St. John's Law Review

Volume 51
Number 1 *Volume 51, Fall 1976, Number 1*

Article 12

Gen. Mun. Law § 50-e: Legislature Liberalizes Notice of Claim Requirements

St. John's Law Review

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Court of Appeals' liberal interpretation of the right to counsel and privilege against self-incrimination provisions of the New York State constitution. It is hoped that this laudable policy of safeguarding these rights will continue to be vigorously applied by the judiciary of this state.

GENERAL MUNICIPAL LAW

Gen. Mun. Law § 50-e: Legislature liberalizes notice of claim requirements.

Section 50-e of the General Municipal Law requires that in any tort action against a public corporation in which a notice of claim must be served upon the corporation as a condition precedent to commencement of the action, such notice must be served within 90 days after the claim arises.[104] In apparent response to repeated judicial criticism,[105] the legislature recently amended section 50-e,[106] mitigating the harshness of some of its more stringent provisions.[107] Prior to the amendment, a claimant's slight departure from the strict prescriptions mandated by this section often enabled a munic-

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> ate, sometimes false, and inevitably incomplete descriptions of the events described.

39 N.Y.2d at 485, 348 N.E.2d at 899, 384 N.Y.S.2d at 423.

[104] N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney Supp. 1976).

[105] As long ago as 1952, the Court of Appeals, in Teresta v. City of New York, 304 N.Y. 440, 108 N.E.2d 397 (1952), acknowledged the inequities which can result from a literal enforcement of § 50-e. In *Teresta,* the Court deemed the City to have waived the notice of claim requirement when it had examined the plaintiff for his alleged injuries and yet failed to object to lack of notice until the eve of trial. Construing the section liberally, the Court noted that the statute should not be applied as "'a trap to catch the unwary or the ignorant.'" *Id.* at 443, 108 N.E.2d at 398, *quoting* Sweeney v. City of New York, 225 N.Y. 271, 273, 122 N.E. 243, 244 (1919). More recently, in Murray v. City of New York, 30 N.Y.2d 113, 282 N.E.2d 103, 331 N.Y.S.2d 9 (1972), Judge Breitel, in articulating his concern with the harsh effects of § 50-e, stated:

> Except to the practitioner who is skilled in tort cases or claims against municipalities, it is a mousetrap. Such a statute should provide a greater discretion to give relief from its requirements and, of course, to avoid obvious abuses, set forth the standards for the exercise of that greater discretion. . . .
>
> There should be prompt legislative correction of the statute.

Id. at 121, 282 N.E.2d at 108, 331 N.Y.S.2d at 16 (Breitel, J., concurring). *See also* Camarella v. East Irondequoit Cent. School Bd., 34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1974) (mem.); Sherman v. Metropolitan Transit Auth., 36 N.Y.2d 776, 777, 329 N.E.2d 673, 673, 368 N.Y.S.2d 842, 843 (1975) (Gabrielli, J., dissenting).

[106] Ch. 745, § 2, [1976] N.Y. Laws 1523 (McKinney).

[107] For an in-depth analysis of § 50-e, see Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes, to be published in* JUDICIAL CONFERENCE, TWENTY-FIRST ANNUAL REPORT (1976). Professor Graziano's report was submitted to the legislature by the Judicial Conference and provided the basis for the amendments to § 50-e.

ipality to avoid liability, notwithstanding the fact that it had actually received timely knowledge of the claim.[108] Consequently, rather than fulfilling the essential legislative purpose of the statute by ensuring that municipalities receive sufficient notice of future claims,[109] section 50-e often served instead as " 'a trap to catch the unwary or the ignorant.' "[110]

