Preserving Meritorious Claims against Public Corporations: Easing the Harshness of Notice of Claim Requirements

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I. FROM SOVEREIGN IMMUNITY TO NOTICE OF CLAIM

The Concept of Sovereign Immunity

It is necessary that a system of law legitimize its own institutions. The English common law legitimized the institution of monarchy by adopting the doctrine of royal prerogative, which established for a king a "special pre-eminence . . . over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity." 2 It logically follows from this "that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him." 3 Having raised the king to such an ethereal height, it was not difficult for the English commentators to conclude that "the king can do no wrong" 4 and develop the concept of sovereign immunity.

It is clear that this immunity to civil suit was intended to be purely personal to the king by reason of his exalted position. 4 Unfortunately, in 1788, the conceptual distinction between the personal role of the king and the functions of administrative bodies had not yet fully matured. It was not difficult, therefore, for an English court in that year to decide that the formerly exclusive royal prerogative extended to an unincorporated body called the County of Devon. 5 This widening of a privilege, which had been applicable to but one person, to the point where it now encompassed hundreds of governmental subdivisions was considered justified by the theory that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 6

In America, after 1789, the powers and prerogatives which

1. W. Blackstone, Commentaries *239.
2. Id. at 242.
4. Id.
5. Russell v. Men of Devon, 100 Eng. Rep. 359 (1788). Plaintiff's wagon was damaged because a bridge belonging to the county was out of repair. The King's Bench decided that "there is no foundation on which this action can be supported; and if it had intended, the Legislature would have interfered and given a remedy . . . ." Id. at 363.
6. Id. at 362.
the English monarch formerly enjoyed devolved upon the sovereign states and the United States government. These included the privilege of immunity to civil suit. In 1812, Massachusetts' highest court partially immunized that state's public corporations by holding that they could not be liable for injuries that result from the negligent performance of duties that were imposed upon them by the legislature.

The Beginning of the Retreat

For a party injured by the negligence of a public corporation to bring suit against that body, it is necessary that the corporation's cloak of immunity to tort actions be either waived or abrogated. Waiver is accomplished by the passage of a statute which consents to the bringing of tort actions against the corporation. Abrogation, in contrast to waiver, is a judicial act. It is accomplished by overturning, in whole or in part, any earlier decision in the jurisdiction which had adopted the Russell v. Men of Devon rule of sovereign immunity.

In the United States there has been a steady retreat from the immunity doctrine. Many state legislatures, and those public corporations enabled by the state to engage in the act of legislating have, however, accompanied the dropping of the immunity barrier with the adoption of conditions precedent to the institution

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7. Keifer & Keifer v. Reconstruction Fin. Corp. & Regional Agricultural Credit Corp., 306 U.S. 381 (1936). Justice Frankfurter explained that "[a]s to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication." Id. at 388.

8. Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812). The facts in this case were similar to those in Russell v. Men of Devon, 100 Eng. Rep. 359 (1788). Plaintiff's horse was killed as a result of a defect in a bridge which the town of Leicester was obliged to keep in good repair. Relying upon the Russell case, the court held that public corporations could not be sued without the statutory permission of the legislature.

8.1. N.Y. Gen. Corp. Law §3 (McKinney 1943) defines "public corporation" as follows,

1. A "public corporation" includes a municipal corporation, a district corporation and a public benefit corporation.

2. A "municipal corporation" includes a county, city, town, village and school district.

3. A "district corporation" includes any territorial division of the state, other than a municipal corporation . . . which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments . . . .

4. A "public benefit corporation" is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which enure to the benefit of this or other states, or to the people thereof.

9. See note 5 supra and accompanying text.
of an action against the corporation. One such condition precedent is a notice of claim. Notices of claim are documents (the contents of which are specified by statute)\textsuperscript{10} which must be served upon the defending public corporation within a specified period of time following the date on which the cause of action accrued. Failure to comply with this condition precedent within the time allowed results in the claimant’s cause of action being forever barred.

