

## The 2008 New York Bar Association Personal Injury Treatise

### *Chapter on MUNICIPAL LIABILITY* *(this is a draft only - final published version to appear shortly)*

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#### INTRODUCTION

Before bringing a claim against the State of New York or one of its subdivisions, one must determine the nature of the beast. Is it the State itself, or is it one of its independent offspring, i.e., a public corporation? The distinction is not always self-evident. The State has many divisions, departments and agencies that, though they may appear somewhat independent, are considered part of the State itself (examples: Department of Transportation, State parks, State University of New York, New York State Department of Correctional Services). If the State must be sued, then you must go to the Court of Claims and adhere to the Court of Claims Act rules for doing so, which will lead you to a bench trial in front of a Court of Claims judge. If, on the other hand, an independent subdivision of the State, i.e., a public corporation, rather than the State itself, must be sued, then generally you must go to Supreme or County Court, where you will try your case before a jury (if any of the parties requests one) and a very different set of rules apply, some of which may be found in the General Municipal Law.

Public corporations, though offspring of the State, have their own separate existence from that of the State, just as children do from their parents. Just as you cannot get jurisdiction over a child by suing the parent, you cannot get jurisdiction over the municipal corporation (or other such entity) by suing the State. The public corporation, not the state, is liable for its own torts and the torts of its employees and agents (see, *Hughes v. State*, 252 A.D. 263 [3rd Dept 1937]; Gen Mun. Law § 50 et seq) except, of course, if the employees or agents did not commit the tort in the scope of their employment (*Osipoff v City of New York*, 286 N.Y. 422 [1941]).

Distinctions among the various types of public corporations are also confusing. For example, the terms “municipality” and “public corporation” are not synonymous. The former clearly constitutes a subset of the later. But both terms are amorphous in New York law. No New York statute contains a universally applicable definition of those terms (see, *Jericho Water Dist. v. One Call Users Council, Inc.*, 37 A.D.3d 136, [2nd Dept 2006]). The term “municipality” appears in dozens of statutes, some of which contain their own definition of the term. While some statutes limit the definition of the term “municipality” to counties, cities, towns, and villages (see e.g. Environmental Conservation Law § 15-1301[3]; General Business Law § 780[4]; General City Law § 20-g[3][a]; General Municipal Law § 239-h [2]; Town Law § 284[3][a]; see also Executive Law § 155-a[4] [for purposes of Executive Law article 6-C, “ [m]unicipalities’ shall mean municipal corporations” ] ), other statutes define the term more broadly. ( see e.g. Environmental Conservation Law §§ 17-1903[1][d], 51-0101[6]; General Municipal

Law § 77-b[1][a]; Parks, Recreation and Historic Preservation Law § 1.03[7]; Public Authorities Law § 1115-a[13]; Public Health Law § 1160[9] ). There are even statutes defining “municipality” to include such diverse entities as fire districts ( see e.g. County Law § 227[2] ), public libraries ( see e.g. General Municipal Law § 77-b[1][a] ), boards of cooperative educational services ( see e.g. Energy Law § 9-102[2] ), Indian nations or tribes ( see e.g. Public Health Law § 1160[9] ), and even public authorities (see e.g. County Law § 227[2]; Public Health Law § 1160[9]).

A “public corporation” includes municipal corporations (county, city, town, village and school district) district corporations (any territorial division of the state, other than a municipal corporation, with the power, inter alia, to contract indebtedness, levy taxes, or benefit assessments upon real estate, for example, water, and fire districts) and public benefit corporations (a corporation organized to construct or operate a public improvement wholly or partly within the state for the benefit of the public, for example, public authorities) (General Corporations Law § 66).

This chapter does not address suits against the State of New York proper, but rather suits against its subdivisions, and more specifically, its public corporations, which include municipal corporations (counties, cities, towns, villages and school districts), district corporations (e.g., a local or regional public health or fire district), public benefit corporations (such as public authorities). This chapter will also discuss the doctrine of “sovereign immunity”, which may apply in suits brought against any government entity or official.

When contemplating claims against any governmental entity, much care must be taken in immediately determining the “nature of the beast.” This will likely determine the “conditions precedent” to be followed before suing the entity.

This chapter is divided into two parts: Procedural Law and Substantive Law.

## PART I: PROCEDURAL LAW

### Introduction

Various statutes impose procedural hurdles for suing public corporations, including municipal corporations (counties, cities, towns, villages, school districts). These include, but are not limited to, serving a notice of claim, complying with the public corporations demand for a pre-suit “examination” (also called a “hearing”, but really more like a deposition), waiting certain periods of time between serving the notice of claim and bringing suit, and in some specific types of cases discussed below in the “premises liability” section, showing “prior written notice” of a defect or hazard.

Since counties, cities, towns, villages and school districts are all “municipal corporations”, the special rules for bringing claims against them are found, not surprisingly, in the General Municipal Law. But the careful practitioner should be careful not to confuse these municipal corporations with other types of public benefit corporations such as public authorities. These latter entities all too often (but not always) come armed with their own confounding set of conditions precedent and different, often shorter, time limitations for serving a notice of claim and/or filing suit found in the Public Authorities Law or in the unconsolidated laws (see, e.g., *Yonkers Contr. Co. v. Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375, 378, 690 N.Y.S.2d 512, 712 N.E.2d 678 [1999] [pursuant to Unconsolidated Laws, plaintiff has one-year time, rather than the one-year ninety days under the General Municipal Law, for commencing a lawsuit against the Port Authority]). These separate requirements constitute a minefield of malpractice bombs waiting to explode under the foot of the unwary practitioner.

## CONDITIONS PRECEDENT TO SUIT:

### The Nature of a “Condition Precedent” to suit

#### NOTICE OF CLAIM:

The purpose of notice of claim requirements is to avoid stale claims and permit the public corporation the opportunity to investigate the claim and thus defend it, or to settle it early on (see. *Teresta v. City of New York*, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952); *asias v. City of New York*, \_\_\_ AD3d \_\_\_, \_\_\_ NY2d \_\_\_ 2007 WL 1150000 [2nd Dept 2007]). General Municipal Law § 50-e does not by itself require that a notice of claim be served against the public corporation. Rather, it establishes the uniform rules for preparing and serving such a notice of claim “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.” Section 50-i requires that a notice of claim be served against all “municipal corporations” (city, county, town, village, fire district or school district) as a condition precedent to suits sounding in tort, and refers to § 50-e for the manner in which this must be accomplished. While

#### § 50-e

contemplates universal requirements and procedures for all public corporations including public authorities (but has been held to apply ,

#### § 50-i

applies expressly to municipal corporations only. section 50-e of the

General Municipal Law was enacted to establish a uniform and equitable procedural system for instituting tort claims against all public corporations, including public authorities. The provisions of section 50-e (regarding the notice of claim) have been held to supersede any inconsistent procedural rules of public corporations, including public authorities, but only where such provisions predate 1945, the date of the passage of 50-e. As for individual public corporation laws (such as public authorities) enacted or amended after 1945, the provisions of 50-e apply only if said law expressly adopt 50-e (see, *Adkins v. City of New York*, 43 N.Y.2d 346, 350, 401 N.Y.S.2d 469, 372 N.E.2d 311; *Guillan v. Triborough Bridge and Tunnel Authority*, 202 A.D.2d 472 [2nd Dept 1994]). None of this, however, affects the shorter statutes of limitations found in some Public Authorities Laws (see, *Arcuri v. Ramos*, 7 A.D.3d 741 [2nd Dept 2004][one-year statute of limitations of the specific Public Authority’s Statute applied rather than the one-year-90-day statute of limitations found in General Municipal Law § 50-i.).

#### When required:

Most notice-of-claim statutes require a notice of claim only when the demand is made for money damages, and do not require one in cases where no money damages are demanded, such as in equity cases where the relief sought is to restrain a continuing act (*Sammons v. City of Gloversville*, 175 N.Y. 346, 67 N.E. 622; see, *Robertson v. Town of Carmel*, 276 A.D.2d 543, 714 N.Y.S.2d 442; *Stanton v. Town of Southold*, 266 A.D.2d 277, 698 N.Y.S.2d 258; *Bass Bldg. Corp. v. Village of Pomona*, 142 A.D.2d 657, 530 N.Y.S.2d 595; *Dutcher v. Town of Shandaken*, 97 A.D.2d 922, 470 N.Y.S.2d 767; *Malcuria v. Town of Seneca*, 84 A.D.2d 931, 446 N.Y.S.2d 698; *Fontana v. Town of Hempstead*, 18 A.D.2d 1084, 239 N.Y.S.2d 512, *affd.* 13 N.Y.2d 1134, 247 N.Y.S.2d 130, 196 N.E.2d 561 *Grant v. Town of Kirkland*, 10 A.D.2d 474, 200 N.Y.S.2d 594; see also, *Serkil, L.L.C. v. City of Troy*, 259 A.D.2d 920, 686 N.Y.S.2d 892; *Clempner v. Town of Southold*, 154 A.D.2d 421, 425, 546 N.Y.S.2d 101). But in equity actions where the plaintiff also makes claims for money damages, those claims will generally be barred unless the claimant complies with the notice of claim requirement and other conditions

precedent (see, *Grant v. Town of Kirkland*, 10 A.D.2d 474, [4th Dept 1960]). Compliance with the notice-of-claim requirements of General Municipal Law § 50-e is not required, however, where the plaintiffs seek equitable relief to abate or enjoin a nuisance and the demand for money damages is “incidental and subordinate” to the requested injunctive relief (see, *Baumler v. Town of Newstead*, 198 A.D.2d 777, 604 N.Y.S.2d 372; *Dutcher v. Town of Shandaken*, 97 A.D.2d 922, 470 N.Y.S.2d 767; *Malloy v. Town of Niskayuna*, 64 Misc.2d 676, 315 N.Y.S.2d 502). Some notice-of-claim statutes (but not General Municipal Law § 50-e) require that a notice of claim be served against the public corporation even in pure equity actions, and this requirement is upheld in Court (see, *Picciano v. Nassau County Civil Service Com’n.*, 290 A.D.2d 164 [2nd Dept 2001] [stating that, while General Municipal Law § 50-e, Town Law § 67 and CPLR 9801 (actions against villages) do not require a notice of claim for equity actions, County Law § 52 does]).

#### Time Limitations:

Section 50-e(1)(a) provides that a notice of claim must be served within 90 days “after the claim arises, except that in wrongful death actions, the ninety days shall run from the appointment of a representative of decedent’s estate” (the wrongful death lawsuit must, however, still be filed within the two-year statute of limitations of § 50-i).

Section 50-e(3)(b) provides that service by registered or certified mail shall be “complete” upon deposit of the notice of claim in a post office or official depository. Of course personal service is complete upon delivery.

#### Accrual date:

When precisely does “the claim arise” for purposes of calculating the start of the 90-day period? It depends. A claim accrues, for Notice-of-Claim purposes, when the claim becomes enforceable; that is, when all the facts essential to the claim have occurred and all the elements of the cause of action can be truly alleged in the Complaint. *Britt v. Legal Aid Society, Inc.*, 95 N.Y.2d 443, 718 N.Y.S.2d 264, 741 N.E.2d 109 [1]. In most personal injury actions, the notice of claim must be served within 90 days of the date of the injury, which is the accrual date (*Jackson v. L.P. Transp., Inc.*, 134 A.D.2d 661 [3rd Dept 1987]). For toxic torts, the accrual date is whenever the claimant had actual or constructive discovery that the toxic exposure has caused him an injury (CPLR § 214-c[3]). For medical malpractice actions, continuous treatment tolls the 90-day period, but infancy and insanity do not (*Kropiewnicki v. City of New York*, 29 AD3d 532 (2nd Dept, 2006)). The accrual date for malicious prosecution is the date when the proceeding was terminated in claimant’s favor by dismissal (*Roche v. Vill. of Tarrytown*, 309 A.D.2d 842, 766 N.Y.S.2d 46 [2d Dept.2003]; *Ragland v. New York City Housing Authority*, 201 A.D.2d 7, 613 N.Y.S.2d 937 [1994]) but for false imprisonment it is the day the confinement terminated (*Santiago v. City of Rochester*, 19 A.D.3d 1061 [4th Dept 2005]). In a claim for a continuing tort (e.g., trespass), the claimant can generally claim damages only starting 90 days before the notice of claim was served (*Rapf v. Suffolk County of New York*, 755 F.2d 282, 292 (2nd Cir.1985); see also, *Kennedy v. U.S.*, 643 F.Supp. 1072 (E.D.N.Y. 1986); *Sova v. Glasier*, 192 A.D.2d 1069, 596 N.Y.S.2d 228; *State of New York v. Schenectady Chems.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010).

