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GML § 50-e: Time Period for Claimant to Apply for Permission to Serve Late Notice of Claim Not Tolled by Infancy Under CPLR 208

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efforts directed at the former party's attorney would transfer the burden to counsel alone either to comply and breach a confidence or not comply and personally face a contempt order.[201] It is suggested that it is unlikely that the statute contemplated such a result.

It is submitted that the *Jacqueline F.* majority neither derogated the principles upon which the attorney-client privilege is based nor diluted the strength of the privilege itself. Nevertheless, in the absence of potential harm to a child's welfare, it is suggested that the privilege should not be disregarded even where nondisclosure of the client's address may serve to evade a court order. Conceivably, resort to available enforcement procedures in that instance may be sufficient to compel disclosure.[202]

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GENERAL MUNICIPAL LAW

GML § 50-e: Time period for claimant to apply for permission to serve late notice of claim not tolled by infancy under CPLR 208

Where a notice of claim is required by statute[203] as a condition

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devices available in article 52 of the CPLR for the enforcement of money judgments. *See, e.g.*, CPLR 5222, 5251 (1978).

[201] *See* CPLR 5104 (1978); SIEGEL §§ 482-483, at 644-46. With respect to the enforcement of child custody decrees, the contempt remedy is available to "uphold judicial process and the reasonable expectations of those who turn to it." *Id.* § 481, at 645; *see* People *ex rel.* Feldman v. Warden, 46 App. Div. 2d 256, 362 N.Y.S.2d 171 (1st Dep't 1974), *aff'd mem.*, 36 N.Y.2d 846, 331 N.E.2d 631, 370 N.Y.S.2d 913 (1975) (foster mother who willfully refused to produce child in custody proceeding, with ability to do so, incarcerated for contempt until performance of act); SIEGEL, at 644 n.24.

[202] *See* notes 196, 200 & 201 *supra*.

[203] The primary purpose of modern notice of claim statutes is to permit prompt and efficient investigation of claims against municipalities. *See, e.g.*, Beary v. City of Rye, 44 N.Y.2d 398, 412-13, 377 N.E.2d 453, 458, 406 N.Y.S.2d 9, 13-14 (1978); Adkins v. City of New York, 43 N.Y.2d 346, 350, 372 N.E.2d 311, 312, 401 N.Y.S.2d 469, 471 (1977); Board of Educ. v. Heckler Elec. Co., 7 N.Y.2d 476, 483, 166 N.E.2d 666, 669, 199 N.Y.S.2d 649, 653 (1960). Although the scope of section 50-e is limited to tort suits, contract actions against municipalities may also entail the mandatory service of a timely notice of claim. *See, e.g.*, Flanagan v. Board of Educ., 63 App. Div. 2d 1013, 406 N.Y.S.2d 503 (2d Dep't 1978), *rev'd on other grounds*, 47 N.Y.2d 613, 393 N.E.2d 991, 419 N.Y.S.2d 917 (1979); Shulga v. Lewin, 415 N.Y.S.2d 765 (Civ. Ct. Kings County 1979); CPLR 9802; N.Y. EDUC. LAW § 3813(1) (McKinney Supp. 1978-1979); N.Y. LOCAL FIN. LAW § 85.10 (McKinney Pam. 1971-1979); N.Y. TOWN LAW § 65(3) (McKinney 1965); NEW YORK, N.Y. ADMIN. CODE ch. 16, § 394a-1.0 (1976). If there is no express statutory provision, service of a notice of claim is not a pre-

precedent[204] to the commencement of a tort action against a public corporation, section 50-e of the General Municipal Law mandates that the notice be served within 90 days from the time the cause of action accrues.[205] Prior to the amendment of subdivision 5 of section 50-e in 1976, courts had discretion to grant leave to serve a late notice only when the application was made within 1 year of the accrual of the plaintiff's claim, the 1-year period not subject to tolling by reason of a claimant's infancy.[206] As amended, the subdi-

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requisite to the maintenance of an action. *See* Meed v. Nassau County Police Dep't, 70 Misc. 2d 274, 332 N.Y.S.2d 679 (Sup. Ct. Nassau County 1972).