In those states in which the sovereign immunity of municipalities and other public corporations has been limited or eliminated it would seem, at first glance, that the continued distinction between suits against individuals and suits against public corporations, inherent in the notice of claim requirement, is improper under the equal protection clause of the fourteenth amendment. Two lines of thought have sustained the requirement against such challenge, however, one adhering in states where sovereign immunity was abolished by legislative action and the other adhering in states which have followed the judicial route to abolition. In the states in which legislative acts have made suits against public corporations possible,\textsuperscript{11} it has been held that, since the legislature might have withheld the right to bring suit altogether, it could also attach to the right it had conferred such conditions and limitations as it saw fit to impose.\textsuperscript{12} Where sovereign immunity has been abrogated by court action, the notice requirement has been sustained because of what has been perceived as the legitimate public policy of allowing public corporations to investigate promptly and to settle claims against them out of court.\textsuperscript{13} The California Supreme Court has stated, for example, that, “[t]o the extent that immunity is abrogated the importance of these considerations is increased.”\textsuperscript{14}

The recent legal history of New York in relation to its attempts, both legislative and judicial, to resolve the conflict be-

\textsuperscript{10} The contents of a notice typically include a statement of the cause, nature, and date of the injury, and the amount of damages sought.
tween the need to protect the public treasury and the countervailing policy of compensating those injured by the negligence of others presents an illustrative case study.

II. THE DEVELOPMENT OF A HARSH NOTICE OF CLAIM STATUTE: NEW YORK'S GENERAL MUNICIPAL LAW § 50-e.

New York is one of those states which has waived its own immunity, and that of its subdivisions, through an act of the legislature. It has also provided, by way of General Municipal Law § 50-e [hereinafter referred to as § 50-e] that:

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 or special proceeding against a public corporation, . . . or any officer, appointee or employee thereof, the notice shall comply with the provisions of this section and it shall be given within ninety days after the claim arises.

Even though the state of New York has consented to have its own liability "determined in accordance with the same laws and rules as [are] applied to actions in the [New York State] supreme court against individuals and corporations . . . ," it has, through the operation of § 50-e, established a distinction between suits against certain public corporations, and all other entities and individuals. This statute creates a drastically shortened statute of limitations period when an action is brought against a public corporation rather than any other type of defendant. The New York statute of limitations period for an action to recover damages for injury to property or person, or to recover damages for an act of malpractice, is normally three years. The effect of § 50-e is to telescope the limitation period to a mere ninety days.

The Roots of § 50-e

After the first breaches were made in the wall of sovereign immunity, but before the adoption of the notice requirement, New York municipalities protected themselves against the financial impact of tort liability in the same way as any private citizen or business—by taking out insurance. This means of protection became impractical as increasing municipal activity resulted in
ever greater exposure of governmental subdivisions to tort suits. Further, the courts responded to the growth of governmental involvement in the average citizen’s life with an increased willingness to grant relief to individuals who were injured as a result of municipal negligence. As a result of these developments, those public corporations which could do so adopted conditions precedent to actions in tort (and often to other forms of action as well) which were brought against them.

The function of notice of claim requirements is not to trap unwary claimants, though this is their effect. The essential purposes of the requirement are the same as those which have been held to justify it against the claims of violating the fourteenth amendment’s equal protection guarantee:

1) to afford the public corporation an opportunity to make an early investigation of the claim while the facts surrounding it are still fresh, thereby protecting the corporation against fraudulent and stale claims; and,

2) to give the public corporation an opportunity to settle meritorious claims out of court where that is desirable and expedient.

Proposal of the 1943 Judicial Conference

The 1943 New York Judicial Council issued a report in

19. See, e.g., Loughran v. City of New York, 298 N.Y. 320, 83 N.E. 2d 136 (1948) for a reaffirmation of New York’s rule regarding liability of a municipality for injuries incurred by pedestrians as a result of a hole or depression in a sidewalk of less than four inches in depth.

20. Of course, only those public corporations with the ability to legislate, such as cities and villages, could adopt such conditions precedent. For a discussion of the development of such conditions precedent, see Note, General Municipal Law Sections 50-e and 50-i: Limitations on Litigation, 11 Syracuse L. Rev. 269 (1960).


22. See notes 10-11 supra and accompanying text; N.Y. JUD. COUNCIL, NINTH ANN. REP. 227 (1943); SATO, supra note 21 at 1141.