A trap for the unwary: A conscious pain and suffering claim on behalf of a deceased must be served within 90 days of the date of the injury-producing accident regardless of when the representative of the estate was appointed and regardless of the date of death (*Miller v. County of Sullivan*, 36 A.D.3d 994 [3rd Dept 2007]; *Jae Woo Yoo v. New York City Health & Hosps. Corp.*, 239 A.D.2d 267, 267-268, 657 N.Y.S.2d 189 [1997]; *Gibbons v. City of Troy*, 91 A.D.2d 707, 707-708, 457 N.Y.S.2d 950 [1982] ).

Thus, although the wrongful death case does not accrue (for the purposes of the 90-day period) until appointment of the representative of the estate of the deceased, the conscious pain and suffering” claim accrues immediately upon the date of the accident.

Tolling the 90-day period:

The requirement of serving a notice of claim within the 90-day time limit is a condition precedent to suing the public corporation rather than a “statute of limitations”. Since the CPLR “tolling” provisions (e.g., infancy, insanity) apply only to the latter and not the former, they do not apply here (see *Harris v. City of New York*, 297 A.D.2d 473, 475, 747 N.Y.S.2d 4). Apparently, the only tolls available (discussed, *infra*) are for continuous treatment (in medical malpractice cases) and equitable estoppel (see, *McCoy v. City of New York*, 10 A.D.3d 724 [2nd Dept 2004] [continuous treatment]; *Sweeney v. City of New York*, 225 N.Y. 271, 273, 122 N.E. 243 [equitable estoppel]). Compare: the CPLR tolling provisions do apply to extend the one-year ninety-day (or two-year for wrongful death) statutes of limitation for suing municipalities, and therefore also toll, coextensively, the time limit to apply for leave to serve a late notice of claim (see, (see *Campbell v. City of New York*, 4 N.Y.3d 200, 791 N.Y.S.2d 880, 825 N.E.2d 121); *Vasquez v. City of Newburgh*, 35 A.D.3d 621 [2nd Dept 2006]).

Since the condition precedent of serving a notice of claim within 90 days of the accrual date is a time limitation (as opposed, for example, to a waiting period), if the case is dismissed for failure to comply with this condition precedent after the statute of limitations is expired it would be futile to recommence the dismissed action under the provisions of CPLR 205(a) because the claimant could never fulfill the condition precedent of serving a timely notice of claim (i.e., within 90 days of the accrual date) or alternatively of applying for leave to serve a late notice of claim within the statute of limitations period.

Consequences of lateness:

Service of the notice of claim received by the public corporation after the 90-day period expires, and without leave of court, is a nullity (see, *Alston v. Aversano*, 24 A.D.3d 399, 805 N.Y.S.2d 117 (2nd Dept 2005)). Further, a public corporation is under no obligation to apprise a claimant that the notice of claim was served late, or to raise the lateness as an affirmative defense. Nor does the defendant’s participation in the litigation prior to bringing its motion to dismiss preclude it from seeking dismissal on this ground; the failure to timely serve the notice of claim is jurisdictional defect that may be raised any time prior to trial without warning (see, *Wade v. New York City Health and Hospitals Corp.*, 16 A.D.3d 677, 793 N.Y.S.2d 68 (2nd Dept 2005); *Maxwell v. City of New York*, 29 A.D.3d 540, 815 N.Y.S.2d 133 (2nd Dept 2006)).

Consider the harshness of this rule! If the notice of claim is served even a day late, i.e., on the 91st day, the notice of claim is a “nullity”. In that case, the public corporation has no duty to inform the claimant that the notice of claim was served late, or to raise this as an affirmative defense in an Answer. Instead, the public corporation can wait until it is too late for the claimant to apply for leave to serve a late notice of claim (and too late to have the previously untimely served notice of claim deemed served *nunc pro tunc*), and even wait until the time of trial. Once the lateness is brought to the attention of the Court, whenever that is, if the statute of limitations is expired, the Court has no discretion to do anything but dismiss the lawsuit, since the service of a timely notice of claim, or an untimely one with leave granted within the statute of limitations period to serve it late, is a condition

precedent to the lawsuit, and the failure to comply with a condition precedent is a jurisdictional defect (see, *Maxwell v. City of New York*, 29 A.D.3d 540, 815 N.Y.S.2d 133 (2nd Dept 2006); *Wade v. New York City Health and Hospitals Corp.*, 16 A.D.3d 677, 793 N.Y.S.2d 68 (2nd Dept 2005); *Small v. New York City Transit Auth.*, 14 A.D.3d 690, 789 N.Y.S.2d 229 (2nd Dept 2005).

#### Equitable Estoppel:

Defendant can be “equitably estopped” from opposing the application to serve a late notice of claim, but this is a rare event. Such an argument prevails only where there is active concealment or misrepresentation, i.e., some affirmative conduct of the defendant that misleads the plaintiff or prevents timely filing of the notice of claim or a timely application for leave to file a late claim. Estoppel will not lie simply because defendant failed to warn plaintiff that no notice of claim had been served, or fails to advise the plaintiff that he served the wrong public corporation or because defendant failed to advise plaintiff of a defect in the claim that rendered it a nullity (see, *Kroin*, 620 N.Y.S.2d 339; *Ceely v. New York City Health and Hospitals Corp.* 162 A.D.2d 492 [2nd Dept 1990]; *Albano v. Long Island R. Co.* 122 A.D.2d 923 [2nd Dept 1986]). The municipality’s participation in the litigation for an extended period of time without advising plaintiff of the defect will not by estop the municipality from raising the notice of claim requirement as a defense, which it could do as soon as the sol expires (see, *Rodriguez v. City of New York*, 169 A.D.2d 532 [1st Dept 2001]).

#### CONTENTS OF NOTICE OF CLAIM:

Section 50-e(2) requires the claim to set forth: the nature of the claim, the time, location and manner in which the claim arose, and the damages claimed, all with sufficient specificity to allow the public corporation to conduct an adequate investigation. The stated purpose of the notice of claim requirement is to “enable authorities to investigate, collect evidence and evaluate the merit of a claim” (*Brown v. City of New York*, 95 N.Y.2d 389 [2000]). The test of the sufficiency of a notice of claim is whether it includes information sufficient to enable the public corporation to investigate the claim. The description should allow the public corporation, at a minimum, to locate the place, fix the time and understand the nature of the claim (*Rosenbaum v. City of New York*, 8 N.Y.3d 1 [2006]). The requirement of setting forth “the nature of the claim” includes sufficiently setting forth the legal theory or cause of action claimed. Yet the courts have not interpreted the statute to require that a claimant state a precise cause of action in a notice of claim (see, *Ismail v. Cohen*, 706 F.Supp. 243, *affd.* 899 F.2d 183; *DeMaio v. City of New York*, 144 A.D.2d 623, 534 N.Y.S.2d 704; *Lampman v. Cairo Cent. School Dist.*, 47 A.D.2d 794, 795, 366 N.Y.S.2d 237).

Partial compliance (i.e., insufficiency of details) can be as fatal to the claim as non-compliance. “Sufficient specificity” means enough accurate information regarding the nature of the claim, the time, location and manner in which the claim arose, and the damages claimed, so as to allow the public corporation to conduct an adequate investigation (*Caselli v. City of New York*, 105 A.D.2d 251 [2nd Dept 1984]; *Marengo v. City of New York*, 266 A.D.2d 438 [2nd Dept 1999]). An insufficient notice-of-claim within the 90-day period constitutes a jurisdictional defect just as a failure to serve a notice of claim does (although under certain circumstances, discussed *infra*, an application can be made to comply beyond the 90-days as long as the application is made within the applicable statute of limitations period).

The notice of claim must be verified by the claimant (General Municipal Law § 50-e [2]). The public corporation must, however, timely inform the claimant that it is rejecting or electing to treat as a

nullity an unverified notice of claim, or else the unverified notice of claim will be deemed valid (*Breco Environmental Contractors, Inc. v. Town of Smithtown*, 31 A.D.3d 357, 819 N.Y.S.2d 58, 2006 N.Y. Slip Op. 05304 (2nd Dept 2006)). Compare: As discussed above, the public corporation has no obligation to inform the claimant that his notice claim otherwise fails to comport with the notice of claim provisions, i.e., that it is timely served and that its contents are sufficiently specific.

#### HOW TO SERVE THE NOTICE OF CLAIM:

##### Section 50-e

(3)(d) provides two alternative manners of service of the notice of claim: by personal service or certified or registered mail. Regular mail won't do. General Municipal Law § 50-e (3)(c), however, contains a savings provision, which specifies that if a notice of claim is timely served "but in a manner not in compliance with the provisions of this subdivision [3]" (e.g., by regular mail) service is nonetheless valid "if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it" or, alternatively, "if the notice is actually received by a proper person within the time specified by this section [i.e., within 90 days after the claim arises], and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received". However, this savings provision can cure only improper methods of service, such as service by ordinary mail, not service on the wrong public entity (*Scantlebury v. New York City Health and Hospitals Corp.*, 4 N.Y.3d 606 [2005]).

Note: Much of the case law refers interchangeably to the "filing" or "service" of the notice of claim (see, e.g., *Carter v. City of New York*, 38 A.D.3d 702 [2nd Dept 2007] [referring to leave to "file" a late notice of claim]). General Municipal Law §50-e, however, refers only to the "service" of a notice of claim. The notice of claim need not be "filed" in the sense that it must be at all delivered to the County Clerk's office. Rather, it must be either personally delivered or sent by certified or registered mail to the proper person at the public corporation (General Municipal Law § 50-e[3])

#### UPON WHOM:

##### Section 50-e

(3)(d) provides for service of the notice of claim on two alternative classes of persons: a person "designated by law", or an attorney regularly engaged in representing such public corporation. As for those "designated by law", refer to CPLR § 311 or, for public authorities and the like, their enabling statutes (see, *Viruet v. City of New York*, 181 Misc.2d 958, 695 [NY Cupt Ct 1999])

#### OTHER CONDITIONS PRECEDENT:

##### Section 50-i(1)(b) Waiting period:

General Municipal Law § 50-i(1)(b) requires that the complaint allege that "at least 30 days have elapsed since the service of the notice of claim and that the adjustment or payment of the claim has been neglected or refused". The mandatory 30-day period between service of the notice of claim and the summons and complaint serves the purpose of allowing municipal defendants to conduct an investigation and examine the plaintiff with respect to the claim (see General Municipal Law, § 50-h; *McKinney's Unconsolidated Laws of NY*, § 7401, subd. 2), and to determine whether the claims should be adjusted or satisfied before the parties are subjected to the expense of litigation (see *Arol Dev. Corp. v. City of New York*, 59 A.D.2d 883, 399 N.Y.S.2d 674; *Devon Estates v. City of New York*, 92 Misc.2d

1077, 1078, 402 N.Y.S.2d 110). The 30-day allegation must be accurate or the complaint is subject to dismissal for failure to comply with this condition precedent (see, *Perkins v. City of New York*, 26 A.D.3d 483[2nd Dept 2006]). Pursuant to Section 50-i(3), the 30 day waiting period of § 50-i(1) does not toll the statute of limitations. But what if permission to serve a late notice of claim is granted with less than 30 days remaining on the statute of limitations? If the claimant files suit before the 30-day waiting period has transpired, the claim is subject to dismissal for failure to comply with said waiting period, but if the claimant waits the full 30 days, the case is subject to a statute-of-limitations dismissal. The answer is this: file without waiting the 30 days, and although the lawsuit will be dismissed, the claimant can recommence suit within 6 months pursuant to CPLR 205(a) (see, *McKune v. City of New York*, 19 A.D.3d 308, 799 N.Y.S.2d 25 (1st Dept 2005)).

