Zimmer v. Chemung Cnty. Performing Arts, Inc.*, 65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S.2d 102 (1985); *Stolt v. Gen. Foods Corp.*, 81 N.Y.2d 918, 613 N.E.2d 556, 597 N.Y.S.2d 650 (1993)); *Id.* at 287, 803 N.E.2d at 761, 771 N.Y.S.2d at 488 (citing *Haimes v. N.Y. Tel. Co.*, 46 N.Y.2d 132, 385 N.E.2d 601, 412 N.Y.S.2d 863 (1978)); *Id.* at 289 n.8, 803 N.E.2d at 762 n.8, 771 N.Y.S.2d at 489 n.8 (citing *Klein v. City of New York*, 89 N.Y.2d 833, 675 N.E.2d 458, 652 N.Y.S.2d 723 (1996)); *Id.* at 290 n.9, 803 N.E.2d at 763 n.9, 771 N.Y.S.2d at 490 n.9 (citing *Hagins v. State*, 81 N.Y.2d 921, 613 N.E.2d 557, 597 N.Y.S.2d 651 (1993)).

¹⁴⁹ *Blake*, 1 N.Y.3d at 287, 289 n.8, 290 n.9, 803 N.E.2d at 761, 762 n.8, 763 n.9, 771

did not say how, if at all, the case at bar differed from those cases.

Was the court impliedly overruling *Haimes*, *Hagins*, *et al.*, and was it *now* saying that the defendants could indeed escape liability for a poorly placed ladder or scaffold where it was *the plaintiff* who negligently placed the device? Well, the court did not *say* it was doing that. Was the court instead positing that failure to lock a ladder's extension clips in *Blake* was in some sense different and distinguishable from *failing to secure a ladder (Haimes)*, from *placing it on "gunk" (Klein)*, or from using a broken ladder (*Stolt*)?¹⁵⁰ Well, the court did not say that either. Bench and bar were thus compelled to reach their own conclusions.

In the initial aftermath of *Blake*, the predominant view was that *Blake* was distinguishable from *Haimes*, *Hagins*, *et al.*, in that *Blake* involved the plaintiff-worker's "misuse[] [of] an otherwise suitable safety device."¹⁵¹ Yet, as time passed and the Court of Appeals followed *Blake* with decisions that treated injured workers even more harshly,¹⁵² that thesis was harder to champion. The Second Department even deemed the *sole proximate cause* legally viable in a fact pattern that seemed to mirror *Gordon* itself.¹⁵³

N.Y.S.2d at 488, 489 n.8, 490 n.9 (citing *Stolt*, 81 N.Y.2d at 918, 613 N.E.2d at 556, 597 N.Y.S.2d at 650; *Haimes*, 46 N.Y.2d at 132, 385 N.E.2d at 601, 412 N.Y.S.2d at 863; *Klein*, 89 N.Y.2d at 833, 675 N.E.2d at 458, 652 N.Y.S.2d at 723; *Hagins*, 81 N.Y.2d at 921, 613 N.E.2d at 557, 597 N.Y.S.2d at 651).

¹⁵⁰ See *supra* text accompanying notes 131–35.

¹⁵¹ *Morin v. Machnick Builders, Ltd.*, 4 A.D.3d 668, 670, 772 N.Y.S.2d 388, 391 (App. Div. 3d Dep't 2004) (citing *Blake*, 1 N.Y.3d at 289 n.8, 803 N.E.2d at 762 n.8, 771 N.Y.S.2d at 489 n.8).

¹⁵² See, e.g., *Robinson v. E. Med. Ctr., LP*, 6 N.Y.3d 550, 554–55, 847 N.E.2d 1162, 1165, 814 N.Y.S.2d 589, 591–92 (2006) (barring plaintiff from recovery because after waiting more than an hour for the eight-foot ladder he needed and had requested he went ahead and used a six-foot ladder which he knew to be too short); *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 38–40, 823 N.E.2d 439, 440–41, 790 N.Y.S.2d 74, 75–76 (2004) (denying recovery because plaintiff disregarded safety instructions he had been given weeks earlier).

¹⁵³ *Palacios v. Lake Carmel Fire Dep't, Inc.*, 15 A.D.3d 461, 790 N.Y.S.2d 185 (App. Div. 2d Dep't 2005).

[P]laintiff allegedly was injured when he fell from an aluminum extension ladder

[P]laintiff testified at his deposition that he was using a ladder, rather than a scaffold, because the owner of the company that employed him . . . had instructed him not to disassemble and move a large scaffold that was adjacent to the work area.

. . . .

. . . [D]efendant's proof consisted of deposition testimony that the plaintiff was instructed to use a scaffold rather than a ladder, that the plaintiff used the scaffold to perform the same work on a different section of the building on the previous workday, and that the scaffold was located within the building where the plaintiff was cutting the materials he was installing. [Defendant's proof] raised triable issues of fact regarding the availability of adequate safety devices and the plaintiff's conduct as a recalcitrant worker who deliberately refused to use such devices

Id. at 462, 790 N.Y.S.2d at 186 (citations omitted).

However, as I write these words during the summer of 2011, it remains that *none* of the above-cited rulings in the workers' favor (*Haimes*, *Klein*, *Gordon*, *Stolt*, and *Hagins*) have ever been expressly overruled. Even in the Court of Appeals' 2006 ruling in *Robinson*, where the worker's conduct that barred recovery was similar to, but not nearly as negligent as that which had not barred recovery in *Stolt*,¹⁵⁴ the earlier decision was not expressly overruled.

Of course, the world did not end with *Blake*. The law concerning the "sole proximate defense" continued to develop, not just as a result of high court rulings, and is far more nuanced than back in 2003.¹⁵⁵ That said, the cost of *Blake*—not the result (plaintiff lost), but the manner in which the result was reached (without expressly overruling, or *not* overruling, prior and relatively recent rulings)—was enormous. Seemingly indistinguishable cases were resolved differently by appellate panels that, very understandably, read the new high court rulings differently.¹⁵⁶

Perhaps the best way I can put it is this: since *Blake* was decided in 2003, it has been cited (as of November 2011) in 640 New York

¹⁵⁴ Compare *Robinson*, 6 N.Y.3d at 554–55, 847 N.E.2d at 1165, 814 N.Y.S.2d at 592 (barring recovery for plaintiff's negligence in using the wrong size ladder), with *Stolt v. Gen. Foods Corp.*, 81 N.Y.2d 918, 919–20, 613 N.E.2d 556, 556–57, 597 N.Y.S.2d 650, 650–51 (1993) (granting recovery for plaintiff despite plaintiff negligently using a broken ladder after expressly being told not to).

¹⁵⁵ See, e.g., *Paz v. City of New York*, 85 A.D.3d 519, 519, 925 N.Y.S.2d 453, 454 (App. Div. 1st Dep't 2011); *Herrnsdorf v. Bernard Janowitz Constr. Corp.*, 67 A.D.3d 640, 641–43, 889 N.Y.S.2d 600, 602–03 (App. Div. 2d Dep't 2009); *Leniar v. Metro. Transit Auth.*, 37 A.D.3d 425, 426, 829 N.Y.S.2d 619, 620 (App. Div. 2d Dep't 2007).

¹⁵⁶ See, e.g., *McCormack v. Universal Carpet & Upholstery Cleaners*, 29 A.D.3d 542, 815 N.Y.S.2d 635 (App. Div. 2d Dep't 2006); *Arey v. M. Dunn, Inc.*, 29 A.D.3d 1137, 816 N.Y.S.2d 197 (App. Div. 3d Dep't 2006). The rulings were rendered nearly a week apart. Compare *McCormack*, 29 A.D.3d at 542, 815 N.Y.S.2d at 635 (decision issued May 2, 2006), with *Arey*, 29 A.D.3d at 1137, 816 N.Y.S.2d at 197 (decision issued May 11, 2006). In each case, plaintiff had not been provided with a needed safety device. *McCormack*, 29 A.D.3d at 544, 815 N.Y.S.2d at 637; *Arey*, 29 A.D.3d at 1138, 816 N.Y.S.2d at 198. In one case it was a pair of goggles; in the other case it was a safety harness. *McCormack*, 542 A.D.3d at 544, 815 N.Y.S.2d at 637; *Arey*, 29 A.D.3d at 1138, 816 N.Y.S.2d at 198. However, in each instance the plaintiff happened to personally own such equipment and failed to bring *his* goggles or harness to the worksite. *McCormack*, 29 A.D.3d at 544, 815 N.Y.S.2d at 637; *Arey*, 29 A.D.3d at 1139, 816 N.Y.S.2d at 198. Was the worker solely at fault for failing to *supply himself* with the needed safety device?; or was that not the worker's responsibility? The two decisions went opposite ways. In *McCormack*, plaintiff's admission that he failed to bring his goggles to work "established, as a matter of law, that the injured plaintiff's actions were the sole proximate cause of his injury." *McCormack*, 29 A.D.3d at 544, 815 N.Y.S.2d at 637. In *Arey*, "[d]efendants' contention that plaintiff could be found solely to blame for the accident since he personally owned a safety harness which he did not bring to the worksite is rejected; a claim of contributory negligence will not suffice." *Arey*, 29 A.D.3d at 1139, 816 N.Y.S.2d at 198 (citing *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 287, 803 N.E.2d 757, 761, 771 N.Y.S.2d 484, 488 (2003)).

decisions;¹⁵⁷ yet, eight years and 640 citations later it is still difficult to find any consensus as to the extent in which it did—or did not—overrule the prior Court of Appeals rulings in *Haimes*, *Klein*, *Gordon*, *Stolt*, and *Hagins*.

II. OVERRULING BY RE-INTERPRETATION

A. *Dog Bites, Breeding Bulls, and the Last Hundred-Plus Years of Rulings That You Only Thought Had Occurred*

The Restatement (Second) of Torts defines two causes of action that may apply when a “domestic animal” owned or harbored by the defendant causes injury to the plaintiff.¹⁵⁸ Section 509 of the Restatement defines a so-called *vicious propensity* cause of action:¹⁵⁹ “A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.”¹⁶⁰ By its very terms the cause will lie only if (a) the animal actually had “dangerous propensities abnormal to its class,” and (b) the defendant knew or should have known such was the case.¹⁶¹ But recovery is not premised upon negligence inasmuch as those conditions will dictate liability for any resultant injuries *even if* defendant exercised the *utmost care* to protect plaintiff from the dog, horse, or whatever.¹⁶²

Section 518 of the Restatement defines an alternative “negligence” cause of action as follows:

Except for animal trespass, one who possesses or harbors a domestic animal that he *does not know or have reason to know to be abnormally dangerous*, is subject to liability for harm done by the animal if, but only if,

- (a) he intentionally causes the animal to do the harm, or
- (b) he is negligent in failing to prevent the harm.¹⁶³

So, where the Restatement is followed, if the defendant knows or should know that his or her dog is rabid, defendant will stand liable

¹⁵⁷ Search of WESTLAW, Keycite Database (Nov. 1, 2011).

¹⁵⁸ RESTATEMENT (SECOND) OF TORTS §§ 509, 518 (1977).

¹⁵⁹ *Id.* § 509.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ *Id.* § 518 (emphasis added).

under section 509 even if defendant did his or her utmost to protect others from the unfortunate canine.¹⁶⁴ If, on the other hand, defendant's dog was a perfectly normal, if somewhat rambunctious, 200-pound St. Bernard puppy, defendant will not be liable absent a finding of negligence, however liability could be imposed under section 518 if the jury concludes that the defendant acted negligently in allowing the playful, 200-pound pup to play fetch in the hospital's nursery.¹⁶⁵

According to Justice Smith's dissenting opinion in *Bard v. Jahnke*, at least twenty states appeared to recognize the "negligence" cause of action embodied in Restatement section 518 and only one state had rejected it.¹⁶⁶ Much more to the point, New York's Court of Appeals had consistently recognized the existence of a negligence cause of action regarding domestic animals for well over a century.

