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GML 50-e: Infant Permitted To File Late Notice of Claim Where Infancy May Have Been Important Factor in Failure to Timely File

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notice of claim to maintain such an action, the court reasoned that the absence of such a mandate in the instant sections reflected the Legislature's intent that none be necessary.[218]

The instant decision, which is supported by decisional law,[219] is a sound construction of the pertinent statutes.

GML 50-e: Infant permitted to file late notice of claim where infancy may have been important factor in failure to timely file.

Section 50-i of the General Municipal Law permits actions in tort against a municipality only if a notice of claim is served within ninety days after the claim arises. Section 50-e(5) provides, *inter alia*, that the court may, in its discretion, permit an infant to file a notice of claim within a reasonable time after expiration of the ninety-day period if he fails to serve a timely notice "by reason of" his infancy. There exists a marked divergence within the appellate division with respect to the level of proof required to establish the nexus between the fact of infancy and the delay. The problem is further complicated when counsel is timely retained, but a delay in filing nonetheless occurs.

The First Department has generally required that a causal relationship between the fact of infancy and the delay be demonstrated. Where the delay is attributable to the attorney's error or inadvertence, the statutory standard is not met.[220] The other departments approach the issue more liberally, presuming disability from the fact of infancy, even where the infant's attorney has been derelict, upon a showing that the delay was attributable in any substantial degree to infancy.[221]

217 N.Y. VILLAGE LAW § 341-b (McKinney 1966); Caruso v. Incorporated Village of Sloatsburg, 35 App. Div. 2d 988, 317 N.Y.S.2d 959 (2d Dep't 1970) (mem.).

218 70 Misc. 2d at 275, 332 N.Y.S.2d at 680.

219 Sullivan v. Whitney, 25 N.Y.S.2d 762 (Sup. Ct. Westchester County 1941).

220 *See* Clark v. Manhattan & Bronx Surface Transit Operating Authority, 34 App. Div. 2d 770, 311 N.Y.S.2d 339 (1st Dep't 1970) (mem.), *aff'd mem.*, 28 N.Y.2d 614, 268 N.E.2d 803, 320 N.Y.S.2d 76 (1971); Shankman v. New York City Housing Authority, 21 App. Div. 2d 968, 252 N.Y.S.2d 707 (1st Dep't 1964) (mem.), *aff'd mem.*, 16 N.Y.2d 500, 208 N.E.2d 175, 260 N.Y.S.2d 442 (1965); Goglas v. New York Housing Authority, 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); Ringgold v. New York City Transit Authority, 286 App. Div. 806, 141 N.Y.S.2d 365 (1st Dep't 1955) (mem.); Schnee v. City of New York, 285 App. Div. 1130, 141 N.Y.S.2d 88 (1st Dep't 1955) (mem.), *aff'd mem.*, 1 N.Y.2d 697, 134 N.E.2d 69, 150 N.Y.S.2d 801 (1956).

221 *See* Perry v. Board of Educ., 34 App. Div. 2d 1089, 312 N.Y.S.2d 640 (4th Dep't 1970) (mem.); Brooks v. Rensselaer County, 34 App. Div. 2d 708, 309 N.Y.S.2d 659 (3d Dep't 1970) (mem.); Kern v. Central Free School Dist. #4, 25 App. Div. 2d 867, 270 N.Y.S.2d 137 (2d Dep't 1966) (mem.); Klee v. Board of Coop. Educ. Servs., 25 App. Div. 2d 715, 270 N.Y.S.2d 230 (4th Dep't 1966) (mem.); Spanos v. Town of Oyster Bay, 23 App. Div. 2d 881, 259 N.Y.S.2d 917 (2d Dep't) (mem.), *aff'd mem.*, 16 N.Y.2d 951, 212 N.E.2d 535, 265 N.Y.S.2d 101 (1965); Pandoliano v. New York City Transit Authority, 17 App. Div. 2d 951, 234 N.Y.S.2d 99 (2d Dep't 1962) (mem.); Biancoviso v. City of New York, 285 App. Div. 320, 137 N.Y.S.2d 773 (2d Dep't 1955); Every v. Ulster County, 280 App. Div. 155, 112 N.Y.S.2d 367 (3d Dep't 1952) (per curiam),

Furthermore, there is debate over whether the rule should be applied in varying degrees to different age groups within the "infant" designation. While many courts have opted for strict enforcement of the statutory requirements for those over eighteen years,[222] some courts have felt that even a mature infant should not be held to the same level of responsibility as an adult, since a legal disability may arise from infancy which is not due to the limitations of understanding of immature infants.[223]

Against this conflicting background the Court of Appeals, in *Murray v. City of New York*,[224] held that allowing a nineteen-year-old plaintiff to file a late notice of claim for a medical malpractice suit was not an abuse of discretion where there had been a six-month delay even though an attorney had been timely retained. The basis of the infant's motion was that certain information was omitted from the initial hospital abstract supplied to the attorney, who did not independently examine the hospital records. The Court stated that "a determination as to the cognizable relation between infancy and the delay is a matter committed to the sound discretion of the court . . . ,"[225] predicated on the facts of each case. Instead of requiring factual demonstration of a causal connection between the disability and the delay, the Court presumed that a lack of maturity and understanding of legal rights attends infancy,[226] and recognized that this impediment may have been an im-

rev'd mem., 304 N.Y. 924, 110 N.E.2d 741, *facts found and motion granted*, 281 App. Div. 1060, 122 N.Y.S.2d 392 (1953); Hogan v. City of Cohoes, 279 App. Div. 282, 110 N.Y.S.2d 3 (3d Dep't 1952). *But cf.* Anderson v. County of Nassau, 31 App. Div. 2d 761, 297 N.Y.S.2d 665 (2d Dep't 1969) (mem.). For an extended survey of the cases, see Young v. Spencerport Cent. School Dist. #1, 67 Misc. 2d 923, 325 N.Y.S.2d 134 (Sup. Ct. Monroe County 1971).