#### 50-h examination:

General Municipal Law § 50-h(1) provides, in relevant part, that wherever a notice of claim is filed against a “city, county, town, village, fire district, ambulance district or school district the city, county, town, village, fire district, ambulance district or school district”, it shall have the right to “demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made” and may include a physical examination of the claimant by a duly qualified physician. The 50-h examination, often called a “hearing”, is really more akin to a deposition. Yet it does not replace the deposition; the public corporation in effect gets two bites at the apple, one before suit is filed (under 50-h) and one after suit is filed pursuant to the CPLR (see, General Municipal Law § 50-h[1]).

Pursuant to section 50-h(1), the public corporation must demand a 50-h hearing, if at all, within 90 days of the date of service of the notice of claim. If such a 50-h demand is made after the 90-day period, claimant can choose to ignore it (General Municipal Law 50-h[1]). The claimant cannot file suit until the 90-day period has expired or, if a 50-h demand is made within this period, section 50-h(5) provides that the claimant may not commence suit until the 50-h has been had or 90-days has transpired since the 50-h demand was made. Pursuant to Section 50-i(3), none of this tolls the statute of limitations (see, *Cinquemani v. County of Nassau*, 28 A.D.3d 699, 814 N.Y.S.2d 663 (2nd Dept 2006; *Mignott v. New York City Health and Hospitals Corp.*, 250 A.D.2d 165 [2nd Dept 1998]). But what if waiting for the 50-h hearing to take place, or for the 90-day waiting period to expire, brings the case beyond the statute of limitations? The choice is easy: Waiting for the statute of limitations to expire is permanently fatal, while filing suit without complying with 50-h requirement is only temporarily fatal: In the latter case, claimant can recommence the dismissed suit within 6 months pursuant to CPLR 205(a) (see, *Secor v. Town of Orangetown*, 250 A.D.2d 588 [2nd Dept 1998]).

#### THE APPLICATION FOR LEAVE TO SERVE A LATE NOTICE OF CLAIM:

Sometimes a notice of claim is not served with the 90-day period required by Section 50-e. This occurs most commonly when the claimant does not retain a lawyer until after the 90-day period for serving a notice of claim has expired. Section 50-e addresses the seeking of leave to serve a late notice of claim. General Municipal Law § 50(e)(5) sets forth the statutory factors to be considered: (1) The public corporation or its attorney or its insurance carrier knew of the essential facts constituting the Claim within 90 days of the incident, or acquired such knowledge within a “reasonable time thereafter” (This includes actual as well as constructive notice); (2) The claimant was an infant, or mentally or physically incapacitated, or dies before the time for service of the Notice of Claim; (3) The failure to timely serve a Notice of Claim was attributable to claimant’s justifiable reliance upon



settlement representations; (4) The claimant or his/her attorney made an “excusable error” concerning the identity of the public corporation; (5) The delay did not “substantially prejudice” the public corporation in maintaining a defense on the merits; and (6) Other factors at the Court’s discretion.

As set forth at # 6, the list is not exhaustive. Case law has added another frequently considered factor: whether the claimant has demonstrated a “reasonable excuse for the failure to serve a timely notice of claim”. Unfortunately for plaintiffs and their lawyers, neither a plaintiff’s ignorance of the 90-day Notice of Claim requirement (see, *Matter of Ragin v. City of New York*, 222 A.D.2d 678, 636 N.Y.S.2d 83; *Weber v. County of Suffolk*, 208 A.D.2d 527, 528, 616 N.Y.S.2d 807; *Matter of Magnotti v. City of New York*, 206 A.D.2d 534, 614 N.Y.S.2d 766) nor “law office failure” (see, *Matter of Deegan v. City of New York*, 227 A.D.2d 620, 643 N.Y.S.2d 596; *Lamper v. City of New York*, 215 A.D.2d 484, 485, 626 N.Y.S.2d 253; *Burns v. New York City Tr. Auth.*, 213 A.D.2d 300, 301, 624 N.Y.S.2d 30) constitutes a “reasonable excuse” for failure to timely serve the Notice of Claim.

Although courts are vested with broad discretion in determining whether to grant an application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5) (see, *Wetzel Servs. Corp. v. Town of Amherst*, 207 A.D.2d 965, 616 N.Y.S.2d 832), and “the presence or absence of any one of the numerous relevant factors the court must consider is not determinative” ( *Salvaggio v. Western Regional Off-Track Betting Corp.*, 203 A.D.2d 938, 938-939, 612 N.Y.S.2d 94), “[o]ne of the factors that should be accorded great weight is whether [the municipality] received actual knowledge of the facts constituting the claim in a timely manner” ( *Matter of Canty v. City of New York*, 273 A.D.2d 467, 711 N.Y.S.2d 750; see, *Kalenda v. Buffalo Mun. Hous. Auth.*, 203 A.D.2d 937, 611 N.Y.S.2d 386). If this is so, then the public corporation cannot really claim “prejudice” from the delay, which is another of the enumerated factors to be considered. Thus, where the public corporation had actual notice of the claim within the 90-day period, the application is almost always granted, even in the absence of a reasonable excuse for the delay (see, *Caminero ex rel. Pineda v. New York City Health and Hospitals Corp.*, 21 A.D.3d 330, [1st Dept 2005]).

Regarding the “infancy” factor, a nexus between infancy and the delay in serving the notice of claim, while not a requirement, remains a statutory factor that a court should take into account. A delay of service caused by infancy makes a more compelling argument to justify an extension. (*Williams v. Nassau County Medical Center*, 6 N.Y.3d 531 (2006).

Although ordinarily courts should not delve into the merits of an action in determining an application for leave to file a late Notice of Claim, the application may be denied where the claim appears “patently meritless” (see, *Katz v. Town of Bedford*, 192 A.D.2d 707 [2nd Dept 1993; *Matter of Groell v. City of New York*, 135 Misc.2d 823, 827, 517 N.Y.S.2d 382)

#### Time Limit:

Section 50-e(5) makes the time limit for bringing the application for permission to serve the late notice of claim coextensive with the statute of limitations (including CPLR tolls). Conversely stated, an application for leave to serve a late Notice of Claim cannot be granted if, at the time the motion was served, the time limit for filing the Summons and Complaint (i.e., the 1-year-90-day, or 2-year in wrongful death actions, statute of limitations, plus any available tolls) had expired (see, *Pierson v. City of New York*, 56 N.Y.2d 950, 954 [1982]; *Campbell v. City of New York*, 4 N.Y.3d 200, 203 [2005]). As we have already seen, although the CPLR Article 2 tolling provisions do not extend the time to serve the Notice of Claim, they do extend the time to file the Summons and Complaint, and simultaneously,

the time to bring a motion for leave to serve a late Notice of Claim against a public corporation. The statute of limitations is tolled from the time the plaintiff mails the application to obtain leave to file a late Notice of Claim until the order granting that relief goes into effect (*Giblin v. Nassau County Medical Center et al.*, 61 N.Y.2d 67, 72, 471 N.Y.S.2d 563, 459 N.E.2d 856 (1984)).

The careful practitioner will not wait until the 11th hour to move for leave to serve a late Notice of Claim. Instead, the attorney will do so as soon as possible, because lengthy delays are more likely to cause “prejudice” to defendant (i.e., hamper the investigation) and are less likely to be justified by a “reasonable excuse”, and therefore more likely to result in denial of the motion (see, e.g., *Berg v. Town of Oyster Bay* 300 A.D.2d 330, [2nd Dept 2002] [two-year delay]; *Knightner v. City of New York*, 269 A.D.2d 397 [eight-month delay]).

Section 50-e(7) requires that the proposed notice of claim accompany the application for leave to serve a late notice of claim, and the Court has no discretion to grant the application if the claimant fails to do so. See, *Scott v. Huntington Union Free School District*, 29 A.D.3d 1010, 816 N.Y.S.2d 165 (2nd Dept 2006).

#### AMENDING OR OTHERWISE CORRECTING NOTICE OF CLAIM

§ 50-e(6) provides, in relevant part, that, absent prejudice to the other party, “[a]t any time after the service of a notice of claim and at any stage of an action [ ... ] a mistake, omission, irregularity or defect made in good faith in the notice of claim, may be corrected, supplied or disregarded ... in the discretion of the court.” See, *Lomax*, 262 A.D.2d at 3, 690 N.Y.S.2d at 3 (). Amendments of a substantive nature, such as raising new claims, are not within the purview of General Municipal Law § 50-e(6) ( see *Richard v. Town of Oyster Bay*, 300 A.D.2d 561, 752 N.Y.S.2d 537; *Ford v. Babylon Union Free School Dist.*, 213 A.D.2d 447, 624 N.Y.S.2d 435; *Demorcy v. City of New York*, 137 A.D.2d 650, 524 N.Y.S.2d 742; *Hines v. City of Buffalo*, 79 A.D.2d 218, 225, 436 N.Y.S.2d 512; *Colena v. City of New York*, 68 A.D.2d 898, 414 N.Y.S.2d 220). Even if, because of the mistake or omission, the initial notice of claim was legally deficient, the correction should be allowed where the municipality had notice of the corrected facts during, or within a short time after, the initial 90-day period (see, *Streletskaya v. New York City Transit Authority*, 27 A.D.3d 640, 812 N.Y.S.2d 130 (2nd Dept 2006 [the manner in which the accident occurred and the specific location of the accident were described at the GML § 50-h hearing conducted about three months after the accident]).

Although the motion to amend or correct the defect in the notice of claim can be made “[a]t any time after the service of a notice of claim and at any stage of an action” (General Municipal Law § 50-e[6], if the defect is of such a nature as to deprive the municipality of a timely meaningful investigation, rather than consisting of merely technical error, the application is likely to be denied if it is brought a significant period of time after the 90-day period has expired. For example, an error in the description of the location which prevented a proper investigation is likely to lead to a denial of leave to amend. (*De Los Santos v. New York City Housing Authority*, 214 A.D.2d 532 [2nd Dept 1995]),

In determining whether the city was prejudiced by any mistake, omission, irregularity or defect in the notice, the court may look to evidence brought to the municipality’s attention at a section 50-h hearing *D’Alessandro v. New York City Tr. Auth.*, 83 N.Y.2d 891, 893, 613 N.Y.S.2d 849, 850, 636 N.E.2d 1382, 1383 (1994).

Unlike the application to serve a late notice of claim, the application to amend or correct a defect in the notice of claim does not toll the statute of limitations (*Fiorito v. Town of Huntington*, 140 A.D.2d 302 [2nd Dept 1988]).

## FILING SUIT

### Content:

The claimant who files suit must specifically plead compliance with all the “conditions precedent” discussed above. Failure to do so subjects the complaint to dismissal (see, *Nicholas v. City of New York*, 130 A.D.2d 470 [1987]).

### Statute of Limitations:

Section 50-i. provides for the statute of limitations in actions for personal or property injury (one year and ninety days from the time of the event) and wrongful death (two years from death). Even so, intentional torts such as unlawful arrest, detention and prosecution are subject to the one-year Statute of Limitations set forth in CPLR 215

(*Pravda v. County of Saratoga*, 224 A.D.2d 764 [3rd Dept 1996]; *Bardi v. Warren County Sheriff’s Dept.*, 260 A.D.2d 763 [3rd Dept 1999]).

CPLR 215(1) provides for a one-year statute of limitations for most actions against a sheriff. A county may not be held responsible for the negligent acts of the Sheriff and his deputies on the theory of respondeat superior, in the absence of a local law assuming such responsibility” ( *Marashian v. City of Utica*, 214 A.D.2d 1034, 1034, 626 N.Y.S.2d 646; see *Smelts v. Meloni* [Appeal No. 3], 306 A.D.2d 872, 873, 762 N.Y.S.2d 467, lv. denied 100 N.Y.2d 516, 769 N.Y.S.2d 203, 801 N.E.2d 424; *Sarhou v. Meloni*, 234 A.D.2d 991, 651 N.Y.S.2d 827. Further, a sheriff cannot be held personally liable for the acts or omissions of his deputies while performing criminal justice functions, and that ... principle precludes vicarious liability for the torts of a deputy” (*Barr*, 50 N.Y.2d at 257, 428 N.Y.S.2d 665, 406 N.E.2d 481.

