TORT LAW

John C. Cherundolo[†]

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† John C. Cherundolo is a former Supreme Court Justice of the New York Unified Court System, Onondaga County, and an Adjunct Professor of Law at Syracuse University College of Law. LL.M. Temple Law, J.D. Syracuse University College of Law, M.P.A Syracuse University Maxwell School, and B.A. Syracuse University.

INTRODUCTION

It was not a busy year in the Court of Appeals with regard to cases surrounding Tort Law. However, there were some significant decisions in the areas of Labor Law, Municipal Liability, Product Liability, and Motor Vehicle No-Fault. In the field of Labor Law, the Court seemed to, for the first time since the *Runner*[1] decision, slow the expansiveness of the rationale that came from *Runner* in making the first major denial of a case to a 240(1) plaintiff in the case of *Fabrizi v. 1095 Avenue of the Americas, L.L.C.*[2] In the field of Products Liability, the Court, in a split decision, decided not to accept a medical monitoring claim standing by itself for a group of smokers that had no injuries to date with regard to their claims against a major cigarette manufacturer. However, the Court firmly affirmed the teaching of *Micallef v. Miehle*[3] in the case of *Hoover v. New Holland North America, Inc.*, and confirmed that even in a case where there is misuse and alteration, if it is foreseeable that such can occur, then the plaintiff may recover for injuries even if guards have been

1. Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 922 N.E.2d 865, 895 N.Y.S.2d 279 (2009).

2. 22 N.Y.3d 658, 664, 8 N.E.3d 791, 795, 985 N.Y.S.2d 416, 420 (2014).

3. Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

removed and the product has not been used as intended.[4] Finally, in the field of No-Fault/Automobile Liability, the Court of Appeals, in the case of *Ramkumar v. Grand Style Transportation Enterprises, Inc.*, softened the rule that was first expressed in *Pommells v. Perez*,[5] in allowing the plaintiff to recover in a case with scant evidence of a reasonable excuse why there was a gap in treatment.[6]

These apparent minor shifts in the law will have significant impact on those who bring tort cases now and in the future.

I. LABOR LAW

A. When Does an Injury Caused by a Falling Object Get 240(1) Protection?

With the New York Court of Appeals case of *Runner v. New York Stock Exchange, Inc.* in December of 2009, the Court made the observation that the dispositive inquiry, framed by all of the cases up to the date of that decision, did "not depend upon the precise characterization of the [safety] device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker."[7] Apparently, as a message of clarification, the Court of Appeals determined that the "single decisive question" to be answered in a case where gravity is or has been involved "is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."[8]

In *Runner*, the defendants contended, as many others had done both at that time and previously, that "the accident was not sufficiently elevation-related to fall within" the confines of section 240(1) of the Labor Law.[9] This long-standing defense argument was based upon the contention that neither the fall of the plaintiff nor the fall of the object that struck the plaintiff was of such a consequence so as to afford protection to the injured worker under the application of the statute.[10] The Court of Appeals in *Runner*, however, determined that the plaintiff was covered under the protective section of Labor Law 240(1),[11] even though

4. 23 N.Y.3d 41, 59, 11 N.E.3d 693, 705, 988 N.Y.S.2d 543, 556 (2014) (citing *Micallef*, 39 N.Y.2d at 386, 348 N.E.2d at 577, 384 N.Y.S.2d at 121).

5. 4 N.Y.3d 566, 572, 830 N.E.2d 278, 281, 797 N.Y.S.2d 380, 383 (2005).

6. 22 N.Y.3d 905, 906-07, 998 N.E.2d 801, 802, 976 N.Y.S.2d 1, 2 (2013).

7. 13 N.Y.3d 599, 603, 922 N.E.2d 865, 866, 895 N.Y.S.2d 279, 280 (2009).

8. *Id.* at 603, 922 N.E.2d at 866-67, 895 N.Y.S.2d at 280-81.

9. *Id.* at 603-04, 922 N.E.2d at 867, 895 N.Y.S.2d at 281.

10. *Id.* at 603, 922 N.E.2d at 867, 895 N.Y.S.2d at 281.

11. *Id.* at 605, 922 N.E.2d at 868, 895 N.Y.S.2d at 282.

the distance that the object fell would have been likely deemed "de minimis" under the previous case law. The Court determined that the operative inquiry is not how far the object causing injury fell, but is "whether the harm [to the injured worker] flows directly from the application of the force of gravity to the object [that falls and injures the plaintiff]."[12] In finding the plaintiff in *Runner* covered by the statute, the Court made the determination that the height differential in the *Runner* case could not be viewed as de minimis, simply by looking at the weight of the object and the amount of force that was applied to the object when the plaintiff was injured.[13]

The cases preceding *Runner* that dealt with falling objects had other preliminary questions that attached and were necessary to answer before courts could make the determination that an injured worker would receive the protection of section 240(1) of the Labor Law.[14]

For example, in *Outar v. City of New York*, a twenty seven year old plaintiff was injured when an unsecured dolly fell and struck him while he was working on subway tracks, allegedly causing severe, permanent, and disabling injuries.[15] In *Outar*, at the time of the injury, the worker was lifting pieces of track and replacing them when a dolly, which was used in his work and stored on the top of a five-and-one-half foot high "bench wall" adjacent to the worksite, fell and hit him.[16] No one was lifting or hoisting or in any other way moving the dolly at the time that it fell.[17] The Appellate Division, Second Department, reversed the motion term and granted judgment to the plaintiff, finding that the facts of the case allowed for protection of the injured worker pursuant to section 240(1) of the Labor Law even though the proof showed that no one was hoisting or securing the dolly at the time it fell from the wall.[18]

Four years after *Outar* was decided, the Court of Appeals, in *Quattrocchi v. F.J. Sciame Construction Co.*, confirmed that "'falling object' liability under Labor Law § 240(1) is not limited to cases in which the object is being hoisted or secured."[19]

12. *Runner*, 13 N.Y.3d at 604, 922 N.E.2d at 868, 895 N.Y.S.2d at 282.
13. *Id.* at 605, 922 N.E.2d at 868, 895 N.Y.S.2d at 282.
14. *See* Outar v. City of N.Y., 286 A.D.2d 671, 672, 730 N.Y.S.2d 138, 139 (2d Dep't 2001).
15. Outar v. City of N.Y., 11 A.D.3d 593, 594, 782 N.Y.S.2d 658, 659 (2d Dep't 2004), *aff'd*, 5 N.Y.3d 731, 832 N.E.2d 1186, 799 N.Y.S.2d 770 (2005).
16. *Outar*, 286 A.D.2d at 672, 730 N.Y.S.2d at 139.
17. *Id.*
18. *Id.* at 672-73, 730 N.Y.S.2d at 139-40.
19. 11 N.Y.3d 757, 758-59, 896 N.E.2d 75, 76, 866 N.Y.S.2d 592, 593 (2008).

It was thought by those knowledgeable in the field of Labor Law section 240(1) cases that the *Runner* case, with its short, but yet very perceptible inquiry, would open up the liability of defendants in cases of falling objects because no longer did the inquiry focus upon how much of a drop or fall there was or whether the object itself was being hoisted or secured.

As an example, *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, decided two years after *Runner*, held that a worker injured "by a falling object whose base stands at the same level as the worker" is not categorically barred form recovery under section 240 (1) of the Labor Law.[20] Previous to the *Wilinski* case, the Court of Appeals had precluded cases under section 240 (1) of the Labor Law where the falling object had a base at the same level as the worker when the object fell.[21] The Court in *Wilinski* found that the "same level" rule was inconsistent with the Court's more recent decisions in *Quattrocchi* and *Runner*.[22] By applying the *Runner* rationale in *Wilinski*, the Court held that the plaintiff is not precluded from recovery under section 240(1) of the Labor Law because the pipes that fell and struck him had a base at the same level as where he was working.[23] In *Wilinski*, the pipes were metal pipes four inches in diameter and were approximately ten feet in height.[24] The Court found that the "height differential cannot be described as de minimis given the 'amount of force [the pipes] w[ere] []able [to] generat[e]'" before striking the plaintiff, and that the plaintiff in that case "suffered harm that 'flow[ed] directly from the application of the force of gravity to the [pipes].'"[25]

During the current *Survey* year, the Court of Appeals was called upon to decide the case of *Fabrizi v. 1095 Avenue of the Americas, L.L.C.*[26] In *Fabrizi*, the plaintiff was an electrician who sustained a serious injury when a sixty-to-eighty pound conduit pipe fell on his hand while he was working at a commercial property.[27] The plaintiff in *Fabrizi*

20. 18 N.Y.3d 1, 5, 959 N.E.2d 488, 490, 935 N.Y.S.2d 551, 553 (2011).

21. *See* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 491, 657 N.E.2d 1318, 1320-21, 634 N.Y.S.2d 35, 37-38 (1995).

22. *Wilinski*, 18 N.Y.3d at 9, 959 N.E.2d at 493, 935 N.Y.S.2d at 556 (citing Quattrocchi v. F.J. Sciame Constr. Co., 11 N.Y.3d 757, 896 N.E.2d 75, 866 N.Y.S.2d 592 (2008); Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 922 N.E.2d 865, 895 N.Y.S.2d 279 (2009)).

23. *Id.* at 10, 959 N.E.2d at 494, 935 N.Y.S.2d at 557.

24. *Id.*

25. *Id.* (alterations in original) (quoting *Runner*, 13 N.Y.3d at 604-05, 922 N.E.2d at 868, 895 N.Y.S.2d at 282).

26. 22 N.Y.3d 658, 8 N.E.3d 791, 985 N.Y.S.2d 416 (2014).

27. *Id.* at 660, 8 N.E.3d at 792, 985 N.Y.S.2d at 417.

was an electrician that worked for the electrical contractor that was responsible for the installation of conduit piping through the building's floors.[28] "The conduit enabled telecommunication wires to run from the building's sub-cellar through each floor's respective telecommunication closet."[29] "The run of the conduit on each floor contain[ed] a 'pencil box' that provid[ed] access to the telecommunication wire."[30] The facts are reported by the Court of Appeals as follows:

> On the day of the incident, [the] plaintiff was relocating a pencil box that Forest [, the electrical contractor,] had installed the previous week. The pencil box was situated between, and affixed to, two pieces of conduit that were four inches in diameter. The top section of conduit was 8 to 10 feet long and ran vertically from the top of the pencil box to the ceiling; the lower section ran vertically from the bottom of the pencil box to the floor. The top conduit was connected to a similar horizontal conduit near the ceiling by a four-inch compression coupling.[31]

At the time of construction, the pencil box obstructed the conduit that was to be installed adjacent to the box.[32] The plaintiff's job was to remove the pencil box.[33] To do so, he had to drill holes in the floor to relocate the support.[34] However, before drilling the holes, the plaintiff had to "cut through the conduit just above and below the pencil box," and remove the pencil box.[35] When the plaintiff made the cut, the conduit was left dangling from a compression coupling above, near the ceiling.[36]

As the plaintiff was drilling below the pipes, one of the pipes fell, apparently because the compression coupling holding the pipes into position was not strong enough to hold the conduit, given the weight of the conduit and the nature of the vibrations from the drilling that the plaintiff was doing.[37] The falling conduit struck the plaintiff on the hand allegedly causing the serious injuries complained of.[38]

The plaintiff brought action under section 240(1) of the Labor Law, making the claim that the compression coupling was not an adequate safety device that properly secured the conduit into position, and that as

28. *Id.*
29. *Id.* at 660-61, 8 N.E.3d 792, 985 N.Y.S.2d at 417.
30. *Id.* at 661, 8 N.E.3d at 792, 985 N.Y.S.2d at 417.
31. *Fabrizi*, 22 N.Y.3d at 661, 8 N.E.3d at 792-93, 985 N.Y.S.2d at 417.
32. *Id.* at 661, 8 N.E.3d at 793, 985 N.Y.S.2d at 418.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Fabrizi*, 22 N.Y.3d at 661, 8 N.E.3d at 793, 985 N.Y.S.2d at 418.
37. *Id.* at 665, 8 N.E.3d at 796, 985 N.Y.S.2d at 421.
38. *Id.* at 661, 8 N.E.3d at 793, 985 N.Y.S.2d at 418.

a result of the forces of gravity, the conduit fell and struck the plaintiff causing injury.[39] The plaintiff claimed that the owner and contractor on the construction site failed to provide proper protection to him, and that the lack of protection was a proximate cause of his serious injuries.[40] In a four-to-two decision, with Judge Abdus-Salaam taking no part, the Court of Appeals set the standard that in order to recover, "the plaintiff must demonstrate that at the time that the object fell, it either was being 'hoisted or secured' or [that it] 'required securing for the purposes of the undertaking.'"[41]

In writing for the majority, Judge Pigott decided that "[c]ontrary to the dissent's contention, section 240(1) does not automatically apply simply because an object fell and injured a worker; '[a] plaintiff must show that the object fell . . . *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute.'"[42]

In finding against the injured worker, the majority determined that the compression coupling was not meant to function as a safety device in the same manner as those devices enumerated under the statute and could not really be designated as a safety device "constructed, placed, and operated as to give proper protection" to prevent the gravity related injuries.[43] The plaintiff argued that the compression coupling itself was a safety device and was inadequate to give the type of protection required by the statute.[44] The plaintiff further argued that the coupling should have had a set screw incorporated in its use, so as to assure the conduit would not fall.[45] The Court found that the failure to use a set screw was not a violation of the statute's "proper protection directive" and was not designed to provide worker protection.[46] Based on that rationale, the majority reversed the decision of the appellate division and granted the summary judgment motions of the defendants, dismissing the case.[47]

39. *Id.* at 661-62, 8 N.E.3d at 793, 985 N.Y.S.2d at 418.

40. *Id.* at 662, 8 N.E.3d at 793, 985 N.Y.S.2d at 418.

