DRUNK DRIVING AND THE APPLICATION OF THE *BARKER*/*MANNING* PUBLIC POLICY DEFENSE

*By Steven V. DeBraccio**

On September 1, 1975, New York State ended its tradition of contributory negligence defeating a plaintiff's civil action, no matter how slight.[1] The then-groundbreaking statute provides:

> [i]n any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.[2]

Of course, even with CPLR 1411 in existence, there are still examples of cases where a plaintiff's conduct bars recovery entirely.[3] They include actions where the plaintiff's actions constitute the sole proximate cause or an unforeseeable superseding event of the accident,[4] and the defense of primary implied assumption of risk—

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[1] *See, e.g.*, Arbegast v. Bd. of Educ. of S. New Berlin Cent. Sch., 480 N.E.2d 365, 368–69 (N.Y. 1985); O'Connor v. G & R Packing Co., 426 N.Y.S.2d 557, 563 (App. Div. 1980) (noting that "contributory negligence bars recovery" at the time of the pre-1975 action); Berenger v. Gottlieb, 357 N.Y.S.2d 583, 584 (App. Term 1973).

[2] N.Y. C.P.L.R. 1411 (McKinney 2022).

[3] *See, e.g.*, Howard v. Poseidon Pools, Inc., 530 N.E.2d 1280, 1281 (N.Y. 1988).

[4] *See, e.g.*, *id.*; Boltax v. Joy Day Camp, 490 N.E.2d 527, 528 (N.Y. 1986); Blake v. Neighborhood Hous. Servs. New York City, Inc., 803 N.E.2d 757 (N.Y. 2003).

the concept of "plaintiff's . . . agreement, express or implied, not to hold defendant responsible for the injury-causing act, negligent though it may have been, which resulted from plaintiff's entering into the activity with knowledge of its danger, or . . . [where] he or she should have had such knowledge."[5] By and large though, for the defense bar, aside from those fairly rare circumstances, a plaintiff's negligence is at most comparative fault and simply reduces the recovery.

However, one other basis for dismissal has survived CPLR 1411 and comparative fault: criminal act liability. As you will see, this defense has been applied to a number of criminally reckless acts, such as drag racing,[6] bomb making,[7] and carjacking.[8] However, this defense has never been applied to a simple case of drunk driving where the defendant does not owe some other duty to the plaintiff besides the duty to operate his or her vehicle with reasonable care. This Article explores the history of the defense, recent case developments, a brief history of drunk driving laws, and a case study and hypothetical the Court of Appeals has yet to answer: whether drunk driving, on its own, would bar a plaintiff's action in a motor vehicle accident, resulting in an action for negligence. Ultimately, this Article concludes that the defense should apply, but explains both sides of the debate.

I. THE HISTORY OF THE CRIMINAL ACT PUBLIC POLICY DEFENSE AND THE TRINITY OF CRIMINAL ACT DEFENSE CASES

A. Historical Cases

While there are three main cases that form the criminal act public policy defense, the first application of the concept of disallowing someone to recover for their own criminal acts dates at least back to the 19th century. In *Riggs v. Palmer*,[9] the decedent testator made out his will and "gave small legacies to his two daughters, . . . the plaintiffs[,] . . . and the remainder of his estate to his grandson, the defendant."[10] The defendant poisoned the testator and claimed the

[5] *Arbegast*, 480 N.E.2d at 368 (citing Dowd v. N.Y., Ontario, & W. Railway Co., 63 N.E. 541, 543–44 (N.Y. 1902)); *see also* Custodi v. Town of Amherst, 980 N.E.2d 933, 935 (N.Y. 2012) (noting that the doctrine is limited to athletic activities).

[6] Hathaway v. Eastman, 996 N.Y.S.2d 382, 384–85 (App. Div. 2014).

[7] Barker v. Kallash, 468 N.E.2d 39, 40–42 (N.Y. 1984).

[8] *See* Manning *ex rel.* Manning v. Brown, 689 N.E.2d 1382, 1384–85 (N.Y. 1997).

[9] Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

[10] *Id.* at 188.

property, arguing that the testator was dead, that his will was "made in due form," and it had been admitted to probate.[11] The court, after considering then-contemporary commentaries, including Blackstone, concluded that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[12] The court continued, "[t]hese maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."[13]

The Court of Appeals has stated that its first application of this public policy bar was in *Reno v. D'Javid*.[14] In *Reno*, the plaintiff sued the defendant-physician for performing an abortion, at her request, on June 6, 1970.[15] The First Department explained that "[s]uch operative procedure was illegal on the date performed and plaintiff, as well as defendant, was guilty of a criminal act as a result thereof."[16] It is clear that it was not until January 22, 1973, that such a procedure was constitutionally protected in any way."[17] It is interesting that the First Department, citing *Riggs*, discussed this defense in only a paragraph,[18] and the Court of Appeals affirmed the decision without any substantive comment (other than Justice Fuchsberg's dissent).[19]

B. Barker v. Kallash

The first of the three major cases for discussion is *Barker v. Kallash*.[20] In *Barker*, the plaintiff, a 15-year-old, was injured while constructing a pipe bomb and sued the defendant, a nine-year-old "who allegedly sold the firecrackers from which the plaintiff's companions extracted the gunpowder used to construct the bomb."[21] The plaintiff also sued another infant who allegedly sold the fire crackers to the nine-year-old defendant, and each of their parents for

[11] *Id.* at 189.
[12] *Id.* at 189–90.
[13] *Id.* at 190.
[14] Reno v. D'Javid, 369 N.E.2d 766, 766 (N.Y. 1977); Alami v. Volkswagen of Am., Inc., 766 N.E.2d 574, 577 (N.Y. 2002).
[15] Reno v. D'Javid, 390 N.Y.S.2d 421, 422 (App. Div.), *aff'd*, 369 N.E.2d 766 (N.Y. 1977).
[16] *Id.*
[17] *See* Roe v. Wade, 410 U.S. 113, 164 (1973), *overruled* by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
[18] *See Reno*, 390 N.Y.S.2d at 422 (quoting *Riggs*, 22 N.E. at 190).
[19] *See Reno*, 369 N.E.2d at 766; *id.* at 766–67 (Fuchsberg, J., dissenting).
[20] Barker v. Kallash, 468 N.E.2d 39 (N.Y. 1984).
[21] *Id.* at 40.

negligent supervision.[22] After depositions were taken, several of the defendants moved for summary judgment on the ground that the plaintiff was "barred from recovering for injuries sustained while engaged in wrongful or illegal conduct."[23] The Court of Appeals agreed and affirmed the grant of summary judgment and dismissal in favor of the defendants.[24]