The amendments to section 50-e are aimed at correcting this situation. Subsection three, which prescribes the proper manner for service of a notice of claim, has been broadly expanded. Formerly, the statute required that notice be served on one "designated by law as a person to whom a summons in an action" could be delivered.[111] Retaining this option, the revised provision also permits notice to be served upon "an attorney regularly engaged in representing [the defendant] public corporation."[112] Furthermore, subsection three now provides that timely notice, though improperly served, will be deemed valid if either the public corporation demands examination of any interested party or the defective "notice is actually received by a proper person" and the corporation fails to reject it within 30 days of receipt.[113] As a result of this amendment, it should no longer

[108] *See, e.g.*, Moore v. New York City Hous. Auth., 35 App. Div. 2d 553, 313 N.Y.S.2d 176 (2d Dep't 1970) (mem.); Coyle v. New York City Transit Auth., 283 App. Div. 1083, 131 N.Y.S.2d 502 (2d Dep't 1954) (mem.). It should be noted, however, that courts often strove diligently to avoid the harsh effects of § 50-e. *See* note 127 *infra.*

[109] *See* N.Y. JUDICIAL COUNCIL, TENTH ANNUAL REPORT 265 (1944). *See generally* 18 E. McQUILLIN, MUNICIPAL CORPORATIONS §§ 53.151-.171 (3d ed. rev. 1963).

[110] Teresta v. City of New York, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952), *quoting* Sweeney v. City of New York, 225 N.Y. 271, 273, 122 N.E. 243, 244 (1919).

[111] N.Y. GEN. MUN. LAW § 50-e(3) (McKinney 1965) (amended 1976).

[112] N.Y. GEN. MUN. LAW § 50-e(3)(a) (McKinney Supp. 1976). In the past, if a public benefit corporation was the defendant to a lawsuit, a notice of claim erroneously served upon the municipality itself, pursuant to CPLR 311(2) or its predecessors, would be defective service as against the public corporation, despite the fact that the municipality's counsel represented the corporation as well. *See* Moore v. New York City Hous. Auth., 35 App. Div. 2d 553, 313 N.Y.S.2d 176 (2d Dep't 1970) (mem.) (service upon N.Y.C. deemed ineffective as service upon Housing Authority); Coyle v. New York City Transit Auth., 283 App. Div. 1083, 131 N.Y.S.2d 502 (2d Dep't 1954) (mem.) (service upon N.Y.C. deemed ineffective as service upon Transit Authority). *But see* Torres v. Board of Educ., 13 App. Div. 2d 948, 216 N.Y.S.2d 875 (1st Dep't 1961) (mem.); Zivyak v. Board of Educ., 282 App. Div. 704, 122 N.Y.S.2d 19 (2d Dep't 1953) (mem.) (service upon N.Y.C. deemed valid service upon Board of Education). Recently, however, a more liberal approach towards § 50-e has developed. *See* notes 122-27 and accompanying text *infra.*

[113] N.Y. GEN. MUN. LAW § 50-e(3)(c) (McKinney Supp. 1976). Should the corporation return the defective notice within the 30-day period, the claimant has 10 days from receipt of the returned notice to serve a corrected notice of claim. N.Y. GEN. MUN. LAW § 50-e(3)(d) (McKinney Supp. 1976). This provision, in effect, has placed a burden upon the municipality to either timely notify the claimant of any defect in the notice of claim or waive noncompliance. In so providing, the amendment comports with the legislative purpose of § 50-e,

be possible for a public corporation to successfully assert a defect in the service of notice when its attorneys have in fact received timely notice of the claim, or when it has participated in the litigation on the merits.