In *Dickson v. McCoy*, decided in 1868, defendant's horse kicked plaintiff, "a child of ten years . . . in the face."¹⁶⁷ Plaintiff's "complaint alleged, that the horse was 'of a malicious and mischievous disposition, and accustomed to attack and injure mankind.'"¹⁶⁸ However, the proof, said the court, was instead that the horse was "young and playful, that he kicks in the air, and runs and gambols when loose in the street."¹⁶⁹ That notwithstanding, the court deemed "the allegation [of vicious propensities] as unnecessary, and the absence of proof on the point as not affecting the right to recover."¹⁷⁰ Defendant had let the "young and playful" horse play upon a city sidewalk (in Troy, New York).¹⁷¹ Although the fact that the horse was allowed to "run and play in the public streets . . . [was] no proof of a mischievous disposition," the practice was "liable to produce mischievous results" and judgment premised upon the negligence-based jury verdict in the plaintiff's favor was therefore affirmed.¹⁷²

Thereafter, in *Unger v. Forty-Second Street & Grand Street Ferry*

¹⁶⁴ See *id.* § 509.

¹⁶⁵ See *id.* §§ 509, 518.

¹⁶⁶ *Bard v. Jahnke*, 6 N.Y.3d 592, 600, 848 N.E.2d 463, 469, 815 N.Y.S.2d 16, 22 (2006) (Smith, J., dissenting).

¹⁶⁷ *Dickson v. McCoy*, 39 N.Y. 400, 400 (1868).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 401 (opinion of Dwight, J.).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 402 (opinion of Grover, J.).

¹⁷² *Id.* at 401–403.

*Railroad Co.*¹⁷³ and *Hyland v. Cobb*,¹⁷⁴ decided in 1873 and 1929 respectively, the Court of Appeals affirmed dismissals of two negligent harboring cases, but each time on the expressly stated ground that plaintiff's proof of negligence was lacking. In *Unger*, a team of "horses got loose and ran away without any fault whatever of the driver" and defendant "discharged its duty" by attaching the horses to the carriage "in the way which was in general use and which had been found reasonably adequate and safe."¹⁷⁵ In *Hyland*, the court ruled that "the mere failure to muzzle a dog cannot be held in itself to constitute negligence" and that a municipal ordinance that forbade unmuzzled dogs "in any public park or place" did not apply in Gramercy Park, a private park.¹⁷⁶

Skipping sixty years to 1990, the Third Department, and then the Court of Appeals, appeared to again acknowledge the negligence cause of action in *Young v. Wyman*.¹⁷⁷ In *Young*, defendant's fourteen-year-old daughter's dog Caesar ran into the road causing a vehicle to swerve and strike the infant-plaintiff.¹⁷⁸ There was no proof that Caesar was vicious.¹⁷⁹ Plaintiff's case was premised upon the claim that the community had a "leash law" and that defendant was therefore negligent in allowing Caesar to roam unattended and unleashed.¹⁸⁰ When defendant moved for summary judgment the Saratoga County Supreme Court granted the motion to the extent of dismissing plaintiff's "vicious propensities" claim, but declined to dismiss the claim based on negligence.¹⁸¹

On appeal, the Third Department split three to two¹⁸² and the Court of Appeals then split five to two¹⁸³ on whether plaintiff had adduced legally sufficient proof of negligence. However, none of the twelve appellate judges said or in any way suggested that recovery *could not* be premised on negligence. The issue that split both courts was whether violation of a leash law could *of itself* support a

¹⁷³ See *Unger v. Forty-Second St. & Grand St. Ferry R.R. Co.*, 51 N.Y. 497, 502 (1873).

¹⁷⁴ *Hyland v. Cobb*, 252 N.Y. 325, 326-27, 169 N.E. 401, 401 (1929).

¹⁷⁵ *Unger*, 51 N.Y. at 500, 502.

¹⁷⁶ *Hyland*, 252 N.Y. at 327-28, 169 N.E. at 401.

¹⁷⁷ *Young v. Wyman*, 159 A.D.2d 792, 551 N.Y.S.2d 1009 (App. Div. 3d Dep't 1990), *aff'd*, 76 N.Y.2d 1009, 566 N.E.2d 1157, 565 N.Y.S.2d 752 (1990).

¹⁷⁸ *Young*, 159 A.D.2d at 793, 551 N.Y.S.2d at 1010.

¹⁷⁹ See *id.* at 793-94, 551 N.Y.S.2d at 1010.

¹⁸⁰ *Id.* at 793, 551 N.Y.S.2d at 1010.

¹⁸¹ *Id.*

¹⁸² See *id.* at 794, 551 N.Y.S.2d at 1010.

¹⁸³ See *Young v. Wyman*, 76 N.Y.2d 1009, 1010, 566 N.E.2d 1157, 1157, 565 N.Y.S.2d 752, 752 (1990).

finding of negligence.¹⁸⁴

The Appellate Division majority noted that there was a common law rule that posited that certain animals should not be allowed to roam and cause mischief and that such circumstance of itself gave rise to an inference of negligence.¹⁸⁵ However, it ruled that such should not apply to dogs because “domestic favorites such as the family dog or cat, as emblematic of a suburban community as a cow or horse is to the standard farm, are, as a norm, frequently allowed to romp unguarded or unattended.”¹⁸⁶ In consequence, “some proof, or issue of fact, must exist beyond a mere showing that [defendant’s] dog was in the road at the time of the accident” and plaintiff had offered none, thus entitling defendant to summary judgment.¹⁸⁷

The Court of Appeals majority affirmed in *Young* on the stated ground “that the mere presence of an unrestrained dog on the street does not give rise to a presumption of negligence on the part of its owner,”¹⁸⁸ a statement that would seemingly imply that there was in fact a negligence cause of action. If there were no negligence cause of action it would have been irrelevant whether the proof warranted a presumption of negligence. By contrast, the Court of Appeals dissent, penned by future Chief Judge Kaye, urged that a presumption of negligence should arise from violation of the leash law because “[s]uch laws suggest that, whatever may have been the expectation in an earlier, more agricultural age, it is no longer expected that dogs will roam the highways of this State at will.”¹⁸⁹

Despite all of the above, a divided (4–3 decision) Court of Appeals ruled in 2004, in *Bard v. Jahnke*, not merely that New York would not *henceforth* recognize a cause of action for negligently harboring or supervision of a nonvicious animal, but that New York had *never* acknowledged any such cause of action.¹⁹⁰ How could the majority possibly reach that conclusion? I will explain.

After *Young* and prior to *Bard*, the Court of Appeals had a case named *Collier v. Zambito*.¹⁹¹ In *Collier*, defendants’ mixed-breed

¹⁸⁴ Compare *Young*, 159 A.D.2d at 793–94, 551 N.Y.S.2d at 1010 (majority opinion), with *id.* at 794, 551 N.Y.S.2d 1011 (Mahoney, P.J., dissenting). See *Young*, 76 N.Y.2d at 1011–12, 566 N.E.2d at 1158, 565 N.Y.S.2d at 753.

¹⁸⁵ *Young*, 159 A.D.2d at 793, 551 N.Y.S.2d at 1010.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 794, 551 N.Y.S.2d at 1010.

¹⁸⁸ *Young*, 76 N.Y.2d at 1010, 566 N.E.2d at 1157, 565 N.Y.S.2d at 752.

¹⁸⁹ *Id.* at 1012, 566 N.E.2d at 1158, 565 N.Y.S.2d at 753 (Kaye, J., dissenting).

¹⁹⁰ *Bard v. Jahnke*, 6 N.Y.3d 592, 599, 848 N.E.2d 463, 468, 815 N.Y.S.2d 16, 21 (2006).

¹⁹¹ *Collier v. Zambito*, 1 N.Y.3d 444, 807 N.E.2d 254, 775 N.Y.S.2d 205 (2004), *aff’g* 299

dog, Cecil, bit defendants' twelve-year-old son's friend while the friend was in defendants' home.¹⁹² The plaintiff did not contend that defendants could or should be held liable for negligence, but urged that there was proof that defendants knew or should have known of the dog's allegedly vicious propensities.¹⁹³ A divided Appellate Division ruled otherwise, as did a divided Court of Appeals.¹⁹⁴ The evidence was, the Court of Appeals said:

[S]imply insufficient to raise an issue of fact as to whether Cecil had vicious propensities that were known, or should have been known, to defendants. . . . Although the dog was restricted to the kitchen area . . . [t]here was no evidence that Cecil was confined because the owners feared he would do any harm to their visitors. There was no evidence that the dog's behavior was ever threatening or menacing.¹⁹⁵

That brings us to *Bard*.¹⁹⁶ In *Bard*, defendant hired a carpenter named John Timer to perform certain work on defendant's dairy farm.¹⁹⁷ Larry Bard went to the farm to meet Timer and help.¹⁹⁸ Defendant had a breeding bull named Fred who was allowed to roam freely in the area that included the location that Timer was to work.¹⁹⁹ Defendant did not warn Timer about Fred and, in turn,

A.D.2d 866, 750 N.Y.S.2d 249 (App. Div. 4th Dep't 2002).

¹⁹² *Id.* at 445, 807 N.E.2d at 255, 775 N.Y.S.2d at 206.

¹⁹³ *Id.* at 446, 807 N.E.2d at 255, 775 N.Y.S.2d at 206.

¹⁹⁴ *Collier*, 299 A.D.2d at 866–67, 750 N.Y.S.2d at 250–51; *Collier*, 1 N.Y.3d at 446, 807 N.E.2d at 255, 775 N.Y.S.2d at 206 (majority opinion); *Id.* at 451, 807 N.E.2d at 259, 775 N.Y.S.2d at 210 (Smith, J., dissenting).

¹⁹⁵ *Collier*, 1 N.Y.3d at 447, 807 N.E.2d at 256, 775 N.Y.S.2d at 207 (footnote omitted).

¹⁹⁶ *Bard v. Jahnke*, 6 N.Y.3d 592, 848 N.E.2d 463, 815 N.Y.S.2d 16 (2006). Although there was no Court of Appeals precedent that presaged the majority ruling in *Bard*, and the *Bard* majority itself cited only *Collier* as support for the result, it should be noted that there had been a good deal of controversy at the Appellate Division level. *See id.* at 596–97, 848 N.E.2d at 466–67, 815 N.Y.S.2d at 19–20 (citing *Collier v. Zambito*, 1 N.Y.3d 444 446, 807 N.E.2d 254, 256, 775 N.Y.S.2d 205, 207 (2004)). After the ruling in *Young*, the Third and Fourth Departments of the Appellate Division started to rule that it was, to put it bluntly, vicious propensities or bust. *See, e.g.*, *Plennert v. Abel*, 269 A.D.2d 796, 796, 704 N.Y.S.2d 417, 418 (App. Div. 4th Dep't 2000); *Morse v. Colombo*, 31 A.D.3d 916, 917, 819 N.Y.S.2d 162, 163–64 (App. Div. 3d Dep't 2006); *Smith v. Farner*, 229 A.D.2d 1017, 1018, 645 N.Y.S.2d 355, 356 (App. Div. 4th Dep't 1996). However, the First and Second Departments continued to rule that the two causes of action co-existed. *See, e.g.*, *Clifford v. Turkel*, 7 A.D.3d 251, 251, 776 N.Y.S.2d 550, 551 (App. Div. 1st Dep't 2004); *Evans v. Craig*, 25 A.D.3d 582, 583–83, 807 N.Y.S.2d 417, 418 (App. Div. 2d Dep't 2006); *Espejo v. Reuven Holding Ltd.*, 308 A.D.2d 373, 373, 764 N.Y.S.2d 275, 276 (App. Div. 1st Dep't 2003). The case law on both sides of the upstate-downstate divide was nicely collected in Justice Mark C. Dillon's ruling in *Petrone v. Fernandez*. *Petrone*, 53 A.D.3d 221, 226–227, 862 N.Y.S.2d 522, 526–527 (App. Div. 2d Dep't 2008), *rev'd*, 12 N.Y.3d 546, 910 N.E.2d 993, 883 N.Y.S.2d 164 (2009).