The Court began its analysis by explaining that "a distinction must be drawn between lawful activities regulated by statute and activities which are entirely prohibited by law."[25] To that end, "a violation of a statute governing the manner in which activities should be conducted, would merely constitute negligence or contributory negligence."[26] However, in *Barker*, "when the plaintiff has engaged in activities prohibited, as opposed to merely regulated, by law, the courts will not entertain the suit if the plaintiff's conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation."[27] The Court explained, "[i]n this latter instance recovery is denied, not because the plaintiff contributed to his injury, but because the public policy of this State generally denies judicial relief to those injured in the course of committing a serious criminal act."[28]

The Court then explained the narrow application of this rule: "[a] complaint should not be dismissed merely because the plaintiff's injuries were occasioned by a criminal act."[29] "However, when the plaintiff's injury is the direct result of his knowing and intentional participation in a criminal act he cannot seek compensation for the loss, if the criminal act is judged to be so serious an offense as to warrant denial of recovery."[30] The Court then illustrated this principle by noting that a burglar who broke his leg while walking down some cellar stairs due to the failure of the homeowner to replace a missing step could not recover compensation from the property owner for his injuries because of the public policy bar.[31]

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[22] *Id.*
[23] *Id.*
[24] *Id.* at 40, 44.
[25] *Id.* at 41.
[26] *Id.*; *see also* Humphrey v. State, 457 N.E.2d 767, 768 (N.Y. 1983).
[27] *Barker*, 468 N.E.2d at 41.
[28] *Id.* (citing Reno v. D'Javid, 369 N.E.2d 766, 766 (1977)).
[29] *Id.* at 41; *cf. Humphrey*, 457 N.E.2d at 768 (imposing liability on state for failing to give adequate warning for dangerous road conditions, even though the driver's blood alcohol content exceeded the legal maximum).
[30] *Barker*, 468 N.E.2d at 41 (citing *Reno*, 369 N.E.2d at 766).
[31] *Id.* at 41–42.

The plaintiff in *Barker* gave three reasons that the public policy bar should not apply, but the Court was unpersuaded by any of them. The plaintiff argued that his acts were "not so egregious" and that the injuries involved "nothing more than 'a claim arising out of injuries suffered by one of several youngsters playing with fireworks shortly before the Fourth of July.'"[32] The Court rejected this argument, concluding that "the plaintiff's conduct may not be fairly characterized as a minor dereliction" of the law, explaining that "[b]y his own admission his injuries did not result from the mere use of firecrackers, but from his efforts to incorporate the gunpowder extracted from the firecrackers into a pipe bomb."[33] The Court noted that "[c]onstructing a bomb is a far more dangerous activity not only to the maker, but to the public at large, and is treated as a far more serious offense under the law."[34] The Court concluded that the conduct was sufficiently serious to apply the public policy bar.[35]

C. Manning ex rel. Manning v. Brown

The second case of the criminal act bar trilogy is *Manning ex rel. Manning v. Brown*.[36] In *Manning*, the plaintiff, Christina Manning, and her friend, defendant Karla Amidon, were high school students and "[n]either girl had a driver's license or learner's permit." [37]

> At around 8:00 P.M. [on April 21, 1993], plaintiff, [defendant] Amidon and a third girl were riding around town in a truck operated by a fourth friend when Amidon spotted a car belonging to defendants Ralph Brown and Julie Brown parked at a local community college. . . . [Defendant] Amidon asked that the truck be stopped so she could check the car for loose change. While rummaging around the console between the front seats, Amidon discovered a set of car keys underneath some papers. She started the car and invited her two girlfriends to join her. Plaintiff rode in the front passenger seat and gave directions as [defendant] Amidon drove.[38]

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[32] *Id.* at 42.
[33] *Id.*
[34] *Id. Compare* N.Y. PENAL LAW § 265.02(2) (McKinney 2022) (noting that possession of an explosive or incendiary bomb is a class D felony), *with* N.Y. PENAL LAW § 270.00(2)(a)(iii) (noting that unlawfully exploding fireworks is a violation).
[35] *See Barker*, 468 N.E.2d at 42.
[36] Manning *ex rel.* Manning v. Brown, 689 N.E.2d 1382 (N.Y. 1997).
[37] *Id.* at 1383.
[38] *Id.*

At the time of the accident, plaintiff was in the passenger seat and defendant Amidon was driving.[39]

> Plaintiff then suggested that they adjust the car radio back to the station set by [defendant Ralph] Brown, presumably so that their use of the car would be undetected by the owner. [Defendant] Amidon . . . took her eyes off the road to adjust the radio. The car swerved and collided with a pole, injuring plaintiff.[40]

Plaintiff commenced a negligence action against defendant Amidon and defendants Ralph Brown and Julie Brown.[41]

This case is notable because plaintiff "pleaded guilty to charges relating to the theft of the vehicle but later withdrew her plea and was apparently never prosecuted."[42] This is an important indication that it does not matter whether the plaintiff was actually prosecuted for the criminal conduct he or she committed. Before turning to defendant Amidon's liability, defendants Ralph Brown and Julie Brown's liability was decided on a separate ground[43] (although it would seem that the criminal conduct bar would apply to these defendants as well). Defendant Amidon admitted in her deposition that she had no permission from defendants Ralph Brown and Julie Brown to drive the car.[44] The Browns' depositions likewise indicated "that they had not given [defendant] Amidon permission to drive their car."[45] (I note here briefly that the defense of an unattended motor vehicle statute, which permits a finding of liability against drivers who leave their vehicle unattended did not apply; however, that only applied to defendants Ralph Brown and Julie Brown).[46]

Returning to defendant Amidon, the Court of Appeals ruled that plaintiff could not sue defendant Amidon.[47] The Court found that, just like in *Barker*, the plaintiff was a willing participant in a serious criminal activity that directly caused her injuries.[48] First, the Court

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *See id.* at 1385.
[44] *Id.* at 1383.
[45] *Id.*
[46] *See id.* at 1385.
[47] *See id.*
[48] *Id.* at 1384; *see* Barker v. Kallash, 468 N.E.2d 39, 41 (N.Y. 1984).

of Appeals clarified that even though plaintiff was merely a passenger in the vehicle that defendant Amidon drove, she was a knowing participant in the joyriding.[49] The Court explained, "[b]y her own testimony plaintiff knew that the car was stolen but continued to ride in it as well as drive it. Plaintiff directed [defendant] Amidon regarding the route to take, took turns driving and suggested readjusting the car radio to hide their criminal conduct."[50] Second, the Court easily found that "plaintiff's injuries were the direct result of her illegal conduct."[51] After all, "plaintiff [sought] redress in connection with the very conduct that constitute[d] a violation of the law. . . . The accident occurred because [defendant] Amidon, plaintiff's accomplice, took her eyes off the road to readjust the car radio at plaintiff's suggestion" while the joyriding was taking place.[52]

The Court of Appeals explained that "[t]he more difficult question is whether plaintiff's conduct constituted such a serious violation of the law that she should be precluded, as a matter of public policy, from recovery."[53] The Court explained that plaintiff's conduct could not "fairly be characterized as a minor dereliction" of the law because "[p]laintiff and [defendant] Amidon, both unlicensed drivers, unjustifiably engaged in an activity which was hazardous not only to themselves but also to the public at large."[54] The court continued, "[a]n automobile is an inherently dangerous instrument in the hands of an inexperienced operator. It becomes even more dangerous when the inexperienced operator does not have permission to take the vehicle."[55] Interestingly enough, the Court then stated that

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[49] *Manning*, 689 N.E.2d. at 1384.