Although the time to serve a notice of claim for wrongful death accrues at the time a representative of the estate is appointed (§ 50-e(1)(a) (provided this is earlier than 2 years from the date of death, for if not, the statute of limitations will have expired pursuant to § 50-i), the accrual date for the statute of limitations for wrongful death is the date of death itself.

In *Campbell v. City of New York*, 4 N.Y.3d 200 [2005]) the Court of Appeals held that the one-year 90-day time limit set forth in Section 50-i, is, for all purposes, a statute of limitations rather than a condition precedent. Thus, all the CPLR tolling provisions, including CPLR 205-a, which allows a dismissed case, under certain conditions, to be recommenced within six months, apply. Compare this to the 90-day period for serving the notice of claim, which is a condition precedent and thus cannot be tolled (except for continuous treatment or equitable estoppel, as discussed, supra).

Note, however, that some time limitations for suing certain public authorities, which have the outward appearance of statutes of limitations, have been deemed “conditions precedent” rather than statutes of limitations, and thus are not tolled (see, e.g., *Yonkers Contr. Co. v. Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375, 378, 690 N.Y.S.2d 512, 712 N.E.2d 678 [1999] [one year time period for commencing a lawsuit against the Port Authority, contained in McKinney’s Unconsolidated Laws of N.Y. § 7107, is a condition precedent that could not be tolled by CPLR 205]).

## SUBSTANTIVE LAW AND DEFENSES:

### SOVEREIGN IMMUNITY

“The king can do no wrong”, or so said the king. We will not here give a history of the sovereign immunity doctrine. What you have to know about sovereign immunity today is this: Suing the State or its subdivisions, i.e., public corporations, is different, in many fundamental ways, both procedurally and substantively, from suing a private individual or corporation. We have already discussed the procedural differences.

As for substantive law, the remnants of the sovereign immunity doctrine have spawned a body of case law affording special defenses that are unique to the government, but usually only when the government is acting in its role as “government”, as will be discussed.

Generally speaking, the government (including public corporations) benefits from immunity (either qualified or absolute) when it is acting as the government, i.e., legislating, adjudging, making governmental decisions, etc. The government (including public corporations) also benefits from immunity for its traditional core governmental services it provides to the public at large (absent a “special relationship” as discussed *infra*) such as police protection; fire protection; conducting safety, code or other inspections, etc. The rationale for the continuation of this vestige of sovereign immunity is the courts’ reluctance to second guess governmental discretionary decisions which implicate, at least to some extent, how best to allocate limited public resources for the provision of public services owed to the public at large (see, *Riss v. City of New York*, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 860; *Cuffy v. City of New York*, 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372, 505 N.E.2d 937).

#### Absolute v. Qualified Immunity:

Absolute immunity for the exercise of discretion and judgment on matters of policy is afforded to judicial, quasi-judicial, legislative and high-level executive branch official acts. Absolute immunity means what it says; the public entity is shielded from liability, regardless of motive, bad faith, or other considerations. All this, of course, is subject to certain constitutional restraints (see, *Doyle v. Rondout Valley Cent. Sch. Dist.*, 3 A.D.3d 669, 770 N.Y.S.2d 480 [2004]).

In other areas of government activity, when the decision-making involves discretion regarding the allocation of public resources, the design of public programs and works, and expert judgment or choices in performing a public service, the government entity is entitled to only “qualified” immunity, which means immunity except where the government acted in bad faith or with no reasonable basis (see, *Lauer v. City of New York*, 95 N.Y.2d 95, 711 N.Y.S.2d 112, 733 N.E.2d 184 [2000]).

#### Discretionary v. Ministerial Acts:

As stated *supra*, there is absolute immunity for official “discretionary” acts of judicial, quasi-judicial, legislative, and high-level executive branch acts. Further, there is at least a qualified immunity for other official discretionary decisions that require the application of expert judgment (*Arteaga v. State*, 72 N.Y.2d 212 [1988]). By contrast, there is no immunity for a government actor’s “ministerial” acts (*Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63, rearg. denied 8 N.Y.2d 934, 204 N.Y.S.2d 1025, 168 N.E.2d 857). Therefore, it is important to understand the difference between discretionary and ministerial acts.

By “discretionary act”, it is meant an act which requires the exercise of judgment and which could produce different acceptable results. To be discretionary, the act must be within the scope of authority of the government actor. In contrast, a “ministerial” act, is one where different acceptable acts are not possible; the government actor is required to adhere to a governing rule or policy with a compulsory result (*Rodriguez v. City of New York*, 189 A.D.2d 166 [1st Dept 1993]; *Davis v. State* 257 A.D.2d 112, [3rd Dept 1999]).

The line between discretionary and ministerial is blurry. (see, *Tango v. Tulevech*, 61 N.Y.2d 34, 41, 471 N.Y.S.2d 73, 459 N.E.2d 182). There are no hard and fast rules, only guidelines. One must consider: (1) Whether the decision or action appears to require an exercise of choice based on expert judgment or matters of policy and (2) whether the decision or action requires the exercise of reasoned judgment of which there are different acceptable results. If such judgment is required, then that act or decision will probably be deemed discretionary, and thus cloaked in governmental immunity. *Haddock*, 554 N.Y.S.2d at 443; *Arteaga*, 532 N.Y.S.2d at 59; *Tango*, 471 N.Y.S.2d at 77; *Rodriguez*, 595 N.Y.S.2d 421, 426. *Tango*, 471 N.Y.S.2d at 76–77. Be careful, however, when conducting this analysis: In one sense, all decisions and actions can be said to be “discretionary” in that there are alternatives to choose from. But in a legal sense, decisions or actions are not “discretionary” for governmental immunity purposes, when there is really only one acceptable alternative.

Another way of looking at it is this: If the actor’s decision was not capable of producing different “acceptable” results, but rather required adherence to a strict governing rule or standard with a compulsory result, then the act is likely to be deemed ministerial *Haddock*, 554 N.Y.S.2d at 443; *Arteaga*, 532 N.Y.S.2d at 59; *Tango*, 471 N.Y.S.2d at 77; *Rodriguez*, 595 N.Y.S.2d 421, 426; *Lauer v. City of New York*, 95 N.Y.2d 95, 711 N.Y.S.2d 112, 733 N.E.2d 184 (2000).

Examples: A defendant acted within her discretionary authority as supervisor of the Probation Department’s In-Take Unit when she refused to detain children for appearance before a Judge but instead released them to their mother (*Tango*), but there was no room for the exercise of reasoned judgment by the Police Commissioner in retaining an alcoholic, armed police officer presenting a known danger to the public *McCrink v. City of New York*, 296 N.Y. 99, 71 N.E.2d 419. The following have also been deemed “ministerial” acts: the failure to revoke the right of a corrections officer to carry a weapon based on prior misconduct in use of a weapon and internal policy (*Wyatt v. State*, 176 A.D.2d 574 [1st Dept 1991]); failure of court clerk to retire an arrest warrant (*Glowinski v. Braun*, 105 A.D.2d 1153, 482 N.Y.S.2d 395, app. dismissed, 65 N.Y.2d 637); permitting convicted felon, who ended up raping the 9-year old plaintiff, to work on City’s playground in violation of City’s own personnel rules (*Haddock v. City of New York*, 75 N.Y.2d 478 [1990]); failure of prison officials to follow mandated protocols regarding delivery of medical care to prison inmates was ministerial negligence exposing the State to liability when it resulted in the plaintiff’s loss of hearing (*Kagan v. State of New York*, 221 A.D.2d 7 [2d Dept 1996]).

### Judicial immunity

Judicial and quasi-judicial acts (if they are discretionary and not ministerial) are entitled to absolute immunity, that is immunity regardless of whether there is a rational basis, and regardless of even of bad faith (*Tango v. Tulevech*, 61 N.Y.2d 34, 41, 471 N.Y.S.2d 73, 459 N.E.2d 182; *Arteaga v. State*, 72 N.Y.2d 212 [1988]). The purpose of this absolute immunity is to afford to the government actor an independence of judgment without fear of retaliation. By “quasi-judicial” act, it is meant that a discretionary decision requires “the application of governing rules to particular facts” and a “reasoned

judgment capable of producing different acceptable results” (Arteaga v. State, 72 N.Y.2d 212 [1988]). There is no immunity when a judge acts de hors his judicial authority (see, Alvarez v. Snyder, 264 A.D.2d 27 [1st Dept 2001]). Administrative judges, hearing examiners, and judicial referees and court clerks also enjoy absolute immunity, but of course under the same terms (Arteaga, supra).

#### Quasi Judicial Immunity:

Actions by other government officials might be deemed “quasi judicial” and thus subject to absolute immunity. This is so when the action involves the conscious exercise of discretion of a judicial or quasi-judicial nature. For example, a District Attorney in his official actions in investigating and prosecuting crime ( Schanbarger v. Kellogg, 35 A.D.2d 902, 315 N.Y.S.2d 1013, app. dsmd. 29 N.Y.2d 649, 324 N.Y.S.2d 1033, 273 N.E.2d 321, cert. den. 405 U.S. 919, 92 S.Ct. 944, 30 L.Ed.2d 789); a State Tax Commissioner in issuing a notice and demand for payment ( Abruzzo v. State of New York, 84 A.D.2d 876, 444 N.Y.S.2d 739); a school official in the determination to discharge an employee ( Van Buskirk v. Bleiler, 46 A.D.2d 707, 360 N.Y.S.2d 88); a building inspector in granting or denying building permits ( Rottkamp v. Young, 21 A.D.2d 373, 249 N.Y.S.2d 330, affd 15 N.Y.2d 831, 257 N.Y.S.2d 944, 205 N.E.2d 866).

#### Prosecutorial Immunity:

A prosecutor may be entitled to immunity for his official actions depending principally on the nature of the function performed ( Ying Jing Gan v. The City of New York, 996 F.2d 522, 530 [2d Cir.1993].) Where the prosecutorial activities are “intimately associated with the judicial phase of the criminal process,” e.g., the “initiat[ion of] a prosecution,” the prosecutor is entitled to absolute immunity from liability ( Id., at 530. This includes decisions such as whether to prosecute, when to prosecution, and for actually prosecuting ( Id., at 530.. If, however, the prosecutorial activities are characterized as administrative or investigative, such as the issuance of grand jury subpoenas, the prosecutor is entitled to only qualified immunity, and therefore can be held liable if the plaintiff proves his bad faith, malice or lack of a reasonable basis for the action (Rodrigues v. City of New York, 193 A.D.2d 79 [1st Dept 1993]).

#### Legislator immunity

Absolute immunity is accorded to legislators for their official and lawful legislative decisions or actions Barrett v. State, 220 N.Y. 423, 116 N.E. 99 (1917) (legislators) and to officials of the executive branch for their official discretionary acts. (Strukuls)

#### FAILURE TO PROVIDE GOVERNMENTAL SERVICES: SPECIAL RELATIONSHIP:

The government cannot be held liable for failure to provide a service owed to the general public, such as police or fire protection or the enforcement of statutes and regulations enacted for the benefit of the general public, absent a “special relationship” with the injured claimant. This “special relationship”, which is quite difficult to establish, may be established in three ways: (1) when the public corporation violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it assumes positive direction and control in the face of a known, blatant and dangerous safety violation; or (3) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty ( Palaez v. Seide, 2 NY3d 186, 202 [2002]).