41. *Fabrizi*, 22 N.Y.3d at 662-63, 8 N.E.3d at 794, 985 N.Y.S.2d at 419 (citing Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 268, 750 N.E.2d 1085, 1089, 727 N.Y.S.2d 37, 41 (2001); Outar v. City of N.Y., 5 N.Y.3d 731, 732, 832 N.E.2d 1186, 1186, 799 N.Y.S.2d 770, 770 (2005); Quattrocchi v. F.J. Sciame Constr. Corp., 11 N.Y.3d 757, 758-59, 896 N.E.2d 75, 75, 866 N.Y.S.2d 592, 592 (2008)).

42. *Id.* at 663, 8 N.E.3d at 794, 985 N.Y.S.2d at 419 (alteration in original) (quoting *Narducci*, 96 N.Y.2d at 268, 750 N.E.2d at 1089, 727 N.Y.S.2d at 41).

43. *Id*.

44. *Id.*

45. *Id.* at 663-64, 8 N.E.3d at 794-95, 985 N.Y.S.2d at 419-20.

46. *Fabrizi*, 22 N.Y.3d at 663, 8 N.E.3d at 794-95, 985 N.Y.S.2d at 419.

47. *Id.* at 664, 8 N.E.3d at 795, 985 N.Y.S.2d at 420.

In a written dissent by Chief Judge Lippman, the minority felt that the plaintiff had "established his entitlement to summary judgment by demonstrating that his gravity-related injury was proximately caused by the defendants' failure to provide an adequate safety device."[48]

In looking at the Court's rulings in *Runner* and *Wilinski*, the Chief Judge wrote that "the dispositive inquiry . . . does not depend upon the precise characterization of the device employed." It follows that the availability of statutory protection here should not depend on whether couplings can be characterized as safety devices under section 240(1), or whether they should be considered part of a building's permanent infrastructure."[49]

The dissent further added, quoting the language from *Runner*, that "'the single decisive question is whether plaintiffs [sic] injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.'"[50]

In closing, Chief Judge Lippman, speaking for the dissent, opined that the defendants' proof failed to rebut the plaintiff's prima facie showing that he was injured as a result of the absence of an adequate safety device.[51]

The *Fabrizi* decision now adds turmoil to the definition, and the real meaning, of the term "safety device," as that term is defined under the statute. Rather than adopt a rather simple, and straight forward approach, as declared in *Runner* and adopted by *Wilinski*, the Court of Appeals, in a split decision without a full bench deciding, throws the analysis to be done by the courts of New York back to a case-by-case analysis, and a test that is based now on whether the defense (perhaps as a matter of semantics—or not) can distinguish the alleged "safety device" from those enumerated under the statute. The decision appears to say that an object (i.e. a coupling) cannot both be a part of the permanent conduit structure and, at the same time, be thought of as a safety device for purposes of section 240(1).

In October of 2014, eight months following the *Fabrizi* decision, the Appellate Division, First Department, undertook to decide the case of

48. *Id.* (Lippman, C.J., dissenting).

49. *Id.* at 665, 8 N.E.3d at 795, 985 N.Y.S.2d at 420 (Lippman, C.J., dissenting) (alteration in original) (quoting Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 10, 959 N.E.2d 488, 494, 935 N.Y.S.2d 551, 557 (2011)) (internal quotation marks omitted).

50. *Id.* at 665, 8 N.E.3d at 796, 985 N.Y.S.2d at 420 (Lippman, C.J., dissenting) (citation omitted).

51. *Fabrizi*, 22 N.Y.3d at 666, 8 N.E.3d at 796, 985 N.Y.S.2d at 421 (Lippman, C.J., dissenting).

Guallpa v. Leon D. DeMatteis Construction Corp.[52] In *Guallpa*, the plaintiff was working for a sub-contractor of the general contractor and was participating in the mason work necessary to get the job completed.[53] During construction, the masonry contractor would receive concrete stones on wooden pallets that measured approximately three-to-four feet high.[54] The pallets and stones were each covered with plastic tarp, presumably for the purpose of keeping the stones dry.[55] On the day of the accident, "as [the] plaintiff walked by one of the pallets, a stone block that was resting on top of [the pile] allegedly fell and struck him on the right knee," causing severe damage.[56] The block weighed approximately twenty-five pounds, and there is nothing in the record to show how it was that the block came to fall and strike the plaintiff.[57]

The court concluded, in a unanimous decision written by Presiding Justice Tom, that the "plaintiff's injury was not caused by the absence [of] or [an] inadequacy of the kind of safety device enumerated in the statute."[58] The court stressed the fact that the plaintiff did "not contend that the block itself was inadequately secured," but instead argued that "his injuries were caused by [the] defendants' failure to provide an adequate safety device to hold the plastic tarp in place," and as a result, "the plastic tarp was inadequately secured."[59] The plaintiff further urged "that the plastic tarp was inadequately secured because, if it had been properly secured, such as with ropes and stakes [and other such safety devices], [the] plaintiff's injury would not have occurred."[60]

In finding that the plaintiff's injuries were not covered under section 240(1) of the Labor Law, the court found that *Wilinski* and *Runner* were distinguishable to the case before the court.[61] The court found that "[t]he plastic tarp was not an object that needed to be secured for purposes of § 240(1)" and that there was "no indication" that the tarp was the cause of the plaintiff's injuries.[62] The court found that "[t]he tarp was in place to

52. 121 A.D.3d 416, 997 N.Y.S.2d 1 (1st Dep't 2014).

53. *Id.* at 417, 997 N.Y.S.2d at 2.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Guallpa*, 121 A.D.3d at 417, 997 N.Y.S.2d at 2.

58. *Id.* at 418, 997 N.Y.S.2d at 3 (citing Fabrizi v. 1095 Ave. of the Ams. L.L.C., 22 N.Y.3d 658, 663, 8 N.E.3d 791, 794, 985 N.Y.S.2d 416, 419 (2014)).

59. *Id.*

60. *Id.*

61. *Id.*; *see* Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 (2011); Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 922 N.E.2d 865, 895 N.Y.S.2d 279 (2009).

62. *Guallpa*, 121 A.D.3d at 418, 997 N.Y.S.2d at 3 (citing Quattrocchi v. F.J. Sciame Constr. Co., 11 N.Y.3d 757, 758-59, 896 N.E.2d 75, 76, 866 N.Y.S.2d 592, 592 (2008)).

keep the stone blocks dry, not to secure the stones stacked on the pallet underneath it."[63] "The purpose of the tarp," the court found, "was to keep possible rain off" of the stones that were housed below the tarp, "not to protect the workers from an elevated risk."[64] Based on those facts, the court found that section 240(1) was not applicable to the plaintiff's injury.[65]

Fabrizi is the first major case that the Court of Appeals has decided in the post-*Runner* time period that has limited what was thought to be an ongoing expansion of liability under section 240(1). The end result of *Fabrizi* is that if an object falls, the plaintiff must point to either the lack of some safety device that could have been used to prevent the fall, or a safety device that was originally placed and intended to be a safety device, but did not prevent the fall.[66] It is not enough that the fallen object and the resultant injury occurred as a result of the failure of a device to hold the object in place, but it now appears that it must be proven to the court's satisfaction that the device must have been intended to act as a safety device as enumerated under section 240(1).[67] It is likely that courts will struggle with upcoming interpretations of *Fabrizi* in making decisions concerning the application to falling objects cases.

In *Flossos v. Waterside Redevelopment Co.*, the plaintiff alleged that he was seriously injured when a large piece of ceiling came down and struck him while he was standing on a ladder painting a ceiling inside of a closet.[68] The plaintiff alleged that the piece of falling ceiling propelled both him and the ladder to the floor, thus causing his injuries.[69] The plaintiff admitted that the ladder was an A-Frame ladder, that he did not lock the ladder into position, and that the ladder was adequate for the job.[70] The plaintiff then "commenced an action" against the owners of the building, "alleging negligence and violations of Labor Law sections 200, 240(1), and 241(6)."[71] The defendants then brought an action against the

63. *Id.*

64. *Id.* (citing Fabrizi v. 1095 Ave. of the Ams. L.L.C., 22 N.Y.3d 658, 663, 8 N.E.3d 791, 794, 985 N.Y.S.2d 416, 419 (2014); *Runner*, 13 N.Y.3d at 603, 922 N.E.2d at 867, 895 N.Y.S.2d at 281; Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., 104 A.D.3d 446, 449-50, 961 N.Y.S.2d 91, 95 (1st Dep't 2013)).

65. *Id.* at 419, 997 N.Y.S.2d at 4.

66. *Fabrizi*, 22 N.Y.3d at 663, 8 N.E.3d at 794, 985 N.Y.S.2d at 419; *see Quattrocchi*, 11 N.Y.3d at 758-59, 896 N.E.2d at 76, 896 N.E.2d at 76, 866 N.Y.S.2d at 593.

67. *Fabrizi*, 22 N.Y.3d at 663, 8 N.E.3d at 794, 985 N.Y.S.2d at 419 (quoting N.Y. LAB. LAW § 240(1) (McKinney 2014)).

68. 108 A.D.3d 647, 650, 970 N.Y.S.2d 51, 54 (2d Dep't 2013).

69. *Id.* at 648, 970 N.Y.S.2d at 53.

70. *Id.*

71. *Id.*

plaintiff's employer alleging "common law and contractual indemnification."[72]

The defendants made a motion for summary judgment dismissing the complaint, and the Supreme Court, Queens County, denied the defendants' motion for summary judgment under section 240(1).[73] The Appellate Division, Second Department, in a unanimous decision affirmed the decision of the motion term.[74] In doing so, the court determined that:

> [D]efendants met their prima facie burden of establishing the absence of a statutory breach, since the plaintiff did not fall as a result of inadequate protection and the object [(the ceiling pieces)] did not fall on the plaintiff due to "the absence or inadequacy of a safety device of the kind enumerated in the statute."[75]

The court relied on the fact that the large part of the ceiling that fell upon the plaintiff and knocked him off of the ladder was "part of the permanent structure of the building," and "not a falling object that was [in any way] being 'hoisted or secured.'"[76]

B. To What Extent is Cleaning Covered by 240(1)?

In February of 2012, the Court of Appeals decided the case of *Dahar v. Holland Ladder & Manufacturing Co.* dealing with the extent to which "cleaning" is a covered activity under section 240(1) of New York Labor Law. In *Dahar*, the Court drew a distinction between cleaning in the context of construction and certain (i.e. window cleaning) professions, and cleaning in the context of a factory worker.[77]

Section 240(1) provides as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and

72. *Id.*

73. *Flossos*, 108 A.D.3d at 648-49, 970 N.Y.S.2d at 53-54.

74. *Id.* at 648, 970 N.Y.S.2d at 53.

75. *Id.* at 649-50, 970 N.Y.S.2d at 54 (quoting Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 268, 750 N.E.2d 1085, 1089, 727 N.Y.S.2d 37, 41 (2001)).

76. *Id.* at 650, 970 N.Y.S.2d at 54 (quoting *Narducci*, 96 N.Y.2d at 268, 750 N.E.2d at 1089, 727 N.Y.S.2d at 41).

77. 18 N.Y.3d 521, 525, 964 N.E.2d 402, 405, 941 N.Y.S.2d 31, 34 (2012).

operated as to give proper protection to a person so employed.[78]

In *Dahar*, the plaintiff was a factory worker at the Cheektowaga, New York, plant of West Metal Works and was in the process of cleaning a recently fabricated "wall module" that was being sold to its customer for installation in a nuclear waste treatment plant in Richland, Washington.[79] The plaintiff was standing on a ladder provided by his employer, and while he was cleaning the wall module, the ladder broke, and the plaintiff fell to the ground.[80] The plaintiff brought an action against the defendants alleging a number of claims, including a violation of section 240(1) of the Labor Law.[81] The defendants brought motions for summary judgment to dismiss the complaint, and the supreme court granted the motions of the defendants.[82] The appellate division affirmed, with two justices dissenting.[83] As of right, the plaintiff appealed.[84]

In a unanimous decision written by Judge Smith, the Court of Appeals affirmed the lower court's decision and dismissed the plaintiff's section 240 claim.[85] The Court reviewed the history of section 240 of the Labor Law in its decision and noted that the Labor Law protection had never been granted to someone in the plaintiff's position.[86] The Court did recognize that there has never existed a specific limitation to the protection granted to just construction practices and noted that for the most part, it has generally applied the protection of the statute in commercial window washing situations.[87] But in this case, the Court determined that the activity that the plaintiff was doing at the time of the accident was not commercial cleaning in the normal sense of the word, but went beyond a point that the Court has never gone, and in this case, refused to go.[88] As a result, the Court dismissed the plaintiff's complaint. Ironically, in the last paragraph of the Court's decision, Judge Smith wrote the following:

> Indeed, the logic of plaintiff's argument here would expand the protections of Labor Law § 240 (1) even beyond manufacturing

78. N.Y. LAB. LAW § 240(1) (McKinney 2014).
79. *Dahar*, 18 N.Y.3d at 523, 964 N.E.2d at 403, 941 N.Y.S.2d at 32.
80. *Id.*
81. *Id.*
82. *Id.* at 523-24, 964 N.E.2d at 403, 941 N.Y.S.2d at 32.
83. *Id.* at 524, 964 N.E.2d at 403, 941 N.Y.S.2d at 32; Dahar v. Holland Ladder & Mfg. Co., 79 A.D.3d 1631, 1632, 1634, 914 N.Y.S.2d 817, 818, 820 (4th Dep't 2010) (majority opinion and Lindley and Green, JJ., dissenting).
84. *Dahar*, 18 N.Y.3d at 524, 964 N.E.2d at 403, 941 N.Y.S.2d at 32.
85. *Id.*
86. *Id.* at 525, 964 N.E.2d at 404-05, 941 N.Y.S.2d at 33-34.
87. *Id.* at 525, 964 N.E.2d at 405, 941 N.Y.S.2d at 34.
88. *Id.*

> activities; the statute would encompass virtually every "cleaning" of any "structure" in the broadest sense of that term. Every bookstore employee who climbs a ladder to dust off a bookshelf; every maintenance worker who climbs to a height to clean a light fixture– these and many others would become potential Labor Law § 240 (1) plaintiffs. We decline to extend the statute so far beyond the purposes it was designed to serve.[89]