[50] *Id.*

[51] *Id.*

[52] *Id.* I note here that it does not necessarily matter how serious the charge is for the act. In *Johnson v. State*, the claimant escaped police custody while drunk and was later found dead in a creek. Johnson v. State, 687 N.Y.S.2d 761, 762 (App. Div. 1999). He of course was not charged, but the Third Department found that "absconding from police custody after being arrested for driving while intoxicated, decedent committed the crime of escape in the third degree in violation of Penal Law § 205.05." *Id.* at 764. The court explained further:

> [a]lthough escape in the third degree is a class A misdemeanor, decedent's conduct cannot be characterized as a minor dereliction. By escaping from police custody, decedent engaged in a hazardous activity that posed a risk not only to himself (the activity in fact caused his death), but to the public as well.

Id. (first citing *Manning*, 689 N.E.2d at 1384; *Barker* 468 N.E.2d at 42; and then citing *Manning*, 689 N.E.2d at 1384–85; Flegenheimer v. Brogan, 30 N.E.2d 591, 592–93 (N.Y. 1940)).

[53] *Manning*, 689 N.E.2d at 1384.

[54] *Id.*

[55] *Id.* at 1384.

"joyriding, as evidenced in the instant case, is typically characterized by more than mere unauthorized use. The unauthorized use is usually accompanied by reckless or excessively fast driving, posing a threat to innocent third parties. Such criminal conduct which puts the public at grave risk constitutes a serious violation."[56] I note that this is interesting because at least reading the opinion, it seems that a number of these attributes to joyriding did not occur in *Manning*.[57] For example, there is no mention in the opinion of unusually fast driving or posing any threat to innocent third parties. Nevertheless, as a result, the plaintiff was barred from suing defendant Amidon.[58]

D. Alami v. Volkswagen of America, Inc.

The third case in the trilogy is *Alami v. Volkswagen of America, Inc.*[59] In *Alami*, in the early morning hours of May 10, 1995, decedent Silhadi Alami was driving home in his Volkswagen Jetta in Yonkers, New York.[60] "Traveling at approximately 35 miles per hour, the Jetta left an exit ramp and collided with a steel utility pole," killing decedent.[61] "At the time of the collision, [however,] his blood alcohol content exceeded the limits set forth in New York Vehicle and Traffic Law [section] 1192(2)"[62] (which at that time was .10%).[63] Plaintiff, decedent's widow, commenced an action against defendant Volkswagen, seeking to recover damages for products liability—namely, that a defect in the vehicle's design enhanced decedent's injuries.[64] "Volkswagen moved for summary judgment arguing that decedent's intoxication was the sole cause of the crash and that no defect or malfunction in the Jetta caused or contributed to it."[65] Volkswagen also argued that in light of decedent's intoxication at the time of the accident, plaintiff's claim was precluded on public policy grounds.[66] "Volkswagen's motion did not address whether plaintiff could sustain her claim that the vehicle was defective."[67] In opposition, the "plaintiff submitted an affidavit and report from an

[56] *Id.* at 1384–85.
[57] *See id.* at 1383.
[58] *See id.*
[59] Alami v. Volkswagen of Am., Inc., 766 N.E.2d 574 (N.Y. 2002).
[60] *Id.* at 575.
[61] *Id.*
[62] *Id.*
[63] N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 1995) (amended 2002).
[64] *Alami*, 766 N.E.2d at 575.
[65] *Id.*
[66] *Id.*
[67] *Id.*

expert who inspected the vehicle, autopsy report, photographs of the scene, police report and crash test results from Volkswagen and the Federal Government."[68] The expert concluded that "the vehicle did not have adequate subframe reinforcement, and that the resultant buckling caused the decedent to be thrown forward, causing thoracic and abdominal injuries that led to his death."[69] Moreover, the expert concluded that there were "safety features which were readily available and in common use in the automobile industry" that if used, would have resulted in decedent surviving the crash with minimal injury.[70]

Supreme Court, Westchester County granted Volkswagen's motion, applying the holdings in *Barker* and *Manning* to "preclude plaintiff's claim based on its finding that decedent's drunk driving constituted a serious violation of the law and that his injuries were the direct result of that violation."[71] The Second Department agreed, "holding only that 'the negligent manner in which the decedent was operating his vehicle was the sole proximate cause of the collision and his fatal injuries.'"[72] The Second Department then stated (as is commonplace), "[i]n view of our determination, we need not reach the defendant's remaining contention."[73] The Court of Appeals reversed.[74] Turning to the elements, the Court concluded that "[o]perating a motor vehicle while in an intoxicated condition is indisputably a serious violation of the law."[75] To that end, "[t]he importance of the governmental interest [in deterring drunk drivers] is beyond question."[76] However, where the Court of Appeals disagreed with the Second Department was the second element: "[w]e refuse to extend [*Barker* and *Manning*'s] application beyond claims where the parties to the suit were involved in the underlying criminal conduct, or where the criminal plaintiff seeks to impose a duty arising out of an illegal act."[77] The Court of Appeals specified its position: "[i]f Volkswagen did defectively design the Jetta as asserted by plaintiff's expert, it breached a duty to any driver of a Jetta involved in a crash regardless of the [legal] cause."[78] Thus, the Court

[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* (citing Alami v. Volkswagen of Am., Inc, 718 N.Y.S.2d 604, 604 (App. Div. 2000)).
[73] *Alami*, 718 N.Y.S.2d at 604.
[74] *Alami*, 766 N.E.2d at 582.
[75] *Id.* at 575.
[76] *Id.* (quoting People v. Scott, 473 N.E.2d 1, 4 (N.Y. 1984)).
[77] *Alami*, 766 N.E.2d. at 577.
[78] *Id.*

concluded, "[p]laintiff does not seek to 'profit' from her husband's intoxication—she asks only that Volkswagen honor its well-recognized duty to produce a product that does not unreasonably enhance or aggravate a user's injuries."[79]