The constitutionality of notice of claim statutes in general, and as applied to infants, has been repeatedly upheld. *See* Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952); MacMullen v. City of Middletown, 187 N.Y. 37, 79 N.E. 863 (1907); Paulsey v. Chaloner, 54 App. Div. 2d 131, 388 N.Y.S.2d 35 (3d Dep't 1976), *appeal dismissed mem.*, 41 N.Y.2d 900, 362 N.E.2d 641, 393 N.Y.S.2d 1029 (1977); Guarrera v. A.L. Lee Memorial Hosp., 51 App. Div. 2d 867, 380 N.Y.S.2d 161 (4th Dep't), *appeal dismissed*, 39 N.Y.2d 942, 386 N.Y.S.2d 1029 (1976).

[204] A condition precedent is an act or event, other than a lapse of time, which must exist or occur before a duty of immediate performance of a promise arises. RESTATEMENT (SECOND) OF CONTRACTS § 250 (Tent. Draft Nos. 1-7, 1973); RESTATEMENT OF CONTRACTS § 250(a) (1932). As applied to tort claims under § 50-e of the General Municipal Law, service of a timely notice of claim is required before the municipal entity "performs its promise" to allow suits against itself. *See* Brown v. Board of Trustees, 303 N.Y. 484, 485, 104 N.E.2d 866, 869 (1952). Ordinarily, a failure to perform a condition precedent may be excused. S. WILLISTON, CONTRACTS § 676 (3d ed. 1961); *see* Winter v. City of Niagara Falls, 190 N.Y. 198, 204, 82 N.E. 1101, 1102 (1907). Types of excuses include impossibility, waiver, and estoppel. S. WILLISTON, *supra*. In *Winter*, the Court doubted that the requirement of serving a notice of claim could be waived by the authorities. 190 N.Y. at 204, 82 N.E. at 1103. Recently, however, the Court of Appeals held that a defendant may be estopped from asserting a defense of untimely service of a notice of claim where a claimant changes his position to his detriment in justifiable reliance on the actions of a governmental subdivision. Bender v. New York City Health & Hosps. Corp., 38 N.Y.2d 662, 668, 345 N.E.2d 561, 564, 382 N.Y.S.2d 18, 20-21 (1976), *rev'g* 46 App. Div. 2d 898, 361 N.Y.S.2d 939 (2d Dep't 1974), *and modifying* Economou v. New York City Health & Hosps. Corp., 47 App. Div. 2d 877, 366 N.Y.S.2d 644 (1st Dep't 1975); *see* Scibilia v. City of Niagara Falls, 44 App. Div. 2d 757, 757, 354 N.Y.S.2d 229, 230 (4th Dep't 1974); Johnson v. Board of Educ., 33 App. Div. 2d 647, 647, 305 N.Y.S.2d 89, 90-91 (4th Dep't 1969).

[205] Section 50-e(1)(a) of the General Municipal Law provides in pertinent part:

> In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action . . . against a public corporation . . . the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises.

N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney 1977).

Section 50-e itself does not require service of a notice of claim as a condition precedent to maintaining a tort action against a public corporation. Preliminary notices of claim are mandated by numerous general, special and local laws scattered throughout the state. For a partial compilation of such laws, see Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes*, TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE, 358, 420-27 (1976). Section 50-e was enacted to provide uniform time and procedural requirements for these statutes. Martin v. School Board, 301 N.Y. 233, 235, 93 N.E.2d 655, 655 (1950).