#### rule or statute creating a special relationship:

First, a statute or other rule may create the “special relationship” (which here really means a private right of action) between the public corporation and the plaintiff. In Palaez v. Seide, 2 NY3d 186, 202

[2002]; the Court of Appeals enunciated a three-prong test to determine whether the legislature, in passing the law in question, intended to authorize a private right of action. Plaintiff must show that he/she is (1) one of a class of persons for whose particular benefit that statute was created; (2) that recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) that to do so would be consistent with the legislative scheme. *Palaez v. Seide*, 2 NY3d 186, 202 [2002]). All three prongs must be satisfied. Thus, in *O'Connor v. City of New York*, 58 N.Y.2d 184, 460 N.Y.S.2d 485, 447 N.E.2d 33 [1983], the Court rejected the plaintiff's argument that the City violated a statutory duty by issuing a "blue card" approving a faulty gas piping system that later exploded and killed several people. Although it was obvious that blue card approval should not have been granted, no private right of action was unavailable because the regulations were intended to protect the general public-as opposed to a particular class of persons-and plaintiff therefore could not satisfy the first prong. Another example is *Uhr v. East Greenbush Cent. School Dist.*, 94 N.Y.2d 32, 698 N.Y.S.2d 609, 720 N.E.2d 886 [1999], where the first two prongs were satisfied, but the third prong failed because a private right of action was not consistent with the legislative scheme.

(2) The public corporation assumes positive direction and control in the face of a known, blatant and dangerous safety violation

This second way of establishing a "special relationship" between the public corporation and the injured person or class of persons is exceedingly rare. Examples of instances where it was established are: where the Town knew of blatant, dangerous violations on a motel's premises, but the town affirmatively certified the premises as safe by issuing a certificate of occupancy, upon which representation plaintiff's justifiably relied in their dealings with the premises, then a proper basis for imposing liability on the town may well have been demonstrated (*Garrett v. Holiday Inns, Inc.*, 58 N.Y.2d 253 [1983]) and where a city sewer inspector observed that private sewer system trench violated rules and code since it had been excavated to a depth of over 11 feet without bracing or shoring and inspector stated to decedent, before he descended therein, that the walls looked pretty solid and that the inspector did not think they needed bracing, city was liable for death of decedent killed in cave-in of trench, by reason of the inspector's positive action in assuming direction and control at jobsite in absence of decedent's supervisor.

(*Smullen v. City of New York*, 28 N.Y.2d 66 [1971]).

(3) The public corporation voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty This is the most common method of establishing a "special relationship" with the public corporation. Yet it is still exceedingly difficult. To succeed, the plaintiff must meet all of four requirements: (1) an assumption by the public entity through promises or action of an affirmative duty to act on behalf of the injured or deceased party; (2) knowledge by the public entity's agents that inaction could lead to harm; (3) some form of direct contact between the public entity's agents and the injured or deceased party; and (4) the injured or deceased party's justifiable reliance on the public entity's affirmative promise *Cuffy v. City of New York*, 69 N.Y.2d 255, 513 N.Y.S.2d 372, 505 N.E.2d 937 (1987).

Each of these four elements have spawned case law explaining and clarifying them:

As for the first element, the government agent who makes the promise to act must in fact have the authority to do so. (*Cuffy*) Further, mere discussions or requests do not constitute a promise see, *Besicorp Group Inc. v. Village of Ellenville*, 205 A.D.2d 944, 613 N.Y.S.2d 763 (3d Dep't 1994); *Herrman v. County of Orange*, 154 A.D.2d 342, 545 N.Y.S.2d 820 (2d Dep't 1989). The promise must

be sufficiently specific, or conversely stated, it cannot be too general or broad (see, *Falzo v. Town of Colonie*, 176 A.D.2d 1154, 575 N.Y.S.2d 596 (3d Dep't 1991)). (A general statement by a police dispatcher that the department will provide additional police patrols in a particular community is not, however, a promise that creates a special duty to any particular person).

The second element requires knowledge by a public entity's agent who made the promise that the breach of it could result in harm to the promisee. This is an exacting requirement. The plaintiff must show that the public corporation was "clearly on notice of palpable danger, as where it is so obvious that a layman would ascertain it without inquiry" ( *Kovit v. Estate of Hallums*, supra at 507-508, 797 N.Y.S.2d 20, 829 N.E.2d 1188). For example, in *Lazan v. County of Suffolk*, 4 N.Y.3d 499, 507-508, 797 N.Y.S.2d 20, 829 N.E.2d 1188, a companion case to *Kovit v. Estate of Hallums*, supra, the plaintiff pulled his car over to the shoulder of the Long Island Expressway. When a police cruiser arrived at the scene, the driver informed the officer that "he had chest pains and was not feeling well". The officer nevertheless directed him to move his car to the nearest service station. The plaintiff did as instructed, but soon lost control of the vehicle and sustained serious injuries when he drove into a guardrail and a telephone pole. The Court of Appeals, noting that the officer could not be expected "to make a refined, expert medical diagnosis of a motorist's latent condition" ( *id.* at 508, 797 N.Y.S.2d 20, 829 N.E.2d 1188), held that the plaintiff's complaints of chest pain and "not feeling well" were insufficient to place the municipality on notice that the plaintiff was too ill to drive ( *id.*).

As for the third element, "direct contact", the promise of an affirmative act must have been made directly to the plaintiff, or in some cases immediate family members (but never friends, no matter how close) acting as "agent" for the plaintiff (*Laratro v. City of New York*, 8 N.Y.3d 79 [2007]).

Finally, as for the fourth element, the requirement that the plaintiff show "justifiable reliance" on the part of the injured party, it is meant that the voluntary undertaking of the governmental entity or agent "lulled [plaintiff] into a false sense of security, induced [her] to either relax [her] own vigilance or forego other avenues of protection, and thereby place [herself] in a worse position than [she] would have been had the [government entity or agent] never assumed the duty." ( *Cuffy v. City of New York*, supra at 261, 513 N.Y.S.2d 372, 505 N.E.2d 937). For example, it was held that a shooting victim did not justifiably rely on county sheriff's department's promise to send a deputy within an hour to protect her from a stalker, and none arrived, and then 20 days went by in which shooting stalker had continued to stalk and harass plaintiff. (*Finch v. County of Saratoga*, 305 A.D.2d 771 3rd Dept 2003]). A murder of a woman by an assailant in her apartment was not the result of justifiable reliance on 911 operator's statement that "help was on the way" where the woman was engaged in a struggle with her assailant before, during, and after the 911 call, and her conversation with 911 operator did not induce her either to relax her own vigilance or to forego other available avenues of protection (*Grieshaber v. City of Albany*, 279 A.D.2d 232 [3rd Dept 2001]). On the other hand, a city may be held liable for neglecting to provide crossing guards for school children when it voluntarily undertook the task and the children's parents justifiably relied on regular and proper performance of this service (*Florence v. Goldberg*).

Affirmative, as opposed to passive, negligence or wrong:

Keep in mind that the special relationship requirement applies only in cases involving "nonfeasance" of traditional governmental services for the benefit of the public as a whole (See *Cuffy*, supra; *Tango v. Tulevech*, 61 N.Y.2d 34, 471 N.Y.S.2d 73, 459 N.E.2d 182). As discussed supra, in other settings, the government can be held liable for its affirmative acts of negligence or wrongdoing, and for acts of



nonfeasance, where the act which should have been done, but wasn't, or was done wrong, was non-discretionary, i.e., ministerial (see, supra). Thus, no special relationship need be shown, and there was no immunity, where a police officer negligently shot a bystander (*Perez v. City of New York*, 298 A.D.2d 265 [1st Dept 2002][non-discretionary act]) or where a firefighter commits a non-discretionary negligent act in its firefighting operations (see, *Wolf v. City of New York*, 39 N.Y.2d 568 [1976]) or where the municipality negligently placed traffic signs thus causing a dangerous traffic condition that injured plaintiff (see, *Nowlin v City of New York*, 81 N.Y.2d 81 [1993] []) as long as the act were not “discretionary” as described above. “Once a municipality undertakes a duty, it must of course perform that duty in a non-negligent manner” (*Nowlin v City of New York*, 81 N.Y.2d 81 [1993]).

#### GOVERNMENT ACTING IN A NON-GOVERNMENTAL ROLE:

The government (including public corporations) generally does not benefit from any immunity for actions that do not implicate its governmental-type decision making or its traditional core governmental services. One way of looking at this is that the government does not get the benefit of any immunity when it is not wearing its government “hat”. For example, the government can act as a landlord *Miller v. State*, 62 N.Y.2d 506, 511, 478 N.Y.S.2d 829, 832, 467 N.E.2d 493 (1984), in which case it wears a proprietary hat, or it can own and run a school (*Logan v. City of NY*, 148 A.D.2d 167, 171, 543 N.Y.S.2d 661; *Mary KK v. Jack LL*, 203 A.D.2d 840, 611 N.Y.S.2d 347) in which case it has wears a parent hat vis-à-vis its students, or it can act as a medical provider (*Schrenpf v. State*, 66 N.Y.2d 289, 496 N.Y.S.2d 973, 487 N.E.2d 883 (1985), in which case it wears a physician hat, or it can act as a common carrier or vehicle driver, which is of course not a core governmental function, etc, and so again it is not wearing its government “hat”. In all these situations, the rules of liability for the public corporation’s (or its agents and employees’) actions will be the same (with some exceptions) as the rules that apply to private individuals or corporations. In all these situations, the “discretionary/ministerial” dichotomy discussed above is of no matter, and a “special relationship” need not be shown. In other words, when the government is not wearing its government “hat”, but rather the hat of a private corporation, it is not cloaked in immunity. Still, the public corporation procedural rules (notice of claim and other conditions precedent, etc.) and time limitations apply.

Yet it is not always clear which hat the public corporation is wearing. For example, police services are considered traditional governmental services. Thus, although the government, when acting as the government, cannot be held liable for failure to provide proper police security (absent a “special relationship”), the government, when acting as landowner or landlord (for example, as owner of an apartment building), can be held liable, even without a special relationship, for failure to provide the same kind of security.

Let’s be clear: The relevant inquiry is not whether the governmental entity generally acts in a governmental or proprietary capacity, but, rather, whether the particular act or omission that allegedly causes injury or death arises from a proprietary or governmental function of the entity. *Crosland*, 506 N.Y.S.2d at 672; *Miller*, 478 N.Y.S.2d at 833; *Weiner v. Metropolitan Transportation Authority*, 55 N.Y.2d 175, 448 N.Y.S.2d 141, 144, 433 N.E.2d 124 (1982). There is a continuum between, on the one extreme, pure “governmental” functions and pure “proprietary” type functions. And there are grey areas. In this regard, the Court of Appeals has adopted a “continuum of responsibility” test:

A governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions. This begins with the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, for example, the repair of steps or the maintenance of doors in an apartment building. The spectrum extends gradually out to more complex measures of safety and security for a greater area and populace, whereupon the actions increasingly, and at a certain point only, involve governmental functions, for example, the maintenance of general police and fire protection. Consequently, any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the State's alleged negligent action falls into, either a proprietary or governmental category.

(*Miller v. State*, 62 N.Y.2d 506 [1984] [state's failure to lock the dormitory's doors was found to be a proprietary rather than a government act]; compare, (*K.H. v. City of New York*, 10 Misc.3d 1066(A), 814 N.Y.S.2d 562 [NY Sup Ct 2005] [City's failure to lock the bathroom of a park where plaintiff was assaulted was a governmental rather than a proprietary function for which the City is not liable absent a special relationship; Court distinguished *Miller v. State* in that City has a proprietary duty to its tenants in City-owned apartment building, but has a police (governmental) duty to make its parks safe]).

#### PREMISES LIABILITY:

As a landowner, a public corporation stands in the same position as a private individual or corporation, and thus the normal rules of premises liability apply (actual or constructive notice of the dangerous condition or affirmatively created the hazard, etc.) This is because ownership of property per se is not deemed a traditional core governmental activity that cloaks the governmental entity in immunity. Rather, the public corporation has the same duty as a private landowner to maintain its property in a reasonably safe condition *Miller v. State of New York*, 62 N.Y.2d 506, 511-12, 478 N.Y.S.2d 829, 467 N.E.2d 493 (1984); see also *Price ex rel. Price v. New York City Housing Auth.*, 92 N.Y.2d 553, 557-58, 684 N.Y.S.2d 143, 706 N.E.2d 1167 (1998).. This includes the duty to warn of dangers (*DeLuke v. City of Albany*, 27 A.D.3d 925 [3rd Dept 2006]). As for a duty to provide security against crimes, while this is a proprietary owner's responsibility, it also can be deemed part of the traditional governmental duty to provide police protection. If it is held to be the latter, then the plaintiff will generally have to show a "special relationship" in order to prevail (*Price ex rel. Price v. New York City Housing Authority* 92 N.Y.2d 553 [1998]).