II. THE HISTORY OF DRUNK DRIVING

It now seems beyond the pale, but "[t]he problem of drunk driving arose almost as soon as motor vehicles came into use."[80] Turning to the 1930s, there was "a continued rise in the number of motor vehicles on the roads, an end to Prohibition, and not coincidentally an increased interest in combating the growing problem of drunk driving."[81] "In 1939, Indiana enacted the first law that defined presumptive intoxication based on [blood alcohol concentration] levels, using the [American Medical Association-]recommended 0.15% [legal limit]."[82] Other states joined and in response to updated guidance from national organizations, lowered the presumptive blood alcohol limit to 0.10%.[83] Subsequently, "[s]tates moved away from mere presumptions that defendants might rebut, and adopted laws providing that driving with a 0.10% BAC or higher was *per se* illegal."[84] In 1984, Congress passed a law which directed the Secretary of Transportation to withhold a percentage of federal highway funds otherwise to be distributed to the States where the states allow individuals to purchase alcohol under the age of twenty-one.[85]

The efforts were realized: "[i]n recent decades, the States and the Federal Government have toughened drunk-driving laws, and those efforts have corresponded to a dramatic decrease in alcohol-related fatalities."[86] Specifically, "[a]s of the early [1980s], the number of annual fatalities averaged 25,000; by 2014, . . . the number had fallen to below 10,000."[87] This statistic is doubly impressive, both from the

[79] *Id.* (citing Bolm v. Triumph Corp., 305 N.E.2d 769, 773–74 (N.Y. 1973); Rainbow v. Albert Elia Bldg. Co., 436 N.Y.S.2d 480, 482 (App. Div. 1981), *aff'd*, 434 N.E.2d 1345, 1345 (N.Y. 1982)). For those curious about the ultimate outcome in this case, on remand, Supreme Court, Westchester County denied defendant's cross motion to dismiss the part of the complaint that focused on the failure to install a particular a seat-belt system. Alami v. Volkswagen of Am., Inc., 780 N.Y.S.2d 638, 639 (App. Div. 2004). The appellate division affirmed. *Id.*

[80] Birchfield v. North Dakota, 579 U.S. 438, 438 (2016).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] South Dakota v. Dole, 483 U.S. 203, 205 (1987).

[86] *Birchfield*, 579 U.S. at 448.

[87] *Id.*

fact that there was a dramatic decrease, and the fact that the number of licensed drivers in the United States from 1990–2019 has increased from approximately 167 million to approximately 229 million.[88] The current legal limit in New York State is 0.08%.[89]

However, the New York State legislature recently proposed a bill to lower the legal limit from 0.08% to 0.05%.[90] The sponsor memo noted:

> [t]he United States trails the rest of the world in lowering the drunken driving standard. The United States has a more lenient BAC for drunk driving than 100 other countries; nearly all the European, Asian, and South American countries have adopted a standard lower than provinces reported a 5–18 percent drop in highway fatalities.[91]

III. APPLICATION TO A CASE STUDY

A. Background

Our firm litigated a case from 2020–21 involving an accident where plaintiff alleged that he was operating a motorcycle on October 19, 2018 in Ulster, New York, when he collided with my client's pickup truck.[92] Interestingly enough, plaintiff also sued a nearby homeowner who allegedly planted trees which obscured the view of the drivers prior to the accident, and the Town of Lloyd, for negligently designing the road (as well as the triangular-shaped grassy island in the middle of the road).[93] The landowner made a motion for summary judgment which was unopposed, so he (and his wife) obtained a dismissal.[94] The Town of Lloyd lost summary judgment, and has appealed that decision—the briefing is still underway.[95] While the issue of highway design is an interesting one, the purpose this case study is in this Article is for the representation

[88] *See* Mathilde Carlier, *Number of Licensed Drivers in the United States from 1990 to 2020*, STATISTA (Feb. 22, 2022), https://www.statista.com/statistics/191653/number-of-licensed-drivers-in-the-us-since-1988/ [https://perma.cc/PMP6-A7F8].

[89] N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 2022).

[90] *See* S.B. 5117, 242d Leg. Sess. (N.Y. 2019).

[91] Sponsor Memo, S.B. 5117, 242d Leg. Sess. (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/s5117 [https://perma.cc/7J68-6K8J].

[92] *See* Summons and Complaint at ¶¶ 41, 45–46, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 18.

[93] *See id.* at ¶¶ 27–40.

[94] *See* Order at 1–2, Read v. Bell, No. EF2019-1337 (Sup. Ct. May 3, 2021), NYSCEF No. 121.

[95] *See* Notice of Appeal at 1, Read v. Bell, No. EF2019-1337 (Sup. Ct. July 28, 2021), NYSCEF No. 130.

of my client (who I shall subsequently refer to as defendant), the operator of the pickup truck.

B. The Argument

First off, similar to the defendant in *Alami*, I did not make a substantive argument about defendant's negligence.[96] I did not do this because of New York's well-settled rules on summary judgment motions.[97] Both motorists stated that the other was in his lane of travel.[98] "On summary judgment, 'facts must be viewed "in the light most favorable to the non-moving party,"'" which in this case would have been plaintiff.[99] Moreover, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact."[100] Since the drivers disagreed about who was in whose lane, that is clearly a triable issue of material fact, so any such motion based on defendant's lack of negligence would be denied.

On the date of the accident, plaintiff testified that he consumed about 24–28 oz. of beer at a restaurant-bar in New Paltz, prior to riding home.[101] Plaintiff arrived at the bar at about 4:00 p.m. that day, and left the bar at about 5:15 p.m. or 5:30 p.m.[102] The accident occurred at about 5:47 p.m.,[103] and plaintiff's blood alcohol concentration was taken at 7:04 p.m.[104] He testified that he had been

[96] *See* Attorney Affirmation in Support of Defendant's Motion for Summary Judgment at ¶ 25, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 17.

[97] Summary judgment is a process by which parties may make a motion to the court for judgment as a matter of law, and dispense with a jury or bench trial, but only where there are no triable issues of material fact. *See* N.Y. C.P.L.R. 3212; Matter of New York City Asbestos Litig., 123 N.E.3d 218, 220 (N.Y. 2019); Alvarez v. Prospect Hosp., 501 N.E.2d 572, 574 (N.Y. 1986).

[98] *See* Examination Before Trial of the Defendant, Charles Bell at 37–40, 69, 76, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 34; Examination Before Trial of the Plaintiff, Dean Read at 81, 163, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 32.