¹⁹⁷ *Bard*, 6 N.Y.3d at 594, 848 N.E.2d at 464–65, 815 N.Y.S.2d at 17–18.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 595, 848 N.E.2d at 465, 815 N.Y.S.2d at 18.

Timer did not warn Bard about Fred.²⁰⁰ As matters turned out, Fred strenuously objected to Bard's presence on the farm, with unfortunate consequences for Bard.²⁰¹

In the litigation that followed, plaintiff could hardly argue that Fred was *more* vicious than other breeding bulls.²⁰² Plaintiff instead argued that defendant was, in the circumstances, negligent.²⁰³ However, based solely upon the circumstance that the majority decision in *Collier* did *not* mention the availability of a negligence cause of action in the context of an appeal in which the plaintiff did not assert one, the *Bard* majority concluded that there was no cause of action other than the vicious propensities cause of action and that a negligence cause of action had *never* existed in New York.²⁰⁴ The Court even said that it declined "*to dilute [its] traditional rule* under the guise of a companion common-law cause of action for negligence."²⁰⁵ Ironically, the author of the dissenting opinion in *Young*, the opinion that posited that allowing a dog to roam free in violation of a leash law should of itself permit a finding of negligence, now joined the majority in ruling that there was no negligence cause of action—and never had been.²⁰⁶

What did the *Bard* majority say about *Dickson*, *Unger*, *Hyland*, and *Young*, the last decided only sixteen years earlier? The majority said nothing about any of those rulings. Although the 2006 majority ruling in *Bard* was several pages long, it cited a grand total of one case, the 2004 ruling in *Collier*.²⁰⁷

²⁰⁰ *See id.* at 594, 848 N.E.2d at 465, 815 N.Y.S.2d at 18.

²⁰¹ *See id.*

²⁰² *See id.* at 597, 848 N.E.2d at 467, 815 N.Y.S.2d at 20.

²⁰³ *Id.* at 598, 848 N.E.2d at 468, 815 N.Y.S.2d at 21.

²⁰⁴ *See id.* at 599, 848 N.E.2d at 468, 815 N.Y.S.2d at 21.

²⁰⁵ *Id.* (emphasis added).

²⁰⁶ *Compare* *Young v. Wyman*, 76 N.Y.2d 1009, 1010–11, 566 N.E.2d 1157, 1157–59, 565 N.Y.S.2d 752, 752–54 (1990) (Kaye, J., dissenting) (arguing to reinstate the common law negligence claim because dogs should no longer be able to freely roam the streets), *with Bard*, 6 N.Y.3d at 602, 848 N.E.2d at 471, 815 N.Y.S.2d at 24 (concurring in the decision that no common law negligence claim had existed in New York is then-Chief Judge Kaye).

²⁰⁷ *Bard*, 6 N.Y.3d at 593–99, 848 N.E.2d at 464–68, 815 N.Y.S.2d at 17–21 (citing *Collier v. Zambito*, 1 N.Y.3d 444, 807 N.E.2d 254, 775 N.Y.S.2d 205 (2004)). Judge Smith's dissenting opinion did address the Court of Appeals' prior rulings, and said:

Under the Restatement (Second) of Torts, the owner of a domestic animal who does not know or have reason to know that the animal is more dangerous than others of its class may still be liable for negligently failing to prevent the animal from inflicting an injury. This Court today becomes the first state court of last resort to reject the Restatement rule. . . .

. . . .

Thus, if ordinary negligence principles apply here, this case should not have been dismissed. . . .

. . . .

As a result of the ruling in *Bard*, one can be held liable for negligent maintenance of a car that causes a collision, but not for negligent supervision of a dog, horse, or other domestic animal.²⁰⁸ What if defendant allowed a spirited, but not “vicious,” Mastiff or Great Dane to play with the neighbor’s two-month-old baby? There is no negligence cause of action²⁰⁹ and there is a split of authority (discussed below) whether such is potentially actionable via the vicious propensities cause of action.²¹⁰ What if defendant allowed a “nonvicious” stallion to roam the front yard of her suburban home? The answer is the same. There is no liability for defendant’s negligence because there is no negligence cause of action (and never was.)²¹¹

The two subsequent “animal” cases that made their way to the Court of Appeals only served to confirm and broaden the ruling in *Bard*. In *Bernstein v. Penny Whistle Toys, Inc.*,²¹² wherein the owner/operator of a toy store kept a dog in the store and the dog bit an eight-year-old child, plaintiff argued and two Appellate Division dissenters agreed that the defendants could be held responsible for negligence since, as the dissenters put it, “[w]e do not view *Bard v. Jahnke* as eradicating the continued viability of prior cases which impose an enhanced duty toward children upon property owners who keep animals, where the presence and actions of children on the premises are reasonably foreseeable.”²¹³ However, the Appellate Division majority²¹⁴ and a unanimous Court of Appeals ruled differently.²¹⁵ The Court of Appeals said: “Since there is no evidence in this case that the dog’s owner had any knowledge of its vicious propensities, the Appellate Division was correct in affirming the dismissal of the complaint against defendants.”²¹⁶ The Court of Appeals cited twice as many cases as it had in *Bard* itself, for it now cited *Collier* and *Bard*.²¹⁷

Before today, our Court’s opinions were consistent with the Restatement rule. *Id.* at 599–601, 848 N.E.2d at 468–69, 815 N.Y.S.2d at 21–22 (Smith, J., dissenting).

²⁰⁸ *Bard*, 6 N.Y.3d at 599, 848 N.E.2d at 468, 815 N.Y.S.2d at 21 (majority opinion).

²⁰⁹ *Id.*

²¹⁰ See *infra* notes 220–33 and accompanying text.

²¹¹ *Bard*, 6 N.Y.3d at 599, 848 N.E.2d at 468, 815 N.Y.S.2d at 21.

²¹² *Bernstein v. Penny Whistle Toys, Inc.*, 10 N.Y.3d 787, 886 N.E.2d 154, 856 N.Y.S.2d 532 (2008), *aff’g* 40 A.D.3d 224, 834 N.Y.S.2d 173 (App. Div. 1st Dep’t 2007).

²¹³ *Bernstein*, 40 A.D.3d at 224–25, 227, 834 N.Y.S.2d at 174–75, 176 (Saxe, J., dissenting) (citations omitted).

²¹⁴ *Id.* at 224, 834 N.Y.S.2d at 174 (majority opinion).

²¹⁵ *Bernstein*, 10 N.Y.3d at 787, 886 N.E.2d at 154, 856 N.Y.S.2d at 532.

²¹⁶ *Id.* at 788, 886 N.E.2d at 155, 856 N.Y.S.2d at 533.

²¹⁷ *Id.* at 788, 886 N.E.2d at 154, 856 N.Y.S.2d at 532 (citing *Collier v. Zambito*, 1 N.Y.3d 444, 807 N.E.2d 254, 775 N.Y.S.2d 205 (2004); *Bard v. Jahnke*, 6 N.Y.3d 592, 848 N.E.2d 463,

In *Petrone v. Fernandez*, the Second Department ruled that “[n]either *Bard* nor *Collier* addressed, and did not need to address, the question of whether negligence involving the violation of a leash law can result in liability when an unleashed dog engages in a chase that proximately causes injury” and that liability should stand in that circumstance, reasoning that the “protections provided by municipal leash laws could [otherwise] be severely weakened, if not eliminated altogether.”²¹⁸ However, the Court of Appeals then reversed, stating that it did not matter whether defendant was negligent since negligence was, per an interesting turn of phrase, “no longer a basis for imposing liability’ after *Collier* and *Bard*.”²¹⁹

In the wake of *Bard*, *Bernstein*, and *Petrone*, it is now crystal clear that, regardless of what may have been the law in 1930 or 1990, there is “no longer” any negligent supervision cause of action with respect to injury caused by a domestic animal.²²⁰ There is, however, a new controversy and a great deal of confusion about when and whether nonaggressive proclivities, such as a horse that is skittish when transported or a dog that is rambunctious, can “count” as “vicious” liability-permitting proclivities if (a) the proclivities can foreseeably cause injury, and (b) the defendant knew or should have known of such proclivities.²²¹

For example, the Fourth Department recently held that a colt’s known “skittish,” “avoidance” behavior could *not* permit imposition

815 N.Y.S.2d 16 (2006)).

²¹⁸ *Petrone v. Fernandez*, 53 A.D.3d 221, 228, 862 N.Y.S.2d 522, 528 (App. Div. 2d Dep’t 2008), *rev’d*, 12 N.Y.3d 546, 910 N.E.2d 993, 883 N.Y.S.2d 164 (2009).

²¹⁹ *Petrone*, 12 N.Y.3d at 550, 910 N.E.2d at 996, 883 N.Y.S.2d at 167 (emphasis added) (quoting *Alia v. Fiorina*, 39 A.D.3d 1068, 1069, 833 N.Y.S.2d 761, 763 (App. Div. 3d Dep’t 2007)).

²²⁰ *See, e.g.*, *Gordon v. Davidson*, 87 A.D.3d 769, 769, 927 N.Y.S.2d 734, 735 (App. Div. 3d Dep’t 2011) (“The Court of Appeals has made clear that a cause of action for ordinary negligence does not lie against the owner of a domestic animal which causes injury. Rather, the sole viable claim is for strict liability . . .” (quoting *Alia*, 39 A.D.3d at 1069, 833 N.Y.S.2d at 762)); *Gannon v. Conti*, 86 A.D.3d 704, 706, 926 N.Y.S.2d 739, 741 (App. Div. 3d Dep’t 2011) (“[B]ecause a plaintiff in a case arising out of an attack by a domestic animal may only recover under a theory of strict liability, plaintiffs’ claims sounding in common-law negligence were properly dismissed.” (citations omitted)); *Hodgson-Romain v. Hunter*, 72 A.D.3d 741, 741, 899 N.Y.S.2d 300, 300–01 (App. Div. 2d Dep’t 2010) (“An owner’s liability for a dog bite or attack is determined solely by application of the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal’s vicious propensities.” (citations omitted)); *Egan v. Hom*, 74 A.D.3d 1133, 1134, 905 N.Y.S.2d 624, 625 (App. Div. 2d Dep’t 2010) (“Supreme Court should have granted that branch of the defendants’ motion which was for summary judgment dismissing the first cause of action alleging common-law negligence, since New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal.” (citations omitted)).