In *Soto v. J. Crew, Inc.*, the plaintiff was a maintenance worker that was employed by a cleaning company to perform daily maintenance at a J. Crew retail store in downtown Manhattan.[90] While there, he was asked by one of the J. Crew employees to clean a six-foot high display.[91] The plaintiff, who was five feet ten inches tall, used a four-foot ladder to get to the top of the display case so he could dust it using a "high duster."[92] As he was dusting the display, the ladder fell over, and the plaintiff was injured.[93] The Court determined that this is the type of "cleaning" that was not contemplated to be covered by section 240(1) of the Labor Law.[94] In making that determination, the Court found that this type of "custodial" cleaning is not the type of cleaning that the statute was intended to include.[95] In doing so, the Court distinguished the facts of this case from the window washer cases that do get the protection of the statutes and those other protected activities that include construction and repair work, but not general maintenance work.[96]

In coming to this conclusion, the Court noted that the primary reason for the enactment of the Labor Law in the State of New York was the protection of workers in the field of construction, who, if they do their job in another less-risky profession, would not be as likely to be injured.[97] Unlike construction workers and window washers, general maintenance has always been an area where courts have held that the Labor Law does not apply. Indeed, a custodial or routine maintenance worker is much less likely to be in a position where there is an escalated likelihood of harm.[98] Noteworthy, in deciding the case, the Court looked at the type of activity being done by the worker, the nature of the tools being used by the worker, and the usual risks involved with the work being done. Here, the

89. *Dahar*, 18 N.Y.3d at 526, 964 N.E.2d at 405, 941 N.Y.S.2d at 34.
90. 21 N.Y.3d 562, 564, 998 N.E.2d 1045, 1046, 976 N.Y.S.2d 421, 422 (2013).
91. *Id.*
92. *Id.* at 564-65, 998 N.E.2d at 1046, 976 N.Y.S.2d at 422.
93. *Id.* at 565, 998 N.E.2d at 1046, 976 N.Y.S.2d at 422.
94. *Id.* at 569, 998 N.E.2d at 1049, 976 N.Y.S.2d at 425.
95. *Soto*, 21 N.Y.3d at 569, 998 N.E.2d at 1049, 976 N.Y.S.2d at 425.
96. *Id.* at 566-69, 998 N.E.2d at 1047-49, 976 N.Y.S.2d at 423-25.
97. *See id.* at 566, 998 N.E.2d at 1047, 976 N.Y.S.2d at 423.
98. *Id*. at 568, 998 N.E.2d at 1048, 976 N.Y.S.2d at 424.

Court found that custodial type work was the kind that was never intended to be included for protection under the Labor Law.[99]

In order to see if the activity is one that should be covered, the Court devised a four-point test to make such a determination: (1) Is the "cleaning" routine?; (2) Does the work require special equipment or expertise?; (3) Does the work involve generally insignificant elevation risks comparable to those involved in general household domestic or cleaning?; (4) Does the type of work being done comply with the core purpose of section 240(1), or is it unrelated to construction, repair, renovation, painting alteration or project repair?[100] While noting that the presence or absence of any one or more of the above might be helpful, it is not dispositive.[101] All must be reviewed in totality to give a full and complete idea of the type of work being performed.[102]

In *Bish v. Odell Farms Partnership*, the plaintiff was a cement truck driver and operator, who had made a delivery of cement at the defendant farm.[103] The defendant farm owner was in the process of building a new silo on the property.[104] The plaintiff was charged by his employer to deliver and unload cement at the construction site and then return to get another load until there was no more cement needed.[105] After delivering a load of concrete and operating the truck to actually get the load of concrete into place, the plaintiff drove his truck to a ditch on the defendant's property and began to clean the truck.[106] While climbing down a ladder affixed to the side of the truck, after washing the top of the truck, the plaintiff slipped and fell into the creek and was injured.[107]

The plaintiff then brought suit against the defendant alleging violation of section 240(1) of the Labor Law.[108] In the defense of the action, the defendant claimed that the plaintiff's actions were not covered by the Labor Law because at the time of his accident, he was cleaning the truck and was not at all involved in the construction of the silo.[109] The plaintiff contended that he was involved in construction because he was continually bringing concrete to the construction job and unloading the concrete, and then doing the necessary cleaning of the truck that had to

99. *Id.* at 568, 998 N.E.2d at 1049, 976 N.Y.S.2d at 425.
100. *Soto*, 21 N.Y.3d at 568, 998 N.E.2d at 1049, 976 N.Y.S.2d at 425.
101. *Id.* at 569, 998 N.E.2d at 1049, 976 N.Y.S.2d at 425.
102. *Id*.
103. 119 A.D.3d 1337, 1337, 989 N.Y.S.2d 719, 720 (4th Dep't 2014).
104. *Id*.
105. *Id*. at 1339, 989 N.Y.S.2d at 722 (Whalen, J., dissenting).
106. *Id.* at 1337, 989 N.Y.S.2d at 720.
107. *Id.*
108. *Bish*, 119 A.D.3d at 1337, 989 N.Y.S.2d at 720.
109. *Id*. at 1338, 989 N.Y.S.2d at 721.

be done before the plaintiff could get another load.[110] The court, in a 4-1 decision, found that the plaintiff was engaged in general cleaning and maintenance and not in any type of construction.[111] The majority noted that the plaintiff was not at the construction site at the time he fell and was not actively engaged in construction at that time.[112] The court also pointed to the fact that the plaintiff cleaned the truck as a regular occurrence each time he delivered a load, which was routine maintenance and cleaning, and that none of that was specifically related to the construction of the silo.[113] The dissent urged that the actions taken by the plaintiff were, in fact, ancillary to the construction of the silo, as he would not only drive the cement to the site, but he would also unload the cement and then wash the truck for the purpose of getting another load to bring back to the construction site.[114] As a result, the dissent urged that there were questions of fact that had to be resolved by a jury, and that the summary judgment motion of the defendant should be denied.[115] Nonetheless, the majority made the decision that the activities that the plaintiff was involved in were not such as was intended to be covered under Labor Law section 240(1).[116]

C. The Distinction between Repair and Routine Maintenance in a 240(1) Action

In another case that dealt with the issue of whether the activity of the plaintiff was protected under Labor Law section 240(1) during the *Survey* year was *Soriano v. St. Mary's Indian Orthodox Church of Rockland, Inc.*[117]

In *Soriano*, the First Department was called upon to decide a case where the plaintiff was an experienced glazier with approximately forty-three years of experience in the glass window business, who was contracted by the church to repair cracked glass panels in the skylight that were part of the church's steeple.[118] To get to the steeple, the plaintiff placed a twelve or fourteen foot extension ladder that belonged to the church on the roof so that he could reach the skylight.[119] As he climbed the ladder, the bottom of the ladder kicked out, and the plaintiff and the

110. *Id*.
111. *Id*. at 1338, 989 N.Y.S.2d at 721-22.
112. *Id*. at 1337, 989 N.Y.S.2d at 720.
113. *Bish*, 119 A.D.3d at 1338, 989 N.Y.S.2d at 721.
114. *Id*. at 1339, 989 N.Y.S.2d at 722 (Whalen, J., dissenting).
115. *Id*. (Whalen, J., dissenting).
116. *Id*. at 1338, 989 N.Y.S.2d at 721.
117. 118 A.D.3d 524, 525, 988 N.Y.S.2d 58, 60 (1st Dep't 2014).
118. *Id*.
119. *Id*.

ladder fell twenty feet to the roof below and he was injured.[120]

After discovery was completed, the plaintiff moved for summary judgment relying on section 240(1) of the Labor Law and the defendant crossed moved.[121] The Supreme Court, New York County, found in favor of the defendant and granted summary judgment dismissing the plaintiff's complaint on the basis that the work activity that the plaintiff was involved in at the time of the fall was routine maintenance, and not repair, or construction, or some other protected activity under the statute.[122] The plaintiff appealed, and the Appellate Division, First Department, reversed the decision of the supreme court, making the determination that the plaintiff's activities were repair in nature and not routine maintenance.[123] The court relied heavily on the affidavit of the plaintiff who said that the windows he was replacing were made of "heavy plate glass" with wire running through them and that the windows simply "do not crack or wear out over time."[124] The plaintiff showed, without contradiction, glass window panes were being replaced not because of wear and tear, as they were not expected to be replaced regularly.[125] The defendant failed to produce any evidence that would support the claim that this was a regular occurrence or a routine maintenance issue.[126] The court found that this was an isolated event that damaged the windows, not a routine or recurrent condition.[127]

D. Sole Proximate Cause and the Application of 240(1) with Stilts

The issue of whether an accident was the plaintiff's sole proximate cause came up as a claimed complete defense in the Fourth Department case of *Nicometi v. Vineyards of Fredonia, LLC*.[128]

In *Nicometi*, the plaintiff was installing insulation on the ceiling of the property owned by the defendant.[129] To get to the ceiling, the plaintiff used stilts that were attached to his lower extremities, which allowed him to get the height to place the insulation on the ceiling.[130] While doing so, he stepped on ice that had accumulated on the construction site and was

120. *Id.*
121. *Id.*
122. *Soriano*, 118 A.D.3d at 525, 988 N.Y.S.2d at 60.
123. *Id*. at 527, 988 N.Y.S.2d at 62.
124. *Id*.
125. *Id.*
126. *Id.*
127. *Soriano*, 118 A.D.3d at 526-27, 988 N.Y.S.2d at 61-62 (citing Dos Santos v. Consol. Edison of N.Y., Inc., 104 A.D.3d 606, 607, 963 N.Y.S.2d 12, 13 (1st Dep't 2013)).
128. 107 A.D.3d 1537, 1539, 967 N.Y.S.2d 563, 564 (4th Dep't 2013).
129. *Id.* at 1538, 967 N.Y.S.2d at 564.
130. *Id.*

injured.[131] The plaintiff brought action claiming a violation of section 240(1) of the Labor Law, among other claims.[132] The defendant moved at Supreme Court, Erie County, for an order dismissing the plaintiff's complaint, based on the fact that the plaintiff was allegedly told by his employer to avoid the icy portion of the floor.[133] The supreme court denied the defendant's motion, and granted the plaintiff's motion for summary judgment for the Labor Law violation.[134]

The Appellate Division, Fourth Department, in a 3-2 decision, vacated the award of judgment and found a question of fact on the issue of sole proximate cause.[135]

The defendants in the case took the position that the plaintiff's injuries were such that they were not covered under Section 240(1) of the Labor Law because he was not working at an elevated height.[136] The court found that the statute applied, finding that the fact that the plaintiff had the stilts on at the time of the accident showed there was a height variation between where the materials were being used and the floor, and that the plaintiff was in fact working at an elevated height.[137] However, the court found that the defendants raised a question of fact whether the plaintiff, because of his own alleged misuse of the stilts, and/or because of the communications from the employer, was the sole proximate cause of his injuries.[138]

In a written memorandum in which Justices Fahey and Whalen join, the dissent argued that the majority has erred in deciding that there was a question of fact concerning the issue of whether the plaintiff's actions were the sole proximate cause of his injuries.[139] The court noted that in the deposition of the plaintiff's supervisor, the supervisor was aware of the ice on the ground, but yet did not place any warning barriers, signs, or other such items so as to protect the plaintiff.[140] The dissent went on to say that even if the plaintiff did receive the proper protection, he still should recover as that protective device (the stilts) were not so properly placed so as to prevent plaintiff's injury.[141] This matter is on its way to the Court of Appeals as a matter of right, and the decision there will no

131. *Id.*
132. *Id.*
133. *Nicometi*, 107 A.D.3d at 1538-39, 967 N.Y.S.2d at 564-65.
134. *Id.* at 1538, 967 N.Y.S.2d at 563.
135. *Id.* at 1539, 967 N.Y.S.2d at 564-65.
136. *Id.* at 1538, 967 N.Y.S.2d at 564.
137. *Id.* at 1538, 967 N.Y.S.2d at 564.
138. *Nicometti*, 107 A.D.3d at 1539, 967 N.Y.S.2d at 565.
139. *Id.*
140. *Id.*
141. *Id.* at 1540, 967 N.Y.S.2d at 566.

doubt be the subject of report in next year's *Survey*.