#### PRIOR WRITTEN NOTICE REQUIREMENTS

In their proprietary function, municipal corporations have a nondelegable duty to maintain their streets, sidewalks, crosswalks, roadways and other public thoroughfares in a reasonably safe condition (see, *Cioe v. Petrocelli Elec. Co., Inc.*

33 A.D.3d 377 [1st Dept 2006]). But the municipality's duty to maintain these road and walkway features is one thing, and the injured plaintiff's right to sue is quite another. As shall be seen, the latter is tightly constrained by "prior written notice" requirements. Under the prior written notice requirement, if the defect or hazard is due to passive negligence (nonfeasance), constructive or even actual notice of the defect will not do; the plaintiff must show that the municipal corporation had prior written notice of the defect *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474, 693 N.Y.S.2d 77, 715 N.E.2d

104; Estrada v. City of New York, 273 A.D.2d 194, 195, 709 N.Y.S.2d 105, lv. denied 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294; Allen v. Matthews, 266 A.D.2d 782, 785, 699 N.Y.S.2d 166)..

The purpose of the prior written notice requirements “is not to make it more difficult for a plaintiff to prove a case but largely ‘to enable the city to prevent accidents by repairing or guarding defects or obstructions [in the streets], thus protecting the traveling public’ ” ( Martin v. City of Cohoes, 37 N.Y.2d 162, 166, 371 N.Y.S.2d 687, 332 N.E.2d 867, quoting from 19 McQuillin, Municipal Corporations § 54.108; see also, Holt v. County of Tioga, 95 A.D.2d 934, 464 N.Y.S.2d 278). Be that as it may, this stated purpose is of little consolation to the plaintiff whose otherwise meritorious complaint is dismissed outright for lack of prior written notice of the defect to the municipality.

General Municipal Law § 50-3(4) provides, in pertinent part: “nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice”.

As can be gleaned from this quote, the General Municipal law does not itself require “prior written notice” of defects in the six-enumerated road and walkway features above. Rather, it simply defers to, and accepts the authority of, other State Statutes and local laws or charters that so require. Municipalities possess the general authority to enact laws requiring prior written notice of defects. This authority has been held to fall under a local government’s power to legislate relating to the presentation, ascertainment, disposition and discharge of claims against it (Mun. Home Rule Law § 10[1][ii] [a][5]; see, N.Y. Const., Art. IX, § 2[c][ii][5]) and the acquisition, care, management and use of its highways, roads, streets, avenues and property (Mun. Home Rule Law § 10[1][ii][a][6]; see, N.Y. Const., Art. IX, § 2[c][ii][6]; see also, Holt v. County of Tioga, 56 N.Y.2d 414, 452 N.Y.S.2d 383, 437 N.E.2d 1140 [1982]; Fullerton v. City of Schenectady, 309 N.Y. 701, 128 N.E.2d 413 [1955] ).

Further, State Statutes that govern particular types of municipalities, such as Town Law § 67 and Village Law § 6-628 set forth prior written notice requirements Besides local laws and charters, some Statutes that govern particular types of municipal corporations also require prior written notice (N.Y. Town Law § 65-a; N.Y. Village Law § 6-628;[FN13] N.Y. Second Class Cities Law § 244; County High. Law § 139(2)

A dilemma arises when prior written notice laws passed by municipalities conflicts with prior written notice laws passed by the state legislature. While Municipalities possess general authority to enact laws requiring prior written notice of defects (see, Mun. Home Rule Law § 10[1][ii] [a][5][6]; N.Y. Const., Art. IX, § 2[c][ii][5]; see also, Holt v. County of Tioga, 56 N.Y.2d 414, 452 N.Y.S.2d 383, 437 N.E.2d 1140 [1982]; Fullerton v. City of Schenectady, 309 N.Y. 701, 128 N.E.2d 413 [1955]), they can do so only where the state legislature has not expressly prohibited the adoption of the type of local law the municipality seeks to enact and where the proposed local law is not inconsistent with pre-existing state law (see, N.Y. Mun. Home Rule Law § 10; Walker v. Town of Hempstead, 84 N.Y.2d 360, 618 N.Y.S.2d 758, 643 N.E.2d 77 [1994] ).

Upon examining the above principals of law, the Court of Appeals has held that a municipal corporation’s prior written notice rule that expands upon the list of six enumerated roadway features

established by General Municipal Law 50-e(4) (street, highway, bridge, culvert, sidewalk and crosswalk), i.e., adds new features of property whose defects require prior written notice, is invalid since it conflicted with the General Municipal Law. *Walker v. Town of Hempstead*, 84 N.Y.2d 360, 618 N.Y.S.2d 758, 643 N.E.2d 77 [1994] ). Thus, a plaintiff needs to prove prior written notice only if the alleged defect is in one of the six above-enumerated road or walkway features, regardless of whether the local law purports to require prior written notice for other such features. Sometimes, however, the Court has taken some “poetic license” with the list, for example, where it held that an outdoor stairway can be deemed a “sidewalk” (*Woodson v. City of New York*, 93 N.Y.2d 936 [1999]).

Some local laws require that a specifically designated municipal official receive the notice. Some cases have held that knowledge by a different official in the same municipal corporation may not be imputed to official designated by local law (See *Sola v. Halsted Auto Laundry Corp.*, 229 N.Y.S.2d 273 (Sup.Ct., Westchester County, 1962) (notice to village manager, rather than clerk, was ineffective). More recent cases, however, appear to reject requirements that a particular municipal officer receive the notice (see, *Gilmore v. City of Rochester*, 163 Misc.2d 660, 622 N.Y.S.2d 189 (Sup.Ct., Monroe County, 1995) (plaintiff herself had previously written to mayor whose office recorded letter and sent City Engineer to inspect sidewalk and speak to plaintiff; letter in conjunction with actions by City Engineer sufficient to meet local rule requirement that notice be sent to City Engineer). See also *Harrington v. City of Plattsburgh*, 216 A.D.2d 724, 627 N.Y.S.2d 838 (3d Dep’t 1995) (written survey by Dept. of Public Works constituted written notice to department); *Haskell v. Chautauqua County Fireman’s Fraternity*, 184 A.D.2d 12, 590 N.Y.S.2d 637 (4th Dep’t 1992) (petition by residents sent to various municipal and county officials including County Superintendent of Highways was sufficient to constitute notice to the Director of Public Works)).

Gen Mun Law § 50-g and local laws require municipalities to record written notices of defect received. Gen Mun Law § 50-f requires the same for notices of claim received (*Mollahan v. Village of Port Washington North*, 153 A.D.2d 881 [2nd Dept 1989]; *Shatzkamer v. Eskind*, 139 Misc.2d 672 [NY City Ct 1988]). A prior notice of claim can, of course, constitute prior written notice of the defect (*Becker v. City of New York*, 131 A.D.2d 413, 516 N.Y.S.2d 225 (2d Dep’t 1987)).

An affidavit by the local official in charge of recording the notices, that he or she has searched the local government’s records and found no notice of defect or prior notice of claim for the location and defect in question, will establish prima facie that no prior written notice was filed.

The claimant, however, can rebut this evidence with evidence of her own that the municipality did have prior written notice (see, *Malone v. Town of Southold*, 303 A.D.2d 651 [2nd Dept 2003]).

The prior written notice must have described the defect which caused plaintiff’s injury with particularity and its location accurately. The test is whether the municipal corporation could have found the defect based on its description (see, *Quinn v. City of New York*, 305 A.D.2d 570 [2nd Dept 2003]).

In New York City, prior written notice is most often supplied by the Big Apple Pothole and Sidewalk Protection Corporation, which periodically maps out all the city’s potholes and other defects, which it mails to the City, thus providing “prior written notice” for any subsequent injuries caused by those defects (see, e.g., *Almadotter v. City of New York* [2nd Dept 2005]) . In almost all other areas of the State, prior written notice of a defect is hard to come by, and thus, unless it can be shown that the municipal corporation created the hazard or enjoyed a “special use” (discussed, *infra*), these claims are almost invariably dismissed (see, e.g., *Lopez v. G & J Rudolph Inc.*, 20 A.D.3d 511 [2nd Dept 2005]).

Note that the prior written notice requirement for county highways is less harsh for the plaintiff. Highway Law § 139(2) specifically provides that liability may be imposed against a county, even in the absence of prior written notice, for dangerous highway conditions of which the county had constructive notice (see, *Bernardo v. County of Nassau*, 150 A.D.2d 320, 540 N.Y.S.2d 849),

Exceptions to prior written notice requirement:

There are two exceptions to the prior written notice rule (1) where the municipality affirmatively created the hazard and (2) where the municipality derived a “special use” of the road or walkway feature at issue. Before discussing these two exceptions, though, it is worth restating the fact that prior written notice is only required to the extent that the specific local law or charter, or relevant State Statute, contains such a requirement. The General Municipal Law does not require municipalities to require prior written notice. Therefore, a claimant must check the State Statutes and local laws to discern whether prior written notice is required. Some local laws, surprisingly, require only actual or constructive notice. Also, keep in mind that a local prior written notice rule, at least as far as Municipal Corporations is concerned, is valid only in so far as it requires notice regarding the six specified items listed in GML. Written notice requirements that require notice for defects in other things are not valid and will not be enforced (*Walker v. Town of Hempstead*, 84 N.Y.2d 360, 618 N.Y.S.2d 758, 643 N.E.2d 77 [1994] ).).

“The municipality affirmatively created the hazard” Exception:

Local prior written notice requirements are not applicable where the municipality affirmatively created the hazard or defect. Stated conversely, prior written notice requirements are only applicable inasmuch as the alleged defective or dangerous condition was caused by the municipality’s nonfeasance, as opposed to its active negligence in creating a hazard or defect. As stated above, if the defect or hazard is due to passive negligence (nonfeasance), constructive or even actual notice of the defect will not do; the plaintiff must show that the municipal corporation had prior written notice of the defect (*Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474, 693 N.Y.S.2d 77, 715 N.E.2d 104; *Estrada v. City of New York*, 273 A.D.2d 194, 195, 709 N.Y.S.2d 105, lv. denied 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294; *Allen v. Matthews*, 266 A.D.2d 782, 785, 699 N.Y.S.2d 166).. The difficult cases are where the condition develops over time from an allegedly negligent municipal repair. Is the defect then due to nonfeasance, in which case prior written notice is required, or to affirmative negligence, in which case it is not? The trend, generally, is toward the former rather than the latter.

**SPECIAL USE:**

There is a “special use” exception to the application of the prior written notice rule. By “special use”, it is meant that the portion of the sidewalk, street or other enumerated feature, containing the alleged defect, was more than just a sidewalk, street, etc., but rather provided a “special use” to the municipality. For example, a manhole or a subway grating in a street constitutes special uses (see, *Posner v. New York City Transit Authority*, 27 A.D.3d 542, 813 N.Y.S.2d 106, 2006 N.Y. Slip Op. 01784 (2nd Dept 2006)).