[206] The requirement under the prior law that leave to serve a late notice of claim could

vision designates the "time limited for the commencement of an action" as the outer limit within which a claimant may apply for leave to serve a late notice of claim.[207] Courts interpreting the new

not be obtained after 1 year expired from the date the claim accrued was rigid and inflexible. *See* Graziano, *supra* note 205, at 384. Courts had no power to extend the time beyond the statutory limit even in the most egregious circumstances. *E.g.*, Moore v. City of New York, 302 N.Y. 563, 96 N.E.2d 619 (1951) (insanity); Corso v. City of New York, 42 Misc. 2d 677, 248 N.Y.S.2d 816 (Sup. Ct. Queens County 1964) (amnesia). Leave to service late notice within the statutory period could be granted only where the claimant died during the 90-day period, was unable to take timely legal action by reason of infancy or physical or mental incapacitation, or delayed in serving notice because he reasonably relied on the written settlement representations of the defendant or his insurance carrier. Ch. 694, § 1, [1945] N.Y. Laws 1486-87, *as amended by* ch. 814, § 1, [1959] N.Y. Laws 2131. A claimant under infancy or suffering from mental or physical incapacity had to establish that failure to serve a notice of claim while the 90-day period required by section 50-e(1) was attributable to the disability. *Id.* This caused great hardship to infant claimants who could not establish an actual causal connection between late filing and infancy. *See, e.g.*, Santiago v. Board of Educ. of New York, 41 App. Div. 2d 616, 340 N.Y.S.2d 491 (1st Dep't 1973); Ostrander v. City of Syracuse, 40 App. Div. 2d 622, 336 N.Y.S.2d 558 (4th Dep't 1972), *aff'd mem.*, 33 N.Y.2d 960, 309 N.E.2d 132, 353 N.Y.S. 2d 732 (1974); Anderson v. County of Nassau, 31 App. Div. 2d 761, 297 N.Y.S.2d 665 (2d Dep't 1969).

Courts attempted to ease the strictness of showing a causal relationship by indulging in a presumption of an impediment due to infancy, without requiring it to be factually proven. *See* Sherman v. Metropolitan Transit Auth., 36 N.Y.2d 776, 329 N.E.2d 673, 368 N.Y.S.2d 842 (1975); Murray v. City of New York, 30 N.Y.2d 113, 282 N.E.2d 103, 331 N.Y.S.2d 9 (1972); Potter v. Board of Educ., 43 App. Div. 2d 248, 350 N.Y.S.2d 671 (1st Dep't 1974). *But see* Sherman v. Metropolitan Transit Auth., 36 N.Y.2d 776, 777-78, 329 N.E.2d 673, 674, 368 N.Y.S.2d 842, 843-44 (1975) (Gabrielli, J., dissenting).

Although the pre-amendment version of § 50-e and its predecessor local-notice-of-claim statutes explicitly stated that a court could not entertain an application for leave to serve a notice of claim after the statutory period expired, *see, e.g.*, Ch. 466, § 149, [1901] N.Y. Laws 1184, *as amended by*, ch. 452, § 261, [1912] N.Y. Laws 934-35, an exception was often made in the case of an "immature infant," Russo v. City of New York, 258 N.Y. 344, 348, 179 N.E. 762, 763 (1932); Murphy v. Village of Fort Edward, 213 N.Y. 397, 403, 107 N.E. 716, 717 (1915); Hector v. City of New York, 193 Misc. 727, 728-29, 85 N.Y.S.2d 440, 442-43 (Sup. Ct. Kings County 1948). As a matter of law, an "immature infant" was a minor under the age of 10, Russo v. City of New York, 258 N.Y. 344, 348, 179 N.E. 762, 763 (1932), although a 14 year-old could have been an immature infant, *id.* This exception was put to rest, however, in Martin v. School Bd., 301 N.Y. 233, 93 N.E.2d 655 (1950), wherein the Court of Appeals held that a court had no authority to extend the time to apply for leave to serve a late notice beyond the statutory period even in the case of an infant, *id.* at 238-39, 93 N.E.2d at 657; *see* note 218 *infra*. The harshness of the *Martin* rule became apparent in subsequent decisions. In Camarella v. East Irondequoit Cent. School Bd., 34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1974), for example, an infant's action had proceeded to the point of a jury verdict in his favor when the defendant raised the issue of the infant's untimely notice of claim on appeal for the first time. Since the statutory period for late service had long since expired, the Court had no power to grant an extension. *Id.* at 142, 373 N.E.2d at 30, 356 N.Y.S.2d at 354. The Court then commented on the need for legislative reconsideration of § 50-e. *Id.* at 142-43, 313 N.E.2d at 30, 356 N.Y.S.2d at 555.