II. MEDICAL MALPRACTICE

A. Late Claims in the Case of Infants

Last year's *Survey* discussed several issues dealing with filing late claims under General Municipal Law section 50(e) in Medical Malpractice cases.[142] This year, the Appellate Division, First Department, was confronted with the case of *Abad v. New York City Health and Hospitals Corp.*[143]

The *Abad* case dealt with a claim of obstetrical medical malpractice that occurred at the time of the birth of Serial Abad in September of 2002.[144] After the delivery, the infant Abad was discharged from the defendant hospital on September 13, 2002 and thus the ninety-day time period to file a notice of claim under 50(e) of the General Municipal Law would have expired.[145] In June of 2004, the plaintiff was diagnosed with pervasive developmental disorder ("PDD"), but it was not until May of 2005 that the plaintiff's attorney first filed a notice of claim upon the defendant alleging malpractice.[146]

The plaintiff thereafter started an action in supreme court in January 2006, but then waited until 2009 to move for an order deeming the 2005 notice timely served *nunc pro tunc*, or alternatively granting the plaintiff the right to file another notice of claim.[147] The Supreme Court, Bronx County, denied the plaintiff's motion for late filing, and the plaintiff appealed.[148] The Appellate Division, First Department, affirmed the lower court decision noting that the decision to make such an order is in the broad discretion of the motion term court.[149] In this case, because of prejudice to the defendant as a result of the delay which was set out in the defendant's motion papers, the court felt it was appropriate to deny the plaintiff's motion.[150] The defendant claimed prejudice because there was nothing in the medical records and nothing in the communications that occurred since then that would put the plaintiff on notice of a potential

142. John C. Cherundolo, *Tort Law, 2012-13 Survey of New York Law*, 64 SYRACUSE L. REV. 551, 908-26 (2014).
143. 114 A.D.3d 564, 980 N.Y.S.2d 450 (1st Dep't 2014).
144. *Id.* at 564-65, 980 N.Y.S.2d at 451.
145. *Id.*
146. *Id.* at 565, 980 N.Y.S.2d at 451.
147. *Id.*
148. *Abad*, 114 A.D.3d at 564, 980 N.Y.S.2d at 451.
149. *Id.* at 564, 980 N.Y.S.2d at 451.
150. *Id.* at 565, 980 N.Y.S.2d at 452.

malpractice claim.[151] The court relied heavily on the fact that nothing in the records supported a history of a hypoxic event, and the plaintiff's fetal heart strips from the labor were reassuring at all times.[152] The infant plaintiff's APGAR scores were 8/10, and there was no other evidence that would support any sort of an anoxic event happening in the hospital at birth.[153] The court noted that the plaintiff's infancy status weighed heavily on the side of granting the plaintiff's motion, but the plaintiff's counsel, who had been aware of the case since at least May of 2005, did not offer any excuse for the delay since 2005 and moving for leave in 2009.[154] As a result, the plaintiff's motion was denied and the case was dismissed.[155]

In *Ingutti v. Rochester General Hospital*, the plaintiff was admitted to the hospital with acute pancreatitis, acute alcohol intoxication, alcohol withdrawal, and delirium tremors.[156] The plaintiff left the hospital against medical advice, and when found several hours later, had severe frostbite injuries to his hands and body.[157] The plaintiff brought action against the defendant hospital alleging negligence in not stopping the plaintiff from leaving the hospital and for not continuing to treat the patient while he was at the hospital.[158] The defendant moved for summary judgment on the basis that there is no duty in the State of New York to keep a patient in the hospital against his will.[159] The Supreme Court, Monroe County, denied the defendant's motion, and the defendant appealed.[160] In a 3-2 decision, the Fourth Department found that there was no duty in the State of New York to retain a patient forcibly when they want to leave the hospital against medical advice ("AMA").[161] Citing *Kowalski v. St. Francis Hospital & Health Centers*,[162] the court found that the hospital could not be held responsible for the plaintiff's actions, even though the staff had assured the patient's wife that they would let her know if he tried to leave, and in this case, did not.[163] The plaintiff's wife was concerned

151. *Id.*
152. *Id.* at 566, 980 N.Y.S.2d at 452.
153. *Abad*, 114 A.D.3d at 566, 908 N.Y.S.2d at 452.
154. *Id.* at 566, 980 N.Y.S.2d at 452.
155. *Id.* at 566, 980 N.Y.S.2d at 453.
156. 114 A.D.3d 1302, 1304, 980 N.Y.S.2d 692, 695.
157. *Id.* at 1302, 980 N.Y.S.2d at 693.
158. *Id.* at 1302, 980 N.Y.S.2d at 693-94.
159. *Id.* at 1302-03, 980 N.Y.S.2d at 694.
160. *Id.* at 1302, 980 N.Y.S.2d at 693.
161. *Ingutti*, 114 A.D.3d at 1302, 1303, 980 N.Y.S.2d at 693, 694.
162. 21 N.Y. 3d 480, 484-85, 995 N.E.2d 148, 150, 972 N.Y.S.2d 186, 188 (2013).
163. *Ingutti*, 114 A.D.3d at 1303-04, 980 N.Y.S.2d at 694; *see Kowalski*, 21 N.Y.3d at 485-86, 995 N.E.2d at 150, 972 N.Y.S.2d at 188.

that the plaintiff might try to leave the hospital AMA and a nurse manager assured her that she would watch the plaintiff and indicate on the chart that he was an escape risk.[164] There was evidence that the plaintiff was confused concerning direction and may have been mistaken on what time events may have happened.[165] Nonetheless, the majority held firm to the holding in *Kowalski* and found that there was no duty to restrain the plaintiff and keep him in the hospital.[166] In the dissent, Justices Sconiers and Whelan felt there were significant questions of fact that a jury should consider concerning the condition and mental status of the plaintiff and the actions of the hospital staff.[167] It is likely that this case may be the subject of next year's *Survey* report.

III. MUNICIPAL LIABILITY

A. Governmental Liability—Proprietary vs. Governmental Function

Ever since the Court of Appeals decision in *McLean v. City of New York*, the evaluation of cases against governmental entities has continuously evolved and now has apparent clarity in analysis.[168] The law that has come out of the *McLean* decision has now made it distinctly clear that governmental action, if discretionary, can never be the basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff apart from any duty owed to the public at large.[169] Thus, any time that there is a potential claim against a government entity, the plaintiff must do a structured analysis as set forth in the decision of *Applewhite v. Accuhealth, Inc.*[170] The Court of Appeals explained:

> When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties. A government entity performs a

164. *Ingutti*, 114 A.D.3d at 1304, 980 N.Y.S.2d at 695 (Sconiers and Whalen, JJ., dissenting).

165. *Id*. (Sconiers and Whalen, JJ., dissenting).

166. *Id*. at 1303, 980 N.Y.S.2d at 694 (majority opinion).

167. *Id*. at 1304, 980 N.Y.S.2d at 695 (Sconiers and Whalen, JJ., dissenting).

168. 12 N.Y.3d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009); *see* Valdez v. City of New York, 18 N.Y. 3d 69, 960 N.E.3d 356, 936 N.Y.S.2d 587 (2011); *see* Kircher v. City of Jamestown, 74 N.Y.2d 251, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989).

169. *See McLean*, 12 N.Y.3d at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244; *Valdez*, 18 N.Y.3d at 75, 960 N.E.2d at 361, 936 N.Y.S.2d at 592.

170. 21 N.Y.3d 420, 425, 995 N.E.2d 131, 134, 972 N.Y.S. 2d 169, 172 (2013).

> purely proprietary role when its "activities essentially substitute for or supplement traditionally private enterprises." In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are "undertaken for the protection and safety of the public pursuant to the general police powers."[171]

1. First, a court must decide whether the municipality was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. If the municipality's actions fall on the proprietary side, then the municipality is subject to suit under the ordinary rules of negligence applicable to non-governmental parties.[172]

This first rule of determining governmental liability was the subject of *Wittorf v. City of New York*, a case decided by the Court of Appeals in June 2014.[173] In *Wittorf*, a Department of Transportation ("DOT") employee of the City of New York and his crew were working on the 65th Street traverse to repair a defective roadway.[174] The crew closed the entrance to the traverse and found the area of the traverse which had the stretch of bad road.[175] The employee then went to the west entrance of the traverse and began to put cones up to prevent travelers from entering the traverse.[176] As he was placing the cones, the plaintiff and her friend were bicycling along the roadway and asked the employee whether they could ride through the traverse.[177] The employee responded that it was "okay to go through."[178] As the couple rode their bicycles through the dark traverse, the plaintiff hit one of the defects in the road, fell, and was injured.[179]

The plaintiff then commenced an action against the City of New York alleging that the employee and the City were negligent and that the negligence caused the plaintiff's injuries.[180] A jury found in favor of the plaintiff, finding her 40% responsible for the injuries and the City 60% responsible.[181] After the verdict, the City moved to set aside the verdict on the grounds that the City employee was acting in a governmental

171. *Id*. (citations omitted).

172. *See In re* World Trade Center Bombing Litig., 17 N.Y.3d 428, 446-447, 957 N.E.2d 733, 744-45, 933 N.Y.S.2d 164, 175-76 (2011) (citing Weiner v. Metro. Transp. Auth., 55 N.Y.2d 175, 182, 433 N.E.2d 124, 127, 448 N.Y.S.2d 141, 144 (1982)).

173. 23 N.Y.3d 473, 15 N.E.3d 333, 991 N.Y.S.2d 578 (2014).

174. *Id.* at 477, 15 N.E.3d at 334, 991 N.Y.S.2d at 579.

175. *Id*.

176. *Id.*

177. *Id.* at 477, 15 N.E.3d at 334-35, 991 N.Y.S.2d at 579-80.

178. *Wittorf*, 23 N.Y.3d at 477, 15 N.E.2d at 335, 991 N.Y.S.2d at 579.

179. *Id.* at 477, 15 N.E.3d at 335, 991 N.Y.S.2d at 580.

180. *Id.* at 477, 15 N.E.3d at 334-35, 991 N.Y.S.2d at 579-80.

181. *Id.* at 478, 15 N.E.3d at 335, 991 N.Y.S.2d at 580.

capacity at the time he allowed the plaintiff and her friend to go through the traverse, and as such, the City was immune from liability.[182] The Court granted the motion and the plaintiff appealed.[183] A divided appellate division affirmed, confirming that the City employee's actions were governmental in nature, and the appellate division granted the plaintiff leave to appeal to the Court of Appeals on a certified question.[184] Justice Manzanet-Daniels dissented, opining that the governmental employee was performing a function that was integral to his roadway maintenance duties, and as such, the actions were proprietary, not governmental.[185]

The Court of Appeals, in a 7-0 decision, reversed the appellate division, finding that the actions of the City employee were, in fact, proprietary in nature, and, as a result, liability was thereby established, and the action was remitted to supreme court for further proceedings.[186] In making the decision, Judge Graffeo, writing for the Court, reviewed the previous law of the state dealing with road construction and repair work, recognizing that road repair is often done by public entities and proprietary organizations.[187] The Court determined that the municipality has the duty to barricade or warn of dangerous defects in roadways, regardless of who or what created the defect.[188] Thus, the Court affirmed the legal rule that municipalities can be held responsible if they do not keep their roads and roadways in a reasonably safe condition.[189]

182. *Id.*

183. *Wittorf*, 23 N.Y.3d at 478, 15 N.E.2d at 335, 991 N.Y.S.2d at 580; *see* Wittorf v. City of N.Y., 33 Misc. 3d 368, 369, 928 N.Y.S.2d 842, 843 (Sup. Ct. N.Y. Cnty. 2011); *see also* Wittorf v. City of N.Y., 104 A.D.3d 584, 584, 961 N.Y.S.2d 432, 433 (1st Dep't 2013).

184. *Wittorf*, 104 A.D.3d at 584, 587, 961 N.Y.S.2d at 433, 435-36.

185. *Id*. at 588, 961 N.Y.S.2d at 437 (Manzanet-Daniels, J., dissenting).

186. *Wittorf*, 23 N.Y.3d at 480-81, 15 N.E.3d at 336-37, 991 N.Y.S.2d at 581-82.

187. *Id.* at 480, 15 N.E.3d at 336-37, 991 N.Y.S.2d at 581-82.

188. *Id*. at 479, 15 N.E.3d 336, 991 N.Y.S.2d at 581.

189. *Id*. at 481, 15 N.E.3d 337, 991 N.Y.S.2d at 582.

2. If the court determines the action to be a governmental function as opposed to proprietary, then the next question that must be asked is whether the claim involves conduct that was discretionary in nature or ministerial in nature. If the conduct is discretionary, then there is no action that can be brought against the municipal entity. If, however, the actions are ministerial in nature, then there can be action taken, as long as there is a special relationship between the municipal entity and the injured plaintiff.[190]

In a somewhat similar case, the Appellate Division, Second Department, reviewed a case in which the plaintiffs were broadsided at an intersection in Brooklyn and were injured in the crash.[191] In the case of *Miller v. City of New York*, the plaintiffs had the green light in going through the intersection, and the other vehicle had a red light.[192] However, the second vehicle was waved through into the intersection by a New York City enforcement agent (an employee of the City) that was directing traffic.[193] As the second vehicle entered the intersection after being waived through by the enforcement officer, the crash occurred and the plaintiffs were seriously injured.[194]

The plaintiffs brought actions against both the driver of the vehicle and the City of New York, alleging that the enforcement officer was negligent in waving the second vehicle into the intersection.[195] The City brought a motion for summary judgment at special term, alleging that the enforcement officer was acting in a governmental capacity when she waved the co-defendant through the intersection, and that her decision to do so was discretionary in nature, and one that she made as part of her duties.[196] The supreme court denied the motion for summary judgement, and the City appealed.[197] The Second Department, in a unanimous memorandum decision, held that the officer was acting in the scope of her duties as an employee of the City, and that at the time she was acting in a governmental capacity.[198] The court further determined that the actions she took in waving the co-defendant through the intersection were

190. *See generally* Miller v. City of N.Y., 116 A.D.3d 829, 983 N.Y.S.2d 428 (2d Dep't 2014); DiMeo v. Rotterdam Emergency Med. Servs., Inc., 110 A.D.3d 1423, 974 N.Y.S.2d 178 (3d Dep't 2013).

191. *Miller*, 116 A.D.3d at 830, 983 N.Y.S.2d at 429.

192. *Id*.

193. *Id*.

194. *Id*.

195. *Id*.

196. *Miller*, 116 A.D.3d at 830, 983 N.Y.S.2d at 429.

197. *Id*.

198. *Id*. at 830-31, 983 N.Y.S.2d at 429.

discretionary and not ministerial in nature.[199] Citing *McLean*, *Applewhite*, and *Valdez v. City of New York*,[200] the court determined that "[g]overnment 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."[201]

In another case dealing with the issue of municipal liability, the Appellate Division, Third Department, reviewed a case dealing with the nature of ambulance services and whether the activities of a governmental ambulance company are governmental or proprietary in nature. In *DiMeo v. Rotterdam Emergency Medical Services, Inc.*, the plaintiff awoke with chest pains and shortness of breath.[202] Fearing a heart attack, the deceased's spouse called 911 for an ambulance, and the dispatcher sent a paramedic that was employed by the Town of Rotterdam and an ambulance that was owned by the Rotterdam Emergency Medical Services, Inc. ("REMS") to the house.[203] The family requested that the patient be brought to a hospital in the City of Albany, which was further away than the closest hospital, and the paramedic determined that, in his opinion, the patient was stable enough to withstand the longer trip to the Albany hospital.[204] However, as the ambulance was in route, the patient's condition worsened, and the patient was in cardiac arrest on arrival to the hospital.[205] Despite life saving measures, the patient died one week after the event.[206]

The plaintiff then brought a wrongful death action against the town, alleging negligence as against the paramedic, as well as REMS and the dispatcher for not having the paramedic go to the hospital in the ambulance with the patient.[207] The defendants moved for summary judgment, and the Supreme Court, Schenectady County, dismissed the action.[208] On appeal, the Third Department conducted the standard assessment to determine if liability actions could be maintained against

199. *Id*. at 830, 983 N.Y.S.2d at 429.