23. The New York Judicial Council was created by an act of the New York State legislature (L. of N.Y. 1934, ch. 128). It was composed of a member of the bar of each judicial department, two citizens from the state at large, the chief judge of the Court of Appeals, the presiding justices of each appellate division of the New York State supreme court, the chairmen and ranking minority members of the New York State Senate’s and Assembly’s Committee on the Judiciary, and the chairmen of the New York State Senate’s and Assembly’s Committee on Codes. The Council was required by its enabling statute to publish an annual report to the legislature recommending legislative actions to improve the administration of justice. The Judicial Council’s reports of 1943 and 1944 contained recommendations which gave birth to General Municipal Law § 50-e.

which it proposed and drafted a model notice of claim statute from which § 50-e was adopted. It is worthwhile to examine that report and the proposed model statute, for had the statute been adopted without change, at least part of the current harshness of § 50-e would have never arisen.

In the Judicial Council’s Report, published in 1943, is an extensive study of the notice of claim requirements of sixty-two New York State city charters. The study revealed a bewildering and varied array of laws which all too often served “as a trap for the unwary and the ignorant.” The various charter provisions were found to be inconsistent as to the causes of action that only could be initiated by first filing a timely notice of claim, the information to be contained in such a notice, and the period of time allowed for the delivery of the notice.

Worst of all, some of the charter provisions were found to contain requirements which varied with the type of action being brought. For example, in White Plains, in 1943, notice of claim for all personal injury cases had to be filed within ten days of the injury’s occurrence and had to contain a notice of intent to claim damages, as well as a description of the time, place, and extent of the injury. With respect to all actions for damages to person or property arising out of misfeasance or negligence, however, a notice of claim had to meet not only all of the above requirements, but also had to be made under oath and had to include a statement of the circumstances under which the injury occurred.

The courts required these early notice of claim statutes to be complied with meticulously if the action was not to be barred. Their decisions, according to the Council Report, too often turned on “technicalities” which prevented the disposition of honest claims on their merits.

The dominant aims of the proposed act, according to the 1943 Judicial Council’s comments to it, were consistency, greater leniency for the benefit of the meritorious claimant, and protec-

25. Id. at 246-58.
29. N.Y. JUD. COUNCIL, NINTH ANN. REP. 227 (1943); N.Y. JUD. COUNCIL, TENTH ANN. REP. 265 (1944).
tion against fraud for municipal treasuries. The Council intended that notice of claim provisions be applied to all causes of action brought against the protected corporations. It rejected the suggestion of Professor Edwin M. Borchard that the period for serving a notice be limited to thirty days, and instead adopted a longer ninety day period. The longer period was believed to be reasonable while a shorter one, it was feared, would produce inequitable results without conferring any extra benefit upon municipal and district corporations.

The notice period was not immutable. It could be extended "in the discretion of the court," and the claimant could "be granted leave to serve the notice within a reasonable time after the expiration of such time" upon a showing that:

1) reasonable excuse for the failure to serve the notice within such time existed;

2) the other party had "actual knowledge of the essential facts constituting the claim" prior to the time period; and

3) the other party was not prejudiced by the failure to timely serve.

In addition, failure to timely serve could be excused on the specific grounds of infancy and mental or physical incapacity. In the event of such incapacity, notice could be served within a reasonable time after the disability had ceased.

The scope of the power to amend, and the ease with which a defective notice of claim could be amended, afforded an aggrieved plaintiff great protection. Under the proposed statute, notice could not be deemed insufficient due to an error in its contents or in the manner of its service, provided that there was no intention on the part of the claimant to mislead the other party, and that the other party was not in fact misled by the error. If the notice happened to be defective, the proposed statute would re-

32. Professor Edwin M. Borchard's article, Borchard, Government Liability in Tort, Yale L.J. 1 (1924), remains to this day the foremost work on sovereign immunity.
34. Id. at 228.
35. Id.
36. Id. at 228, 239.
37. Id. at 228.
38. Id.
39. Id.
quire the receiving party to return it to the claimant with due diligence and the claimant would have ten days in which to re-submit a corrected copy. If the defendant failed to return a defective notice to the claimant, he would not be able to assert a defense based on such defect. The possibility of errors occurring in the first instance, it was hoped, would be reduced by the standardization of the content of notices and by a reduction in the number of notices needed to be served in any claim to one.

