

Partner Daniel Persing, Esq. says it may be time for NY state to update its pothole liability laws

Taking On a Pothole Law: In Winter, New York State Rejects Drivers' Claims

By Sam Roberts

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Thomas J. Abinanti, a Democratic assemblyman from Westchester County, was driving to Albany on the Taconic State Parkway in January when his car struck a pothole. He made it to the capital, but the tire had to be replaced. A few weeks later, he hit another pothole, this one on Interstate 95. Limping off the exit ramp in Mamaroneck on the dented rim, he pulled into a nearby gas station.

"Here comes another one," the attendant said.

At the other end of the state, Melissa Vacarro, a receptionist at a factory in Buffalo, was going home to Cheektowaga on Route 33 one day this past winter when her car plunged into a pothole, a hazard she said she had reported to the State Transportation Department twice. She lost both passenger side tires, and both wheel rims. The bill was nearly \$4,000.

Winter always wreaks havoc on roads, but the onslaught this year transformed ribbons of asphalt into pockmarked lunar landscapes rarely seen.

Still, New York drivers looking to Albany for financial relief from winter's wrath, like Mr. Abinanti and Ms. Vacarro, are bound to be frustrated by a mind-boggling legal anomaly: They are not entitled to file a claim against the state for damages.

The Taconic, I-95 and Route 33 are state roads, and under the state's jurisdiction; that is not the rub. The hitch is that both drivers had the misfortune of hitting potholes when potholes are most likely to occur, during the coldest months of the year.

Until midnight on Wednesday, if a car is dinged or even totaled because of a defect on a New

York State road, drivers cannot legally claim reimbursement for damages from the state. After midnight, drivers should call their lawyer. Section 58 of the State Highway Law explicitly exempts the state from liability for damages arising from defects in its highways except between May 1 and Nov. 15.

The law defies modern technology and judicial logic, and has now spawned legislation to bring it into the 21st century.

"I was very surprised," said Ms. Vacarro, who was told by the Transportation Department that she could not file a claim. "They have the law flip-flopped. They should cover potholes in the winter. In the summertime, I can see them and avoid them."

She filed a claim with her insurance company, but still paid about \$1,000 in out-of-pocket repairs.

Mr. Abinanti spent \$700 on two new tires, a cost within the deductible on his insurance policy. He said he would not have filed a claim against the state anyway ("I'm an assemblyman; it wouldn't be good publicity"), but added: "I don't understand why the state exempts itself. It's discriminatory. It's a very unfair law."

Robert F. Danzi, president of the New York State Trial Lawyers Association, said he was unaware of similar winter waivers of liability in other states.

The state budget approved last month included an extra \$40 million to help municipalities repair potholes after the brutal winter, in which snow and ice storms prompted Gov. Andrew M. Cuomo to declare a half-dozen states of emergency and state crews filled potholes with 16,000 tons of patch mix, double the typical amount.

But the state's legal immunity for pothole claims during the peak winter pothole season helps to explain the huge disparity between what the state and New York City disbursed. In 2013, the city paid out \$5.5 million in pothole-related claims. That same year, for defects that caused damages only in the balmy months from May 1 to Nov. 15, the state reimbursed motorists \$13,386.

 Courts have since ruled that the state is still liable for out-and-out misfeasance or negligence, but the winter not-my-fault waiver has been on the books at least as far back as 1935, when Albany, faced with a tenfold increase in auto registrations over two decades, approved a major investment in new roads and relieved the state of liability for damages caused by snow and ice on its highways.

"It's probably from a time when the state had to husband its resources," said Stephan H. Peskin, a past president of the trial lawyers' group. "It gives me one more reason not to take on cases upstate."

The legislative history suggests it dates back even further, to the turn of the 20th century, when asphalt companies closed during the winter because the blacktop that was available back then would not stick in cold weather.

"It's an anachronism that should be revisited," said Daniel J. Persing of Tully Rinckey, a law firm in Albany. "With new products, they can certainly extend the paving season."

Roughly 15 percent of roads in New York, or about 15,000 miles, are under state jurisdiction. By one count, municipalities, including New York City, are under contract with the state to remove snow and make minor repairs to about 8,000 miles of state-owned roads within their jurisdictions.

Mr. Abinanti and a fellow Democrat, State Senator Timothy M. Kennedy of Buffalo, have introduced legislation that would limit the state's blanket inoculation from claims during the colder months.

Many local jurisdictions, including New York City, also limit their liability, but not absolutely. Typically, they become liable for defects only after prior written notice of a defect, and after a specified time, at least 15 days in the city's case, in which to make repairs.

Mr. Abinanti is proposing far less time in his bill. "Twenty-four hours or even 12 hours would make sense," he said, meaning once a pothole was reported, the state would have that much time to fill it before being liable for damages.

Mr. Kennedy's bill would allow motorists to seek damages from the state for "egregious or unreasonable" defects year-round or when it was given prior notice of a defect.

The State Assembly speaker, Sheldon Silver, a Manhattan Democrat who works for a personal injury law firm, said: "We have a responsibility to ensure safe roads. If a pothole has been reported and the state fails to repair it in a timely manner, motorists should have the ability to recover costs if their vehicle is damaged."

Mr. Danzi, of the trial lawyers' association, described Section 58 — which was amended as recently as 1971, though the essence of the law remains unchanged — as "the most blatant and draconian" example of "trading safety for financial expedience.