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Municipal Corporations--Notice of Claim--Failure of Another to Act for Incapacitated Claimant Will Not Bar Application for Late Filing (Rosenberg v. City of New York, 309 N.Y. 304 (1955))

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these decrees are beyond full faith and credit considerations, the dissent points out that New York policy has been to recognize judgments of foreign countries except where they contravene public policy. The Mexican decree to be procured, then, would be valid on its face and have effect until declared void.[23] In that situation, as in the *Garvin* case, an injunction would be justified to save the plaintiff the burden of striking down the prima facie effect of the decree.

In denying presumptive validity to Mexican decrees, the Court leaves plaintiff's marital rights in danger. If the defendant obtains the decree he seeks in Mexico, the plaintiff must have the decree declared a nullity to protect her rights.[24] In the meantime, the decree will be accorded prima facie validity in other states [25] and the husband may use the decree to the plaintiff's injury. Defendant supports the plaintiff. If he remarries, he would have to provide for two "wives" and his support of the plaintiff might thus be impaired.[26] Even if separated from the second "wife," he could be obliged to support her and he would not be allowed to plead the invalidity of his decree.[27]

The decision aids no one. The defendant is left free to entangle himself further in marital difficulties; the plaintiff must stand by helplessly while her cause of action becomes overripe; the state will find itself burdened by more litigation. Clearly, it would have been wiser to adopt the view of the dissent that: "It is traditional for equity to restrain persons from doing acts which will work an injury to others, and are for that reason contrary to equity and good conscience." [28]

MUNICIPAL CORPORATIONS — NOTICE OF CLAIM — FAILURE OF ANOTHER TO ACT FOR INCAPACITATED CLAIMANT WILL NOT BAR APPLICATION FOR LATE FILING.—Six months after sustaining injury,

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[23] Rosenbaum v. Rosenbaum, *supra* note 21 at 381-82, 130 N.E.2d at 907 (dissenting opinion). See also Goldstein v. Goldstein, 283 N.Y. 146, 153-54, 27 N.E.2d 969, 972 (1940) (dissenting opinion).

[24] Chief Judge Conway notes in his dissent that "If we deny plaintiff the right to injunctive relief we will be placing her in a position where she cannot prevent a so-called 'legal nullity' from coming into existence, yet in order to have this 'legal nullity' so adjudged she will have to prove, in an action for a declaratory judgment, the self-same allegations presently before us." Rosenbaum v. Rosenbaum, *supra* note 21 at 381, 130 N.E.2d at 907 (dissenting opinion).

[25] See Reik v. Reik, 109 N.J. Eq. 615, 158 Atl. 519 (Ch. 1932), *aff'd per curiam*, 112 N.J. Eq. 234, 163 Atl. 907 (Ct. Err. & App. 1933); Commonwealth *ex rel.* Thompson v. Yarnell, 313 Pa. 244, 169 Atl. 370 (1933).

[26] See Goldstein v. Goldstein, *supra* note 23 at 156, 27 N.E.2d at 973 (dissenting opinion).

[27] See Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940).

[28] Rosenbaum v. Rosenbaum, 309 N.Y. 371, 382, 130 N.E.2d 902, 907 (1955) (dissenting opinion).

plaintiff applied for an extension of the period within which to file her notice of claim against the city. Despite claimant's incapacity, the lower court refused an extension, in effect ruling that claimant's husband should have filed the notice for her. The Court of Appeals *held* that the failure of another to act for claimant will not bar her application for an extension within the year. *Rosenberg* v. *City of New York,* 309 N.Y. 304, 130 N.E.2d 629 (1955).

