



## Road Negligence Ruling Leaves NYC Open To Massive Liability

By **Pete Brush**

Law360, New York (June 06, 2014, 6:37 PM ET) -- New York City is liable the same way a private contractor would be when negligent city road crews cause injuries to travelers, the state's top court has ruled, rejecting an often-invoked governmental immunity defense in a move experts said Friday would afford hundreds of plaintiffs a path to damages.

*"Here the court is saying what the city was doing is the same as the work of a private contractor. This ruling is going to help a lot of plaintiffs," said personal injury lawyer **Daniel Flanzig of Flanzig & Flanzig LLP**. Given the sheer number of mishaps that occur on unsafe city roads, he says the city's liability is potentially very serious.*

In Wittorf's case alone, by way of example, a jury awarded \$2.5 million for pain and suffering and more than \$800,000 in medical expenses — though the amount she ultimately receives is still a question for the court. Wittorf sued after a 2005 incident in which a New York City Department of Transportation supervisor named Donald Bowles cleared her to ride her bike on a Central Park transverse road under repair for potholes. Because of darkness in the tunnel, Wittorf did not see one of the depressions until she was almost upon it. When she attempted to avoid the hole, she encountered another, fell and was injured.

A jury cleared the city on some damages theories but held that the supervisor was negligent in permitting Wittorf and a companion to enter the 65th Street transverse. The negligence verdict was subsequently dismissed on a post-trial motion in which the city asserted that it enjoyed governmental immunity. That dismissal triggered the newly decided appellate review.

The Court of Appeals, in an opinion penned by Judge Victoria A. Graffeo, rejected the contention that there couldn't be liability for negligence. Road repair work is more akin to private-sector — or proprietary — work than it is to a protected governmental function, the court said. Graffeo cited a string of precedent in which municipalities were held liable for other mishaps, such as failures to install traffic signs and repaint road stripes, finding it "well established" that a municipality has a proprietary duty to keep its roads and highways safe.

"We conclude that Bowles was engaged in a proprietary function at the time he failed to warn plaintiff of the conditions in the transverse," the opinion said.

The ruling allows the city to continue asserting defenses in cases where it doesn't have a written notice of a defect and where it did not affirmatively create a road hazard. But, according to **Flanzig**, it clears the way for plaintiffs in hundreds if not thousands of cases to claim for damages where road crews are negligent.

*"Plaintiffs now have an alternative theory with regard to road-condition claims," he said. "It's not an unfair decision. The court is telling the city: If you are going to do something, do it right, like the rest of us are required."*

In a brief penned by attorney Michael S. Buskus, the New York State Trial Lawyers Association noted that the case is especially important to New York City bikers, "for whom road defects pose a special danger."

The ruling cuts against the grain of recent Court of Appeals rulings — including *McLean v. City of New York* from 2009 and *Valdez v. City of New York* from 2011 — where the city was shielded because the alleged negligent conduct arose from governmental functions and thus wasn't subject to a negligence standard.

The Court of Appeals continued in that vein in 2012, when it **ruled** inspectors owed no special duty to passengers after a boat that capsized on an Adirondack lake in 2005 killed 20 people.

But in Thursday's decision, Shoot said, "they've said there's only so far this pendulum is going to swing."

As a result of Thursday's ruling, Wittorf's case goes back to trial court, where a judge must decide on her challenge to the comparative negligence finding. She argues the city should be held completely liable, not just partially liable.

The jury awarded Wittorf \$2.5 million for pain and suffering and more than \$800,000 for past and future medical expenses. If the comparative negligence finding is struck, she could win the full amount. Part of the medical expense damages she won from the jury also are being contested by the city.

Now that the Court of Appeals is done with the negligence appeal, remaining post-verdict questions will go to a different trial judge, because the judge who heard the case, Paul G. Feinman, now sits on a New York City appellate court.

The city declined to comment.