In addition to the specific provisions of the proposed statute, there was a direction given to the judiciary, and an implied warning to the protected corporations, that, "[t]his section shall be liberally construed with a view to substantial justice between the parties." The Legislative Response

The law passed by the legislature in 1945 was much harsher than the one recommended by the Judicial Council. It provided for a sixty day filing period, applicable only to tort actions, which was absolute. Substantial compliance with the time allowed was not enough. Infancy, death, and mental or physical incapacity could result in permission to file a late notice upon a showing that such circumstances were the actual cause of the failure on the part of the claimant to timely file. Amendment could only be achieved by motion to the court. Such motion could only be made before the trial of an action, and would be accepted only if the good faith of the claimant when he made the error, and lack of prejudice to the defendant by the acceptance of the amendment, could be shown. Amendment was limited to the contents of the notice, and could not be utilized for the purpose of correcting improper service. The Judicial Council's proposal that defective notices be returned to the claimant for correction and resubmission was not adopted.

40. Id. at 229.
41. Id.
42. Id. at 228, 232. Thus, the problem encountered with the multiple White Plains statutes (note 27 supra and accompanying text) would have been eliminated.
43. Id. at 229.
44. L. of N.Y. 1945, ch. 694, § 1, as amended, N.Y. GEN. MUNIC. LAW § 50-e (McKinney 1965).
45. Id. § 1(1).
46. Id. § 1(5).
47. Id. § 1(6).
48. Id.
49. Note that it will probably never reappear, since its adoption would result in an enormous administrative burden upon the City of New York.
The Legislature Attempts to Escape from the Harshness of its Creation

The Draconian nature of the original statute gradually became obvious to the legislature. In 1950 the filing period was extended from sixty days to the originally proposed ninety days, and the period for amending the notice was enlarged to include the time of the trial on the merits, in addition to the previously allowed pretrial period.

The New York legislature has slowly but significantly continued to change § 50-e so as to give a greater degree of justice to those whose valid claims would otherwise have been denied relief by the original statute’s harsh requirements. Improperly served notice is now sufficient, “if such notice is actually received [by the person designated to receive such notice] and such party against whom the claim is made shall cause the claimant or any other person designated by the claim to be examined in regard to such claim.” Reliance upon written settlement offers made by the defendant to the claimant or his insurer now stands beside infancy and mental or physical incapacity as an excuse for the untimely filing of notice. The time for amendment of the notice was enlarged again in 1966 to include “[a]ny time after the date of service of the notice of claim” in addition to the earlier extended period.

Judicial Support for the Legislative Trend

For the last thirty years the New York State legislature has been trying to escape from the harshness of its original creation. The general thrust of this reform has been in the direction of lessening the rigidity of the requirement that notice must be properly served, extending the time period for giving of notice and amendment of notice, and enlarging the number of circumstances that will justify the giving of late notice.

The New York State judiciary has supported and advanced

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51. Id. § 1(6).
52. L. of N.Y. 1951, ch. 393, § 1, N.Y. GEN. MUNIC. LAW § 50-e, subd. 3 (McKinney 1965).
this legislative trend by allowing documents that are functionally, but not technically, notices to be amended so that they can serve as such, by adopting ingenious doctrines for calculating the date on which a cause of action accrued with the result that the period of limitation is often extended, and by excusing the timely notice of claim requirement for an increasing number of claimants. The latter trend has been particularly true in cases involving infant claimants.

By way of a hypothetical fact pattern, not dissimilar to many actual cases involving § 50-e, let us examine the current effect of that section of the law on potential claimants: Johnny went to school one day. While he was playing in the yard somebody hit him on the head with a pipe. His father was so incensed by this occurrence that he sent a letter to the board of education. One hundred days later somebody told Johnny’s father that he should have sued. The father took Johnny to see a lawyer. By allowing ninety days to elapse, Johnny has not met the requirements of § 50-e.

Preservation of the Claim through Amendment

The New York courts may allow an amendment of the father’s letter, or of the accident report that the school required Johnny to fill out in quadruplicate, so that it meets the standards of a timely filed notice of claim. Acceptance of such a letter as a timely filed notice of claim is conditioned upon whether it fulfills the chief purpose of a notice, that of making the corporation aware of the existence of a potential claim against it. It must be established as well that such notice was actually received by someone who is authorized to receive it. The latter restriction is necessitated by the proscription against amendment of service.