[99] *N.Y.C. Asbestos Litig.*, 123 N.E.3d at 220 (quoting Vega v. Restani Constr. Corp., 965 N.E.2d 240, 242 (N.Y. 2012)). I should note that plaintiff did cross-move for summary judgment on liability. Notice of Cross-Motion at 1, Read v. Bell, No. EF2019-1337 (Sup. Ct. Feb. 3, 2021), NYSCEF No. 84. However, that motion was unrelated to the drunk driving issue in this Article. *See id.*

[100] *N.Y.C. Asbestos Litig.*, 123 N.E.3d at 220 (quoting Alvarez v. Prospect Hosp., 501 N.E.2d 572, 574 (N.Y. 1986)).

[101] *See* Examination Before Trial of the Plaintiff, Dean Read, *supra* note 98, at 147–48.

[102] *Id.* at 147, 149.

[103] Examination Under Oath of the Claimant, Dean T. Read at 9, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 29.

[104] Affidavit of Joel R. Milzoff, Ph.D., DABFT. in Support of Motion for Summary Judgment at ¶ 7, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 44.

riding motorcycles since 1968 and he described himself as a "skillful rider recognizing danger."[105] Plaintiff admitted that he had been convicted of driving while ability impaired in 1989.[106] He also admitted that in prior years, he had operated a motor vehicle or a motorcycle after consuming alcohol.[107] I[108] used the report and affidavit of Joel R. Milzoff, Ph.D., DABFT, to establish plaintiff's level of intoxication at the time of the crash.[109] This was not a typical drunk–driving case, however, because while plaintiff's blood alcohol level was taken at a hospital, plaintiff was never ticketed for any drunk driving offenses.[110] In fairness, plaintiff's blood alcohol concentration was 0.075%, which was below the legal limit.[111]

Dr. Milzoff concluded that because alcohol metabolizes at a rate of about 0.01–0.03% per hour or higher, plaintiff would have consumed approximately 4.0–6.1 alcoholic drinks during the time he was drinking at the bar.[112] He explained, "[e]xtrapolating backwards, this would also mean that his blood alcohol level at the time of the accident was approximately between .08–.11%, which is over the per se legal limit."[113] He also explained the effects of alcohol: "[i]ndividuals having blood alcohol concentrations in the range of .03–.12% are generally viewed as the stage of euphoria."[114] Moreover, "[i]ndividuals generally demonstrate increased self-confidence,

[105] *See* Examination Under Oath of the Claimant, Dean T. Read, *supra* note 103, at 8, 27, 62.

[106] *See* Examination Before Trial of the Plaintiff, Dean Read, *supra* note 98, at 30. Driving while ability impaired is a lesser degree of driving while intoxicated. *See* N.Y. VEH. & TRAF. LAW § 1192(1)–(2) (McKinney 2022). While driving while ability impaired is commonly a lesser offense that individuals who actually committed driving while intoxicated plead down to, in this particular case, whether this was a guilty plea to a lesser offense or plaintiff did not have a blood alcohol level high enough to constitute driving while intoxicated, I will not speculate. In any event, driving while ability impaired is all plaintiff was convicted of. Attorney Affirmation in Support of Defendant's Motion for Summary Judgment, *supra* note 96, at ¶ 25.

[107] Examination Before Trial of the Plaintiff, Dean Read, *supra* note 98, at 287.

[108] I cannot take sole credit for this decision. I credit my then-coworker, now an associate attorney at Goldberg Segalla, Thomas P. Armstrong, Esq.

[109] Affidavit of Joel R. Milzoff, Ph.D., DABFT. in Support of Motion for Summary Judgment, *supra* note 104, at ¶ 7.

[110] *See* Examination Under Oath of the Claimant, Dean T. Read, *supra* note 103, at 87–88. While (I hope) interesting, in my opinion, this is a distinction without a difference. There is no requirement that the plaintiff actually be prosecuted or found guilty of the offense in order for the *Barker/Manning* defense to apply. *See supra* note 42–43 and accompanying text.

[111] Affidavit of Joel R. Milzoff, Ph.D., DABFT. in Support of Motion for Summary Judgment, *supra* note 104, at ¶ 7.

[112] *Id.* at ¶ 10.

[113] *Id.* It is permissible in New York to use reverse extrapolation of blood alcohol content to prove that a defendant was over the legal limit. *See* People v. Menegan, 967 N.Y.S.2d 461, 463 (App. Div. 2013) (citing People v. Dombrowski-Bove, 753 N.Y.S.2d 259, 260 (App. Div. 2002)).

[114] Affidavit of Joel R. Milzoff, Ph.D., DABFT. in Support of Motion for Summary Judgment, *supra* note 104, at ¶ 8.

decreased inhibitions, decreased attention, decreased judgment, and decreased control with slowed information processing."[115]

In addition to this expert, I submitted a motorcycle manual and a motorcycle safety article in support of my argument.[116] As the motorcycle manual notes,

> [o]peration of a motorcycle is a complex task. . . . Your ability to perform and respond to road and traffic conditions that constantly change is influenced by how fit and alert you are. Alcohol and other drugs, more than any other factors, degrade your ability to think clearly and to ride safely. As little as one drink can have a significant effect on your performance.[117]

Motorcycle operation has an even narrower margin of error—"panic–braking a motorcycle poses unique hazards and requires greater operator skill than stopping a car in panic situations or in a skid."[118] There is an even stronger connection between intoxication and an accident (thus, strengthening the "direct cause" element from *Barker* and *Manning*).[119]

C. Plaintiffs' Opposing Argument

Plaintiffs cross-moved for partial summary judgment on liability,[120] which is unsurprising for two reasons. First, the Court of Appeals ruled recently that "[t]o be entitled to partial summary judgment [on liability] a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault."[121] Second, a finding of

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[115] *Id.*

[116] *See generally* New York State Motorcycle Safety Program Manual, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 42; Motorcycle Factors: Braking, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 43.

[117] New York State Motorcycle Safety Program Manual, *supra* note 116, at 36.

[118] Motorcycle Factors: Braking, *supra* note 116, at 1.

[119] *See* New York State Motorcycle Safety Program Manual, *supra* note 116, at 36.

[120] Affirmation in Opposition of Defendants' Motions and in Support of Plaintiffs' Cross-Motion for Summary Judgment at ¶ 2, Read v. Bell, No. EF2019-1337 (Sup. Ct. Feb. 1, 2021), NYSCEF No. 74.