200. *Id*.

201. *Miller*, 116 A.D.3d at 830, 983 N.Y.S.2d at 429 (alteration in original) (quoting Valdez v. City of N.Y., 18 N.Y.3d 69, 76-77, 960 N.E.2d 356, 361, 936 N.Y.S.2d 587, 593 (2011) (quoting McLean v. City of N.Y., 12 N.Y.3d 194, 203, 905 N.E.2d 1167, 1173-74, 878 N.Y.S.2d 238, 244-45 (2009))) (internal quotation marks omitted); *see also* Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 425, 995 N.E.2d 131, 134, 972 N.Y.S.2d 169, 172 (2013).

202. 110 A.D.3d 1423, 1423, 974 N.Y.S.2d 178, 179 (3d Dep't 2013).

203. *Id*.

204. *Id*. at 1423-24, 974 N.Y.S.2d at 179.

205. *Id*. at 1424, 974 N.Y.S.2d at 179.

206. *Id*.

207. *DiMeo*, 110 A.D.3d at 1424-25, 974 N.Y.S.2d at 179-80.

208. *Id*. at 1423-24, 974 N.Y.S.2d at 179.

the named municipal entities and whether the activities of the Town and REMS were governmental or proprietary in nature.[209] The court found that the actions of the Town were governmental in nature and that the actions of the dispatcher and the paramedic were discretionary, thus defeating any claim that the plaintiff may try to make against the municipality.[210] With regard to REMS, the court likewise dismissed the action against it, holding that the paramedic had no duty to go with the ambulance to the hospital, and that REMS could not force him to go.[211] The paramedic made a discretionary decision that the decedent was stable enough to go to the hospital without him, and the Emergency Medical Technicians ("EMTs") present had to defer to his judgment.[212]

The court also found that given the proximity to the hospital at the time of cardiac arrest, the EMTs' decision not to use the automated external defibrillator on board the ambulance was understandable, and the failure to do advanced medical care on board was also beyond the EMT's scope of duty and learning.[213] The court decided that the case must be dismissed because the court found "[t]here [wa]s no proof that the EMTs [departed] from the acceptable standard of care or that their actions caused [the] decedent harm."[214] Also, with regard to the issue of causation, there was no proof submitted that any different or earlier treatment would have made a difference in the final outcome.[215]

3. If the actions are governmental in nature, and if the actions are ministerial, then the plaintiff must prove the presence of a special relationship between the municipal entity and the plaintiff in order for the plaintiff to be able to recover.[216]

In a case that actually included much of the evaluation that now needs to be accomplished in a municipal law case, the Appellate Division, Second Department, decided the case of *Benn v. New York Presbyterian Hospital*.[217] In that case, the infant plaintiff was on her way to school and

209. *Id.* at 1424-26, 974 N.Y.S.2d at 179-81.
210. *Id.* at 1424-25, 974 N.Y.S.2d at 180.
211. *Id.* at 1425, 974 N.Y.S.2d at 181.
212. *DiMeo*, 110 A.D.3d at 1425, 974 N.Y.S.2d at 181
213. *Id.* at 1426, 974 N.Y.S.2d at 181.
214. *Id.*
215. *Id.*
216. *See generally* Williams v. Weatherstone, 23 N.Y.3d 384, 15 N.E.3d 792, 991 N.Y.S.2d 779 (2014); Benn v. N.Y. Presbyterian Hosp., 120 A.D.3d 453, 990 N.Y.S.2d 584 (2d Dep't 2014); Gilberti v. Town of Spafford, 117 A.D.3d 1547, 985 N.Y.S.2d 787 (4th Dep't 2014).
217. 120 A.D.3d 453, 990 N.Y.S.2d 584.

had exited a city bus near her school, P.S. 99 in New York City.[218] She began to cross the street to get to her school when she came to the Coney Island Avenue.[219] There was a school crossing guard at Coney Island Avenue, and the infant plaintiff, upon getting to the crossing, began to cross with the light in her favor.[220] As she crossed the lanes of traffic, the light changed, and turned green for the traffic going through that intersection.[221] The crossing guard, a City employee, saw an ambulance approaching which was on an emergency call.[222] She attempted to stop the infant plaintiff from crossing by blowing her whistle, and then by raising her arm, but the infant plaintiff was struck by the ambulance as it came through the intersection.[223]

The mother of the infant then brought action against the City, the ambulance, the hospital that owned the ambulance, and the New York City Police Department.[224] With regard to the claims against the City, the plaintiff alleged that the crossing guard was negligent in failing to stop the child before she was struck by the ambulance.[225] The City then made a motion for summary judgment, and the supreme court denied the motion.[226] On appeal, the Second Department reviewed each of the defendants' contentions raised in the motion for summary judgment, including the contentions that the crossing guard's actions were discretionary in nature and the claim that there was no special relationship created between the crossing guard and the infant plaintiff.[227]

The court looked at the issue of special relationship and reviewed the facts in the case with regard to the claim of the defendants that there was no special relationship upon which a claim can be based against the City.[228] In part of the review, the court set forth the general principles in evaluating whether there exists a special relationship in the case as follows:

> "To impose liability [upon a municipality], there must be a duty that runs from the municipality to the plaintiff. We have recognized a narrow class of cases in which a duty is born of a special relationship

218. *Id.* at 453-54, 990 N.Y.S.2d at 586.
219. *Id.* at 454, 990 N.Y.S.2d at 586.
220. *Id.* at 454, 990 N.Y.S.2d at 586.
221. *Id.* at 454, 990 N.Y.S.2d at 586-87.
222. *Benn*, 120 A.D.3d at 454, 457, 990 N.Y.S.2d at 586-87, 589.
223. *Id*. at 454, 457, 990 N.Y.S.2d at 587, 589.
224. *Id*. at 454, 990 N.Y.S.2d at 587.
225. Benn v. N.Y. Presbyterian Hosp., No. 15281/08, 2012 N.Y. Slip Op. 51034(U), at 1-2 (Sup. Ct. Kings Cnty. 2012).
226. *Id.* at 7.
227. *Benn*, 120 A.D.3d at 454-57, 990 N.Y.S.2d at 587-89.
228. *Id.* at 456-57, 990 N.Y.S.2d at 588-89.

> between the plaintiff and the governmental entity." One of the ways that a special relationship arises is when the municipality "assumes a duty that generates justifiable reliance by the person who benefits from the duty."[229]

The court went on to say:

> The issue of whether a municipality has assumed an affirmative duty that resulted in justifiable reliance by the plaintiff requires: "(1) an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of a 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) that party's justifiable reliance on the municipality's affirmative undertaking."[230]

Based on the facts before the court, the court held that there was a question of fact on the issue of special relationship, the motion to dismiss was denied, and the supreme court decision was affirmed.[231]

With regard to the issue of the analysis of discretion versus ministerial, the appellate division found that there was a question of fact as to whether the crossing guard's actions were discretionary or ministerial.[232] The court also found that the defendants failed to establish prima facie entitlement as a matter of law.[233] Based on the defendants' submissions, "the City . . . failed to eliminate all triable issues of fact," and the motion was denied.[234]

In a similar case decided during the *Survey* year, the Court of Appeals decided the case of *Williams v. Weatherstone*.[235] In *Williams*, the infant plaintiff was waiting at her usual bus stop in the morning when her bus drove past her and the stop and continued in a westerly direction down the highway some distance.[236] Upon realizing that he missed a stop, the bus driver made a U-turn, with the idea of driving back in an easterly

229. *Id.* at 456, 990 N.Y.S.2d at 588 (quoting Pelaez v. Seide, 2 N.Y.3d 186, 198-99, 810 N.E.2d 393, 399-400, 778 N.Y.S.2d 111, 117-18 (2004); see Flagstar Bank, F.S.B. v. State, 114 A.D.3d 138, 143-44, 978 N.Y.S.2d 266, 270-71 (2d Dep't 2013)).

230. *Id.* at 456-57, 990 N.Y.S.2d at 588-89 (quoting *Pelaez*, 2 N.Y.3d at 202, 810 N.E.2d at 401, 778 N.Y.S.2d at 119); see Cuffy v. City of N.Y., 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987); Matican v. City of N.Y., 94 A.D.3d 826, 828, 941 N.Y.S.2d 698, 699 (2d Dep't 2012); Vandewinckel v. Northport/E. Northport Union Free Sch. Dist., 24 A.D.3d 432, 433, 805 N.Y.S.2d 133, 135 (2d Dep't 2005).

231. Benn, 120 A.D.3d at 457-58, 990 N.Y.S.2d at 589.

232. *Id.* at 457, 990 N.Y.S.2d at 589.

233. *Id.*

234. *Id.*

235. 23 N.Y.3d 384, 15 N.E.3d 792, 991 N.Y.S.2d 779 (2014).

236. *Id.* at 391, 15 N.E.3d at 794, 991 N.Y.S.2d at 781.

direction up past the infant's bus stop and house, at which point he planned to do another U-turn to again go in the westerly direction, and pick the infant plaintiff up at her established stop at the foot of the driveway to her house.[237] However, after the bus sped past the infant in the first instance, the infant saw that the bus was slowing down to make a U-Turn.[238] Thinking that the driver planned to meet her on the other side of the street, the infant plaintiff began to run across the street so as to meet the bus on the other side.[239] As she crossed the street, she was struck by co-defendant Weatherstone's vehicle and was seriously injured.[240]

The day before the incident, the infant plaintiff's usual bus and driver were re-routed because a new family had moved into the neighborhood, and as a result, the driver on the morning of the accident was a new driver, who simply forgot to stop at the infant plaintiff's house.[241] The on-bus monitor saw the infant as they drove past and alerted the driver that he had missed her stop.[242] Neither the driver nor the monitor signaled in any way to the infant.[243] The police investigation showed that the accident occurred because of "pedestrian error" and because the Weatherstone's vehicle was being driven with frost on the windshield.[244] The plaintiff's mother brought the action on behalf of the injured child against the driver of the Weatherstone vehicle and also the school district, alleging negligence against the defendants.[245] The school district made a motion for summary judgment dismissing the case on the basis "that it owed no duty to a student not within its physical care or custody and that . . . the [claimed] negligence was not a proximate cause of [the infant's] injuries."[246] The Supreme Court, Onondaga County, denied the defendant's motion to dismiss, finding that a district owes students the "duty to exercise the same degree of care as a reasonably prudent parent" during the time that the student is within the custody of the district.[247] The defendant district appealed, and the Appellate Division, Fourth Department, in a 3-2 decision, agreed with Onondaga County Supreme Court and found that there existed questions of fact "as

237. *Id*. at 391, 15 N.E.3d at 794-95, 991 N.Y.S.2d at 781-82.
238. *Id*. at 392, 15 N.E.3d at 795, 991 N.Y.S.2d at 782.
239. *Id.*
240. Williams, 23 N.Y.3d at 391, 15 N.E.3d at 795, 991 N.Y.S.2d at 782.
241. *Id*. at 390-91, 15 N.E.3d at 794, 991 N.Y.S.2d at 781.
242. *Id.* at 391, 15 N.E.3d at 794, 991 N.Y.S.2d at 781.
243. *Id.*
244. *Id.* at 391-392, 15 N.E.3d at 795, 991 N.Y.S.2d at 782.
245. *Williams*, 23 N.Y.3d at 392, 15 N.E.3d at 795, 991 N.Y.S.2d at 782.
246. *Id.*
247. *Id.*

to whether the [d]istrict's . . . negligence proximately caused the accident."[248] The court found, however, that the supreme court should have found for the defendant on the issue of violation of the Vehicle and Traffic Law.[249]

The dissenting justices would have dismissed the plaintiff's case in its entirety in reliance on the lead decisions in the area,[250] *Pratt v. Robinson*[251] and *Norton v. Canandaigua City School District*.[252] The dissent also refused to endorse the plaintiff's contention "that the [d]istrict 'assumed a duty to the child as a [result] of the potentially [dangerous] situation . . . created by the . . . bus driver . . . .'"[253] Leave to appeal was granted, and the appellate division certified the question: "'Was the order [of the Appellate Division] . . . properly made?'"[254]

The Court of Appeals found, based on the record before the Court, that the infant plaintiff never left the custody and control of her parents on the date of the accident.[255] The Court placed great reliance on the fact that the parents trusted the infant to wait by herself at the established bus stop, and as a result, the child was never within the custody and control of the district that morning.[256] Additionally, the Court found that there was no special duty or relationship that existed from the district to the child.[257] The plaintiff had urged that because of the child's Individualized Education Program ("IEP"), there existed a special duty owed to the child by the district.[258] The Court looked closely at the IEP and found by the direct interpretation of the document, all that was established by the document in the context of a relationship was that the district was to provide bus services to the infant.[259] There was no provision for any special services beyond that.[260] Thus, there was no relationship created that was any different than that existing for all the other students that were provided bussing services in the district, and as a result, no special duty was owed.[261]