²²¹ There is no doubt that liability cannot be imposed in the absence of such notice.

of liability where there was no evidence “that the colt’s avoidance behavior was ‘abnormal to its class.’”²²² Also, where “it was undisputed that defendant knew that his bull had a propensity to break free of its enclosure and wander onto plaintiffs’ property,” such known “proclivity” could *not* give rise to liability where “[t]he bull’s proclivity to wander was not the proclivity that resulted in the injury to plaintiff . . . [and] the act that precipitated plaintiff’s injury [after the bull wandered onto plaintiff’s property] was the aggressive act of the bull in spinning around and knocking plaintiff to the ground,” something the bull had never done before.²²³

The Fourth Department also ruled, by a three-to-two vote, that proof that the defendants were aware “that their barking dog rushed toward cars and people on numerous occasions prior to the incident” *could* qualify as dangerous behavior under the rule.²²⁴ The two dissenters said, “[w]e agree with defendants that the dog’s tendency to run and bark is merely common canine behavior that does not endanger anyone.”²²⁵

The Fourth Department again split three-to-two, this time with the majority ruling that plaintiff raised an issue of fact by submitting “the affidavit of a witness who had observed the dog loose on a few occasions and averred that the dog ‘barks and runs for the roadway.’”²²⁶ The majority relied upon dictum in *Collier* in which the Court of Appeals had said that “An animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit.”²²⁷ The dissenters, by contrast, felt that proof that the dog “occasionally ran into the road” should not of itself constitute a dangerous proclivity unless there was also proof that the dog had interfered with traffic.²²⁸

²²² *Krieger v. Cogar*, 83 A.D.3d 1552, 1553, 921 N.Y.S.2d 767, 769 (App. Div. 4th Dep’t 2011) (quoting *Bard v. Jahnke*, 6 N.Y.3d 592, 597 n.2, 848 N.E.2d 463, 467 n.2, 815 N.Y.S.2d 16, 20 n.2 (2006)).

²²³ *Farnham v. Meder*, 72 A.D.3d 1574, 1575–76, 899 N.Y.S.2d 509, 511 (App. Div. 4th Dep’t 2010).

²²⁴ *Lewis v. Lustan*, 72 A.D.3d 1486, 1487, 899 N.Y.S.2d 767, 768 (App. Div. 4th Dep’t 2010), *appeal denied*, 77 A.D.3d 1456, 908 N.Y.S.2d 382 (2010).

²²⁵ *Id.* at 1487–88, 899 N.Y.S.2d at 769 (Smith, J.P., and Pine, J., dissenting).

²²⁶ *Smith v. Reilly*, 83 A.D.3d 1492, 1493, 921 N.Y.S.2d 423, 425 (App. Div. 4th Dep’t 2011), *leave to appeal granted*, 86 A.D.3d 934, 926 N.Y.S.2d 838 (2011).

²²⁷ *Id.* at 1493, 921 N.Y.S.2d at 425 (quoting *Collier v. Zambito*, 1 N.Y.3d 444, 447, 807 N.E.2d 254, 256, 775 N.Y.S.2d 205, 207 (2004)).

²²⁸ *Id.* at 1495, 921 N.Y.S.2d at 426 (Scudder, P.J., and Smith, J., dissenting) (quoting

The Appellate Division for the Second Department split four-to-one as to whether plaintiffs raised a triable issue as to “vicious propensities” with proof that “the dog growled, barked, snarled, and bared its teeth directly at her and her family” on each of the plaintiff’s “two arrivals at the defendant’s home.”²²⁹ The majority ruled for the plaintiff,²³⁰ while the dissenter answered that:

[T]he majority ignores the uncontroverted evidence that the defendant’s dog was kept unconfined in the home as a family pet, was regularly in the presence of visitors to the home without incident, that the defendant had no knowledge of any aggressive behavior by the dog, and had not received any complaints about the dog’s behavior.²³¹

In *Illian v. Butler*, the Third Department ruled that the dog’s past conduct in “leaping off the porch, barking, and running toward her [a witness] as she walked past” was “‘typical territorial behavior,’ insufficient to establish vicious propensities.”²³²

The current state of “animal injury” cases some five years after the sea change affected by *Bard* is thus, that (1) there is no longer any negligence cause of action in such cases, (2) liability *probably* can be premised upon a “vicious proclivity” that is not truly “vicious,” but would likely cause injury, (3) there is, however, a great deal of uncertainty as to what kind of nonvicious behavior can qualify and as to whether the animal’s sort of “vicious” proclivity must be unusually pronounced as compared to other horses, bull terriers, or whatever the comparison class may be, and (4) whatever does or does not qualify as “vicious” behavior, liability will not lie unless defendant knew or should have known of the proclivity.²³³

Obviously, depending on how this sorts out in the end, there could be some rather strange looking results. For example, if liability will follow only if the animal was particularly “vicious,” as compared to others of the applicable class, then the very fact that *any* animal of the class would have caused injury in the circumstances defendant created (e.g., bringing a breeding bull into the proverbial china shop or toy store) would then be a defense, not a basis for liability.

Yet, the point for present purposes is not whether the rule is good

Rigley v. Utter, 53 A.D.3d 755, 756, 862 N.Y.S.2d 147, 149 (App. Div. 3d Dep’t 2008)).

²²⁹ Dykeman v. Heht, 52 A.D.3d 767, 769, 861 N.Y.S.2d 732, 735 (App. Div. 2d Dep’t 2008).

²³⁰ *Id.* at 770, 861 N.Y.S.2d at 735.

²³¹ *Id.* at 771, 861 N.Y.S.2d at 736 (Dillon, J., dissenting).

²³² *Illian v. Butler*, 66 A.D.3d 1312, 1314, 888 N.Y.S.2d 247, 248 (App. Div. 3d Dep’t 2009) (quoting *Blackstone v. Hayward*, 304 A.D.2d 941, 941, 757 N.Y.S.2d 160, 161 (App. Div. 3d Dep’t 2003)).

²³³ *See supra* notes 191–232 and accompanying text.

or bad, logical or illogical (although the reader can no doubt discern my opinion), but instead the way that *Young*, *Dickson*, and a century of precedent were impliedly overruled with the re-interpretive conclusion that they had never existed in the first place. The cost that follows is that there is now substantial uncertainty as to the tort rules that govern a class of occurrences that have been happening roughly as long as people have kept domesticated animals.

B. Ms. McLean's Daughter and the Belated Impact upon Municipal Tort Liability

Up until March of 2009, there was no uniform rule that governed municipal liability in all cases, but there were a number of different rules, many solidified by decades of appellate precedent, that governed liability in different factual settings.²³⁴ For example, highway design—and later, municipal planning decisions that were sufficiently analogous to highway design determinations—were governed by the rule set forth in *Weiss v. Fote* and its progeny: essentially, that plaintiff would have to show something more than a mere disagreement between experts to challenge a determination that was founded upon study, but that “garden variety” tort standards governed in the absence of such a study.²³⁵

There was also a clear rule, premised upon multiple Court of Appeals decisions, regarding a municipal defendant's failure to provide “police protection.” Ever since the four-to-three ruling in *Riss v. City of New York* back in 1968, it was clear that a municipality's negligent failure to provide police protection could not *of itself* render the municipality liable for the resultant harm.²³⁶ However, such negligence could give rise to liability if the municipality promised to provide protection and the plaintiff or decedent reasonably relied to his or her detriment on that promise.²³⁷

²³⁴ *McLean v. City of New York*, 12 N.Y.3d 194, 203, 905 N.E.2d 1167, 1173–74, 878 N.Y.S.2d 238, 244–45 (2009); *see, e.g.*, *Affleck v. Buckley*, 96 N.Y.2d 553, 557, 758 N.E.2d 651, 654, 732 N.Y.S.2d 625, 628 (2001); *Merrill Transp. Co. v. State*, 97 A.D.2d 921, 921, 470 N.Y.S.2d 764, 765 (App. Div. 3d Dep't 1983); *Trautman v. State*, 179 A.D.2d 635, 636, 578 N.Y.S.2d 245, 246 (App. Div. 2d Dep't 1992).

²³⁵ *Weiss v. Fote*, 7 N.Y.2d 579, 588, 167 N.E.2d 63, 67, 200 N.Y.S.2d 409, 415 (1960).

²³⁶ *Riss v. City of New York*, 22 N.Y.2d 579, 583, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 899 (1968).

²³⁷ *E.g.*, *Mastroianni v. Cnty. of Suffolk*, 91 N.Y.2d 198, 205, 691 N.E.2d 613, 616, 668 N.Y.S.2d 542, 545 (1997); *De Long v. Cnty. of Erie*, 60 N.Y.2d 296, 306, 457 N.E.2d 717, 722, 469 N.Y.S.2d 611, 617 (1983).

This ultimately gave rise to a four-prong test, first detailed in *Cuffy v. City of New York*, as to whether there was a “special relationship” between plaintiff and defendant which could render the defendant liable to plaintiff for negligent failure to provide police-type protection.²³⁸ *Cuffy*’s four-prong test was thereafter applied in literally dozens of Appellate Division cases that involved allegedly negligent failure to provide police protection.²³⁹ The Court of Appeals itself repeatedly said that liability in such cases, or more accurately, whether there was a tort duty to act reasonably, turned on whether there was a “special relationship” under the *Cuffy* test.²⁴⁰

In the wake of *Cuffy* and its progeny, the rule was very straightforward. In the unusual case in which the plaintiff could satisfy the *Cuffy* standard and show that there was a promise of protection that was made directly to the victim (or where the victim was an infant, to the child’s parent) that the victim reasonably relied upon to his or her detriment, liability could be imposed upon jury findings of negligence and proximate causation.²⁴¹ Plaintiffs met that standard in *De Long*, *Mastroianni*, and *Sorichetti v. City of New York*.²⁴² In the far more common instance in which the plaintiff could not establish that the requisite “special relationship” existed, defendant thereby prevailed as a matter of law.²⁴³

Of course, all or virtually all of these so-called “police protection” cases, those in which recovery was allowed and those in which recovery was denied, involved allegedly negligent conduct that could be characterized as “discretionary,” that is, as involving some exercise of judgment, rather than as “ministerial” conduct that did

²³⁸ *Cuffy v. City of New York*, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987).

²³⁹ See, e.g., *McLean v. City of New York*, 12 N.Y.3d 194, 201, 905 N.E.2d 1167, 1172, 878 N.Y.S.2d 238, 243 (2009); *Lauer v. City of New York*, 95 N.Y.2d 95, 102–03, 733 N.E.2d 184, 189, 711 N.Y.S.2d 112, 117 (2000); *Valdez v. City of New York*, 74 A.D.3d 76, 78–79, 901 N.Y.S.2d 166, 168 (App. Div. 1st Dep’t 2010), *aff’d*, No. 153, 2011 N.Y. LEXIS 3075, at *1 (N.Y. Oct. 18, 2011); *Hanna v. St. Lawrence Cnty.*, 34 A.D.3d 1146, 1148 n.1, 825 N.Y.S.2d 798, 800 n.1 (App. Div. 3d Dep’t 2006).

²⁴⁰ See, e.g., *McLean*, 12 N.Y.3d at 199, 905 N.E.2d at 1171, 878 N.Y.S.2d at 242; *Lauer*, 95 N.Y.2d at 102–03, 733 N.E.2d at 189, 711 N.Y.S.2d at 117.

²⁴¹ See, e.g., *Boland v. State*, 218 A.D.2d 235, 245, 638 N.Y.S.2d 500, 506 (1996).

²⁴² All three cases held that when a special relationship is found cases should be submitted to a jury to determine the government-defendant’s negligence. *De Long*, 60 N.Y.2d at 306, 457 N.E.2d at 722, 469 N.Y.S.2d at 616–17; *Mastroianni*, 91 N.Y.2d at 205–06, 691 N.E.2d at 617, 668 N.Y.S.2d at 546; *Sorichetti v. City of New York*, 65 N.Y.2d 461, 471, 482 N.E.2d 70, 76–77, 492 N.Y.S.2d 591, 597–98 (1985).