Subsection five, which deals with applications for leave to serve a late notice of claim, also has been significantly altered. Previously, the statute only permitted a court to allow late service in three situations: (1) if the person originally entitled to institute the claim died before expiration of the time limit; (2) if the failure to serve timely notice resulted from the claimant's infancy or his mental or physical incapacity; and, (3) if the delay was due to reasonable reliance upon representations of settlement.[114] As amended, the subsection no longer requires an applicant to fit within one of these exclusive categories;[115] rather, it grants the court much greater discretion in considering an application for late service. The statute now simply enumerates certain factors which the court is required to consider in exercising this discretion.[116] In addition to inquiring

discussed in text accompanying note 109 *supra.* Since the municipality has received timely notice of the claim, a requirement that it timely object to defective notice does not prejudice the merits of the defense, but rather, prevents the claimant from suffering undue hardship because of his failure to achieve technical compliance with the notice requirements. Moreover, the provision should reduce the calendar congestion and economic waste that has previously occurred where a defendant acquiesced in the court proceedings only to object to defective notice of claim at a much later date. For a dramatic example of this type of occurrence, see Camarella v. East Irondequoit Cent. School Bd., 34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1974) (mem.), *discussed in* notes 120-21 and accompanying text *infra,* wherein the objection to improper notice was not raised until after a trial on the merits had resulted in a verdict for the plaintiff. Notwithstanding this fact, the Court upheld dismissal of the complaint. It did, however, indicate its dislike for such conduct by assessing costs and disbursements against the defendant. 34 N.Y.2d at 141, 313 N.E.2d at 29, 356 N.Y.S.2d at 554.

[114] N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1965) (amended 1976).

[115] The incapacity provision has been significantly modified in that the amendment omits the prior requirement, *see id.,* that the defective notice be *causally* related to the incapacity. It is interesting to note that the judiciary had previously endorsed a similar result, specifically in regard to the infancy exception, under the old language. Prior to 1972, there had been a considerable amount of conflict among several appellate departments concerning the construction of this provision. *Compare* Goglas v. New York City Hous. Auth., 13 App. Div. 2d 939, 216 N.Y.S.2d 756 (1st Dep't 1961) (mem.), *aff'd mem.,* 11 N.Y.2d 680, 180 N.E.2d 910, 225 N.Y.S.2d 756 (1962) (strict requirement that causation be factually established), *with* Pandoliano v. New York City Transit Auth., 17 App. Div. 2d 951, 234 N.Y.S.2d 99 (2d Dep't 1962) (mem.) (causality inferred from the fact of infancy). Finally, in Murray v. City of New York, 30 N.Y.2d 113, 282 N.E.2d 103, 331 N.Y.S.2d 9 (1972), the Court of Appeals reconciled this conflict by approving the exercise of broad judicial discretion in sustaining or denying applications for late filing. Subsequently, in Sherman v. Metropolitan Transit Auth., 36 N.Y.2d 776, 329 N.E.2d 673, 368 N.Y.S.2d 842 (1975) (mem.), the Court reaffirmed its holding in *Murray.*

[116] N.Y. GEN. MUN. LAW § 50-e(5) (McKinney Supp. 1976).

whether the dilatory claimant falls within one of the previously exclusive categories, the court should consider such factors as whether the delay was the result of an excusable error in identifying the corporation and whether it has substantially prejudiced the defendant.[117] Most significantly, the amendment further directs that "the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts . . . within the time specified . . . or within a reasonable time thereafter."[118]

The reforms introduced by these amendments are long overdue. Repeatedly, courts have voiced concern over plaintiffs who have been denied recovery on otherwise meritorious claims due to the rigidity of the prior statutory requirements.[119] These inequities are well illustrated in two recent decisions of the Court of Appeals. In the 1974 case of *Camarella v. East Irondequoit Central School Board,*[120] plaintiff served a notice of claim 2 days after the expiration of the 90-day period under section 50-e. Failing to raise any immediate objection, the school board opposed the claim on the merits. Only after a verdict was rendered in favor of plaintiff did defendant urge dismissal upon the ground that the notice of claim had not been timely served. Although the Court recognized the apparent inequities that result from a literal interpretation of section 50-e, it felt constrained to comply with the statute. The *Camarella* Court did, however, strongly suggest that "legislative reconsideration of the harsher aspects of section 50-e" be made.[121]

In *Bender v. New York City Health & Hospitals Corp.,*[122] a consolidation of two cases involving personal injury actions, plaintiffs failed to comply with the technical requirements of section 50-e. Rather than serving notice upon an officer or director of the

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[117] *Id.* Although the statute is silent in regard to the burden of proof on the issue of prejudicial delay, it would appear logical to place the burden upon the defendant, the party who would benefit from such a finding and who would be best able to demonstrate such prejudice.