[121] Rodriguez v. City of New York, 101 N.E.3d 366, 374 (N.Y. 2018). This means that in order to raise a triable issue of material fact, a defendant has to provide some evidence that he or she was not liable *at all*, not just that plaintiff was comparatively at fault. *See* De Diaz v. Klausner, 156 N.Y.S.3d 16, 18 (App. Div. 2021) (holding that there were triable issues of material fact where defendant alleged that he was not liable at all). This situation, of course, does not include the rare case where a court finds that the plaintiff was the sole proximate cause of the accident. *See* Shvydkaya v. Park Ave. BMW Acura Motor Corp., 100 N.Y.S.3d 320, 322 (App. Div. 2019).

partial summary judgment on liability begins the time which statutory (9%)[122] interest applies.[123] However, more important to this Article is that plaintiffs opposed my motion for summary judgment, and made several arguments in that regard.[124] First, as an evidentiary matter, they argued that the blood alcohol results were inadmissible.[125] However, counsel applied criminal cases to a civil case,[126] and New York has far more generous admission standards for civil cases than criminal cases:

> [a] blood alcohol test result, as set forth in a certified hospital record, constitutes prima facie evidence of a test result pursuant to CPLR 4518(c). Thus, the blood alcohol test results contained in a certified hospital record . . . would be sufficient to make a prima facie showing that [the operator] was intoxicated at the time of the accident.[127]

Next, plaintiffs argued that "[t]here is not one indicia of proof . . . of any evidence of intoxication and the record is devoid of any proof that intoxication was a factor to any extent in the occurrence of this accident."[128] However, this argument appears to be foreclosed in *Barker* and *Manning*. In *Barker*, the plaintiff argued that "because of his age, not quite 15 at the time of the incident . . . he could not be convicted of a criminal offense and . . . that he should be granted a similar exception from the rule precluding tort recovery."[129] Moreover, in *Manning*, recall that the "[p]laintiff . . . pleaded guilty to charges relating to the theft of the vehicle but later withdrew her plea and was apparently never prosecuted."[130] It would appear, although it is uncertain, that there is no requirement that a party

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[122] N.Y. C.P.L.R. § 5004 (McKinney 2022).

[123] *See* Love v. State, 583 N.E.2d 1296, 1299 (N.Y. 1991).

[124] Affirmation in Opposition of Defendants' Motions and in Support of Plaintiffs' Cross-Motion for Summary Judgment, *supra* note 120, at ¶ 2.

[125] *See id.* at ¶ 51.

[126] *See id.* at ¶¶ 49–50. Plaintiffs at one point cited the New York Prosecutors Trial Institute Manual, which of course has no bearing on this case study. *See id.* at ¶¶ 45–47.

[127] Westchester Med. Ctr. v. Progressive Cas. Ins. Co., 858 N.Y.S.2d 754, 758 (App. Div. 2008) (citations omitted); *see also* Stein v. Lebowitz-Pine View Hotel, Inc., 489 N.Y.S.2d 635, 638 (App. Div. 1985).

[128] Affirmation in Opposition of Defendants' Motions and in Support of Plaintiffs' Cross-Motion for Summary Judgment, *supra* note 120, at ¶ 53. Notably, plaintiff was not arrested or cited for any alcohol-related offense. Police Report/Toxicology Report at 1, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 46.

[129] Barker v. Kallash, 468 N.E.2d 39, 42 (N.Y. 1984).

[130] Manning *ex rel.* Manning v. Brown, 689 N.E.2d 1382, 1383 (N.Y. 1997).

even be arrested or cited for the violation—the fact that the party committed the conduct is sufficient to invoke the bar.

Plaintiffs to their credit, did not argue that driving while intoxicated was not serious criminal conduct, and obviously, they could not reasonably do so.[131] The plaintiffs focused on the second element—whether the serious criminal conduct directly caused the accident.[132] Dr. Milzoff submitted a reply affidavit and he clarified his position on the case.[133] He explained as to proximate cause,

> [n]otwithstanding whatever argument defendant Bell's counsel made about [causation] . . . I am not an attorney and could not opine on that. I can only opine that plaintiff was in an intoxicated condition at the time of his accident and that it would have (in some fashion) affected his motor skills and reaction time in attempting to avoid a collision with another vehicle.[134]

Moreover, he explained, "I cannot (and frankly no one could) opine on the degree to which plaintiff was impaired absent a control test where plaintiff was compared driving his motorcycle sober versus intoxicated."[135] The best Dr. Milzoff can opine is to what the average drinker's abilities are given a certain blood alcohol level.[136]

Although the Ulster County Supreme Court impliedly admitted Dr. Milzoff's affidavit without any challenge to its admissibility,[137] plaintiffs bring up an interesting point—how would one prove that voluntary intoxication was a direct cause of the accident? It is not as easy a problem to solve as the case in *Manning*: the plaintiff had no right to be in the car she carjacked and joyrode at all.[138] By contrast, plaintiff had a right to drive his motorcycle in this case study. He just did not have a right to drive his motorcycle in an intoxicated condition. One could make the argument that *Barker* covers this situation, with its "distinction . . . between lawful activities regulated by statute and activities which are entirely prohibited by law," with

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131 *Cf.* Alami v. Volkswagen of Am., Inc., 766 N.E.2d 574, 575–76 (2002).

132 *See supra* note 77 and accompanying text.

133 *See generally* Affidavit of Joel R. Milzoff, Ph.D., DABFT. in Reply to Plaintiff's Opposition to Defendant Charles Bell's Motion for Summary Judgment, Read v. Bell, No. EF2019-1337 (Sup. Ct. Mar. 1, 2021), NYSCEF No. 115.

134 *Id.* at ¶ 8.

135 *Id.* at ¶ 4.

136 *See supra* notes 114–115 and accompanying text.

137 *See generally* Affidavit of Joel R. Milzoff, Ph.D., DABFT. in Reply to Plaintiff's Opposition to Defendant Charles Bell's Motion for Summary Judgment, *supra* note 133.

138 *See* Manning *ex rel.* Manning v. Brown, 689 N.E.2d 1382, 1384–85 (N.Y. 1997).

the former only constituting comparative negligence.[139] If that is true, then that conclusion favors plaintiffs in that drunk driving is merely comparative fault.

Thus, as the argument goes, it is not illegal to drink, it is not illegal to drive, it is not illegal to drink and drive. Rather, it is only illegal to drink and drive *in an intoxicated condition*. After all, even Dr. Milzoff's report, produced at my behest, conceded that "[i]ndividuals having blood alcohol concentrations of 0.01 – 0.05 per cent are generally viewed as subclinical with the influence of alcohol not typically apparent or obvious and behavior nearly normal by ordinary observation."[140] To that end, *People v. Gallagher*[141] concluded that "[a]s its name implies, drunk driving is the act of driving a vehicle after *consuming enough alcohol to impair one's motor skills and mental capacity*."[142] In other words, it is not drinking any alcohol, it is drinking *too much* alcohol.[143]

D. The Court's Decision

Ultimately, the Ulster County Supreme Court granted plaintiffs' cross motion for partial summary judgment and denied my motion for summary judgment, concluding that the plaintiffs

> have adequately raised triable issues of fact in their opposition to the defendant['s] . . . motion for summary judgment. As there is not sufficient evidence submitted to permit this Court to conclude that defendants . . . as a matter of law did not contribute or create, even in some small way, to the accident.[144]

This is an interesting ruling because there really was no dispute about the blood alcohol results[145] and the determination of the

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[139] Barker v. Kallash, 468 N.E.2d 39, 41 (N.Y. 1984).