[207] Ch. 745, § 2, [1976] N.Y. Laws 1525 (McKinney) (codified at N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977)). The 1976 amendment removed the requirement that a claimant's disability have a causal connection to the failure to serve a timely notice. *Id.; see*

provision have suggested in dicta that the tolling provisions of CPLR 208[208] apply to cases involving applications by infants to serve late notices of claim.[209] Recently, however, the Appellate Division, Second Department, in *Cohen v. Pearl River Union Free School District*,[210] held that the infancy provision of CPLR 208 does not toll the period of time within which a court may grant leave to serve a late notice of claim.[211]

In *Cohen*, the infant claimant was injured while participating in a school soccer game, and approximately 2 years later, he moved for permission to serve a late notice on the school district.[212] Originally, the Supreme Court, Rockland County, denied the motion because it had not been brought within 1 year and 90 days after the accident, "the time limited for the commencement of the action."[213]

FOURTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1976), in TWENTY-FIRST ANN. REP. OF THE N.Y. JUD. CONFERENCE 282, 301 (1976) [hereinafter cited as 1976 REPORT], and eliminated the requirement that settlement representations of a defendant be in writing, N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977); *see* 1976 REPORT, *supra*, at 302. Additional factors under the amended provision for the courts to consider in deciding the question of granting leave to serve a late notice are whether a claimant's excusable error concerned the identity of the public corporation to be sued, N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977); *see* Bender v. New York City Health & Hosps. Corp., 38 N.Y.2d 662, 345 N.E.2d 561, 382 N.Y.S.2d 18 (1974); 1976 REPORT, *supra*, at 302, whether the public corporation acquired actual knowledge of the facts constituting the claim within the 90-day period of § 50-e(1), and whether permitting late service will substantially prejudice the corporation's defense on the merits, N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977). *See* 1976 REPORT, *supra*, at 301-03.

[208] CPLR 208 provides in pertinent part:

> If a person entitled to commence an action is under a disabiity because of infancy or insanity at the time the cause of action accrues, and . . . if the time . . . is less than three years, the time shall be extended by the period of the disability.

CPLR 208 (Supp. 1979-1980). Where service of a notice of claim by an infant or disabled person under § 50-e(1)(a) is timely, courts have held that the time limitation under § 50-i for the commencement of the action is tolled by CPLR 208. Hurd v. County of Allegany, 39 App. Div. 2d 499, 502, 336 N.Y.S.2d 952, 956 (4th Dep't 1972); Corbett v. Fayetteville-Manlius Cent. School Dist., 34 App. Div. 2d 379, 380-81, 311 N.Y.S.2d 540, 541 (4th Dep't 1970); Abbatemarco v. Town of Brookhaven, 26 App. Div. 2d 664, 664, 272 N.Y.S.2d 450, 451 (2d Dep't 1966); LaFave v. Town of Franklin, 20 App. Div. 2d 738, 738, 247 N.Y.S.2d 72, 73-74 (3d Dep't 1964).

[209] Beary v. City of Rye, 44 N.Y.2d 398, 413, 377 N.E.2d 453, 458-59, 406 N.Y.S.2d 9, 14 (1978); Vega v. New York City Health & Hosps. Corp., 65 App. Div. 2d 713, 713, 410 N.Y.S.2d 594, 595 (1st Dep't 1978); McGill v. Board of Educ., 59 App. Div. 2d 888, 888, 399 N.Y.S.2d 41, 42 (2d Dep't 1977), *appeal dismissed*, 43 N.Y.2d 893, 374 N.E.2d 396, 403 N.Y.S.2d 499 (1978); *see* note 230 *infra*.

[210] 70 App. Div. 2d 94, 419 N.Y.S.2d 998 (2d Dep't 1979).

[211] *Id.* at 98, 419 N.Y.S.2d at 1001.

[212] *Id.* at 95-96, 419 N.Y.S.2d at 999. The claimant's motion was made approximately 15 months after the effective date of the amendment to section 50-e and approximately 26 months after the accident. *Id.* at 96, 419 N.Y.S.2d at 999.