[118] N.Y. GEN. MUN. LAW § 50-e(5) (McKinney Supp. 1976).

[119] *See, e.g.,* cases cited in note 105 *supra.*

[120] 34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1974) (mem.).

[121] *Id.* at 142, 313 N.E.2d at 30, 356 N.Y.S.2d at 555. The result in *Camarella* is particularly distressing in light of the fact that the school board had obtained actual knowledge of the accident when it received a report filed by the school principal on the day after the accident. In addition, defendant's insurance carrier had received a letter of representation from plaintiff's attorney a week later, notifying it of plaintiff's intent to bring suit. *Id.,* 313 N.E.2d at 30, 356 N.Y.S.2d at 554.

[122] 38 N.Y.2d 662, 345 N.E.2d 561, 382 N.Y.S.2d 18 (1976), *rev'g* 46 App. Div. 2d 898, 361 N.Y.S.2d 939 (2d Dep't 1974) (mem.), *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) (mem.).

Health & Hospitals Corp. (HHC), the proper defendant,[123] plaintiffs served the City of New York through its corporation counsel.[124] Nevertheless, since the corporation counsel represented HHC as well as the City, HHC actually received timely notice of the claims. Upon learning of the establishment of HHC, plaintiffs moved to allow their notices of claim to be served upon HHC nunc pro tunc. Apparently willing to go to great lengths to avoid the harsh effects of section 50-e,[125] the Court of Appeals explicitly declared that the doctrine of equitable estoppel can be utilized in the notice of claim area[126] to avert a dismissal due to technical noncompliance with the statutory requirements.[127]

It is rather ironic to note the circumstances surrounding what could be considered a demonstration of judicial impatience with a seemingly lethargic legislature. Having previously declined the opportunity to mitigate the harshness of section 50-e in *Camarella,* the Court, in *Bender,* chose to act at a time when the legislature was on the verge of amending the statute. Inevitably, this action by the legislature will diminish the significance of *Bender.* Nevertheless, these parallel developments indicate that the future approach to section 50-e will be a more equitable one. Hopefully, the amendments[128] will bring section 50-e closer to its avowed purpose and

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[123] *See* N.Y. UNCONSOL. LAWS § 7385(1) (McKinney Supp. 1976).

[124] Pursuant to CPLR 311(2), the corporation counsel is the proper party to receive service for the City of New York.

[125] Although the Court made no mention of its previous holding in *Camarella,* its decision demonstrated that it will no longer adhere to the strict requirements of § 50-e when equity demands a contrary result.

[126] It should be noted that the Court refused to decide whether estoppel was applicable in *Bender* because the record was thought to be insufficient to make such a determination. Instead, the Court remitted both cases for complete evidentiary hearings. 38 N.Y.2d at 668-69, 345 N.E.2d at 564-65, 382 N.Y.S.2d at 21.

[127] *Id.* at 667-68, 345 N.E.2d at 564, 382 N.Y.S.2d at 20. Some judicial precedent does exist which indicates that equitable estoppel can be applied to mitigate the harshness of § 50-e. On occasion, the statute has been interpreted to avoid a result that would defeat the rights of persons with legitimate claims. *See* Scibilia v. City of Niagara Falls, 44 App. Div. 2d 757, 354 N.Y.S.2d 229 (4th Dep't 1974) (mem.); Daley v. Greece Cent. School Dist., 21 App. Div. 2d 976, 252 N.Y.S.2d 899 (4th Dep't 1964) (mem.), *aff'd mem.*, 17 N.Y.2d 530, 215 N.E.2d 165, 267 N.Y.S.2d 909 (1966); Debes v. Monroe County Water Auth., 16 App. Div. 2d 381, 228 N.Y.S.2d 364 (4th Dep't 1962) (per curiam).