## CLAIMS BROUGHT BY FIREFIGHTERS OR POLICE OFFICERS UNDER THE MUNICIPAL LAW

In response to the perceived unfairness of the “firefighter’s” rule barring all recovery against private parties to a police officer or firefighter for line-of-duty injuries, the Legislature first responded by enacting statutes Gen. Mun. Law § 205-a (firefighters) and 205-e (police officers), which impose liability for the injury or death of the firefighter or police officer caused by a person’s violation of any federal, state, or local statute, ordinance, rule, order, or other requirement. Recovery is allowed when the injuries arise out of a violation of any statute, ordinance, rule, or order of any governmental unit, but a violation of a rule or regulation or guideline that permits the actor discretion does not state a claim under Sections 205-a or 205-e (*Gonzalez v. Iocovello*, 93 N.Y.2d 539 [1999]). In order to make out a claim under these statutes, the injured firefighter or policeman must: (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which he/she was injured, and (3) set forth those facts from which it may be inferred that the defendant’s negligence in violating the rule “directly or indirectly caused the harm” (*Williams v. City of New York*, 2 NY3d 352, 363 [2004], quoting *Giuffrida v. Citibank Corp.*, 100 NY2d 72, 79 [2003]). These Statutes do not require plaintiff to prove that the violation of the rule was the “proximate cause” of the injury; the causation element is relaxed, and plaintiff need only prove that violation of the rule bore a practical or reasonable causal connection to the injured plaintiff’s injuries ( see *Giuffrida v. Citibank Corp.*, supra at 81, 760 N.Y.S.2d 397, 790 N.E.2d 772; *Mullen v. Zoebie, Inc.*, 86 N.Y.2d 135, 140, 630 N.Y.S.2d 269, 654 N.E.2d 90; *Foiles v. V.L.J. Constr. Corp.*, 17 A.D.3d 297, 794 N.Y.S.2d 27). Further, the defense of comparative negligence is not available to the defendant (( *Warner v. Adelphi University*, 240 A.D.2d 730, 660 N.Y.S.2d 50 [2d Dept. 1997] ).

In 1996, the legislature abolished the common law bar to suits by firefighters and police officers for injuries incurred in the line of duty and broadened the statutory causes of action under Gen. Mun. Law § 205-a and § 205-e to remove restrictions imposed by decisional law. The legislation added new Section 11-106 to the N.Y. Gen. Oblig. Law, providing that police officers and firefighters who suffer line-of-duty injury or death proximately caused by the culpable conduct of any other person have a common law right of action for damages against such culpable persons, except their employers and co-employees.

### PARTICULAR TYPES OF CLAIMS AGAINST MUNICIPALITIES:

#### Claims against jailors

Although, as discussed above, the government is generally immune from liability for failing to provide police protection or other governmental services which are for the general public, absent a “special relationship”, this analysis breaks down when the issue is the government’s duty to protect its inmates from harm. The distinction is this; here the government, in imprisoning some of its citizens, has an affirmative duty of reasonable care to protect them from foreseeable risks of harm, including the foreseeable risks of attacks by other inmates. But it is not an insurer of the safety of inmates. Generally, the plaintiff has to prove that the jailing institution knew or should have known that the plaintiff was vulnerable to assault, that the assailant was dangerous; or knew or should have known that the assault was about to take place (*Sanchez v. State of New York*, 99 N.Y.2d 247 [2002]).

Prison physicians and medical care providers are subject to the normal rules of medical malpractice. It is settled that an inmate, who “must rely on prison authorities to treat [the inmate’s] medical needs”

( *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251), “has a fundamental right to ‘reasonable’ \* \* \* and ‘adequate’ \* \* \* medical care” ( *Powlowski v. Wullich*, 102 A.D.2d 575, 587, 479 N.Y.S.2d 89).

#### Common State Law Claims against Police Officers:

In addition to federal causes of action (for example, under the United States Constitution and 42 USCA 1983), here are some typical New York State law claims against police officers:

##### Excessive Force

In order to determine whether a police officer used excessive force, the claim must be “analyzed under the Fourth Amendment and its standard of objective reasonableness” ( *Ostrander v. State of New York*, 289 A.D.2d 463, 464 [2001] ). The reasonableness of an officer’s use of force must be “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” ( *Graham v. Connor*, 490 U.S. 386, 396 [1989]; see also *Koeiman v. City of New York*, 36 AD3d 451 [2007] ).

The trier of fact should take into account “the severity of the crime at issue, whether the suspect[s] pose [d] an immediate threat to the safety of the officers or others, and whether [they were] actively resisting arrest or attempting to evade arrest” ( *Graham*, 490 U.S. at 396),

##### Malicious Prosecution

In order to establish a prima facie case of malicious prosecution, a plaintiff must demonstrate (1) the commencement of a criminal proceeding by defendant against him, (2) the termination of that proceeding in his favor, (3) the absence of probable cause for the proceeding, and (4) actual malice (see, *Colon v. City of New York*, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453, 455 N.E.2d 1248). It is well established that a criminal proceeding is not considered to be terminated in a party’s favor for malicious prosecution purposes where the dismissal results from the facial insufficiency of the criminal information since the dismissal is not based upon the merits of the case (see, *MacFawn v. Kresler*, 88 N.Y.2d 859, 860, 644 N.Y.S.2d 486, 666 N.E.2d 1359; see also, *Christenson v. Gutman*, 249 A.D.2d 805, 809, 671 N.Y.S.2d 835; *Reinhart v. Jakubowski*, 239 A.D.2d 765, 657 N.Y.S.2d 802).

##### False imprisonment

A plaintiff asserting a claim for false arrest must demonstrate that: the defendant intended to confine the plaintiff; the plaintiff was conscious of the confinement; the plaintiff did not consent to the confinement; and the confinement was not otherwise privileged ( *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 85, 735 N.Y.S.2d 868, 761 N.E.2d 560 [2001]; \*230 *Broughton v. State of New York*, 37 N.Y.2d 451, 458, 373 N.Y.S.2d 87, 335 N.E.2d 310 [1975], cert. denied sub nom. *Schanbarger v. Kellogg*, 423 U.S. 929, 96 S.Ct. 277, 46 L.Ed.2d 257 [1975] ). The hotly disputed element is, in cases brought against the police authorities, the last one. The existence of probable cause to arrest or imprisonment constitutes a complete defense to the claims of false arrest as well as unlawful imprisonment ( *Strange v. County of Westchester*, 29 A.D.3d 676, 815 N.Y.S.2d 155 [2006]; *Molina v. City of New York*, 28 A.D.3d 372, 814 N.Y.S.2d 120 [2006] ).

##### False Arrest

The elements of a false arrest cause of action are: (1) the defendant intended to confine claimant; (2) claimant was conscious of the confinement; (3) claimant did not consent to the confinement; and (4)

the confinement was not otherwise privileged (“probable cause” is one such privilege) (*Broughton v. State of New York*, 37 N.Y.2d 451, 373 N.Y.S.2d 87, 335 N.E.2d 310 ). The last element is the hotly disputed one in cases against the police authorities. The issue is “probable cause”. Indeed, a plaintiff cannot prevail on causes of action based upon false arrest, false imprisonment, or malicious prosecution if the arresting officers had probable cause to believe that he or she committed the underlying offense (see *Burns v. City of New York*, 17 A.D.3d 305, 791 N.Y.S.2d 851).

#### Negligence in Pursuit of Lawbreakers

When a police officer is in pursuit of a suspected lawbreaker, the officer’s conduct may not form the basis of civil liability to a third person unless the officer acts in reckless disregard for the safety of others ( see, *Vehicle and Traffic Law* § 1104; *Saarinen v. Kerr*, 84 N.Y.2d 494, 620 N.Y.S.2d 297, 644 N.E.2d 988; *Williams v. City of New York*, 240 A.D.2d 734, 659 N.Y.S.2d 302). This standard of recklessness has been interpreted to mean that the officer must have “intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome” ( *Saarinen v. Kerr*, supra, at 501, 620 N.Y.S.2d 297, 644 N.E.2d 988; see, *Mulligan v. City of New York*, 245 A.D.2d 277, 664 N.Y.S.2d 484). Depending on the circumstances, an act of a police officer in firing at a suspect in a crowd does not implicate the “judgmental error rule”, i.e., is not a discretionary act; rather, it is an act that deviated from clearly accepted and established protocols and procedures and thus was ministerial (*Rodriguez v. City of New York*, 189 A.D.2d 166, [1st Dept 1993]).

#### Negligent Investigation:

New York courts do not recognize claims for negligent or malicious investigation. “A plaintiff seeking damages for an injury resulting from a wrongful arrest and detention ‘may not recover under broad general principles of negligence . . . but must proceed by way of the traditional remedies of false arrest and imprisonment’ ” ( *Antonious v. Muhammad*, 250 A.D.2d 559, 559-560, 673 N.Y.S.2d 158, quoting *Boose v. City of Rochester*, 71 A.D.2d 59, 62, 421 N.Y.S.2d 740; see *Heath v. State of New York*, supra ).

#### Other claims against police officers:

Keep in mind that police officers cannot be held liable for failure to provide police protection or security owed to the general public absent a “special relationship” (see, discussion in section , supra; *Palaez v. Seide*, 2 NY3d 186, 202 [2002]; See *De Long v. County of Erie*, 60 N.Y.2d 296, 304, 469 N.Y.S.2d 611, 457 N.E.2d 717 [a municipality may not be held liable in negligence for a police officer’s failure to arrest a criminal absent the establishment of a special relationship with the plaintiff]). Nevertheless, a police officer will be liable for his affirmative acts of negligence, or failure to act, if the act/failure to act is deemed a violation of his “ministerial” duties and not discretionary (see, discussion in section (*Tango v. Tulevech*, 61 N.Y.2d 34, 471 N.Y.S.2d 73, 459 N.E.2d 182, see, *Green v. City of New York*, 181 Misc.2d 607 [NY City Civ Ct 1999] [police officers determination that, under the circumstances, a Missing Persons Report should not be filed, involved the exercise of reasoned judgment which could produce different results and was thus discretionary act for which City could not be held liable]; *Rodriguez v. City of New York*, 189 A.D.2d 166, [1st Dept 1993] [the act of a police officer firing at suspect with a crowd of people in between and hitting plaintiff does not implicate the “judgmental error rule”, i.e., is not a discretionary act; rather, it was an act that deviated from clearly accepted and established protocols and procedures and thus was ministerial]).



## Claims against school districts

Municipal corporations, which are one type of public corporation, include counties, cities, towns, villages and school districts (General Construction Law § 66[2]). Therefore, it goes without saying that the provisions of the procedural rules set forth in the General Municipal Law apply to school districts.

In school settings, it is important to distinguish between liability based on (1) proprietary negligence; (2) supervisory (quasi-parental) negligence and (3) true governmental discretionary acts. There may be liability for the first two but generally not for the last

(1) Negligence in the School District's proprietary role: As discussed supra in section , governmental immunity principals apply only where the government is acting in its traditional role as government, and not when it acts in its proprietary function. Thus, a school district may be held liable as a property owner, in which case its duty to the general public is the same as any landowner's (see, *Rodriguez v. White Plains Public Schools*, 35 A.D.3d 704 [2nd Dept 2006] [slip and fall on school grounds]). The failure to provide adequate security could be deemed a proprietary function, but it could also be deemed to fall within the traditional governmental police role of providing security to the general public, and if this latter is so, then the plaintiff must prove a "special relationship" for liability to be imposed (see, *Pascucci v. Board of Educ. of the City of New York*, 305 A.D.2d 103 [1st Dept 2003]; *Moreno v. City of New York*, 27 A.D.3d 536, 813 N.Y.S.2d 143 (2nd Dept 2006)).

(2) Negligence in School District's quasi-parental supervisory capacity: School authorities have a duty to students to provide adequate supervision on school premises or when students are otherwise in the control of school personnel (see *Dia CC v. Ithaca City School Dist.*, 304 A.D.2d 955, 758 N.Y.S.2d 197 (3d Dept.2003)). The school's duty of care derives from its *parens patriae* status, its quasi-parental responsibility to care for children in its custody. See *Logan v. City of NY*, 148 A.D.2d 167, 171, 543 N.Y.S.2d 661; *Mary KK v. Jack LL*, 203 A.D.2d 840, 611 N.Y.S.2d 347. The duty is that of "a parent of ordinary prudence would observe in comparable circumstances" ( *Mirand v. City of New York*, supra at 49, 614 N.Y.S.2d 372, 637 N.E.2d 263; see *David v. County of Suffolk*, 1 N.Y.3d 525, 526, 775 N.Y.S.2d 229, 807 N.E.2d 278; *Macalino v. Elmont Union Free School Dist.*, 18 A.D.3d 625, 795 N.Y.S.2d 656; *Jennings v. Oceanside Union Free School Dist.*, 279 A.D.2d 507, 508, 719 N.Y.S.2d 271). Schools are not insurers of the safety of children, and thus they have no duty to provide constant supervision *Pratt v. Robinson*, supra; *Gleich v. Volpe*, 32 N.Y.2d 517, 346 N.Y.S.2d 806, 300 N.E.2d 148). Further, where an accident occurs in so short a span of time that reasonable supervision could not have prevented it, any lack of supervision is not the proximate cause (*Mirand*, supra; see, *Ronan v. School District of the City of New Rochelle*, 35 AD3d 429, 430 [2d Dept 2006]). The school's duty of supervision is coextensive with its physical custody of the child; the duty to supervise generally ends at the school property line, unless the child continues in the custody of the school thereafter, such as on a field trip (see, *Bell v. Board of Educ. of City of N.Y.*, 90 N.Y.2d 944, 665 N.Y.S.2d 42, 687 N.E.2d 1325; *Pratt v. Robinson*, supra, at 560, 384 N.Y.S.2d 749, 349 N.E.2d 849.)