[140] Police Report/Toxicology Report at 7, Read v. Bell, No. EF2019-1337 (Sup. Ct. Dec. 20, 2020), NYSCEF No. 46.

[141] People v. Gallagher, No. LN0231033, 2020 N.Y. Misc. LEXIS 11298 (City Ct. Westchester Cnty. Dec. 16, 2020).

[142] *Id.* at *1 (emphasis added).

[143] *Humphrey v. State*, another drunk-driving fact pattern, does not solve this question. Humphrey v. Statem 456 N.Y.S.2d 861 (App. Div. 1982), *aff'd*, 457 N.E.2d 767 (N.Y. 1983). First, a read of the Third Department's opinion that was affirmed by the Court of Appeals indicates that this case was argued as a sole-proximate-cause argument, not an argument based on public policy. *Id.* at 862.

[144] Decision at 9, Read v. Bell, No. EF2019-1337 (Sup. Ct. July 26, 2021), NYSCEF No. 123.

[145] *But see id.* at 4–5.

application of the *Barker*/*Manning* bar was, by all accounts, a *legal* determination. Following this decision, the parties decided to settle their case, so no appeal (on my client's behalf) was ever taken to the Third Department.[146] Nevertheless, this case is instructive for practitioners, both defense and plaintiffs, as to the viability of this defense for drunk motorcyclists as well as drunk drivers.[147]

E. Instructive Cases and Future Developments

It should also be noted that this defense could even extend to the *passengers* of drunk drivers. In *Manning*, of course, the plaintiff was a passenger in the vehicle that defendant Amidon was driving.[148] As well, in *Hathaway v. Eastman*,[149] the plaintiff was encouraging an individual whom he knew had been drinking beer all day to participate in a drag race.[150] The Third Department held that that activity was sufficient to come within the *Barker*/*Manning* public policy bar.[151] However, as of the date of this Article, there has not been a straight-up drunk driving case where an appellate court has applied the *Barker*/*Manning* bar.

There are three cases involving drunk driving, but are not squarely on point. The first is *La Page v. Smith*.[152] In *La Page*, the plaintiff's decedent was killed in a car accident where, prior to the accident, the "decedent consumed several bottles of beer with [the] defendant and then agreed to a race to determine who had the faster vehicle."[153] The record reflects "that the two vehicles were traveling at speeds in excess of 100 [mph] and that, although slowing to approximately 75 [mph], the decedent was unable to negotiate a curve in the road."[154] The court ruled that the

> decedent was not only operating his vehicle while intoxicated but did so at speeds in excess of 100 miles per hour. Furthermore, [the] decedent did so after agreeing to a race to

[146] *See* Court Notice, Read v. Bell, No. EF2019-1337 (Sup. Ct. Sept. 7, 2021), NYSCEF No. 136 (withdrawing the defendant's notice of appeal as the parties settled the case).

[147] *See generally* Zannelli v. Walker, 811 N.Y.S.2d 420, 421–22 (App. Div. 2006) (concluding that the plaintiff's action of grabbing the steering wheel was not sufficiently serious to fall within the *Barker*/*Manning* bar); LaPage v. Smith, 563 N.Y.S.2d 174, 175 (App. Div. 1990).

[148] *See* Manning *ex rel.* Manning v. Brown, 689 N.E.2d 1382, 1383 (N.Y. 1997).

[149] Hathaway v. Eastman, 996 N.Y.S.2d 382 (App. Div. 2014).

[150] *See id.* at 384.

[151] *See id.* at 385.

[152] La Page v. Smith, 563 N.Y.S.2d 174 (App. Div. 1990).

[153] *Id.* at 174.

[154] *Id.*

> determine who had the fastest car; a race which, given the "course" chosen, involved two vehicles "jockeying" at high speeds in both lanes of a two-lane road. In our view, such hazardous illegal conduct falls clearly within the ambit of the rule as outlined in *Barker* . . . .[155]

In other words, *La Page* involved drunk driving plus speed racing.

The court in *La Page* referenced the other two cases for discussion—*Humphrey v. State* and *Clark v. State*.[156] First, in *Humphrey*, the "[d]ecedent died instantly in an unwitnessed one-vehicle accident on a dead-end" road.[157] The court of first instance concluded that the defendant–State was negligent for "failing to give adequate warning of road conditions."[158] The Court of Claims assessed 40% of the fault to the decedent and 60% of the fault to the State.[159] The Court of Claims noted that "there was [also] evidence that [the] decedent had a .17% blood alcohol level at the time of his death and that" there was evidence that this "impairment played a role in [the] decedent's failure to respond to warning signs."[160] However, the Court of Appeals concluded,

> The State's argument that [the] decedent's blood alcohol level at the time of his accident is a supervening cause as a matter of law must be rejected. Claimant need not exclude all other possible causes of the accident. The fact that decedent's ability to drive was impaired does not exonerate the State from liability on the ground that its negligence was not one of the proximate causes of the accident.[161]

Two observations are important. The Court of Appeals, while having known that the *Reno* case existed,[162] decided this case on sole proximate cause grounds instead.[163] This could be for a myriad of reasons, not the least of which is that courts generally only decide the

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[155] *Id.* at 175.
[156] *See id.* (citing Humphrey v. State, 457 N.E.2d 767, 768 (N.Y. 1983); Clark v. State, 508 N.Y.S.2d 648, 648–49 (App. Div. 1986)).
[157] *Humphrey*, 457 N.E.2d at 768.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* (citing Hulett v. State, 164 N.Y.S.2d 929, 931 (App. Div. 1957)).
[162] *See supra* notes 14–19 and accompanying text.
[163] *See Humphrey*, 457 N.E.2d at 768.

issues the litigants raise before it.[164] Second, it seems that even if this case were decided based on *Barker*/*Manning* grounds, the Court would rule that, similar to *Alami*, the bar did not apply because the State's duty to provide proper road signs applies to all motorists, drunk or sober.[165]