[128] In addition to the amendments discussed above, § 50-e, as it presently reads, incorporates several other changes. The most important of these concerns the period within which a claimant can apply for leave to serve a late notice of claim. Previously, the application had to be made prior to commencement of the action and within 1 year after the happening of the event upon which the claim was based. *See* N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1965) (amended 1976). The section now permits an application to be made any time during the period within which an action may be commenced. In addition, the amended section provides that "[a]n application for leave to serve a late notice shall not be denied on the

signal an end to its use as "'a trap to catch the unwary or the ignorant.'"[129]

DEVELOPMENTS IN NEW YORK PRACTICE

Patent danger rule in negligent design actions abandoned.

The patent danger rule, propounded more than 25 years ago in *Campo v. Schofield*,[130] has prevented many a potential plaintiff from maintaining an action against a manufacturer for injuries sustained in the use of a negligently designed product. Under the *Campo* doctrine, a manufacturer had no duty to warn or protect a user from conspicuous defects in the design or operation of the product.[131] Consequently, the injured user had no right of redress in negligence against a manufacturer who sold a "patently" dangerous product, even if minimal safety features were completely lacking.[132] In accord with the current trend towards imposing greater potential liability on those who place dangerous or defective products into the stream of commerce,[133] the Court of Appeals, in *Micallef v. Miehle Co.*,[134] has overruled *Campo* and held that a manufacturer must exercise that degree of care in the design of his product which is necessary to prevent an unreasonable risk of harm to anyone exposed to dangers created by any intended or foreseeable use of the product.[135]

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ground that it was made after commencement of an action against the public corporation." N.Y. GEN. MUN. LAW § 50-e(5) (McKinney Supp. 1976).

[129] 38 N.Y.2d at 668, 345 N.E.2d at 564, 382 N.Y.S.2d at 21, *quoting* Sweeney v. City of New York, 225 N.Y. 271, 273, 122 N.E. 243, 244 (1919).

[130] 301 N.Y. 468, 95 N.E.2d 802 (1950).

[131] In *Campo*, the Court held that a manufacturer "is under no duty to guard against injury from a patent peril or from a source manifestly dangerous." *Id.* at 472, 95 N.E.2d at 804.

[132] *See, e.g.*, Sarnoff v. Charles Schad, Inc., 22 N.Y.2d 180, 239 N.E.2d 194, 292 N.Y.S.2d 93 (1968) (supplier not liable for injury caused by obviously defective scaffolding); Inman v. Binghamton Hous. Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (builder not liable for child's fall from porch with no guard rail); Edgar v. Nachman, 37 App. Div. 2d 86, 323 N.Y.S.2d 53 (3d Dep't), *motion for leave to appeal denied*, 29 N.Y.2d 483, 274 N.E.2d 312, 324 N.Y.S.2d 1029 (1971) (allegations of improperly designed gas tank and cap insufficient to state claim); Tatik v. Miehle-Goss-Dexter, Inc., 28 App. Div. 2d 1111, 284 N.Y.S.2d 597 (1st Dep't 1967) (mem.), *aff'd mem.*, 23 N.Y.2d 828, 245 N.E.2d 231, 297 N.Y.S.2d 586 (1969) (absence of automatic shutoff device on offset press not evidence of defective design).

[133] *See, e.g.*, Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), *discussed in The Survey*, 50 ST. JOHN'S L. REV. 179, 181 (1975).

[134] 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976), *rev'g* 46 App. Div. 2d 790, 361 N.Y.S.2d 25 (2d Dep't 1974) (mem.). For another discussion of *Micallef*, see 1 L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY § 7.02 (1976) [hereinafter cited as FRUMER & FRIEDMAN].

[135] 39 N.Y.2d at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 121.