248. *Id.* at 393, 15 N.E.3d at 795-96, 991 N.Y.S.2d at 782-83.
249. *Id.* at 393-94, 15 N.E.3d at 796, 991 N.Y.S.2d at 783.
250. *Williams*, 23 N.Y.3d at 394, 15 N.E.3d at 796, 991 N.Y.S.2d at 783.
251. 39 N.Y.2d 554, 349 N.E.2d 849, 384 N.Y.S.2d 749 (1976).
252. 208 A.D.2d 282, 624 N.Y.S.2d 695 (4th Dep't 1995).
253. *Williams*, 23 N.Y.3d at 394, 15 N.E.3d at 796, 991 N.Y.S.2d at 783.
254. *Id.* at 394-95, 15 N.E.3d at 797, 991 N.Y.S.2d at 784 (alteration in original).
255. *Id.* at 403, 15 N.E.3d at 803, 991 N.Y.S.2d at 790.
256. *Id.*
257. *Id.* at 402-03, 15 N.E.3d at 802-03, 991 N.Y.S.2d at 789-90.
258. *Williams*, 23 N.Y.3d at 402, 15 N.E.3d at 802, 991 N.Y.S.2d at 789.
259. *Id.* at 402-03, 15 N.E.3d at 802-03, 991 N.Y.S.2d at 789-90.
260. *Id.* at 403, 15 N.E.3d at 802-03, 991 N.Y.S.2d at 789-90.
261. *Id.*

In a dissent authored by Judge Smith, and joined by Judge Pigott and Chief Judge Lippman, the minority made the assessment that when children are bussed, they are on "the borderline between the school's custody and the parents' control," and often times it is "difficult" to determine where one ends and the other begins.[262] Judge Smith distinguished the *Pratt* decision by showing that in this case, the child was being picked up to go to school and not being dropped off at the end of the day, as in the *Pratt* case.[263] The minority felt that was a major difference between the cases and that issue alone called for a reversal of the Court of Appeals' finding.[264] Judge Smith also noted that the infant child "went into the street [only as a] direct re[sult of] the bus driver's . . . negligent maneuver," making the U-Turn after passing her bus stop.[265] In conclusion, the dissent opined that the precedents of the Court of Appeals, "fairly read, compel the [existence of] a duty" in this case.[266] The dissent also found that, weak as it may be, the plaintiff did prove enough of a causation claim to create a question of fact.[267] Thus, the dissent would have given the infant child her day in court and affirmed the order of the appellate division.[268] Nonetheless, as harsh as the result may be, the plaintiff's claim was dismissed.[269]

In what may have been the clearest statement of the law in a municipal liability case, the Appellate Division, Fourth Department, in the case of *Gilberti v. Town of Spafford*, determined that a municipality's "'operation, maintenance and repair of [its] sewer system is a proprietary function'" and not a governmental function.[270] As a result, in making such a claim, the plaintiff need not prove a special relationship existed between the Town and the plaintiff such that a special duty would be created.[271] On the contrary, once the municipality acts in a proprietary manner, the municipality can be sued just as any other citizen of the State.[272] In the

262. *Id.* at 404, 407, 15 N.E.3d at 803, 805, 991 N.Y.S.2d at 790, 792.

263. *Williams*, 23 N.Y.3d at 404-05, 15 N.E.3d at 804, 991 N.Y.S.2d at 791 (Smith, J., dissenting) (citing Pratt v. Robinson, 39 N.Y.2d 554, 556, 349 N.E.2d 849, 850, 384 N.Y.S.2d 749, 750 (1976)).

264. *Id.* at 405-06, 15 N.E.3d at 804-05, 991 N.Y.S.2d at 791-92 (Smith, J., dissenting).

265. *Id.* at 405, 15 N.E.3d at 804, 991 N.Y.S.2d at 791.

266. *Id.* at 406, 15 N.E.3d at 805, 991 N.Y.S.2d at 792.

267. *Id.*

268. *Williams*, 23 N.Y.3d at 406, 15 N.E.3d at 805, 991 N.Y.S.2d at 792.

269. *Id.* at 407, 15 N.E.3d at 805, 991 N.Y.S.2d at 792.

270. 117 A.D.3d 1547, 1549, 985 N.Y.S.2d 787, 789 (4th Dep't 2014) (citation omitted).

271. *Id.*

272. *Id.* at 1548-49, 985 N.Y.S.2d at 789 (citing Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 425, 995 N.E.2d 131, 134, 972 N.Y.S.2d 169, 172 (2013); McLean v. City of N.Y., 12 N.Y.3d 194, 199, 905 N.E.2d 1167, 1171, 878 N.Y.S.2d 238, 242 (2009); Valdez v.

Gilberti action, the plaintiff had suffered significant property damage as a result of the Town's drainage system overflowing and catastrophically failing, thus forcing a flood of water through the plaintiff's property and the plaintiff's house.[273] The plaintiff claimed that the sewer system was not adequately designed and that the Town was negligent, careless, and reckless in not taking proper care of the drainage system in a reasonably prudent manner.[274] The claims included, among others, the Town's "excessive deepening of the drainage ditches during cleanings in the summer and fall of 2007;" the failure to remove debris that clogged two pipes in the storm water system; and the "failure to repair the crushed ends of [two pipes] prior to th[e] storm.[275] The court found these actions/omissions to be proprietary in nature, and as a result, the defendant's motion to dismiss was properly denied by the supreme court.[276]

IV. PRODUCT LIABILITY

A. The Court of Appeals Rejects Medical Monitoring Case for Former Cigarette Smokers

There were a number of noteworthy cases that were reported in the area of product liability during the *Survey* year, and the cases reported not only made new legal policy but also affirmed some long lasting theories of law from older decisions.

One case that developed new policy in the State was the case of *Caronia v. Philip Morris USA, Inc*.[277] In *Caronia*, the plaintiffs were all current and/or former cigarette smokers of Marlboro cigarettes, with smoking histories of twenty pack-years or more.[278] The plaintiffs brought an action against the defendant seeking to recover on an equitable claim for medical monitoring as a result of smoking the defendant's cigarettes.[279] None of the plaintiffs suffered any of the common diseases that have been related to smoking, such as cancer, nor were they under investigation by a physician for suspected lung cancer.[280]

The plaintiffs collectively, as a putative class, brought action against

City of N.Y., 18 N.Y.3d 69, 75-76, 960 N.E.2d 356, 361-62, 936 N.Y.S.2d 587, 592-93 (2011)).

273. *Id.* at 1547-48, 985 N.Y.S.2d at 788-89.
274. *Id.* at 1547, 985 N.Y.S.2d at 788.
275. *Gilberti*, 117 A.D.3d at 1549, 985 N.Y.S.2d at 790.
276. *Id.* at 1547, 1549-50, 985 N.Y.S.2d at 788, 790.
277. 22 N.Y.3d 439, 5 N.E.3d 11, 982 N.Y.S.2d 40 (2013).
278. *Id.* at 445, 5 N.E.3d at 13, 982 N.Y.S.2d at 42.
279. *Id.*
280. *Id.*

Philip Morris USA, Inc. in product liability theories of negligence, strict liability, and breach of implied warranty of merchantability.[281] The plaintiffs requested the creation of a court-supervised medical monitoring program that would provide them with low-dose CT scanning of the chest, at the defendant's expense, which plaintiffs argued would be effective in the early detection of lung cancer.[282] When discovery was complete, the defendant moved for summary judgment, and the federal district court granted the motion with regard to the negligence and strict product liability claims but ordered further briefing on the breach of warranty claims and on the issue of whether an independent cause of action for medical monitoring would be consistent with New York law.[283] The federal district court dismissed the breach-of-warranty claims, and also dismissed the medical monitoring claims, in the process holding that even though the New York courts would likely recognize such a claim, the plaintiffs failed to allege that it was because of the tortious conduct of the defendant that such a program was needed.[284] On appeal to the Second Circuit Court of Appeals, the court affirmed the dismissal of all of the product liability claims, but certified the question of whether New York law is consistent with the medical monitoring claims to the New York Court of Appeals.[285] In doing so, the Second Circuit certified the following question:

> Under New York Law, may a current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease?
>
> If New York recognizes such an independent cause of action for medical monitoring,
>
> (A) What are the elements of that cause of action?
>
> (B) What is the applicable statute of limitations, and when does that cause of action accrue?[286]

The New York Court of Appeals, in a 4-2 decision, authored by Judge Pigott, reviewed the history of torts in New York State and underscored the fundamental black-letter law that includes the

281. *Id.*

282. *Caronia*, 22 N.Y.3d at 445, 5 N.E.3d at 13, 982 N.Y.S.2d at 42.

283. *Id.*

284. *Id.* at 445, 5 N.E.3d at 14, 982 N.Y.S.2d at 43 (quoting Caronia v. Philip Morris USA, Inc., No. 06-CV-224, 2011 U.S. Dist. LEXIS 12610, at *6 (E.D.N.Y 2011)).

285. *Id.* at 445-46, 5 N.E.3d at 14, 982 N.Y.S.2d at 43.

286. *Id.* (quoting Caronia v. Philip Morris USA, Inc., 715 F.3d 417, 450 (2d Cir. 2013)) (internal quotation marks omitted).

requirement that a plaintiff must have sustained a physical harm before being able to recover in tort liability.[287] The majority reviewed the entirety of New York tort law and the appellate courts' insistence in New York that any type of medical monitoring be associated with some sort of physical injury.[288] The Court then looked to what the other states in the country have done regarding medical monitoring actions and found that while some states do allow such actions, many do not.[289] The Court then reviewed the policy issues in allowing such a claim in the State and the need to keep the resources available to fully compensate those that have suffered a real injury, before using whatever resources might be available to pay for monitoring programs on people who might never become injured because of the tortious conduct of the defendant.[290] But the Court did recognize the policy reasons for allowing such a claim, including the possibility of early detection and treatment, not only mitigating the disease, but also reducing costs to the tortfeasor.[291] But then, Judge Pigott warned that "the potential systemic effects of creating a new, full-blown, tort law cause of action cannot be ignored."[292]

The Court reasoned that to open such a new body of tort claims could lead to tens of millions of potential plaintiffs seeking to recover monitoring costs, while at the same time depleting the resources of those who have really been injured and need the resources to treat the injuries already sustained.[293] Additionally, the Court also noted that it was speculative, at best, whether any, some, or all would ever become afflicted with the disease, and to give them the money for medical monitoring would only serve the inequitable diversion of money away from those who have actually suffered an injury.[294] The Court concluded that there can be no independent cause of action for medical monitoring, but such claims must be reserved to those that have already suffered physical injury.[295] As a result, the first certified question from the Second

287. *Caronia*, 22 N.Y.3d at 446, 460, 5 N.E.3d at 14, 24, 982 N.Y.S.2d at 43, 53.

288. *Id.* at 448, 5 N.E.3d at 16, 982 N.Y.S.2d at 45 (citing Abusio v. Consol. Edison Co., 238 A.D.2d 454, 454, 656 N.Y.S.2d 371, 372 (2d Dep't), *lv. denied*, 90 N.Y.2d 806, 686 N.E.2d 1363, 664 N.Y.S.2d 268 (1997)).

289. *Id.* at 450, 5 N.E.3d at 17, 982 N.Y.S.2d at 46.

290. *Id.* at 451, 5 N.E.3d at 17-18, 982 N.Y.S.2d at 46-47.

291. *Id.* (quoting Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 431 (W. Va. 1999))

292. *Caronia*, 22 N.Y.3d at 451, 5 N.E.3d at 17-18, 982 N.Y.S.2d at 46-47 (quoting Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 443 (1997)) (internal quotation marks omitted).

293. *Id.* at 451, 5 N.E.3d at 18, 982 N.Y.S.2d at 47 (citation omitted).

294. *Id.*

295. *Id.* at 452, 5 N.E.3d at 18, 982 N.Y.S.2d at 47.

Circuit was answered in the negative and the remaining questions were moot.[296]

Chief Judge Lippman, writing for the two dissenters, disagreed with the majority and stated that the answer to the first certified question should be in the affirmative.[297] Judge Lippman noted that the Court is confronted by a defendant that has conceded that the cigarettes they sell do have carcinogenic effects, and plaintiffs who, with early detection of any possible related cancers, with technology available that can find local tumors much earlier than ever before, will have a much better outcome with a medical monitoring program in place.[298] The minority position then was stated with elegant clarity by the Chief Judge when he wrote: "In sum, where a defendant's alleged misconduct causes severe harm, and the opportunity exists to save lives and alleviate suffering, countervailing public policy considerations must be extraordinarily compelling to justify such an 'absolute failure of justice.' The majority's justifications fall short of the mark."[299]

Chief Judge Lippman went on to dismiss the majority's warning concerning the runaway claims that would be presented, noting that each claim would have to have adequate proof before entry into the monitoring plan would be allowed.[300] Additionally, the dissent points out that the courts are a good and reliable entity to administer such a monitoring program, using the state of Maryland as an example.[301] Chief Judge Lippman closed the dissent by saying: "In the face of such circumstances, the majority resolutely stands frozen in time as it denies plaintiffs the opportunity to take advantage of life-saving technology. This result is indefensible when equitable relief is well within the province of this Court."[302]

For now, at least, it does not appear as though medical monitoring will exist as an independent equitable remedy in the State of New York.

296. *Id.* at 452, 5 N.E.3d at 19, 982 N.Y.S.2d at 48.

297. *Caronia*, 22 N.Y.3d at 453, 5 N.E.3d at 19, 982 N.Y.S.2d at 48 (Lippman, C.J., dissenting).

298. *Id.* (Lippman, C.J., dissenting).

299. *Id.* at 455-56, 5 N.E.3d at 21, 982 N.Y.S.2d at 50 (Lippman, C.J., dissenting) (quoting Strusburgh v. Mayor of N.Y., 87 N.Y. 452, 456 (1882)).

300. *Id.* at 457-59, 5 N.E.3d at 22-23, 982 N.Y.S.2d at 51-52 (Lippman, C.J., dissenting).

301. *Id.* at 460, 5 N.E.3d at 24, 982 N.Y.S.2d at 53 (Lippman, C.J., dissenting).

302. *Caronia*, 22 N.Y.3d at 460, 5 N.E.3d at 24, 982 N.Y.S.2d at 53 (Lippman, C.J., dissenting).