In *Clark*, the claimant was seriously injured in a one-car accident when her vehicle left the State highway at a curve and struck a guardrail.[166] The Court of Claims ruled that the claimant's intoxication (with a blood alcohol level of 0.14%) caused the accident, and not any negligent design of the road, as alleged against the State.[167] The Third Department applied comparative fault principles to plaintiff, and found her 60% liable for the accident, but did not apply the *Barker*/*Manning* public policy defense.[168] The defense was discussed only by the dissent, who concluded that the bar should have applied, based on the seriousness of drunk driving and the claimant's high blood alcohol level.[169] The dissent, similar to the Court of Appeals in *Manning*, noted the severity of drunk driving as affecting the public, as well as the fact that the "'serious nature' of the problem of the intoxicated driver has been recognized by the Governor and the Legislature and has precipitated considerable legislative activity."[170] Though the majority of the court did not directly address the *Barker*/*Manning* defense, it seems clear that it would have resolved it similarly to the way the Court of Appeals in *Humphrey* and *Alami* resolved those cases—that plaintiff's drunkenness occasioned the accident, but there was a separate duty to the public to maintain the roads such that plaintiff was not seeking to benefit from her drunkenness; she was merely holding the State to the standard of reasonably maintaining roads for all motorists.[171]

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[164] *See* Misicki v. Caradonna, 909 N.E.2d 1213, 1218–19 (N.Y. 2009) ("While appellate judges surely do not 'sit as automatons,' they are not freelance lawyers either. Our system depends in large part on adversary presentation; our role in that system 'is best accomplished when [we] determine[] legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court.'" (quoting People v. Hawkins, 900 N.E.2d 946, 951 (N.Y. 2008))).

[165] *Cf.* Alami v. Volkswagen of Am., Inc., 766 N.E.2d 574, 577 (N.Y. 2002).

[166] Clark v. State, 508 N.Y.S.2d 648, 648 (App. Div. 1986).

[167] *See id.*

[168] *See id.* at 649–50.

[169] *See id.* at 650 (Kane, J., dissenting).

[170] *Id.* (citations omitted).

[171] *See supra* notes 161–165 and accompanying text; Alami v. Volkswagen of Am., Inc., 766 N.E.2d 574, 577 (N.Y. 2002).

IV. CONCLUSION

As these cases demonstrate, we have yet to find that perfect fact pattern of straight–up drunk driving without a larger duty to the general public. One trial court case so ruled;[172] however, apparently no notice of appeal was filed, so we will not get an appellate court to rule on that issue. As for how it will be decided, there are two competing policy interests at play—the interest in leaving apportionment of fault to go to the jury,[173] and the public policy that motorists who drive drunk should not benefit from their actions.[174] However, I believe the scales tip slightly for the defendant—after all, the appellate division has already ruled that "an intoxicated person should not generally be permitted to benefit from his or her own intoxication" when suing under the theory of negligent entrustment,[175] or under a theory of Dram Shop Liability.[176] It will be interesting to see if an appellate court finds that the *Barker*/*Manning* policy bar applies, and if so, perhaps what level of intoxication is required. The plaintiff's level of intoxication in my case, even using reverse extrapolation, was only 0.11%,[177]

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[172] *See* Gwood v. Progressive Waste Sols. of LI, Inc., 104 N.Y.S.3d 856, 863 (Sup. Ct. 2019). In *Gwood*, the Supreme Court concluded:

> In the Alami case, the manufacturer's defective design of the vehicle operated by the plaintiff's decedent allegedly put any driver of the vehicle in jeopardy of enhanced injury, whether sober or intoxicated, such that a minor fender bender could and allegedly did result in a fatality. Furthermore, the Alami plaintiff's claim was directly connected to the manufacturer's duty to design a reasonably safe vehicle for all foreseeable users of its vehicle.

Gwood's claim, on the other hand, originates from and is inextricably bound to his own felonious conduct.

Id. at 862–63.

[173] *See id.* at 859.

[174] *Cf. supra* notes 27–28 and accompanying text.

[175] Shultes v. Carr, 512 N.Y.S.2d 276, 277 (App. Div. 1987) (citing Allen v. County of Westchester, 492 N.Y.S.2d 772, 776 (App. Div. 1985)).

[176] *See, e.g.*, Soto v. Montanez, 608 N.Y.S.2d 36, 37 (App. Div. 1994). "General Obligations Law § 11–101(1), known as the Dram Shop Act, makes a party who 'unlawfully' sells alcohol to another person liable for injuries caused by reason of that person's intoxication." Adamy v. Ziriakus, 704 N.E.2d 216, 218 (N.Y. 1998); s*ee also* D'Amico v. Christie, 518 N.E.2d 896, 898 (N.Y. 1987).

[177] *See supra* note 113 and accompanying text; *see, e.g.*, Cabrera v. Hirth, 779 N.Y.S.2d 471, 472 (App. Div. 2004) ("It is well settled that negligence and apportionment of liability are generally matters for the factfinder's determination, and a jury's apportionment of fault should not be disturbed where . . . it is based on a fair interpretation of the evidence." (citing Kovit v. Estate of Hallmus, 763 N.Y.S.2d 325, 327 (App. Div. 2003))).

significantly lower than the drivers in *Humphrey* and *Clark*.[178] The next question is, for that matter, what about driving while ability impaired or driving under the influence of drugs?

I write this Article not to suggest that barring a personal injury lawsuit for drunk drivers is a silver bullet that would immediately eliminate incidents of drunk driving. And admittedly, comparative fault has grown in application and absolute defenses have significantly narrowed in recent years.[179] However, dangerous, but legal activities is one thing. Drunk driving is another. After all, even the *Alami* court allowed the plaintiff's case to go forward; it noted that the "same reasoning, however, would deny a burglar injured on a defective staircase from asserting a claim against his victim."[180] Just as qualified immunity's goal (in the constitutional civil rights arena) is to avoid subjecting officers to trial, even if they would eventually be found not liable,[181] the goal of the public policy doctrine is to protect defendants from being found liable where they never should have been put in a situation to be found liable in the first place. It is an equitable doctrine of fairness. We can only await a fact pattern similar to the one I had and an appellate court who reaches the decision on the ultimate issue.

[178] *See* Humphrey v. State, 457 N.E.2d 767, 768 (N.Y. 1983); Clark v. State, 508 N.Y.S.2d 648, 648 (App. Div. 1986).

[179] *Compare* Benjamin P. Pomerance, Note, *Forewarned: Sports, Torts, and New York's Dangerous Assumption*, 76 ALB. L. REV. 1275, 1306 (2013) (indicating that comparative negligence has risen in popularity), *with* Custodi v. Town of Amherst, 980 N.E.2d 933, 935 (N.Y. 2012) ("Since the adoption of CPLR 1411, we have generally restricted the concept of assumption of the risk to particular athletic and recreative activities . . . .").

[180] Alami v. Volkswagen of Am., Inc., 766 N.E.2d 574, 577 (N.Y. 2002) (citing Barker v. Kallash, 468 N.E.2d 39, 41–42 (N.Y. 1984)).

[181] *See, e.g.*, Plumhoff v. Rickard, 572 U.S. 765, 771–72 (2014) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).