[213] *Id.* at 97, 419 N.Y.S.2d at 1000.

Upon reargument, special term apparently interpreted an intervening Court of Appeals decision, *Beary v. City of Rye,*[214] as indicating that the time within which an infant may serve a notice of claim tolls during the period of his infancy. Thus, special term, citing CPLR 208, found the application timely, since it was made within 1 year and 90 days from the date the infant reached his majority.[245]

Referring to special term's reliance on *Beary* as "misplaced,"[216] the appellate division reversed. In a unanimous opinion written by Justice Titone, the court reasoned that *Beary* did not resolve the question presented, since the only issue in *Beary* was whether the 1976 amendment to section 50-e should be retroactively applied.[217] Justice Titone declared that the legislative history and judicial decisions addressing the pre-1976 version of section 50-e clearly indicated that infancy did not toll the limitation period for applying for leave to serve a late notice of claim.[218] The *Cohen* court found that in amending the section, the legislature did not contemplate a change by tolling or extending the time within which an application for late service could be considered.[219] Rather, Justice Titone viewed the amendment as a limited change intended to enlarge the class of people eligible to apply for leave to serve a late notice[220] and found no language, express or implied, that tolled the period for late service in the case of an infant claimant.[221] The court concluded that if

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[214] 44 N.Y.2d 398, 377 N.E.2d 453, 406 N.Y.S.2d 9 (1978), *discussed in The Survey,* 53 ST. JOHN'S L. REV. 107, 153 (1978).

[215] 70 App. Div. 2d at 97-98, 419 N.Y.S.2d at 1001 (2d Dep't 1979).

[216] *Id.* at 98, 419 N.Y.S.2d at 1001.

[217] *Id.*

[218] *Id.* at 101-05, 419 N.Y.S.2d at 1003-05. The court observed that in enacting § 50-e in 1945, ch. 694, § 1, [1945] N.Y. Laws 1486, the legislature specifically rejected a recommendation by the Judicial Council that would have extended the time for late service in the case of a person under a disability until a reasonable time after its removal. 70 App. Div. 2d at 100-01, 419 N.Y.S.2d at 1002-03. *See* Recommended Improvements and Unification of Requirements of Notice of Claim against Municipal Corporations, TENTH ANN. REP. N.Y. JUD. COUNCIL (1944) 265, 266.

The *Cohen* court also discussed the conflict in the trial courts with respect to the tender-years exception which was resolved in Martin v. School Bd., 301 N.Y. 233, 193 N.E.2d 655 (1950). *See* 70 App. Div. 2d at 101-04, 419 N.Y.S.2d at 1003-04; note 206 *supra.*

Additionally, Justice Titone observed that notice statutes are intended to allow municipal or public corporations the opportunity to make a prompt investigation of the incident, whereas statutes of limitations are intended to bury stale claims. 70 App. Div. 2d at 99, 419 N.Y.S.2d at 1001-02. Since the purpose of a tolling statute based on a disability is to give such person additional time to sue, the court concluded that "exceptions to a limitations statute in favor of persons under a disability should be strictly construed and never extended beyond their plain import." *Id.* at 99-100, 419 N.Y.S.2d at 1002.

[219] 70 App. Div. 2d at 105, 419 N.Y.S.2d at 1005.

[220] *Id.; see* note 207 *supra.*

[221] 70 App. Div. 2d at 105, 419 N.Y.S.2d at 1006.

the legislature had intended a tolling provision, it could have enacted implementing language in CPLR 208 when it amended section 50-e.[222]

In reaching its decision, it is submitted that the *Cohen* court misinterpreted the legislative intent underlying the 1976 amendment to section 50-e as expressed in the 1976 Judicial Conference report to the legislature.[223] The report states that "[t]he shortness of the statutory period, which even against persons under a disability runs from the happening of the event, rather than the removal of the disability . . . ha[s] produced grossly unjust results, and urgently require[s] statutory relief."[224] Immediately thereafter in the text of the report is set forth the amendment changing the period in which a court may allow a claimant to serve a late notice from within 1 year of the claim's accrual to the "time limited for the commencement of an action by the claimant against the public corporation."[225] In discussing this extension, the report comments that no attempt is made to extend the statute of limitations for the commencement of the action,[226] but the statute of limitations is tolled when the claimant is under a disability.[227] Since the statute of limitations is identical to the new statutory limit within which a late notice of claim may be served, this comment clearly indicates that the legislature intended to extend the discretionary period for serving a late notice of claim by the period of the applicable statute of limitations as tolled by CPLR 208.[228]

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[222] *Id.*

[223] 1976 REPORT, *supra* note 207, at 286-307.