The state's common-law immunity from suit [1] does not extend to municipal corporations acting in a corporate or proprietary capacity.[2] However, for negligence in the performance of a governmental function, the citizen has no common-law remedy; nor is the right to sue the municipality guaranteed by constitutional provision.[3] The present rule, that the state and its municipal adjuncts are liable in New York in the same manner as individuals, is statutory in origin.[4] Accordingly, the right to sue may be granted on such conditions as the Legislature sees fit to impose.[5] Prior to the adoption of Section 50-e of the General Municipal Law, administrative codes and municipal charters included procedural provisions governing notice of claims against district corporations, municipal corporations, and their appointees.[6] Thus the period prescribed for giving notice varied throughout the state.[7] To effect uniformity, the Judicial Council proposed that a new section be added to the General Municipal Law which would supersede local provisions.[8] In September, 1945, a compromise bill was adopted calling for filing of notice of tort claims within sixty days after the claim arises. This period was later enlarged to ninety days.[9]

Since notice of claim is a condition precedent to the commencement of the action,[10] a failure to file the notice within ninety days after the cause of action has accrued will bar any future action unless

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[1] See Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857); 1 BLACKSTONE, COMMENTARIES *242; RESTATEMENT, TORTS § 887 (1939).

[2] See Oakes Mfg. Co. v. City of New York, 206 N.Y. 221, 228, 99 N.E. 540, 541 (1912) (dictum); Duren v. Binghampton, 172 Misc. 580, 583, 15 N.Y.S.2d 518, 521 (Sup. Ct. 1939) (dictum); 17 MCQUILLIN, MUNICIPAL CORPORATIONS § 49.02 (3d ed. 1950).

[3] See Brown v. Board of Trustees, 303 N.Y. 484, 489, 104 N.E.2d 866, 868 (1952).

[4] N.Y. CT. CL. ACT § 8; see Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

[5] See Baker v. Manitau, 277 Fed. 232 (8th Cir. 1921); Brown v. Board of Trustees, *supra* note 3; Winter v. Niagara Falls, 190 N.Y. 198, 82 N.E. 1101 (1907).

[6] 9 REP. N.Y. JUDICIAL COUNCIL 229-30 (1943).

[7] *Id.* at 246-58. Ithaca, New York, Oneonta, Rochester, Syracuse, Troy (six months); Newburgh, Watertown (sixty days); Albany, Mount Vernon, Peekskill (three months); White Plains (ten days).

[8] *Id.* at 227.

[9] N.Y. GEN. MUNIC. LAW § 50-e.

[10] See Rudolph v. City of New York, 191 Misc. 947, 77 N.Y.S.2d 788 (Sup. Ct. 1947).

the court in its discretion extends the statutory period. However, under the statute, the court is free to exercise its discretion only where there is proof by affidavit that the claimant was mentally or physically incapacitated and that the failure to serve notice within the prescribed period was due to such disability.[11] Moreover, under no circumstances will the court permit late entry of claim beyond the one-year period provided for in the statute.[12]

Since an immature infant is a ward of the court, his rights should not be forfeited because some other party failed to act.[13] Thus, the statute permits the claim to be filed within the year if the delay in filing was attributable to the fact of infancy. The provision has been liberally interpreted as requiring only a *reasonable* relation between the infancy and the delay.[14] However, when an adult presents his application for late service of claim, the causal relationship between the incapacity and the delay is subject to strict interpretation by the courts. Accordingly, claimants have been denied the application where delay was due to ignorance of the law,[15] difficulty in ascertaining ownership of land,[16] uncertainty as to extent of injuries,[17] and even to assurance by municipal officers that a recovery would be granted.[18]

When presented with an application for late service, the courts were often confronted with the question—should the fact that the per-

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[11] See Haines v. City of New York, 296 N.Y. 702, 70 N.E.2d 532 (1946) (mem. opinion); Rudolph v. City of New York, *supra* note 10.