Supporting the judicial attempt to preserve the otherwise lost rights of meritorious claimants are those decisions which have allowed a notice of claim filed by a third party (whose inter-

55. See notes 58-63 infra and accompanying text.
56. See notes 64-67 infra and accompanying text.
57. See notes 68-76 infra and accompanying text.
61. N.Y. Gen. Munic. Law § 50-e, subd. 6 (McKinney 1965).
est is derived from the claimant's) to be amended so that it can serve as sufficient notice on behalf of the claimant himself. For example, a notice of claim filed by the claimant's insurance carrier, where the carrier has a contingent interest in the claimant's cause of action, has been held to be sufficient as to the claimant if the claimant was actually examined after the filing of notice. Likewise, a bailee's notice of claim which alleged, in part, that the city's negligence caused the bailee's warehouse to be destroyed by fire and the bailor's property located therein to be consumed by the blaze, was deemed sufficient as to the bailor's claim. These decisions are justified by the reasonable assumption that any investigation of the third party's claim will necessarily cover the same ground as an investigation of the plaintiff's claim.

**Calculating the Time of Accrual so as to Preserve the Claim**

Additionally, the courts have overcome the barrier to claims presented by the ninety day filing period. Whether a claim has been timely asserted is a question of fact which, if in dispute, bars dismissal of the claim. The likelihood of such disputes, however, has been increased by the development of doctrines, favorable to claimants, that fix the date on which the cause of action is deemed to have accrued at a time after the date of injury. It has been held, for example, that causes of action for false imprisonment accrue on the date that each individual imprisonment comes to an end rather than on the day each began. In the case of an action for malpractice that is brought against a municipal hospital, it has been held that the date of accrual is the date of the final treatment rather than the date on which the malpractice occurred, provided that the treatment has been continuous from the time of the incident of malpractice. Finally, it has been held

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65. Schildhaus v. City of New York, 17 N.Y. 2d 853, 218 N.E. 2d 325, 271 N.Y.S. 2d 286 (1966); Allee v. City of New York, 42 App. Div. 2d 899, 347 N.Y.S. 2d 708 (1st Dep't 1973). In Schildhaus, plaintiff put forth the theory that in cases of false imprisonment the ninety day limitation period should be calculated from the ultimate date of acquittal on charges for which the imprisonment had been instituted. This theory of the date of accrual, which would have resulted in an even longer period during which § 50-e's requirements could be fulfilled, was rejected by the court.

that a continuing tort may be deemed to have arisen anew each time it occurred, and thus, no more than one notice of claim need be filed for it.67

**Excusing Late Notice of Claim by Reason of Infancy**

Infancy is one of the statutory excuses for filing a late notice of claim.68 Determining the age at which a claimant’s late filing can be excused by the condition of infancy has long been a troublesome problem for the New York judiciary. Illinois courts long ago exempted all infants from the requirement of filing a timely notice of claim69 despite the fact that the state’s notice of claim statute contains no express exceptions that justify late filing.70 Until the recent case of Murray v. City of New York,71 New York’s courts had presumed immature infancy to be a form of physical and mental disability which would excuse failure to timely file a notice.72 An infant of five years was considered to be an immature infant, while an infant of twenty years could not be said to suffer from the disability. The existence of this disability in persons between the ages of five and twenty could be determined only after litigation.73

The Murray case confronted the New York Court of Appeals with the plight of a nineteen year old late-filing infant. George Murray had been injured while motorcycling. He was admitted for treatment to a municipal hospital. There an operation was

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67. Hackensack Water Co. v. Village of Nyack, 289 F. Supp. 671, 682 (S.D.N.Y. 1968). This suit arose from continuing damage to plaintiff, a New Jersey water company, by reason of defendant village’s diversion of upstream waters. Notice of claim was filed by plaintiff on May 22, 1967 although the complaint sought money damages from May 1966. The court ruled that a continuing trespass is deemed to have “arisen anew” each day it goes on. Therefore, only those injuries occurring more than ninety days prior to May 22, 1967 were excluded from potential recovery.

68. N.Y. GEN. MUNIC. LAW § 50-e, subd. 5 (McKinney 1965).


70. ILL. REV. STAT. ch. 85, §§ 8-102, 103 (Smith-Hurd Supp. 1974).


72. See, e.g., Murphy v. Village of Ft. Edward, 213 N.Y. 397, 107 N.E. 716 (1915). In that case, the failure of a five year old infant’s guardian ad litem to timely file a notice of claim on her behalf did not result in the action being barred. The notice period was sixty days and the notice was filed twenty-three months after the injury.

performed upon his leg which caused a severe infection and resulted in an osteomyelitic condition. Nine months after the "infant's" discharge from the municipal hospital he filed a notice alleging malpractice on the part of the city hospital. The court ruled that:74

An infant of 19 may indeed lack the acumen to appreciate the source, or for that matter, the nature of the wrong allegedly perpetrated against him and, consequently, have been remiss in the proper assertion of his legal rights. The impediment may reasonably be presumed to attend infancy; there is no requirement that it be factually demonstrated . . . .