²⁴³ *Laratro v. City of New York*, 8 N.Y.3d 79, 84, 861 N.E.2d 95, 97–98, 828 N.Y.S.2d 280, 282–83 (2006); *Pelaez v. Seide*, 2 N.Y.3d 186, 193, 810 N.E.2d 393, 395, 778 N.Y.S.2d 111, 113 (2004).

not involve the exercise of judgment.²⁴⁴ But the assumption was that “discretionary” conduct *could* give rise to liability if the requisite “special relationship” existed.²⁴⁵ Indeed, if that were not the case, there would have been no point in ascertaining whether there was a “special relationship.”²⁴⁶

What is more, the Court of Appeals had expressly said that “municipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents, *except* when plaintiffs establish a ‘special relationship.’”²⁴⁷ This was also the rule followed in most states.²⁴⁸

All of that aside, the rule in “police protection” cases and in a still unknown number of other contexts may have changed with the 2009 ruling in *McLean v. City of New York*.²⁴⁹ As in *Bard*, the change did not come with any express overruling of prior authority, but instead with the pronouncement that the law had been different than everyone supposed all along.²⁵⁰

1. Ms. McLean’s Daughter

Ms. Charlene McLean had given birth to a daughter and now wanted to return to work, but she was a single mother who first needed to find a day care provider to look after her little girl.²⁵¹ Knowing that the city of New York licensed such providers, she called the appropriate city office and was given the names of five

²⁴⁴ *E.g.*, *McLean*, 12 N.Y.3d at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244.

²⁴⁵ *Kircher v. City of Jamestown*, 74 N.Y.2d 251, 255–56, 543 N.E.2d 443, 445–46, 544 N.Y.S.2d 995, 997–98 (1989).

²⁴⁶ *See id.* at 256, 543 N.E.2d at 445–46, 544 N.Y.S.2d at 998; *see also Laratro*, 8 N.Y.3d at 82–83, 861 N.E.2d at 96–97, 828 N.Y.S.2d at 281–82 (describing special relationship as only creating a municipal duty of care in “a narrow class of cases” (quoting *Cuffy v. City of New York*, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987))).

²⁴⁷ *Kovit v. Hallums*, 4 N.Y.3d 499, 505, 829 N.E.2d 1188, 1189, 797 N.Y.S.2d 20, 21 (2005) (emphasis added); *see also Pelaez*, 2 N.Y.3d at 193, 810 N.E.2d at 395, 778 N.Y.S.2d at 113 (“As a rule, municipalities are immune from tort liability when their employees perform discretionary acts involved the exercise of reasoned judgment.”).

²⁴⁸ The Prosser hornbook puts it this way:

Since most states afford a qualified, malice-destructible immunity for discretionary acts, but no immunity at all for “ministerial” acts, the distinction between the two is critical in any case where the plaintiff cannot show malice. Where there is an absolute immunity for discretionary acts, the distinction is critical in all cases. It is not, however, a distinction that judicial, academic or practicing lawyers have been able to define.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 132, at 1062 (5th ed. 1984).

²⁴⁹ *McLean*, 12 N.Y.3d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238.

²⁵⁰ To my chagrin, I was appellate counsel for the plaintiff in *McLean*.

²⁵¹ Brief of Plaintiffs-Respondents at 58, *McLean v. City of New York*, 12 N.Y.3d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009) (No. 119189/00).

providers in her area.²⁵² Ms. McLean settled upon one of the providers and trusted her daughter to its care.²⁵³

Now, the city had three different offices that were pertinent to the case.²⁵⁴ One office, which was part of the city's Administration for Children's Services ("ACS"), investigated claims of child abuse or neglect lodged against day care providers.²⁵⁵ A second office, part of the city's Department of Health, granted and renewed licenses and registrations of day care providers.²⁵⁶ A third, also part of ACS informed callers, on request, of licensed or registered day care providers in their geographic area.²⁵⁷

However, the city office that issued the licenses and registrations had a practice of *not* checking with the office that investigated child abuse claims before issuing licenses and registrations.²⁵⁸ Nor did the city licensing office check with the state database regarding child abuse complaints.²⁵⁹ The city office that issued the providers' names had a practice of *not* checking with either of the other city offices, or even of verifying that the day care providers in their data base were *still* licensed or registered.²⁶⁰ Once a provider's name was added to the list the name was not dropped unless *the provider* requested it be dropped.²⁶¹

As it happened, the provider which Ms. McLean selected had two known-to-the-city-itself incidents of abuse or neglect.²⁶² Ms. McLean's four-month old child sustained brain damage while in the provider's care, ostensibly as a result of repeated traumas.²⁶³

2. The Reinterpretation

McLean presented many issues. However, the issue that ultimately cast the largest shadow concerned whether liability could be premised upon a municipality's negligent performance of a ministerial task.²⁶⁴

²⁵² *Id.* at 1–2.

²⁵³ *Id.* at 2.

²⁵⁴ *See id.* at 1–3.

²⁵⁵ *Id.* at 1–2.

²⁵⁶ *Id.* at 3.

²⁵⁷ *See id.* at 1–2.

²⁵⁸ *See id.* at 3–4.

²⁵⁹ *Id.* at 4.

²⁶⁰ *Id.*

²⁶¹ *See id.*

²⁶² *Id.* at 3.

²⁶³ *See id.* at 2.

²⁶⁴ *McLean v. City of New York*, 12 N.Y.3d 194, 203, 905 N.E.2d 1167, 1173, 878 N.Y.S.2d 238, 244 (2009).

A state statute had stated that a provider's application for renewal of registration could not be accepted, let alone granted, where there were outstanding complaints of abuse.²⁶⁵ Here, the city had nonetheless renewed the registration of such an applicant.²⁶⁶ Plaintiff urged that this was negligent performance of a ministerial function inasmuch as there could be no discretionary latitude to violate the law.²⁶⁷ The defendant city countered that negligent performance of a ministerial function could not give rise to liability absent a special duty of care, and that one without the other was not enough.²⁶⁸ The latter position taken by the city is precisely how the Court of Appeals ruled.²⁶⁹ This, according to the *McLean* court, was old law, dating at least back to 1983, not new law.²⁷⁰ The Court purported to derive the conclusion that ministerial negligence could not give rise to liability absent a special duty of care from its decisions in *Tango v. Tulevech* and *Lauer v. City of New York*.²⁷¹

Yet, in *Tango*, where the holding had been that a probation officer's "discretionary" decision to allow plaintiff's former wife to take the children out of state could not give rise to liability, the court had actually said: "[W]hen the [official] action is exclusively ministerial, the officer will be liable *if it is otherwise tortious* and not justifiable pursuant to statutory command."²⁷² Similarly, in *Lauer*, where the court held that a medical examiner's negligent failure to correct an autopsy finding could not give rise to liability, it was the absence of *any* tort duty of care, not the absence of a "special duty," that was plaintiff's undoing.²⁷³ The *Lauer* court said that a distinction was drawn "between 'discretionary' and 'ministerial' governmental acts," that "ministerial acts—meaning

²⁶⁵ *Id.* at 200–02, 905 N.E.2d at 1171–72, 878 N.Y.S.2d at 242–43 (citing N.Y. SOC. SERV. LAW § 390(2)(d)(ii)(B)(1), (3) (McKinney 2011) (requiring that day care providers comply with Social Services Law sections 390-a and 424-a (N.Y. SOC. SERV. LAW § 390-a (McKinney 2011) (requiring that child care providers receive training to prevent child abuse)); *id.* § 424-a (requiring that child care providers inquire of ACS whether a person considered for employment to work with children is the subject of an indicated child abuse report).

²⁶⁶ *McLean*, 12 N.Y.3d at 198, 905 N.E.2d at 1170, 878 N.Y.S.2d at 241.

²⁶⁷ *Id.* at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244.

²⁶⁸ *See id.* at 203, 905 N.E.2d at 1173–74, 878 N.Y.S.2d at 24–25.

²⁶⁹ *Id.*

²⁷⁰ *See id.* at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244.

²⁷¹ *Id.* (citing *Tango v. Tulevech*, 61 N.Y.2d 34, 41, 459 N.E.2d 182, 186, 471 N.Y.S.2d 73, 77 (1983); *Lauer v. City of New York*, 95 N.Y.2d 95, 99–100, 733 N.E.2d 184, 187, 711 N.Y.S.2d 112, 115 (2000)).

²⁷² *Tango*, 61 N.Y.2d at 36, 40–41, 459 N.E.2d at 183, 185–86, 471 N.Y.S.2d at 74, 76–77 (emphasis added) (citations omitted).

²⁷³ *Lauer*, 95 N.Y.2d at 97–98, 101, 103, 733 N.E.2d at 186, 188–89, 711 N.Y.S.2d at 114, 116–17.

conduct requiring adherence to a governing rule, with a compulsory result—*may subject the municipal employer to liability for negligence,*” but that “[w]ithout a *duty* running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.”²⁷⁴ Those were the *only* authorities cited in support of the proposition, now deemed the law all along, that ministerial negligence was not actionable unless the plaintiff *also* established the existence of a special duty of care.²⁷⁵

In ruling as it did, the *McLean* Court did not explain why it had ever bothered to create the *Cuffy* test in police protection cases if, per the new rule (which, supposedly, had been the rule all along), there was to be no liability as a matter of law irrespective of whether the *Cuffy* standard was met or not met.²⁷⁶ Nor, looking forward, did the *McLean* Court expressly say (a) whether its rulings in *DeLong*, *Sorichetti*, and *Mastroianni* (amongst other cases) were now overruled, or (b) whether there was now to be blanket immunity for failure to provide police protection *even if* there was a “special relationship” under the *Cuffy* test.

The *McLean* Court did, however, address the cases in which it had *appeared* to flatout say that “discretionary” conduct *could* give rise to liability where a special duty was owed.²⁷⁷ The *McLean* Court said that the cited language was “admittedly confusing,” but that the court had not meant what the language may have appeared to say:

Ms. McLean relies, however, on *admittedly confusing* language in two more recent cases. In *Pelaez*, we said: “As a rule, municipalities are immune from tort liability when their employees perform discretionary acts In a narrow exception to the rule, we have upheld tort claims when plaintiffs have established a ‘special relationship’ with the municipality.” And in *Kovit v. Estate of Hallums*, we said, citing *Pelaez*: “municipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents, except when plaintiffs establish a ‘special relationship’ with the municipality.” *If these comments are taken to mean* that the special duty/special relationship rule

²⁷⁴ *Id.* at 99–100, 733 N.E.2d at 187, 711 N.Y.S.2d at 115 (emphasis added) (citations omitted).

²⁷⁵ *McLean*, 12 N.Y.3d at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244.

²⁷⁶ *See id.* at 202–03, 905 N.E.2d at 1173–74, 878 N.Y.S.2d at 244–45.

²⁷⁷ *Id.* at 203, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244.

applies to discretionary rather than ministerial acts, then *Tango* and *Lauer* on the one hand, and *Pelaez* and *Kovit* on the other, seem inconsistent.

If there is an inconsistency, we resolve it now: *Tango* and *Lauer* are right, and any contrary inference that may be drawn from the quoted language in *Pelaez* and *Kovit* is wrong. Government action, if discretionary, may not be a basis for liability, while *ministerial actions may be, but only if they violate a special duty owed to the plaintiff*, apart from any duty to the public in general. The holdings of *Pelaez* and *Kovit* are consistent with this principle. In each of those cases we found no special relationship or special duty. Thus there could be no liability, whether the actions at issue were characterized as ministerial or discretionary.²⁷⁸

3. Everything You Thought You Knew is Now Wrong and Always was Wrong

If the *McLean* court had expressly created a new rule or new exception to provide the city with immunity in the factual context presented in that case that would have been bad for Ms. McLean and her daughter but hardly a sea change in the tort law. One problem with revisiting a twenty-five-year-old decision and discovering that it actually meant something quite different than everyone thought is that there may well have been a host of cases in a range of different factual circumstances that relied to one extent or another upon the rule now said to be wrong all along. If so, the question that inevitably follows is whether all of the rulings premised upon the language now said to be “confusing” are now wrong as well.