[224] *Id.* at 286.

[225] *Id.* at 291.

[226] *Id.* at 303. The report comments that there is a "hands off" policy regarding any attempt to "extend the short statutes of limitation which normally govern . . . actions against a public corporation." *Id.* Under the General Municipal Law, the time period within which a claimant may commence an action against a municipal corporation is limited to 1 year and 90 days. N.Y. GEN. MUN. LAW § 50-i (McKinney 1970). This provision was enacted in 1959 on the recommendation of the Joint Legislative Committee on Municipal Tort Liability. Its purpose was to alleviate existing confusion with respect to variations in the statutes of limitations. Ch. 788, § 1, [1959] N.Y. Laws 2082.

[227] 1976 REPORT, *supra* note 207, at 303. *See* note 206 and accompanying text *supra.*

[228] *See* H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 196-97 (4th ed. 1978); *1978 Survey of New York Law: Civil Practice,* 30 SYRACUSE L. REV. 385, 393-95 (1979); *1976 Survey of New York Law: Civil Practice,* 28 SYRACUSE L. REV. 379, 382-83 (1977).

Before the Judicial Conference recommended the amendments that are now part of § 50-e, *see* 1976 REPORT, *supra* note 207, at 286-307, it had considered a study proposing amendments to section 50-e. *See* Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes,* TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 358 (1976). Rather than amending subdivision (5) of § 50-e by redefining the time within which a claimant could seek leave to serve a late notice of claim as the period of the statute

Indeed, in *Beary*, the Court of Appeals implicitly acknowledged that under the 1976 amendment, the time within which a late notice of claim may be served is tolled by a claimant's infancy. The *Beary* Court, in evaluating the retroactivity of the 1976 amendment, was sensitive to the extent to which a disability could extend the time for leave to serve a late notice.[229] Thus, the Court concluded that retroactive application of the 1976 amendment had to be limited to claims arising within 1 year of the amendment's effective date to avoid resurrecting claims that had accrued as long as 18 years ago.[230] If the *Beary* Court had not assumed that the tolling provision applied, it need not have concerned itself with stale claims.

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of limitations, Professor Graziano proposed to modify § 50-e(1) by adding a new subdivision (b). The suggested subdivision would have extended the time within which a notice of claim may be served by the length of the disability. Graziano, *supra*, at 385-86. Insertion of Professor Graziano's proposal under subdivision 1, rather than subdivision 5, would have had the effect of according an infant an absolute right to serve a notice of claim within 90 days of the date he reaches his majority. If that time expired, application could have been made for leave to serve a late notice in accordance with proposed amended subdivision (5). Graziano, *supra*, at 387, 402.

A different result obtains under the amendment that was actually enacted. The amended language is part of subdivision (5), entitled: "Application for leave to serve late notice." As enacted, the infant does not have an absolute right to serve a notice of claim within 90 days after he reaches his majority, but must seek leave to do so. Thus, the recommendation adopted by the legislature differs from the Graziano proposal, which would have conferred an absolute right to serve a late notice of claim, in that permission to serve a late notice must be sought from a court.

[229] *See Beary*, 44 N.Y.2d 398, 408, 413, 377 N.E.2d 453, 455, 458-59, 406 N.Y.S.2d 9, 11, 14 (1978).

[230] *Id.* at 413, 377 N.E.2d at 458-59, 406 N.Y.S.2d at 14 (1978). In discussing the 1976 amendment, the *Beary* Court observed:

> The outside time limit for a claimant who seeks to file belatedly was formerly "one year after the happening of the event upon which the claim is based." Under the revision, the period during which late filing may be permitted is identical with "the time limited for the commencement of an action against the public corporation." *Save where the claimant is under a disability* . . . this is one year and 90 days.