222 *See, e.g.*, Hardin v. Village of Akron, 32 App. Div. 2d 610, 299 N.Y.S.2d 92 (4th Dep't 1969) (mem.); Negrone v. New York City Transit Authority, 15 App. Div. 2d 676, 224 N.Y.S.2d 172 (2d Dep't 1962) (mem.); Schnee v. City of New York, 285 App. Div. 1130, 141 N.Y.S.2d 88 (1st Dep't 1955) (mem.), *aff'd mem.*, 1 N.Y.2d 697, 134 N.E.2d 69, 150 N.Y.S.2d 801 (1956); Nori v. City of Yonkers, 274 App. Div. 545, 85 N.Y.S.2d 131 (2d Dep't 1948), *aff'd*, 300 N.Y. 632, 90 N.E.2d 492 (1950).

223 *See* Every v. Ulster County, 280 App. Div. 155, 156, 112 N.Y.S.2d 367, 368 (3d Dep't 1952) (per curiam), *rev'd mem.*, 304 N.Y. 924, 110 N.E.2d 741, *facts found and motion granted*, 281 App. Div. 1060, 122 N.Y.S.2d 392 (1953); Nori v. City of Yonkers, 274 App. Div. 545, 550, 85 N.Y.S.2d 131, 136 (2d Dep't 1948) (dissenting opinion) ("The Legislature did not adopt the proposed exception in favor of *immature infants*, but did provide for a limited exception, subject to the discretion of the court, in cases involving *infant* claimants."); Weingard v. City of New York, 124 N.Y.S.2d 198 (Sup. Ct. Kings County 1953). The *Every* court thought that there were many restrictions on the freedom of legal action which continue until maturity is reached, and that the question of whether the failure to timely file was due to infancy should be approached liberally.

224 30 N.Y.2d 113, 282 N.E.2d 103, 331 N.Y.S.2d 9 (1972).

225 *Id.* at 119, 282 N.E.2d at 107, 331 N.Y.S.2d at 14, *citing* Pandoliano v. New York City Transit Authority, 17 App. Div. 2d 951, 234 N.Y.S.2d 99 (2d Dep't 1962) (mem.).

226 *Id.* at 120, 282 N.E.2d at 108, 331 N.Y.S.2d at 15, *citing* Smith v. Meadowbrook

portant factor in the infant's failure to correct the attorney's mistake.[227] The Court felt that wherever the fault might lie, it is the plaintiff who stands to suffer.[228]

While the Court of Appeals' unanimous affirmance was a refusal to interfere with the discretion of the lower court, its flexible stand in permitting this presumption of disability attending infancy increases the possibility that infants may institute otherwise untimely actions. In accommodating the plaintiff, the Court also recognized the difference in treatment afforded to similar fact situations.[229] Judge Breitel, in concurring, stated that the statute should provide greater discretion in granting relief because it is presently a "mousetrap" to all but the most sophisticated practitioners.[230]

INSURANCE LAW

Ins. Law: Insurer not liable in excess judgment suit where refusal to defend or settle is based on good faith belief that policy had been cancelled.

In handling a negligence claim against its policyholder which is in excess of policy limits, a liability insurer is invariably faced with the choice of either attempting to negotiate a settlement within policy limits or proceeding to trial in the hope of absolving its insured from liability. Because of the conflict between the interests of the insurer and its insured inherent in this situation, the Court of Appeals early recognized a duty on the part of the insurer to act in good faith in carrying out its obligations under the insurance contract. In *Brassil v. Maryland Casualty Co.*,[231] the insurer was held liable for the expenses incurred by the insured in prosecuting an appeal which the company had unjustifiably refused to pursue on his behalf.

Even after *Brassil*, however, courts often afforded the insurer wide discretion in deciding whether or not to settle.[232] Then, in 1928, the

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Hosp., 33 App. Div. 2d 779, 307 N.Y.S.2d 830 (2d Dep't 1969) (mem.), *aff'd mem.*, 26 N.Y.2d 997, 259 N.E.2d 499, 311 N.Y.S.2d 34 (1970); Pandoliano v. New York City Transit Authority, 17 App. Div. 2d 951, 234 N.Y.S.2d 99 (2d Dep't 1962) (mem.).

227 30 N.Y.2d at 120, 282 N.E.2d at 108, 331 N.Y.S.2d at 15.

228 *Id.*, 282 N.E.2d at 107, 331 N.Y.S.2d at 15.

229 *Id.* at 119, 282 N.E.2d at 107, 331 N.Y.S.2d at 14.

230 *Id.* at 121, 282 N.E.2d at 108, 331 N.Y.S.2d at 16.

231 210 N.Y. 235, 104 N.E. 602 (1914).

232 *See, e.g.*, Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 140 N.E. 577 (1923); McAleenan v. Massachusetts Bonding & Ins. Co., 173 App. Div. 100, 159 N.Y.S. 401 (1st Dep't), *aff'd mem.*, 219 N.Y. 563, 114 N.E. 114 (1916); Levin v. New England Cas. Co., 101 Misc. 402, 166 N.Y.S. 1055 (App. T. 1st Dep't 1917), *aff'd mem.*, 187 App. Div. 935, 174 N.Y.S. 910 (1st Dep't 1919), *aff'd mem.*, 233 N.Y. 631, 135 N.E. 948 (1922).