For example, *McLean* did not itself involve liability for alleged failure to provide police protection.²⁷⁹ Yet, if the general principle now said to be the law all along (i.e., that liability can follow only if the conduct was “ministerial” and a “special duty” of care was owed)²⁸⁰ is accurate, then all of the above-cited cases that allowed imposition of liability for failure to provide police protection (including the Court of Appeals’ decisions in *Sorichetti* and

²⁷⁸ *Id.* at 203, 905 N.E.2d at 1173–74, 878 N.Y.S.2d at 244–45 (emphasis added) (quoting *Kovit v. Hallums*, 4 N.Y.3d 499, 505, 829 N.E.2d 1188, 1189, 797 N.Y.S.2d 20, 21 (2005); *Palaez v. Seide*, 2 N.Y.3d 186, 193, 810 N.E.2d 393, 395, 778 N.Y.S.2d 111, 113 (2004)).

²⁷⁹ See *McLean*, 12 N.Y.3d at 198–99, 905 N.E.2d at 1170, 878 N.Y.S.2d at 241.

²⁸⁰ *Id.* at 203, 905 N.E.2d at 1173–74, 878 N.Y.S.2d at 244–45.

Mastroianni)²⁸¹ must have been wrongly decided and the rule is, instead, that failure to provide police protection can *never* give rise to liability. Must the rulings in those cases now be annulled as well? It was only a matter of time before that issue came to the Court of Appeals and it did later that very year.

In *Dinardo v. City of New York*:²⁸²

Plaintiff Zelinda Dinardo, a special education teacher at a New York City public school, was injured when she tried to restrain one student from attacking another. The student had been verbally and physically aggressive for several months, and plaintiff had repeatedly expressed concerns to her supervisors about her safety in the classroom. The school's supervisor of special education and the principal had both told her that "things were being worked on, things were happening" and urged her to "hang in there because something was being done" to have the student removed.²⁸³

Plaintiff claimed that she reasonably relied on those promises to her detriment.²⁸⁴ The Appellate Division majority ruled that, construing the facts in the plaintiff's favor, a jury could conclude that the requisite "special relationship" created a tort duty of care.²⁸⁵

The Court of Appeals reversed and dismissed the complaint per a memorandum opinion that was six paragraphs long.²⁸⁶ Essentially, without addressing whether there was now to be immunity *whether or not* a "special relationship" existed, the majority ruled that the promises made to Ms. DiNardo had been too amorphous to permit a finding of justified reliance.²⁸⁷

Chief Judge Lippman, who had not participated in the ruling in *McLean*, took occasion to write a concurring opinion in which he said: (1) that he deemed *McLean* controlling, but (2) he questioned the analysis in *McLean*.²⁸⁸ Regarding the latter, he wrote:

I concur in the majority's result on constraint of *McLean v.*

²⁸¹ See *supra* notes 242–49 and accompanying text.

²⁸² *Dinardo v. City of New York*, 13 N.Y.3d 872, 873, 921 N.E.2d 585, 586, 893 N.Y.S.2d 818, 819 (2009).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Dinardo v. City of New York*, 57 A.D.3d 373, 374, 871 N.Y.S.2d 15, 16 (App. Div. 1st Dep't 2008), *rev'd*, 13 N.Y.3d 872, 921 N.E.2d 585, 893 N.Y.S.2d 818 (2009).

²⁸⁶ *Dinardo*, 13 N.Y.3d at 873–75, 921 N.E.2d at 586–87, 893 N.Y.S.2d at 819–20.

²⁸⁷ *Id.* at 874–75, 921 N.E.2d at 587, 893 N.Y.S.2d at 820.

²⁸⁸ *Dinardo*, 13 N.Y.3d at 876, 921 N.E.2d at 588, 893 N.Y.S.2d at 821 (Lippman, C.J., concurring).

City of New York. In *McLean*, this Court held that government action, if discretionary, may never form the basis for tort liability, even if a special relationship exists between the plaintiff and the municipality. . . . Even if *Tango and Lauer* can arguably be read to imply that the special relationship exception does not apply to discretionary acts, that interpretation was flatly rejected in *Pelaez v. Seide*, decided after *Tango and Lauer*, but prior to *McLean*. . . . One year later, in *Kovit v. Estate of Hallums*, we recognized that the police officer was exercising his discretion and that in order “to hold the City liable for the negligent performance of a discretionary act, a plaintiff must establish a special relationship with the municipality.” *I can discern no convincing rationale for the Court’s disregard of this relevant binding precedent, which so unreasonably narrows—indeed effectively eliminates—the special relationship exception.*

. . . .

Whether the municipality’s act is characterized as ministerial or discretionary should not be, and never has been, determinative in special duty cases. Indeed, in *Cuffy*, a seminal case in the special duty context, the plaintiffs alleged that the police had a special duty to protect them based on a police officer’s promise that an arrest would be made or some other protective action would be taken regarding an ongoing dispute between plaintiffs and their neighbors. . . .

*. . . Because almost any governmental act may be characterized as discretionary, McLean too broadly insulates government agencies from being held accountable to injured parties.*²⁸⁹

4. The Impact of *McLean*, if any, upon “Police Protection” Cases

a. *Majority*

Given that the *Dinardo* majority never addressed whether *McLean* controlled (since the plaintiff lost even under the “old” law), the question remains. Did *McLean/Dinardo* and now *Donald*,²⁹⁰

²⁸⁹ *Id.* at 876–77, 921 N.E.2d at 588–89, 893 N.Y.S.2d at 821–22 (emphasis added) (citations omitted) (quoting *Kovit v. Hallums*, 4 N.Y.3d 499, 506, 829 N.E.2d 1188, 1190, 797 N.Y.S.2d 20, 22 (2005)).

²⁹⁰ *Donald v. State*, 17 N.Y.3d 389, 953 N.E.2d 790, 929 N.Y.S.2d 552 (2011). In a case not

overrule *Cuffy*?

The confusion that now reigns regarding that once well-settled area of law is plainly evident from a recent First Department ruling in which the panel split three ways.

Valdez v. City of New York was a “police protection” case.²⁹¹ Plaintiff, who had an order of protection against her former boyfriend, received a phone call in which the ex-boyfriend threatened to kill her.²⁹² A police officer who knew of the order of protection and was apprised of the phone threat told plaintiff the boyfriend would be arrested.²⁹³ This did not occur and the boyfriend shot plaintiff the next day.²⁹⁴

Up until the decisions in *McLean* and *Dinardo* the governing rule in such cases was clear. Plaintiff would have had to establish, per the four-prong standard of *Cuffy*:

- (1) that the municipality assumed an affirmative duty, through promises or actions, to act on behalf of the injured party;
- (2) knowledge on the part of the municipality’s agents that inaction could lead to harm;
- (3) some form of direct contact between the municipality’s agents and the injured party; and
- (4) the party’s justifiable reliance on the municipality’s undertaking.²⁹⁵

If plaintiff proved those elements she could prevail.²⁹⁶ If not, she had no cause of action for negligent failure to provide police protection.²⁹⁷

Valdez thus presented two issues: Was *Cuffy* still good law or was the new rule that the city was simply immune on the ground that the alleged actionable conduct was “discretionary?”; If *Cuffy* was still good law, did plaintiff’s proof sufficiently support the jury’s liability verdict?

The two-judge plurality ruled in the 1st Department decision

far removed from *Tango*, the court held that the Department of Correctional Services could not be held liable because its alleged errors in recording postrelease supervision terms as part of the claimants’ sentences were discretionary and therefore nonactionable. *Id.* at 393, 395, 953 N.E.2d at 792, 794, 929 N.Y.S.2d at 554–55.

²⁹¹ *Valdez v. City of New York*, 74 A.D.3d 76, 77, 901 N.Y.S.2d 166, 167 (App. Div. 1st Dep’t 2010), *aff’d*, No. 153, 2011 WL 4916330 (Oct. 18, 2011); *see also infra* Part IV (elaborating on the recent Court of Appeals decision in *Valdez*).

²⁹² *Valdez*, 74 A.D.3d at 77, 901 N.Y.S.2d at 167.

²⁹³ *Id.* at 79, 901 N.Y.S.2d at 168.

²⁹⁴ *Id.* at 80, 901 N.Y.S.2d at 169.

²⁹⁵ *Id.* at 79, 901 N.Y.S.2d at 168 (quoting *Cuffy v. City of New York*, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987)).

²⁹⁶ *Valdez*, 74 A.D.3d at 78–79, 901 N.Y.S.2d at 168.

²⁹⁷ *Id.*

penned by Justice Catterson that (1) *Cuffy* was still good law, but (2) plaintiff's proof of justified reliance was deficient as a matter of law.²⁹⁸

Regarding the defendant city's claim that *Cuffy* was now superseded by a *McLean* standard of absolute immunity for discretionary conduct, the plurality deemed it "inconceivable" that the Court of Appeals:

[I]ntended to eliminate the special duty exception upon which liability in police cases can be found without explicitly reversing the position it appears to solidly reiterate by citing *Cuffy* at length in the decision. On the contrary, both *McLean* and *Dinardo* support the position that the starting point of any analysis as to governmental liability is whether a special relationship existed, and not whether the governmental action is ministerial or discretionary.²⁹⁹

As the plurality saw it:

[T]he resolution lies in accepting that the Court [of Appeals] did not intend to eliminate the special duty exception, but rather *specifically recognized that its precedent established a subset of police action or nonaction that can provide a basis for liability* [inasmuch as] the focus by the *McLean* Court on the decision in *Cuffy* appears to reinforce the well established rule that a governmental agency's liability for negligent performance depends in the first instance on whether a special relationship existed with the injured person.³⁰⁰

Yet, plaintiff could not recover under *Cuffy*, the plurality ruled, because plaintiff's reliance was not *justified* in the circumstances.³⁰¹ Although plaintiff said that she expected the police to phone her after the arrest, she left the protection of her home without having received such a call.³⁰² The plurality reasoned: "In the few cases where courts have found justifiable reliance, and thus a special relationship exception, a verbal assurance invariably has been followed by visible police protection of the plaintiff."³⁰³

The concurring opinion of Justice Abdus-Salaam agreed that the proof of justified reliance was fatally lacking and therefore agreed

²⁹⁸ *Id.* at 77–78, 81–82, 901 N.Y.S.2d at 167–68, 170.

²⁹⁹ *Id.* at 78, 901 N.Y.S.2d at 167 (citations omitted).

³⁰⁰ *Id.* (emphasis added) (citing *Cuffy*, 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372).

³⁰¹ *Id.* at 81, 901 N.Y.S.2d at 170.