B. A PJI 2:15 Charge cannot be Charged to the Jury in a Product Liability Case

Another major case that was decided by the Court of Appeals during the *Survey* year was *Reis v. Volvo Cars of North America.*[303]

In *Reis*, the plaintiff was showing his newly purchased Volvo station wagon to his friend.[304] The plaintiff asked the owner of the vehicle if he could start the engine, and the owner then walked around to the driver's side window, reached his arm in to hold onto the ignition key, and turned the engine to the on position.[305] When that happened, the vehicle lurched forward, pinned the plaintiff against a wall and caused serious injuries.[306] The Volvo was equipped with a manual transmission and the starter and/or transmission was not equipped with starter interlock, which would make it so the vehicle would not start without the brake being depressed.[307]

The plaintiff then brought an action alleging claims of negligence, failure to warn, and strict liability in tort as against the defendant, Volvo, USA.[308] The proof at trial centered around a design defect and a failure to warn claim, with much of the proof being what other automobile manufacturers provided as safety devices in the United States at the time of the original sale of the station wagon and up to the time of the injury.[309] The plaintiff proved that General Motors, Ford, and Toyota used starter interlocks in 1987 (the year of manufacture of the subject vehicle), and as a result most of the automobiles sold in the United States in 1987 had the starter interlocks included as a safety device on the automobiles.[310] When the proof was completed, the plaintiff asked that the court charge Pattern Jury Instructions ("PJI") sections 2:15 and 2:16 when the court charged the jury.[311] Over the objection of Volvo, the charges were submitted to the jury.[312] The jury was asked the following questions on the jury verdict sheet: "'Was the defendant Volvo negligent in failing to use a starter interlock device in its vehicle?' and also 'Was the defendant Volvo's vehicle not reasonably safe in that it was defective without a

303. 24 N.Y.3d 35, 18 N.E.3d 383, 993 N.Y.S.2d 672 (2014).
304. *Id.* at 38-39, 18 N.E.3d at 385, 993 N.Y.S.2d at 674.
305. *Id.* at 39, 18 N.E.3d at 385, 993 N.Y.S.2d at 674.
306. *Id.*
307. *Id.*
308. *Reis*, 24 N.Y.3d at 44, 18 N.E.3d at 389, 993 N.Y.S.2d at 678 (Graffeo, J., dissenting).
309. *Id.* at 39, 18 N.E.3d at 385, 993 N.Y.S.2d at 674.
310. *Id.*
311. *Id.*
312. *Id.*

starter interlock device?'"[313] The jury answered "yes" to the first question and "no" to the second question.[314] The jury also found for the plaintiff on the failure to warn claims and awarded damages totaling roughly $10,000,000.[315]

After the verdict, the appellate division determined that the failure to warn claim was to be dismissed, as there was no evidence that any such failure caused the injuries.[316] Both parties appealed to the appellate division, which affirmed the trial court's actions concerning the issues of liability.[317] Specifically, the appellate division found that the trial court did not commit error by charging 2:15 and 2:16.[318] Two of the appellate justices dissented and voted to remand the case for another trial because they felt it was an error for the lower court to charge PJI 2:16, as there was no proof of a customary procedure or policy that was "reflective of an industry standard or a generally-accepted safety practice."[319]

Volvo then appealed to the Court of Appeals as of right, and at that time, urged that the lower courts erred by giving the PJI charges 2:15 and 2:16.[320] The Court found, in a written decision by Judge Smith, that the PJI charge 2:15 should not have been given to the jury.[321] The Court noted that the particular charge was a charge distinctly related to medical malpractice cases and even though the PJI committee promoted the charge for use in cases involving skilled trades and to professions not thought of in connection with malpractice, there was no case that the courts have decided where the charge had been used in a negligent design or design defect case.[322] In writing that the difference between the "community" and "reasonable person" standards is a subtle one, the Court found that presenting this charge as the supreme court did was an error.[323] However, even with the error, if the charge as a whole laid out the general negligence principles, then the Court would feel comfortable

313. *Reis*, 24 N.Y.3d at 40, 18 N.E.3d at 385-86, 993 N.Y.S.2d at 674-75.

314. *Id.* at 40, 18 N.E.3d at 386, 993 N.Y.S.2d at 675.

315. *Id.*

316. *Id.* (quoting Reis v. Volvo Cars of N. Am., Inc., 73 A.D.3d 420, 423, 901 N.Y.S.2d 10, 13 (1st Dep't 2010)).

317. *Id.* (citing generally Reis v. Volvo Cars of N. Am., Inc., 105 A.D.3d 663, 964 N.Y.S.2d 125 (1st Dep't 2013)).

318. *Reis*, 24 N.Y.3d at 40, 18 N.E.3d at 386, 993 N.Y.S.2d at 675 (quoting *Reis*, 105 A.D.3d at 664, 964 N.Y.S.2d at 128).

319. *Id.* (quoting *Reis*, 105 A.D.3d at 665, 964 N.Y.S.2d at 129 (Abdus-Salaam, J., dissenting)).

320. *Id.* at 41, 18 N.E.3d at 386, 993 N.Y.S.2d at 675.

321. *Id.* at 41, 18 N.E.3d at 387, 993 N.Y.S.2d at 676.

322. *Id.* at 42, 18 N.E.3d at 387, 993 N.Y.S.2d at 676.

323. *Reis*, 24 N.Y.3d at 42-43, 18 N.E.3d at 388, 993 N.Y.S.2d at 677.

that the jury was not led astray.[324] In this case, the Court had no such confidence.[325]

The Court determined that 2:15 is reserved for malpractice cases because the standard of care for malpractice cases is quite different from general negligence cases.[326] The Court noted that a doctor or a lawyer are held to the standard of care that exists among their peers in the community.[327] Generally, the standard of care for a physician is one established by the physicians themselves.[328] That is not so with other general negligence cases.[329] In these cases, the jury must compare the actions of the alleged offenders in accord with a reasonable person under the same circumstances.[330] In other words, would a reasonable person, using the risk utility test, deem the product to be not reasonably safe?[331] Noting the inconsistency in the jury's answers, the Court felt that they may have been confused, and as a result, decided that the case must be sent back for another trial, and at the new trial, PJI 2:15 should not be charged to the jury.[332] The Court also looked at the issue concerning 2:15 and the "Business Practice" charge.[333] The Court concluded that the charge was properly given to the jury, as it asks the jury to make their own determination whether there was a business practice or a standard to which companies like Volvo must comply.[334] Thus, the wording of the charge is adequate to lead the jury to the appropriate analysis, and the charge should be given.[335] As a result, the Court found that the appellate court's order should be reversed, and a new trial was ordered.[336]

Writing in dissent, Judge Graffeo noted that with the use of PJI 2:15, the Court's charge instructed the jury that the degree of care owed by Volvo was that of a reasonably prudent manufacturer.[337] Also, Judge Graffeo noted, this particular charge was submitted at the request of Volvo.[338] Also, the dissent noted that 2:16 was charged to the jury after

324. *Id.* at 43, 18 N.E.3d at 388, 993 N.Y.S.2d at 677.
325. *Id.*
326. *Id.* at 42, 18 N.E.3d at 387, 993 N.Y.S.2d at 676.
327. *Id.*
328. *Reis*, 24 N.Y.3d at 42, 18 N.E.3d at 387, 993 N.Y.S.2d at 676.
329. *See id.*
330. *Id.*
331. *Id*. at 42, 18 N.E.3d at 388, 993 N.Y.S.2d at 677.
332. *Id.* at 43, 18 N.E.3d at 388, 993 N.Y.S.2d at 677.
333. *Reis*, 24 N.Y.3d at 39, 44, 18 N.E.3d at 385, 388, 993 N.Y.S.2d at 674, 677.
334. *Id.* at 44, 18 N.E.3d at 388, 993 N.Y.S.2d at 677.
335. *Id.*
336. *Id.* at 44, 18 N.E.3d at 389, 993 N.Y.S.2d at 678.
337. *Id.* at 46, 18 N.E.3d at 390, 993 N.Y.S.2d at 679 (Graffeo, J., dissenting).
338. *Reis*, 24 N.Y.3d at 46, 18 N.E.3d at 390, 993 N.Y.S.2d at 679 (Graffeo, J., dissenting).

2:15, and if there was any inconsistency, it was certainly alleviated by the later charge.[339] In conclusion, the dissent would affirm the appellate division order.[340]

C. Claim of Foreseeable Misuse and Foreseeable Alteration goes to Jury

In *In re Hoover v. New Holland North America, Inc.*, the plaintiff was a young 16-year-old girl who was seriously injured when she was caught and dragged into the rotating driveline of a tractor-driven post hole digger distributed by defendants CNH America and sold by defendant Niagara Frontier Equipment Sales, Inc.[341] Prior to the accident happening, the owner of the machine had removed a plastic guard that covered the gear box input shaft and most of the U-joint including a protruding nut and bolt which protruded beyond the yolks collar outer surface.[342] The machine owner allowed the plaintiff's stepfather to use the machine, and Hoover was not aware when he borrowed the digger that presumably would have prevented the accident from occurring, which it would have covered the gear box assembly and the U joint yolk that is secured to the gear box input shaft using the bolt that extended beyond the yolks collar and outer surface.[343]

On the day of the injury, the plaintiff never had occasion to use the digger before.[344] It was her first time, and she was wearing flip flops, a tank top, and a loose fitting outer shirt that got caught on the bolt, and she was then sucked into the machine, seriously injuring her.[345] Plaintiff's right arm was severed above the elbow, and she also sustained other severe injuries to her left scapula, left clavicle, and right humerus.[346] Plaintiff commenced the product liability action alleging negligence and strict products liability for manufacturing defect, design defect, and failure to warn.[347] At the deposition of the owner of the digger, the defendant Smith testified that he purchased the vehicle in 1966 to dig holes for plants in the vineyard.[348] Apparently some of the holes that needed to be dug were deeper than the auger, and he would drill the holes down to the U bolt joint each time banging and damaging the plastic

339. *Id.*
340. *Id.*
341. 23 N.Y.3d 41, 46, 48, 11 N.E.3d 693, 696-97, 988 N.Y.S.2d 543, 546-47 (2014).
342. *Id.*
343. *Id.* at 47-48, 11 N.E.3d at 697, 988 N.Y.S.2d at 547.
344. *Id.* at 48, 11 N.E.3d at 697, 988 N.Y.S.2d at 547.
345. *Id.* at 48, 11 N.E.3d at 697, 988 N.Y.S.2d at 547-48.
346. *Hoover*, 23 N.Y.3d at 48, 11 N.E.3d at 697, 988 N.Y.S.2d at 547-48.
347. *Id.* at 48, 11 N.E.3d at 697, 988 N.Y.S.2d at 548.
348. *Id.*

shield that was affixed to protect users from being involved with the pinched point and the bolt assembly.[349] Over the course of time the shield became significantly damaged and worthless.[350] As a result, the defendant Smith removed the shield, and did not get a new one, as he felt that would only get damaged as well and would be more of a nuisance than a safety device.[351]

The defendant manufacturer, Alamo/SMC Corporation, defended the product liability action alleging a *Robinson v. Reed-Prentice Division of Package Machinery Co.*[352] misuse and alteration theory saying that the guard was in place when the product was originally sold, and only by virtue of the actions of the owners was the guard then removed thus causing the open pinch point to exist that eventually led to the plaintiff's injuries.[353] The manufacturer also defended on the basis that the manual warned users not to submerge the auger beyond the flighting (the spiral blade on the auger shaft) because, as stated in the manual, "this will cause binding and overloading."[354] The manual does not and did not warn that the gear box safety shield could become damaged if it contacts the ground.[355] The defendant owner of the machine testified that he did replace some of the pieces of the machine, including the auger, but did not replace the shield because it was "only going to get bent up, broke up, or tore off again."[356] A new shield could have been purchased from the dealer for forty dollars and installed in about fifteen to thirty minutes using regular tools that he had in his toolbox.[357]

Following discovery, all defendants moved for summary judgment, and the defendant manufacturer asserted, under *Robinson*, that when the digger was sold it was safe at that time, and it was only because of the removal of the shield and the failure to replace it that the product became dangerous.[358] The defendants further alleged that the owner misused the digger by regularly allowing the shield to contact the ground, and that he abused the machine by using it with such high frequency in his

349. *Id.* at 49, 11 N.E.3d at 697, 988 N.Y.S.2d at 548.

350. *Id.* at 49, 11 N.E.3d at 698, 988 N.Y.S.2d at 548; *see also Hoover*, 23 N.Y.3d at 62, 11 N.E.3d at 707-08, 988 N.Y.S.2d at 558 (Smith, J., dissenting).

351. *Hoover*, 23 N.Y.3d at 49, 11 N.E.3d at 698, 988 N.Y.S.2d at 548.

352. 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

353. *Hoover*, 23 N.Y.3d at 51, 11 N.E.3d at 699, 988 N.Y.S.2d at 549 (citing *Robinson*, 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717).

354. *Id.* at 49, 11 N.E.3d at 697, 988 N.Y.S. at 548.

355. *Id.* at 49, 11 N.E.3d at 698, 988 N.Y.S.2d at 548.