[12] Martin v. School Bd., 301 N.Y. 233, 93 N.E.2d 655 (1950); Chavers v. Mount Vernon, 301 N.Y. 634, 93 N.E.2d 918 (1950). Noting the harshness of the rule, the dissenting judge in the *Martin* case wrote: "In accordance with the well established rule as followed by this court in these situations over a long period of years . . . the statute under review should be interpreted so as to allow the present application to be made, and the court's discretion to be exercised, beyond the period specified in section 50-e in the case of this twelve-year-old infant; to hold otherwise would be tantamount to depriving young and immature infants of their right to action." Martin v. School Bd., *supra* at 243, 93 N.E.2d at 660 (dissenting opinion).

[13] See Hogan v. Cohoes, 279 App. Div. 282, 110 N.Y.S.2d 3 (3d Dep't 1952); *cf. In re* Rothenberg, 115 N.Y.S.2d 300 (Sup. Ct. 1952).

[14] See Hogan v. Cohoes, *supra* note 13 (where the failure of an attorney to make a motion to permit a late filing excused the delay); *In re* Rothenberg, *supra* note 13 (where the failure to file within the statutory period, due to the religious beliefs of the parents, was held excusable). However, the fact of infancy alone will not warrant an extension of time to file notice of claim. It is interesting to note that in many cases involving infants who are not considered "immature," the claimants have been denied an extension. See, *e.g.*, Bosh v. Board of Educ., 282 App. Div. 887, 124 N.Y.S.2d 762 (2d Dep't 1953) (mem. opinion) (15 years old); Adanuncio v. City of New York, 281 App. Div. 763, 118 N.Y.S.2d 260 (2d Dep't 1951) (mem. opinion) (15 years old); Nori v. Yonkers, 274 App. Div. 545, 85 N.Y.S.2d 131 (2d Dep't 1948) (20 years old).

[15] See Grimaldi v. Board of Educ., 107 N.Y.S.2d 658 (Sup. Ct. 1951).

[16] See Adanuncio v. City of New York, 200 Misc. 676, 104 N.Y.S.2d 105 (Sup. Ct.), *aff'd mem.*, 281 App. Div. 763, 118 N.Y.S.2d 260 (2d Dep't 1951).

[17] See White v. City of New York, 194 Misc. 562, 87 N.Y.S.2d 446 (Sup. Ct. 1949).

[18] See Parsons v. Dannemora, 275 App. Div. 738, 87 N.Y.S.2d 71 (3d Dep't 1949) (mem. opinion).

son incapacitated could have requested another to file on his behalf influence the court? [19] The leading New York case of *Haas v. Cedarhurst* [20] illustrates the solution reached by one court. After sustaining serious injury, claimant was hospitalized and an attorney was consulted on her behalf before the ninety-day statutory period had elapsed. However, the physician advised against discussing the action with the claimant or requesting her to sign any document. At the earliest feasible time (four months later), a notice of claim was executed by the claimant. The Court of Appeals upheld the rejection of the claim by village authorities, holding that claimant did not prove that she was "unable to serve a notice of claim sworn to by her or by someone in her behalf." [21] In *Brophy v. Utica,* [22] claimant was injured as a result of a fall on a sidewalk and subsequently underwent surgery. Although claimant had walked neither prior to nor following surgery, the court denied the application holding that since there was no evidence that her condition prior to surgery was any more incapacitating than her condition following the surgery, the extension should be denied. Citing the *Haas* case, the court then added, "there is no evidence of incapacity on the part of the husband." [23]

This tendency to refuse an application because it could have been more timely filed by someone else has been checked by the instant case. The Court of Appeals emphasized the fact that nothing in the statute requires that someone else shall act for such an incapacitated person. "Vicarious service of notice of claim within the year was at most permissive but not mandatory." [24] Since there could have been no question about claimant's mental or physical incapacity to file the claim, [25] the only basis on which the Appellate Division could have found that she possessed such capacity is its expressed theory that her husband could have filed for her. "That theory," said the Court of Appeals, "is erroneous as a matter of law." [26]

A majority of the states [27] have enacted statutes which require notice of tort claims against municipalities to be given within certain fixed time limits to designated city officers. Most of these statutes

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[19] See Sullivan v. Babylon, 302 N.Y. 609, 96 N.E.2d 898 (1951); Halloran v. Board of Educ., 271 App. Div. 830, 65 N.Y.S.2d 569 (2d Dep't 1947); Axell v. City of New York, 109 N.Y.S.2d 406 (Sup. Ct. 1951).