(3) true governmental discretionary acts: The school's quasi-parental duty to supervise runs only to the students under its charge, not to others such as teachers, parents and visitors (see, *Pendulik v. East Hampton Union Free School District*, 17 A.D.3d 334, 792 N.Y.S.2d 583 (2nd Dept 2005); *Moreno v. City of New York*, 27 A.D.3d 536, 813 N.Y.S.2d 143 (2nd Dept 2006)). Thus, generally the teacher or other non-student who is assaulted on school premises must prove a "special relationship" to sue the school for its passive negligence in failing to provide adequate protection (see, *Pascucci v. Board of Educ. of the City of New York*, 305 A.D.2d 103, [2d Dept 2003]). This is because the school district is

a governmental entity, and absent some other exception, the normal rules for suing a governmental entity apply, including immunity for its discretionary decisions regarding the amount of security to supply.

NOTE: There is no cognizable cause of action in New York for “educational malpractice” see, *De Rosa v. City of New York*, 132 A.D.2d 592, 517 N.Y.S.2d 754, 2nd Dept., 1987; *Torres v. Little Flower Children’s Services*, 64 N.Y.2d 119, 485 N.Y.S.2d 15, 474 N.E.2d 223).

### Claims for highway design defects

Governmental entities have a nondelegable duty to design, construct and maintain their highways, roads, thoroughfares (including the shoulders) in a reasonably safe condition for their intended purpose, which includes appropriate warnings (*Melby v. Duffy*, 304 A.D.2d 33, 39 [2nd Dept 2003]; *Annino v. City of Utica*, 276 N.Y.192, 196 [1937]; *Friedman v. State of New York*, 67 N.Y.2d 271 [1986]; *Weiss v. Fote*, 7 N.Y.2d 579 [1960] )... Such a duty includes the duty to maintain traffic control devices, barriers, and the like (*McDonald v. State of New York*, 307 A.D.2d 687 [2003]; see, *Vehicle and Traffic Law*, s 1681; *Cimino v. City of New York*, 54 A.D.2d 843, 388 N.Y.S.2d 276, affd 43 N.Y.2d 966, 404 N.Y.S.2d 595, 375 N.E.2d 775).

In this realm, however, the defense of qualified immunity for highway and road related designs and plans often rears its head. This doctrine holds that the governmental entity will not be liable for its discretionary decisions in the design of the roadway, etc. (as opposed to its maintenance, repair or construction) unless 1) the planning or design decision was made based on an inadequate study; 2) there was no reasonable basis for the design or plan, or 3) there is unjustifiable delay in implementation of a design modification or plan that would have alleviated the danger; or 4) there is a failure to re-evaluate an existing plan after the passage of time, a change in usage or road conditions or notice of a dangerous condition (*Weiss v. Fote*, 7 N.Y.2d 579 [1960]). Once a decision on design is made, it must be carried through with reasonable care (*Id.*). Liability cannot be imposed unless the design decisions were based on a study that was plainly inadequate and/or the plan or design itself lacked a reasonable basis ( *Weiss v. Fote*, supra at 589). The purpose of this rule, as with government immunity generally, is to prevent the finder of fact from “second-guessing the planning decisions of governmental bodies regarding such operations as traffic control and regulation” ( *Deringer v. Rossi*, 260 A.D.2d 305, 306 [1999] ). Therefore, as a general rule, where experts have differing opinions about whether a planning decision was proper, the act of choosing the design is “discretionary, and the difference of opinion is sufficient to establish that the decision was reasonable ( *Schwartz v. New York State Thruway Auth.*, 95 A.D.2d 928, 929 [1983], affd 61 N.Y.2d 955 [1984] ).

These same principals can be applied to government planning and design in areas other than highways (see, e.g., *Southworth v. State of New York*, 62 A.D.2d 731, 405 N.Y.S.2d 548, affd 47 N.Y.2d 874, 419 N.Y.S.2d 71, 392 N.E.2d 1254, (the design of an experimental driver’s rehabilitation program; *Butz v. Econoumou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, (decision of Department of Agriculture officials to institute an enforcement proceeding); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (decision of state officials in deploying the National Guard at Kent State University).

### VEHICLE LIABILITY

When a governmental employee drives a vehicle, this is not deemed a traditional core governmental action, and thus the employee, and his public corporation employer, may be held liable to the same

extent as a private driver (see, General Municipal Law § 50-a [liability attaches to a municipality for the negligent operation of a municipally owned vehicle]; *Van Tassell v. Hill*, 285 A.D. 584 [4th Dept 1955]). There are special protections, however, granted by Statute to government operated emergency and police vehicles.

emergency vehicles

#### Vehicle & Traffic Law § 1104

This Statute provides that the driver of an authorized emergency vehicle, when involved in an emergency operation, may proceed past a red light, a flashing red signal or a stop sign, exceed the speed limits, and disregard regulations governing directions of movement of vehicles generally, when the emergency sound and lights are activated. audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible. Further, an authorized emergency vehicle operated as a police, sheriff or deputy sheriff vehicle may exceed the maximum speed limits for the purpose of calibrating the speed of other vehicles. The driver, and her municipal employer, cannot be held liable for injuries caused during such activities absent proof that the driver engaged in a “reckless disregard for the safety of others” (see, Vehicle & Traffic Law § 1104; *Badalamenti v. City of New York*, 30 A.D.3d 452, 453, 817 N.Y.S.2d 134; *Saarinen v. Kerr*, 84 N.Y.2d 494, 501, 620 N.Y.S.2d 297, 644 N.E.2d 988; *Rodriguez v. Incorporated Vil. of Freeport*, 21 A.D.3d 1024, 801 N.Y.S.2d 352; *Turini v. County of Suffolk*, 8 A.D.3d 260, 778 N.Y.S.2d 66). “The ‘reckless disregard’ standard requires proof that the officer intentionally committed an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow” ( *Badalamenti v. City of New York*, supra at 453, 817 N.Y.S.2d 134).

#### Vehicle & Traffic Law § 1103(b)

This Statute provides, in pertinent part, that the provisions of the Vehicle & Traffic Law (except those regarding driving while intoxicated) do not apply to government vehicles “engaged in work on a highway” and to government “hazard vehicles while actually engaged in hazardous operation” absent “reckless disregard for the safety of others” (Vehicle & Traffic Law § 1103[b]). Vehicle and Traffic Law § 117-a defines “hazard vehicle” as: “Every vehicle owned and operated or leased by a utility, whether public or private, used in the construction, maintenance and repair of its facilities, every vehicle specially equipped or designed for the towing or pushing of disabled vehicles, every vehicle engaged in highway maintenance, or in ice and snow removal where such operation involves the use of a public highway and vehicles driven by rural letter carriers while in the performance of their official duties.” “Hazardous operation” is defined as the “operation, or parking, of a vehicle on or immediately adjacent to a public highway while such vehicle is actually engaged in an operation which would restrict, impede or interfere with the normal flow of traffic” (Vehicle and Traffic Law § 117-b). The protections afforded to the municipality by this Statute apply only to vehicles “actually engaged in work upon a highway,” which is construed as being limited to vehicles performing “construction, repair, maintenance or similar work” (*Riley v. County of Broome* 95 N.Y.2d 455 [2000]).

## SOCIAL SERVICES:

The government has a duty to use reasonable care when placing children in the care of others. This duty flows from its role as *parens patriae* (see, e.g., *Bartels v. County of Westchester*, 76 A.D.2d 517, 429 N.Y.S.2d 906; *Andrews v. County of Otsego*, 112 Misc.2d 37, 446 N.Y.S.2d 169). Therefore, social services may be held liable where, through negligent placement of the child, the child is abused, neglected or otherwise harmed (*id.*). Social services therefore can be held liable for negligently selecting foster parents (for example, for placing them with known sex offenders) and for failure to oversee the subsequent care given. This being said, social services is not vicariously liable for the negligence of the foster parents, as foster parents are not its employees.

If such placement is mandated by court order, however, is entitled to judicial immunity (see, *Mosher-Simons v. County of Allegany*, 99 N.Y.2d 214, 219-220, 753 N.Y.S.2d 444, 783 N.E.2d 509 [2002] ), which extends to the employees of a child protective service that assists the court in effecting the placement ( *id.* at 220-221, 753 N.Y.S.2d 444, 783 N.E.2d 509; see also *Matter of Cromwell v. New York City Dept. of Social Servs.*, 239 A.D.2d 299, 658 N.Y.S.2d 24 [1997] [“placement of the infant with a foster family was a discretionary, nonactionable act”] ). In addition, it is settled that Social Services Law § 419 provides no private right of action to a plaintiff alleging negligence in connection with the furnishing of information pertinent to the placement of a child in protective care ( *Mark G. v. Sabol*, 93 N.Y.2d 710, 722, 695 N.Y.S.2d 730, 717 N.E.2d 1067 [1999] [alleging breach of the defendants’ governmental responsibility to furnish protective and preventive services] ).

The Second Department has held that common law immunity does not attach for negligent placement and supervision of a foster child ( *Battles v. Westchester County*, 76 A.D.2d 517, 429 N.Y.S.2d 906; *Barnes v. Nassau County*, 108 A.D.2d 50, 487 N.Y.S.2d 827), ( *Matthews v. New York City Dept. of Social Servs.*, 217 A.D.2d 413, 415, 629 N.Y.S.2d 241 [1995], *lv. denied* 87 N.Y.2d 812, 644 N.Y.S.2d 145, 666 N.E.2d 1059 [1996] ). There has been no Court of Appeals case deciding the issue.

Social Services Law § 419 affords qualified immunity to those participating in the investigation of child abuse allegations ( see Social Services Law § 424; *William M. v. Laub*, 149 A.D.2d 475, 539 N.Y.S.2d 970 [1989] ), i.e., immunity as long as they act within the scope of their employment and do not engage in willful misconduct or gross negligence ( *Van Emrik v. Chemung County Dept. of Social Servs.*, 220 A.D.2d 952, 953, 632 N.Y.S.2d 712 [1995], *lv. dismissed* 88 N.Y.2d 874, 645 N.Y.S.2d 448, 668 N.E.2d 419 [1996] ).

## DAMAGES AGAINST A PUBLIC CORPORATION

Money damages against public corporations are no different than against private parties, with one exception: punitive damages are not recoverable against any governmental entity, including public corporations (*Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382 [1987]; *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 452 N.Y.S.2d 347, 437 N.E.2d 1104).. The rationale behind the rule is that the goals of punishment and deterrence would not served when punitive damages are imposed against the government, since it ultimately is the innocent taxpayer who is punished (*Sharapata v. Town of Islip*, 56 N.Y.2d 332, 452 N.Y.S.2d 347, 437 N.E.2d 1104.) Punitive damages may, however, be recoverable against any individual public employee. But if punitive damages are warranted, this may also mean that the employee was acting outside the scope of his employment, and that the government employer may therefore not vicariously liable (see, *Miller v. City of Rensselaer*, 94 A.D.2d 862 []). Where punitive damages are assessed against an employee, the government is not obligated to indemnify the employee (*Id.*)