356. *Id.*

357. *Id.*

358. *Hoover*, 23 N.Y.3d at 51, 11 N.E.3d at 699, 988 N.Y.S.2d at 549.

vineyard.[359] The defendants further argued that it had no duty to furnish a machine that cannot be abused and that will otherwise not wear out and that it was inexcusable that the owner failed to spend the small amount of time that it would have taken and the expense necessary to replace the shield before the accident.[360] The plaintiff opposed the motion for summary judgment alleging that there were two design defects, the protruding nut and bolt at the U joint connection and the plastic shield that wore out, that broke up, and was ultimately removed.[361] The testimony from various engineers also supported plaintiff's assertion that there were questions of fact concerning the foreseeability of the owner's conduct when the shield was removed as to whether the shield was defectively designed.[362] The supreme court granted summary judgment to the extent of dismissing plaintiff's manufacturing defect and failure to warn claims.[363] However, the court denied summary judgment with regard to the design defect claims that were asserted against the defendants.[364] On the third day of trial, many of the defendants settled with the plaintiff.[365] The trial thereafter continued as against the appealing defendants on the basis of the design defect claim.[366]

The jury returned a verdict in favor of the plaintiff in an amount of $8,811,587.29 and apportioned liability 35% to CNH, 30% to SMC, 30% to the owner, 3% to the plaintiff's stepfather, and 2% to the distributor.[367] The defendants moved for summary judgment notwithstanding the verdict and also sought to set aside the verdict on the basis that the verdict was against the weight of the evidence.[368] The court denied all motions and entered judgment on behalf of the plaintiff, and the defendants appealed.[369] The appellate division affirmed saying that the plaintiff presented sufficient evidence that the digger was defectively designed and that the owner's removal of the damaged gear box did not constitute a "substantial modification."[370] The Court of Appeals affirmed the appellate division's decision, reaffirmed the judgment, and found that the plaintiff established material issues of fact sufficient to overcome

359. *Id.*
360. *Id.* at 51, 11 N.E.3d at 699, 988 N.Y.S.2d at 549-50.
361. *Id.* at 51, 11 N.E.3d at 699, 988 N.Y.S.2d at 550.
362. *Id.* at 51-52, 11 N.E.3d at 699-700, 988 N.Y.S.2d at 550.
363. *Hoover*, 23 N.Y.3d at 52, 11 N.E.3d at 700, 988 N.Y.S.2d at 550.
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.* at 53, 11 N.E.3d at 700, 988 N.Y.S.2d at 551.
368. *Hoover*, 23 N.Y.3d at 53, 11 N.E.3d at 700, 988 N.Y.S.2d at 551.
369. *Id.*
370. *Id.* at 53, 11 N.E.3d at 700-01, 988 N.Y.S.2d at 551.

defendants' substantial modification defense.[371] In affirming, the fact that the guard had been destroyed by years of wear and tear and would no longer stay attached to the digger and essentially ceased to provide protection from the rotating components near the gearbox supported the Court's decision.[372] The Court noted that unlike the employer in *Robinson*, the owner did not modify the digger in order to circumvent the utility of the shield or adapt the digger to his own needs, but rather removed the shield because of its lack of functional utility as it had been destroyed in time and use of the machine.[373] Plaintiff had also proffered an expert affidavit at the time of the motion for summary judgment that averred that the shield was "not reasonably safe" because it was "not designed to last the life" of the digger, and the defendants failed to incorporate a safer yet feasible alternative design, such as a guard that would be an integral part of the machine or a metal shield that would have prevented the accident.[374] The "defendants did not adequately refute [the] plaintiff's assertions that the plastic shield failed prematurely under the circumstances presented" in the case.[375] The Court also found that, under the circumstances, the actions of the owner were foreseeable and that to the extent that there was any misuse, the misuse was a foreseeable misuse, which does not have the impact of negating a plaintiff's claim for damages.[376]

Judge Smith dissented and argued that the fact that the machine came with safety decals warning in large letters against the operation without a safety shield illustrated with a simple drawing what could happen if the warnings were disregarded, and included warnings in the operator's manual including one that said "never operate machinery without all shields" in place.[377] The manual also warned the operator "IMPORTANT: Do not allow the auger to penetrate the ground to a depth where the flighting [a helical blade] is submerged."[378] Recognizing that the farmer ignored all of these warnings, and then chose to not get a replacement shield for forty dollars, Judge Smith asserted that this was a

371. *Id.* at 57, 11 N.E.3d at 704, 988 N.Y.S.2d at 554.

372. *Hoover*, 23 N.Y.3d at 57, 11 N.E.3d at 704, 988 N.Y.S.2d at 554.

373. *Id.* (citing Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 481, 403 N.E.2d 440, 444, 426 N.Y.S.2d 717, 721 (1980)).

374. *Id.* at 51-52, 57, 11 N.E.3d at 699-700, 704, 988 N.Y.S.2d at 550, 554 (internal quotation marks omitted).

375. *Id.* at 58, 11 N.E.3d at 704, 988 N.Y.S.2d at 554.

376. *Id.* at 61, 11 N.E.3d at 706-07, 988 N.Y.S.2d at 557.

377. *Hoover*, 23 N.Y.3d at 62, 11 N.E.3d at 707, 988 N.Y.S.2d at 558 (Smith, J., dissenting).

378. *Id.* (alteration in original) (emphasis in original omitted) (Smith, J., dissenting).

"substantial modification" which fell under the rule of *Robinson*.[379] Judge Smith argued that "the post-hole digger in this case *was* safe at the time of sale," and was safe while the safety shield remained in place.[380] Chief Judge Lippman, along with Judges Graffeo, Reed, Pigott, and Rivera, concurred with Judge Abdus-Salaam who wrote the decision.[381] Judge Smith was the lone dissenter in the case.[382]

D. The Ever-Changing Law of Jurisdiction in the Court of Appeals

The United States Supreme Court, in January of 2014, decided the case of *Daimler AG v. Bauman*.[383] In that case, the plaintiffs were twenty-two residents of Argentina that filed suit in a California Federal District Court against DaimlerChrysler, a German public stock company and predecessor to Daimler AG.[384] The complaint alleged that "Daimler's Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina) collaborated with state security forces" during Argentina's 1976-1983 war, "to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs."[385] The action was brought under the Alien Tort Statute and the Tort Victim Protection Act of 1991, as well as California and Argentina Law.[386] The Supreme Court held that the defendant was not amenable to suit in the state of California for injuries that were allegedly caused by the conduct of a separate corporation, Mercedes-Benz of Argentina, and that took place entirely outside of the United States.[387]

Shortly thereafter, in July of 2014, the Appellate Division, Third Department, was called upon to determine whether there was personal jurisdiction against another German company, Hetronic Deutschland, in a product liability action pending in New York State.[388]

In *Darrow v. Hetronic Deutschland*, the plaintiff "was operating a boom with a radio remote control manufactured by [the German] defendant when the boom inadvertently engaged and crushed Darrow

379. *Id.* at 62-63, 11 N.E.3d at 707-08, 988 N.Y.S.2d at 558 (Smith, J., dissenting) (quoting Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 479, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980)).

380. *Id.* at 63, 11 N.E.3d at 708, 988 N.Y.S.2d at 558.

381. *Id.* at 64, 11 N.E.3d at 709, 988 N.Y.S.2d at 559.

382. *Hoover*, 23 N.Y.3d at 64, 11 N.E.3d at 709, 988 N.Y.S.2d at 559.

383. 134 S. Ct. 746 (2014).

384. *Id.* at 750-51.

385. *Id.* at 751.

386. *Id.*

387. *Id.* at 762.

388. Darrow v. Hetronic Deutschland, 119 A.D.3d 1142, 1143, 990 N.Y.S.2d 150, 151 (3d Dep't 2014).

against the ground, resulting in serious injuries."[389] An action was brought against the German company.[390] The German defendant moved to dismiss the complaint for lack of personal jurisdiction, and the "[s]upreme [c]ourt stayed the motion to dismiss in order to allow the parties to conduct limited discovery on the jurisdictional issue."[391] Following the completion of that discovery, the supreme court denied the defendant's motion to dismiss, "finding that the exercise of long-arm jurisdiction over it was compatible with both CPLR 302 [Civil Practice Law and Rules] and due process."[392]

The plaintiffs in that case relied upon the New York C.P.L.R. section 302(a)(3)(ii), which gives jurisdiction over a defendant when the defendant commits a tortious act outside the State of New York that causes injuries to a person or property within the State and the defendant "expects or should reasonably expect the act to have consequences in the [S]tate and derives substantial revenue from interstate or international commerce . . . ."[393] The defendant admitted that half of its revenue came from export sales, including over one million dollars in exports to the United States in 1997, when the remote control at issue was sold.[394] The question that came before the court is whether or not the defendant should have reasonably foreseen that a defect in a manufacturing product of its radio remotes would have consequences in the State of New York.[395] The court held that that was the key link in the case as to whether or not the defendant would be reasonably required to defend itself in the State.[396]

The record reflected, after the short discovery that was done by the plaintiffs, that the defendant maintained an exclusive agreement with Hetronic USA to distribute its products to various locations within the United States, including New York.[397] Additionally, the evidence showed that Hetronic USA "affected distribution to certain states in this country through a network of regional distributors, one of which was designated to serve the New York market."[398] Additionally, the website for the defendant and other Hetronic companies showed the German defendant indeed had awareness of the network and reached the conclusion that the "defendant sought to indirectly market its product in

389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.*
393. N.Y. C.P.L.R. 302(a)(3)(ii) (McKinney 2014).
394. *Darrow*, 119 A.D.3d at 1144, 990 N.Y.S.2d at 151.
395. *Id.*
396. *Id.* at 1144, 990 N.Y.S.2d at 151-52.
397. *Id.* at 1144, 990 N.Y.S.2d at 152.
398. *Id.*

New York and, thus, should have reasonably expected a manufacturing defect to have consequences in the [S]tate."[399] The court found:

> Under the circumstances here, inasmuch as the defendant targeted New York customers through a network of distributors that rendered it likely that its products would be sold in New York, "it is not unreasonable to subject it to suit in this [S]tate if its allegedly defective merchandise has been the source of injury to a New York resident."[400]

V. MOTOR VEHICLE/NO-FAULT

A. The Court of Appeals Lessens the Proof Necessary When There is a Gap in Treatment

In *Pommells v. Perez*, decided in 2005, the Court of Appeals confronted the issue of when does a gap in treatment disqualify a plaintiff from bringing an action for "serious injury" outside to the no-fault law.[401] The Court at that time established the rule that the plaintiff must have a reasonable explanation in order to recover for pain and suffering if there is a gap in treatment of the injuries plaintiff claims to have sustained.[402]

This year, the Court of Appeals, in a 5-2 decision in *Ramkumar v. Grand Style Transportation Enterprises Inc.*, dealt with a case where the plaintiff testified at his deposition that "they" cut him off and that he did not have medical insurance at the time of the accident, and as a result he could not get treated for his injuries.[403]

The majority noted that there was no requirement that a plaintiff offer either direct documentary evidence to support his sworn statement that his no-fault benefits were cut off, or to indicate that he could not afford to pay for his own treatment.[404] The Court found that the plaintiff came forward with the bare minimum required to raise an issue of fact, and that there was "some reasonable explanation" under *Pommells* that showed the reason for the gap in treatment and the cessation of physical therapy.[405] The Court further looked at the quantitative and qualitative assessment of plaintiff's condition, as required under *Toure v. Avis Rent A Car Systems, Inc.*,[406] and found that "the physician who performed

399. *Darrow*, 119 A.D.3d at 1144, 990 N.Y.S.2d at 152.

400. *Id.* at 1145, 990 N.Y.S.2d at 152 (alteration in original omitted) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 217, 735 N.E.2d 883, 888, 713 N.Y.S.2d 304, 309 (2000)).

401. 4 N.Y.3d 566, 571-72, 830 N.E.2d 278, 280-81, 797 N.Y.S.2d 380, 382-83 (2005).

402. *Id.* at 572, 575, 580, 830 N.E.2d at 281, 283, 287, 797 N.Y.S.2d at 383, 385, 389.

403. 22 N.Y.3d 905, 906, 998 N.E.2d 801, 802, 976 N.Y.S.2d 1, 2 (2013).

404. *Id.*

405. *Id.* at 907, 998 N.E.2d at 802, 976 N.Y.S.2d at 2.

406. 98 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002).

arthroscopic surgery on plaintiff's knee" gave the opinion that the plaintiff's meniscal tear was causally related to his car accident and that the meniscus had permanently lost its stability with the onset of "scar tissue, instability, loss of range of motion, and pain, which plaintiff would have for the rest of his life."[407] Judge Smith, writing for the dissent in which Judge Read concurred, felt that the case should have been dismissed, as the majority's decision was based on the "plaintiff's ambiguous and self-serving statement at his deposition—'they cut me off like five months[.]'"[408] The dissent urged that the Court should demand more than this type of testimony in evaluating this type of an action.[409] Judge Smith further noted that the plaintiff "could have submitted an affidavit in opposition to" the motion for summary judgment identifying his no-fault carrier, and "attaching a copy of the written communication, or describing the oral one, in which the carrier cut him off" and could have given the reason why the carrier did so.[410] The plaintiff could also have said in the affidavit that he didn't have any other insurance that would pay for the care needed to treat his injured knee, but there was no such testimony as well.[411] Judge Smith finished his dissent recognizing that the majority lowered the barrier for courts and opened the door for "baseless no-fault claims" by declining to impose simple requirements that would better express the reason for gap in treatment during the course of plaintiff's post-accident time period.[412]

CONCLUSION

Clearly, there have been some significant cases in the field of products liability and municipal law that will reverberate and set newly established policy going forward in the State of New York. It appears as though the Court of Appeals is becoming more lenient with regard to no-fault claims, particularly with regard to gaps in treatment during the course of the post-accident time period. One thing that further clear—the Court has reaffirmed the fact that in a product liability action, the product must be fit not only for the intended purpose, but also for an unintended, yet foreseeable purpose, and that would include not only a foreseeable misuse of the product, but also the foreseeable alteration of the product, as long as a foreseeable injury comes from the accident. In the field of

407. *Ramkumar*, 22 N.Y.3d at 907, 998 N.E.2d at 802, 976 N.Y.S.2d at 2.
408. *Id.* at 908, 998 N.E.2d at 803, 976 N.Y.S.2d at 3 (Smith, J., dissenting).
409. *Id.* (Smith, J., dissenting).
410. *Id.* (Smith, J., dissenting).
411. *Id.* (Smith, J., dissenting).
412. *Ramkumar*, 22 N.Y.3d at 908, 998 N.E.2d at 804, 976 N.Y.S.2d at 4 (Smith, J., dissenting).

municipal law, the courts have now become accustomed to the analysis that must be done under the *McLean/Valez* decisions, recognizing that in doing that analysis, harsh results to innocent injured plaintiffs will be forthcoming.