³⁰² *Id.*

³⁰³ *Id.* at 80, 901 N.Y.S.2d at 169 (citations omitted).

with the result (dismissal), but appeared to disagree with the plurality's conclusion that *McLean* did not alter the legal standards in "police protection" cases.³⁰⁴ Per the concurrence, plaintiff would have to establish the four *Cuffy* elements *and* prove that the alleged negligence was "ministerial" in nature.³⁰⁵

b. Dissent

The two dissenters, per an opinion by Justice DeGrasse, agreed with the plurality that "*McLean* does not abrogate municipal liability based on a special relationship in a case involving police protection," noting that "neither *Dinardo* nor *McLean* involves police protection."³⁰⁶

The point of departure with the plurality was that the dissenters disagreed with the "premise that a special duty generally does not exist without 'visible police conduct or action' at the victim's home or some similar site."³⁰⁷ As they saw it, the Court of Appeals had never before voiced such an element, and, additionally, there had been no such conduct or action in *Sorichetti v. City of New York* where liability was permitted.³⁰⁸ The Court of Appeals ultimately affirmed the 1st Department's decision in *Valdez*, a point discussed further in Part IV.³⁰⁹

5. Beyond the "Police Protection" Issues—One Illustrative Example

As I noted earlier, there never was a "unified theory" of municipal liability.³¹⁰ There were a host of different rules and exceptions thereto.³¹¹ Although there have been many, many "police protection" cases, that is merely one subset of municipal tort liability. The general principle announced in *McLean*, there deemed to have been the law all along, cuts a much wider swath.

The uncertainty engendered by *McLean* and *Dinardo* outside of the area of "police protection" was nicely described by Judge Judith

³⁰⁴ *Id.* at 83–84, 901 N.Y.S.2d at 172 (Abdus-Salaam, J., concurring).

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 88, 901 N.Y.S.2d at 175 (DeGrasse, J., dissenting).

³⁰⁷ *Id.* at 86, 901 N.Y.S.2d at 174.

³⁰⁸ *Id.* at 87, 901 N.Y.S.2d at 174 (citing *Sorichetti v. City of New York*, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985)). The plurality found the dissent's reliance upon *Sorichetti* unconvincing since that decision had preceded the ruling in *Cuffy*. *Id.* at 82, 901 N.Y.S.2d at 170 (majority opinion).

³⁰⁹ *See infra* Part IV.

³¹⁰ *See supra* Part II.B.

³¹¹ *See id.*

A. Hard in *Signature Health Center, LLC v. State*.³¹²

Signature was a case in which a Medicaid provider sued to recover consequential damages resulting from delay by New York State Department of Health (“DOH”) in posting the provider’s revised Medicaid reimbursement rates.³¹³ Shortly before the ruling in *McLean*, the Court of Claims granted claimant summary judgment on the ground that a 2003 Supreme Court decision collaterally estopped the State from relitigating the issue of whether there had been ministerial neglect.³¹⁴ But *McLean* followed soon thereafter.

Just as municipal defendants were arguing in instances in which a *Cuffy* special duty had previously been sufficient for liability that the plaintiff must additionally prove the conduct was “ministerial,” municipal defendants now argued in those contexts in which ministerial negligence used to be actionable that the plaintiff must now additionally prove a “special relationship.”³¹⁵

Reviewing the law that preceded *McLean*, Judge Hard wrote that:

Governmental actions that are judicial or quasi-judicial in nature are, and have been at all times, entitled to absolute immunity. On the other hand, governmental actions that require the exercise of discretion but are not judicial or quasi-judicial have been held to be entitled to “qualified immunity,” meaning that they are immune from liability unless performed in bad faith or without reasonable basis.³¹⁶

Beyond that:

Prior to *McLean* and *Dinardo*, it was the understanding of this Court, and apparently many other courts, that there was another, very narrow exception to the general rule of non-liability for discretionary governmental acts: situations in which the injured party had a “special relationship” with the government, one giving rise to a “special duty” owed by the government to the injured party, where the injury resulted from a violation of the special duty.³¹⁷

The *Signature* court ruled that the law had indeed changed, even if it was “not entirely clear when the principles articulated in

³¹² *Signature Health Ctr., LLC v. State*, 28 Misc. 3d 543, 554–58, 902 N.Y.S.2d 893, 904–07 (N.Y. Ct. Cl. 2010).

³¹³ *Id.* at 546, 902 N.Y.S.2d at 898.

³¹⁴ *Id.* at 544, 902 N.Y.S.2d at 896.

³¹⁵ *Id.* at 558, 902 N.Y.S.2d at 907.

³¹⁶ *Id.* at 548, 902 N.Y.S.2d at 899 (citations omitted).

³¹⁷ *Id.* at 549, 902 N.Y.S.2d at 899–900 (citations omitted).

McLean became the governing law,” and that the claimant was now required to show that there was a “special duty,” *as well as* ministerial negligence.³¹⁸ But the matter ended well for claimant inasmuch as the court found that the statute governing Medicaid reimbursements “implicitly created a private right of action for the benefit of treatment providers who become entitled to reimbursement under its provisions.”³¹⁹

6. The Ripples Spread

There is no telling exactly how far *McLean* will extend, or whether it too will some day be deemed to have meant something very different than what everyone thought it meant. Thus far, many plaintiffs, in a wide variety of settings, who perhaps would not have been required to establish a special relationship in the pre-*McLean* world have lost because of that failing.³²⁰ In other cases stretching across a variety of factual contexts, plaintiffs who perhaps would not have lost three years ago now lost because the conduct was deemed “discretionary.”³²¹

³¹⁸ *Id.* at 558–59, 902 N.Y.S.2d 907–08.

³¹⁹ *Id.* at 558, 902 N.Y.S.2d at 907.

³²⁰ *See, e.g.,* *Rivera v. City of New York*, 82 A.D.3d 647, 648, 920 N.Y.S.2d 314, 315–16 (App. Div. 1st Dep’t 2011) (holding there is no “special duty” to properly conduct child abuse investigations); *Rivera v. Bd. of Educ. of City of New York*, 82 A.D.3d 614, 614–15, 919 N.Y.S.2d 154, 155–56 (App. Div. 1st Dep’t 2011) (failing to assign a student to a different class after defendant requested that the student be removed from her classroom); *Lamot v. City of New York*, 62 A.D.3d 572, 572, 878 N.Y.S.2d 886, 886 (App. Div. 1st Dep’t 2009) (“Defendant’s alleged failure to carry out its obligations under title 6 of the Social Services Law is not actionable [because] plaintiff failed to show that defendant owed a special duty to her apart from any it owed to the public in general.”); *Kochanski v. City of New York*, 76 A.D.3d 1050, 1050, 1052, 908 N.Y.S.2d 260, 261–63 (App. Div. 2d Dep’t 2010) (holding where defendant operated a group home for youths in need of foster care, the home was operated pursuant to a contract with the city, and three teenaged residents of the group home broke into the nearby home and beat and stabbed the decedent, that the city was performing a “governmental function” by fostering “abandoned children” and that the absence of a “special duty” was thus fatal to the claim); *Brinkerhoff v. Cnty. of St. Lawrence*, 70 A.D.3d 1272, 1274–75, 897 N.Y.S.2d 269, 271 (App. Div. 3d Dep’t 2010) (holding where St. Lawrence County Department of Probation had purportedly violated its own rules in failing to enforce probation violation, where the subject thereof ultimately went on to shoot and kill the decedent-police officer, the county’s ministerial negligence could not give rise to liability under *McLean* because plaintiff did not allege or prove a *Cuffy*-type special relationship); *Carson v. Town of Oswego*, 77 A.D.3d 1321–22, 908 N.Y.S.2d 482, 482–83 (App. Div. 4th Dep’t 2010) (finding where the plaintiff-developer alleged that he lost potential sales of real property due to the town’s alleged failure to build an adequate sewage treatment plant for the subdivision in issue, plaintiff failed to prove a “special duty,” even assuming, for argument, that the conduct was “ministerial”).

³²¹ *See, e.g.,* *Devivo v. Adeyemo*, 70 A.D.3d 587, 587, 894 N.Y.S.2d 747, 747–48 (App. Div. 1st Dep’t 2010) (“The officers’ alleged negligence cannot support municipal liability as it involved discretionary acts in managing pedestrian and vehicular traffic undertaken in

Obviously, if *McLean* had really been nothing more than another application of a principle that had been settled law since 1983 the ruling would have had little impact. If the court had given a case-specific reason why Charlene McLean and her daughter had no legal cause for complaint about having been invited to use a childcare provider with known-to-the-city findings of abuse, the decision would likewise have been of lesser significance. It was precisely because *McLean* altered a general premise on which courts had long relied, and precisely because that result was achieved by means of re-interpretation of past precedents, that no one truly knows what the law will ultimately be said to be in any number of contexts in which the law had previously been settled.

*C. The Index Number Blues and Whether the Defect is
“Jurisdictional”*

Everyone knows that purchase of an index number (and, not incidentally, payment of the fee for an index number) is a prerequisite for commencing an action or special proceeding.³²² But is the failure to purchase an index number a “jurisdictional” defect? The Court of Appeals seemingly answered the question one way, and then seemingly gave a different answer.

Back in *Gershel v. Porr*, which was decided in 1996 (when commencement-by-filing was relatively new), petitioner, who had been suspended from his job without pay for three weeks, instituted a proceeding under CPLR article 78 by filing a verified petition and an order to show cause with the clerk of Orange County Supreme Court.³²³ Petitioner therein sought compensation for the three-week

furtherance of public safety.” (citations omitted)); *Petrosillo v. Town of Huntington*, 73 A.D.3d 1146, 1147, 901 N.Y.S.2d 692, 693–94 (App. Div. 2d Dep’t 2010) (“The defendant demonstrated, prima facie, that the plaintiff’s allegations concerning the alleged conduct of its employee in seeking his assistance in removing the garbage bags from the metal containers involved discretionary acts for which the defendant could not be held liable.” (citations omitted)); *Doe v. City of New York*, 67 A.D.3d 854, 855, 857, 890 N.Y.S.2d 548, 550–51 (App. Div. 2d Dep’t 2009) (“The gravamen of the plaintiff’s complaint against the MTA/LIRR [was] that they failed to remove the homeless encampment and homeless individuals from their property, and failed to consider the safety problems associated with the homeless outreach program. . . . [The] policy decision to address the issue of homelessness by employing a social outreach program, rather than by forcibly removing homeless individuals from their property . . . was a discretionary governmental decision, for which there can be no liability.” (citations omitted)); *Wittorf v. City of New York*, 928 N.Y.S.2d 842, 844, 852 (Sup. Ct. N.Y. County 2011) (holding that the claim was not actionable because the Department of Transportation employee who told plaintiffs they could bicycle across a bridge that was under repair had made a “discretionary” decision).

³²² N.Y. C.P.L.R. 304, 306-a (McKinney 2011).

³²³ *Gershel v. Porr*, 89 N.Y.2d 327, 329, 675 N.E.2d 836, 837, 653 N.Y.S.2d 82, 83 (1996).

period in dispute.³²⁴ After respondent claimed ineffective service, petitioner recast the order to show cause as a petition and commenced a new proceeding for the same relief, but with the same index number.³²⁵

Respondent this time moved to dismiss “based on petitioner’s noncompliance with the filing requirements of CPLR 304 and 306-a by failing to purchase a new index number.”³²⁶ A unanimous Court of Appeals ruled that CPLR 304 and 306-a mandated purchase of a second index number and that the commencement of the second proceeding without a new index number was a “nullity.”³²⁷ The *Gershel* Court said:

Under the new filing system, service of process without first paying the filing fee and filing the initiatory papers is a nullity, the action or proceeding never having been properly commenced. . . .

. . . .

[P]etitioner made the decision to start anew. Along with this decision came the obligation again to comply fully with the statutory filing requirements, that is, to file the notice of petition and the petition, pay the filing fee, secure an index number, effect service, and file proof of service within the prescribed period. Since petitioner did not take these steps, the new proceeding was never properly commenced and the attempted service was a nullity.³²⁸

The decision in *Gershel*, expressly stating that commencement without a second index number is a “nullity” was viewed by some as positing that a defect consisting of a failure to purchase a new and needed index number went to *subject matter jurisdiction* and was therefore not subject to waiver.³²⁹

The next year, in *Fry v. Village of Tarrytown*, the Court of Appeals departed from *Gershel* in a case that involved a commencement defect that was arguably different from failure to purchase an index number.³³⁰ In *Fry*, petitioner sought to commence a special proceeding by means of an order to show

³²⁴ *Id.*

³²⁵ *Id.* at 329, 675 N.E.2d at 837–38, 653 N.Y.S.2d at 83–84.