Despite a prior divergence of approach among lower courts,75 the Murray court made it clear that a presumption will now exist that all infants are incapable of timely filing a notice of claim.76 While this presumption may be overcome by submission of contrary evidence,77 the door has been opened for discretionary allow-

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76. It did not, however, remove from infants the duty to file a notice of claim prior to instituting an action. See Camarella v. E. Irondequoit School Bd., 34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1974). Note also that subsequent to the Murray decision, the New York legislature lowered the age of majority to eighteen for almost all purposes (see L. of N.Y. 1974, chs. 889-940). Presumably, the Murray decision should now be read as applying to persons under eighteen years of age.
77. [A] determination as to a cognizable relation between infancy and the delay is a matter committed to the sound discretion of the court, to be exercised in light of all the facts and circumstances in a given case . . . .

ance of a number of meritorious suits that would have been otherwise summarily dismissed. Indeed, the trend may be for courts to recognize the harshness of § 50-e as being unjust and to allow as many meritorious “infants” as possible to bring suits, despite their failure to timely file a notice of claim. Therefore, many more meritorious smaller claims which might otherwise not be filed may be preserved, and more frequent out-of-court settlements may occur. Such results would carry forward the Judicial Council’s original purposes.

III. § 50-e: Continuing and Increasing Difficulties

Despite the efforts of the New York legislature and judiciary to ease the harshness of General Municipal Law § 50-e, it still remains an often fatal obstacle to many claimants who would otherwise be entitled to relief. The statutory period poses a formidable barrier to those whose knowledge of the legal system is least developed, and to those whose contact with lawyers is most infrequent. It may at least be argued, however, that the loss of these claims is justified as a necessary means of protecting the public treasury, for without the time limit the ability of the municipal corporation to ferret out fraudulent claims through prompt investigation will be lost.

Injustice seems even more acute in those cases involving claims which are lost because of errors in the notice of claim which cannot be amended. Unamendable errors in the notice of claim come in two varieties. First, there are those errors whose amendment the court would deem prejudicial to the defendant. Second, there are those errors involving the manner of service of the notice of claim. As to the first, the problem of determining when an amendment is, or is not, prejudicial to the defendant has been a source of great confusion to the courts and has occasionally resulted in absurdly contradictory decisions.

Professor David D. Siegel has proposed a rational, general, procedural standard
which some courts have utilized to solve this problem. He suggests that "the underlying question is whether the earlier document gave adequate notice of the underlying event." It has followed from Siegel's rule that a previously filed notice of a personal injury may be amended to include an action for wrongful death that results from the same injury, and that a husband's notice of claim for losses arising from his wife's injury may be amended to include the wife's personal injury action. It is impossible to reconcile the rule, however, with cases that have held that a notice for a property damage claim may not be amended to include an action for personal injury, or that a notice filed for false arrest may not be amended to include a malicious prosecution action.

The explanation for these otherwise inexplicable results lies not in the caprice of judicial reasoning, but in the vagaries of the word "prejudice" as it is used in subdivision six of General Municipal Law § 50-e. That the meaning of this word has been the subject of an extraordinary amount of litigation, and that the results of these frequent efforts fail to be logically reconcilable, should put us on notice that a new standard upon which to make a determination of when to allow a proposed amendment must be found.