[20] 298 N.Y. 757, 83 N.E.2d 156 (1948), *affirming mem.*, 272 App. Div. 1031, 74 N.Y.S.2d 72 (2d Dep't 1947), *reversing mem.*, 70 N.Y.S.2d 110 (Sup. Ct. 1947).

[21] *Id.* at 758, 83 N.E.2d at 156.

[22] 86 N.Y.S.2d 143 (Sup. Ct. 1949).

[23] *Id.* at 144.

[24] Rosenberg v. City of New York, 309 N.Y. 304, 306, 130 N.E.2d 629, 631 (1955).

[25] ". . . [I]t appears from the record as a matter of law that she was incapacitated until her claim was filed." *Id.* at 309, 130 N.E.2d at 632.

[26] *Id.* at 310, 130 N.E.2d at 633.

[27] See Sahm, *Tort Notice Of Claim To Municipalities,* 46 DICK. L. REV. 1 (1941).

contain provisions whereby a lack of timely notice will be excused under specific circumstances. Thus extensions are allowed where the claimant was bereft of reason as a result of the accident [28] or where the claimant has a reasonable excuse.[29] In each of these cases the claimant would be allowed to file within a reasonable time after the disability ceases.

The instant case gives a more just interpretation of Section 50-e than the previous decisions. However, it should be borne in mind that the requirement of notice imposes a burden which is non-existent in suits involving private persons. The municipality thus has an advantage which is hardly in keeping with its decision to waive immunity from tort actions. Recognizing that the right to sue is statutory in origin and may be surrounded by conditions, it is not doubted that the municipality has the right to prescribe reasonable measures to protect itself against unfounded or fraudulent claims.[30] However, a notice requirement need not be harsh or inflexible; it should be fair to the claimant as well as to the municipality. It is submitted that a requirement that notice be filed within a reasonable time after the disability ceases would not unduly burden either the claimant or the municipality and would afford ample protection without impairing the rights of either party.[31]

TORTS — CHARITABLE IMMUNITY — HOSPITAL NOT LIABLE FOR INJURY CAUSED BY TECHNICIAN'S MISTAKE IN DETERMINING PATIENT'S BLOOD FACTOR. — A blood transfusion had been ordered for the plaintiff by her physician. A qualified laboratory technician of

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[28] See Ray v. Saint Paul, 44 Minn. 340, 46 N.W. 675 (1890). In construing the city charter, the court said: "It is, however, also provided that notice need not be given where the person injured shall, in consequence of the injury, 'be bereft of reason.'" *Id.* at 675.

[29] PA. STAT. ANN. tit. 53, § 2774 (Purdon Supp. 1954), McBride v. Rome TP., 347 Pa. 228, 32 A.2d 212 (1943) (where the court held that negligence of counsel furnished a reasonable excuse).

[30] See Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952); Sweeney v. City of New York, 225 N.Y. 271, 122 N.E. 243 (1919); 9 REP. N.Y. JUDICIAL COUNCIL 227 (1943).

[31] Several bills have been introduced to amend Section 50-e. Since the Joint Legislative Committee on Municipal Tort Liability was established to study such proposals, the policy of the legislature has been to defer approval until the committee makes its final report. In any serious study of amendments, the comment of the original draftor should be borne in mind: "It is my judgment that Section 50-e is sadly in need of a substantial over-hauling with a view of a liberalization of its provisions in behalf of claimants against public corporations." Prashker, Report on S. No. 3255, Int. 2986, introduced by Mr. Gittleson, N.Y. STATE BAR ASS'N COMMITTEE ON STATE LEGISLATION (1956).