³²⁶ *Id.* at 329, 675 N.E.2d at 838, 653 N.Y.S.2d at 84.

³²⁷ *Id.* at 330, 675 N.E.2d at 838, 653 N.Y.S.2d at 84.

³²⁸ *Id.* at 330, 332, 675 N.E.2d at 838–39, 653 N.Y.S.2d at 84–85 (citations omitted).

³²⁹ *See, e.g.,* Chiacchia & Fleming, LLP v. Guerra, 309 A.D.2d 1213, 1214, 765 N.Y.S.2d 134, 135 (App. Div. 4th Dep’t 2003).

³³⁰ *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 716, 680 N.E.2d 578, 579, 658 N.Y.S.2d 205, 206 (1997).

cause.³³¹ While the order to show cause was signed and an index number had been purchased, petitioner filed only an unexecuted order to show cause and petition with the clerk of the court.³³² A divided Court of Appeals held that petitioner had failed to “satisfy the provision of the commencement-by-filing statute requiring petitioner to file an order to show cause or a notice of petition along with the petition,” but that the defect did not go to subject matter jurisdiction and was thus waivable.³³³ In so ruling, the majority reasoned that “[t]he Legislature’s main reason for converting from a commencement-by-service to a commencement-by-filing system was to raise money for the State coffers,” and that “the court’s principal interest in the filing system was satisfied” where “the defective filing related only to the sufficiency of the filed papers.”³³⁴

All of the above would have *seemingly* suggested (1) that commencement errors that did *not* involve failure to buy an index number were waivable under *Fry*,³³⁵ (2) that failure to buy an index number was at least generally a nonwaivable defect that rendered the proceeding a “nullity” under *Gershel*, and (3) that there might or might not be an exception to *Gershel* for certain “related” proceedings.³³⁶

We now skip almost a decade, to *Harris v. Niagara Falls Board of Education*.³³⁷ In *Harris*, the Appellate Division for the Fourth Department held that failure to purchase a second index number in the late-notice-of-claim-followed-by-related-action context was a nonwaivable defect.³³⁸ By contrast the First Department had ruled, in the very same context, that failure to purchase a second index number was a correctable defect without jurisdictional consequences, in part on the rationale that the earlier order granting leave to file late notice of claim *contemplated* the second proceeding.³³⁹

³³¹ *Id.*

³³² *See id.* at 717, 680 N.E.2d at 579, 658 N.Y.S.2d at 206.

³³³ *Id.* at 717, 722, 680 N.E.2d at 579, 582–83, 658 N.Y.S.2d at 206, 209–10 (citations omitted).

³³⁴ *Id.* at 719, 680 N.E.2d at 580–81, 658 N.Y.S.2d at 207–08.

³³⁵ *See id.* at 717, 680 N.E.2d at 582–83, 658 N.Y.S.2d at 209–10.

³³⁶ *Gershel v. Porr*, 89 N.Y.2d 327, 332, 675 N.E.2d 836, 839, 653 N.Y.S.2d 82, 85 (1996).

³³⁷ *Harris v. Niagara Falls Bd. of Educ.*, 6 N.Y.3d 155, 844 N.E.2d 753, 811 N.Y.S.2d 299 (2006).

³³⁸ *Harris v. Niagara Falls Bd. of Educ.*, 16 A.D.3d 1165, 1165, 792 N.Y.S.2d 746, 747 (App. Div. 4th Dep’t 2005), *aff’d*, *Harris*, 6 N.Y.3d 155, 844 N.E.2d 753, 811 N.Y.S.2d 299.

³³⁹ *Rybka v. N.Y.C. Health & Hosps. Corp.*, 263 A.D.2d 403, 404–05, 693 N.Y.S.2d 566, 567 (App. Div. 1st Dep’t 1999) (citing *Ruiz v. N.Y.C. Hous. Auth.*, 216 A.D.2d 258, 629 N.Y.S.2d 222 (App. Div. 1st Dep’t 1995)).

Although most commentators thought that the difference in result between *Fry* and *Gershel* was due to the different *kinds* of defects that had been involved in those cases (i.e., that only *Gershel* had involved a failure to purchase an index number),³⁴⁰ the Court of Appeals ruled in *Harris* that the real difference was that timely objection was asserted in *Gershel*, but not in *Fry*.³⁴¹ The court thus construed *Gershel* and *Fry* to collectively mean: (1) a second index number is required even where the two actions or proceedings are related; but (2) there is no distinction between failure to purchase an index number and other kinds of commencement defects; (3) none of those defects, including failure to buy a second index number, are nonwaivable, subject-matter defects; and (4) failure to purchase an index number thus warrants dismissal only if the defendant “timely” raises objection.³⁴²

But what of the *Gershel* court’s use of the N-word (“nullity”)? And how could jurisdiction exist *if there was no action or proceeding*? That aspect of *Gershel* was not expressly overruled; it was just re-interpreted.

III. CONCLUSION

I suppose that I should at some point address a subject that deserves some consideration: my own biases. When not writing articles, I specialize in appellate practice, where, at least in the tort context, I represent plaintiffs almost exclusively. Four of the five decisions that I have singled out as impliedly overruling Court of Appeals precedents were tort decisions in the defendant’s favor. I represented the plaintiff in one of those cases³⁴³ and submitted an amicus brief in another.³⁴⁴ All of this may give rise to the perception of bias or sour grapes and that my real gripe is that the plaintiffs did not prevail.

Yet, I hope and think that this is not the case. It is one thing to say, for example, that it was a bad idea to recognize a cause of action arising from negligent supervision of a domestic animal and

³⁴⁰ See, e.g., David D. Siegel, *New Fee on Filing Action is Required Even Though Fee was Paid on Prior Application to File Late 50-e Notice: Result is Dismissal*, 146 SIEGEL’S PRAC. REV. 2 (Mar. 2004).

³⁴¹ *Harris*, 6 N.Y.3d at 159, 844 N.E.2d at 756, 811 N.Y.S.2d at 302.

³⁴² See *id.* at 159, 844 N.E.2d at 755, 811 N.Y.S.2d at 301.

³⁴³ *McLean v. City of New York*, 12 N.Y.3d 194, 203, 905 N.E.2d 1167, 1173–74, 878 N.Y.S.2d 238, 244–45 (2009).

³⁴⁴ *Blake v. Neighborhood Hous. Servs. of N.Y.C.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003).

that the prior decisions should be overruled. It is quite different to say that the cause of action was never recognized in New York law. And, while I would have preferred to also offer examples in which precedents supporting the defendant's view were impliedly overruled, that is not, for the most part, the way the pendulum has been swinging for the last decade or so. Where the tort plaintiff has prevailed, the plaintiff has done so (1) based upon adherence to precedent, or (2) based upon express acknowledgment and distinction of contrary authority (as in *San Marco*).³⁴⁵ I cannot recall any recent exception to that tendency.

Few would urge that *stare decisis* should be so inflexible as to brook no departures. However, I believe that a departure from precedent should be acknowledged as such. Failure to do so can impair the court's clarity and credibility, and can thereby create uncertainty for bench and bar.

IV. EPILOGUE

Shortly after I finished this article, a divided (5–2 decision) Court of Appeals panel affirmed the Appellate Division order in *Valdez*—in the process stating that the law concerning so-called “police protection” cases had long been different than some (including the dissenters) had thought.³⁴⁶

As was earlier noted, the Court of Appeals had ruled in a series of cases that a municipality's failure to provide police protection could give rise to liability if the plaintiff or decedent had justifiably relied, to his or her detriment, upon a promise of police protection.³⁴⁷ The court ultimately reduced that rule to a four-prong test in its 1987 ruling in *Cuffy v. City of New York*.³⁴⁸ *Cuffy* was thereafter cited more than 300 times in New York decisions.³⁴⁹ The *Cuffy* test did *not* entail or involve any showing that the conduct, in failing to provide the promised police protection, was “ministerial” rather than “discretionary.”

As the reader will recall from the earlier discussion of *Valdez*, three members of the Appellate Division panel in that case felt that

³⁴⁵ See *supra* notes 84–90 and accompanying text.

³⁴⁶ *Valdez v. City of New York*, No. 153, 2011 N.Y. LEXIS 3075, at *29 (N.Y. Oct. 18, 2011); *id.* at *32–33 (Lippman, C.J., dissenting), *aff'g* 74 A.D.3d 76, 901 N.Y.S.2d 166 (App. Div. 1st Dep't 2010).

³⁴⁷ See *supra* notes 234–48 and accompanying text.

³⁴⁸ *Cuffy v. City of New York*, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987).

³⁴⁹ Search of WESTLAW, Keycite Database (Nov. 1, 2011).

the plaintiff's reliance upon the promised police protection was not justified in the circumstances and that the defendant city should therefore prevail.³⁵⁰ In affirming that result, the Court of Appeals agreed that plaintiff's reliance was not justified and that she therefore failed the *Cuffy* test.³⁵¹ But it then went on to add that the city would have been able to assert the "governmental function immunity defense" even if plaintiff *had* passed the *Cuffy* test.³⁵²

With respect to the fact that the court had never before said anything of that sort in any of the many other "police protection" cases (including *Cuffy*) that it had resolved, the court answered that the rule it now stated had been recently noted in *McLean v. City of New York*, (which had not involved any alleged failure to provide police protection) and that "*McLean* did not announce a new rule—it merely distilled the analysis applied in prior cases such as *Lauer*" (which had also not involved any alleged failure to provide police protection).³⁵³

With respect to the Chief Judge's charge (in dissent) that every or virtually every decision to provide or withhold police protection is "discretionary" and that the majority's ruling "effectively tolls the death knell for these ["police protection"] actions,"³⁵⁴ the majority answered, "[w]e know of no decision of this Court holding that police action (or inaction, as it might be more accurately characterized in this case) is always deemed to be discretionary under the discretionary/ministerial duty analysis."³⁵⁵

Of course, while the latter statement was no doubt true, the full truth is that the court had never before had occasion to address whether any particular withholding of promised police protection was "discretionary" or "ministerial" inasmuch as that question never before mattered. The court did not indicate how many of its prior decisions allowing liability for the failure to provide police protection remained good law under the "merely distilled" and by no means "new" rule it announced in *Valdez*.

³⁵⁰ *Valdez v. City of New York*, 74 A.D.3d 76, 78, 901 N.Y.S.2d 166, 168 (App. Div. 1st Dep't 2010), *aff'd*, 2011 N.Y. LEXIS 3075, at *1; *see notes* 291–308 and accompanying text.

³⁵¹ *Valdez*, 2011 N.Y. LEXIS 3075, at *28–29.

³⁵² *Id.* at *29.

³⁵³ *Id.* at *11 (citing *McLean v. City of New York*, 12 N.Y.2d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009); *Lauer v. City of New York*, 95 N.Y.2d 95, 733 N.E.2d 184, 711 N.Y.S.2d 112 (2000); *Garrett v. Holiday Inns*, 58 N.Y.2d 253, 447 N.E.2d 717 (1983)).

³⁵⁴ *Valdez*, 2011 N.Y. LEXIS 3075, at *45–46 (Lippman, C.J., dissenting).

³⁵⁵ *Id.* at *15 (majority opinion).