The second source of error as to the notice of claim involves the manner of service. The failure of the adopted version of § 50-

81. N.Y.C.P.L.R. § 3025(b), Practice Commentary 3025:12 (McKinney 1974).
86. [A] mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded as the case may be in the discretion of the court provided it shall appear that the other party was not prejudiced thereby.
N.Y. Gen. Munic. Law § 50-e, subd. 6 (McKinney 1965).
88. See section IV infra for further discussion.
e to include any provision allowing for the amendment of "the manner or time of service" is an increasing source of hardship and injustice. Since the provisions of § 50-e are applicable wherever "a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding . . . ," few public corporations have missed the opportunity to be included within the protective boundaries of the statute. It has of course, been applied to all of the counties, towns, and villages of New York. Unfortunately § 50-e has also been adopted by entities that injured parties are not likely to perceive as being protected by the statute. Before a tort action may be commenced against these entities, a notice of claim must be served for example, upon the New York City Sports Authority, the New York City Transit Authority, the New York State Sports Authority, the New York City Health and Hospitals Corporation, all the state school districts, boards of education and their employees, public housing authorities, and even upon the Westchester County Playland Commission. The predicament of the meritorious claimant becomes more difficult when we learn that city charters may adopt the requirements of § 50-e and apply them to public officers for whom the city is not obligated to provide compensation.

Attorneys must be aware that, though not easily ascertained, the possibility exists that the public corporation or the employee

90. Id.
91. N.Y. County Law § 52 (McKinney 1972).
92. N.Y. Town Law § 67 (McKinney 1965).
100. See Pekar v. Westchester County Playland Comm'n, 190 F. Supp. 430 (S.D.N.Y. 1961), wherein the court relied on § 50-e in holding that plaintiff could not bring an action against a public benefit corporation without giving proper notice.
101. See Siegel v. Epstein, 21 App. Div.2d 521, 251 N.Y.S.2d 538 (2d Dept '64), aff'd, 17 N.Y.2d 639, 216 N.E.2d 541, 269 N.Y.S. 2d 138 (1966) wherein the charter of the City of Long Beach was held to require that a notice of claim be served on the municipality before an action could be commenced against the Marshal of the City of Long Beach, despite the fact that the city was not obligated to reimburse him for tort liability incurred by him during the course of his duties. This holding resulted in the dismissal of plaintiff's causes of action for wrongful eviction and conversion.
against whom the suit is brought may be insulated by the notice of claim requirement. They must repeatedly search through state laws and city ordinances to determine whether service is necessary and who is designated to receive it.\textsuperscript{102} The proliferation of General Municipal Law § 50-e has defeated its original purpose: “to effect uniformity throughout the state as to the requirements for notice of claims.”\textsuperscript{103} It has instead become “a trap for the unwary and the ignorant.”\textsuperscript{104}

IV. PROPOSALS FOR REFORM

The confusion and hardship caused by General Municipal Law § 50-e should not be allowed to continue. The law should be reformed in at least two ways. First, its application should be limited to a few large municipal corporations, perhaps only to cities, towns, villages and counties. The requirement of service, and the method of service upon these corporations should be contained in a single provision of law. The result of this reform would be to end the unjustified proliferation of the statute.\textsuperscript{105} It is doubtful that a sports authority will be subjected to more tort claims than a large department store. There is no justifiable reason to give such a quasi-governmental institution greater protection than a private business establishment. On the other hand, there is also no reason to drop the notice of claim requirement entirely, since it may afford valuable and perhaps necessary protection for municipal treasuries. The advantages of municipal investigation and the possibility of out of court settlements serve both the public interest and that of the meritorious claimant.

A second recommended reform is one that would bring back the mild amendment provisions of the draft of § 50-e proposed by the Judicial Council in 1943 to replace subdivision six of the current law.\textsuperscript{106} The 1943 proposal contained two major advantages: it allowed amendment of defective service and thereby prevented the disqualification of otherwise meritorious claims on a technicality, and it did not condition the acceptance of an amendment on the vague word “prejudice.” Instead it required that acceptance of an amendment be based upon an appearance

\textsuperscript{102} In the absence of a statute that otherwise determines who is to receive service of the notice of claim, the provisions of N.Y.C.P.L.R. § 311 (McKinney 1972) are applied.
\textsuperscript{104} Id.
\textsuperscript{105} See text accompanying notes 23-43, supra.
“that there was no intention to mislead the other party and that such party was not, in fact, misled thereby.”

If we are to justify the preservation of the special protection provided to municipalities by notice of claim requirements, then these laws must be drafted and interpreted in a manner that affords relief to the meritorious claimant while thwarting deception and fraud so as to protect the municipal treasury. By allowing the municipal corporation to make an early investigation of claims, General Municipal Law § 50-e accomplishes the latter. It fails, however, as to the former and should, therefore, be reformed in the manner suggested.

Mark J. Fox

107. Id.