Id. at 408, 377 N.E.2d at 455, 406 N.Y.S.2d at 11 (emphasis supplied) (citations omitted). Relying on *Beary*, the first department in Vega v. New York City Health & Hosps. Corp., 65 App. Div. 2d 713, 714, 410 N.Y.S.2d 594, 595 (1st Dep't 1978), denied an infant leave to serve a late notice of claim for an injury occurring in 1963.

Indeed, in a prior case, the second department appeared to recognize that under the 1976 amendment to § 50-e, the period of time within which an infant may apply for leave to serve a late notice is tolled by infancy. In McGill v. Board of Educ., 59 App. Div. 2d 888, 399 N.Y.S.2d 41 (2d Dep't 1977), *appeal dismissed*, 43 N.Y.2d 893, 374 N.E.2d 396, 403 N.Y.S.2d 499 (1978), a pre-*Beary* case, the court refused to apply the 1976 amendment retroactively, but noted that such an application would be of no assistance to the claimant, who did not move for leave to serve a late notice within 1 year and 90 days of the time she reached her majority. *Id.* at 888-89, 399 N.Y.S.2d at 42. Thus, the second department itself implicitly assumed that the time period for serving a late notice of claim is tolled by infancy.

Finally, the *Cohen* court's restrictive interpretation of section 50-e seems to deprive the 1976 amendment of its vitality by giving it de minimus effect. Where an infant brings an action against a municipal corporation, the amendment, as interpreted in *Cohen,* merely substitutes 1 year and 90 days for the prior 1-year period as the time limitation within which an infant may apply for permission to serve a late notice of claim. This result hardly supplied the "urgently require[d] statutory relief" to which the Judicial Conference referred in its 1976 report to the legislature.[231] Further, in actions against public corporations where the applicable statute of limitations is 1 year,[232] the *Cohen* interpretation has the effect of negating the amendment and reinstating the prior law, since under either version of section 50-e the time limitation to apply for leave to serve a late notice would be 1 year from the date the cause of action accrues. Because such results were not intended by the legislative changes, other courts should not follow this rigid position.

Clara S. Licata

GENERAL OBLIGATIONS LAW

GOL § 17-103(1): Contractual provision agreed upon before cause of action accrued may not extend statute of limitations notwithstanding contrary intent of parties

Statutes of limitations are intended to protect individuals from "stale" and "vexatious" claims and the public by "giving repose to human affairs."[233] Although contracting parties have some freedom

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[231] 1976 REPORT, *supra* note 207, at 286.

[232] A public corporation includes a municipal corporation, a district corporation or a public benefit corporation. N.Y. GEN. CONSTR. LAW § 66(1) (McKinney Supp. 1978-1979). The 1-year 90-day statute of limitations prescribed by § 50-i of the General Municipal Law applies only to municipal corporations. GEN. MUN. LAW § 50-i (McKinney 1977). There are numerous public benefit corporations within the Public Authorities Law which prescribe a 1-year statute of limitations for tort claims. *E.g.,* N.Y. PUB. AUTH. LAW §§ 569-a(2), 1276(2), 1297(2), 1299-p(2) (McKinney 1970).

[233] Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 429, 248 N.E.2d 871, 872, 301 N.Y.S.2d 23, 25 (1969); *see* Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938). Although considered statutes of repose, Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 302, 200 N.E. 824, 827 (1936), statutes of limitations often may prevent the assertion of a just claim. Any resulting hardship, however, is deemed outweighed by the public interest in barring stale claims. *Id.* at 302, 200 N.E. at 827-28; Note, *Validity and Effect of Agreements Waiving the Statute of Limitations,* 1951 WIS. L. REV. 718, 718. Moreover, courts may not ignore these statutes in order to prevent an unjust result. *In re* City of New York (Elm St.), 239 N.Y. 220, 225, 146 N.E. 342, 344 (1924); *see* CPLR 201 (1972). *See generally* 1 WK&M ¶ 201.01.