1971

Delay in Notice of Tort Claim against a Government Agency

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DESPITE AN ONSLAUGHT of criticism[1] and a rationale predicated on the discredited doctrine of Divine Right of Kings,[2] the rule of sovereign immunity still exists in many states.[3] As a result of this anachronism,[4] municipalities and other subdivisions of state government have continued to escape liability for the tortious conduct of their agents.[5] This situation has persisted despite a tendency by the courts to restrict rather than extend the principle of immunity.[6] Statutory enactments such as short term notice provisions applied against potential plaintiffs by states and their subdivisions, when strictly construed by the courts, have had the effect of a short term statute of limitation.[7] The result of such construction is the exacerbation of the fiction of immunity.

Intent Behind Notice Provisions

The courts have rendered many opinions relevant to the intent of notice provisions. A New Jersey court in *Atlantic Aviation Corp. v. Port of New York Authority*,[8] argues logically that the intent of the notice statute in question is three-fold: (1) to advise the city of the "existence and nature" of a claim; (2) to allow time for a city investigation; and (3) in the absence of settlement, to allow the city to prepare a defense. A court in Kansas similarly defended the intent of short term notice provisions as (1) to inform the city of the place where the accident occurred so the city could correct the defective condition, (2) to allow the city to ascertain the extent of the claimant's injuries, and

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1 Kirksey v. Ft. Smith, ___ Ark. ___, 300 S.W. 2d 257 (1957); Wendler v. Great Bend, 181 Kan. 753, 316 P. 2d 265 (1957); Wendler v. Neblock v. Salt Lake City, 100 Utah 573, 111 P. 2d 800 (1941) concurring opinion; Bingham v. Board of Education, 118 Utah 562, 223 P. 2d 423 (1950) dissenting opinion; Britten v. Eau Claire, 260 Wis. 382, 51 N.W. 2d 30 (1952); *see also* 60 A.L.R. 2d 1198 (1958); and Borchard, Government Liability in Tort, 34 Yale L.J. 1 (1924), and 36 Yale L.J. 759 (1927); and see, Oleck, Negligence Forms of Pleading, Sec. 256 (and forms therein) (1957 rev. ed.).

2 Annot., 120 A.L.R. 1376 (1939) at 1377.

3 Annot., 25 A.L.R. 3d 322 (1969).

4 Annot., 120 A.L.R. 1376 (1939).

5 Boreffi v. Town of Vestal, 33 A.D. 2d 1073, 307 N.Y.S. 2d 400 (1970).

6 Evans v. Berry, 262 N.Y. 61, 186 N.E. 203, 89 A.L.R. 387 1933; Hoggard v. Richmond, 172 Na. 145, 200 S.E. 610 (1939), 120 A.L.R. 1368 (1939).

7 Harte v. City of Eagle River, 45 Wis. 2d 513, 173 N.W. 2d 683 (1970).

8 66 N.J. Super. 15, 168 A. 2d 262 (Law Div. 1961).

finally, (3) to allow the city opportunity to investigate accidents while all facts were current.[9]

In *Mapley v. Board of Education,*[10] the rationales of avoidance of "surprise," prevention of stale claims, and protection against needless litigation were accepted by the New York court as reasons to uphold the notice statutes. In *Grams v. Independent School District No. 742,*[11] a Minnesota court commented upon the importance of an investigation so that a determination of "truth" could be made along with an evaluation of the merits of the claim. An Indiana court felt "prompt investigation" was the purpose of the statute.[12] An Idaho court reasoned that to avoid depleting already small city treasuries was reason enough for notice provisions.[13] Finally, a Texas court frankly admitted that it was anxious to avoid tort suits involving governmental bodies based on pecuniary demands.[14] Courts in most jurisdictions have advanced a vast array of apparently logical rationales for notice provisions. However, it is not the superficial logic with which we should be concerned, but rather the far reaching calamities occurring as a result of these provisions.

Undesirable Effects of Strict Compliance

With the various judicial pronouncements fresh in our minds let us examine some of the acrimonious results of court opinions of the notice provisions. In the New York case of *Bauer v. City of New York,*[15] the plaintiff, an infant, seriously injured as a result of the negligence of a city employee, was denied recovery because of her failure to comply with New York's notice provisions as set out in the General Municipal Law. This decision was sustained by the appellate court despite the fact that an investigation had been made and the city was not prejudiced by her failure to file timely notice.

A second illustration of the undesirable effects of these provisions is demonstrated in *Murray v. City of Milcord, Connecticut.*[16] The appellant, a minor, was denied relief for her failure to comply with a 30 day notice provision. A five month delay in notice occurred here and completely barred the action regardless of mitigating circumstances. Perhaps in the minds of some a delay of five months could be too long a delay to be justified, but can a 24 hour delay be rationalized honestly

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[9] Cornett v. City of Neodesha, 187 Kan. 60, 353 P. 2d 975 (1960).

[10] 175 N.Y.S. 2d 354 (App. Div. 2d 1958).

[11] 176 N.W. 2d 539 (Minn. 1970).

[12] Galbreath v. City of Indianapolis, 255 N.E. 2d 225 (Ind. 1970).

[13] Jorstad v. County of Lewiston, 93 Idaho 122, 456 P. 2d 766 (1968).

[14] City of El Paso v. Nicholson, 361 S.W. 2d 415 (Tex. App. 1962).

[15] 33 App. Div. 2d 784, 307 N.Y.S. 183 (1969).

[16] 380 F. 2d 468 (2d Cir. 1967).

and squared against the policy arguments set forth by the courts? In another New York case the plaintiffs were injured on September 20, 1968, and promptly contacted an attorney.[17] The attorney drafted the notices within the statutory period, but failed, because of a busy schedule, to serve notice on the necessary authorities until 91 days had passed. The plaintiffs' claim was denied. It was just one day late. Such a decision demonstrates with clarity that the courts were certainly looking with an eye to something other than justice. Such a decision takes us back to the Medieval era protecting the "sovereign" at all costs.

New York and Connecticut do not have a monopoly on strict construction of notice provisions. A Michigan court in *Trbovich v. City of Detroit,*[18] held, with two justices strongly dissenting, that the plaintiff, who was rendered mentally and physically incompetent as a result of the city's non litigated negligence, was denied recovery on the ground that she had failed to comply with the notice provision. This unfortunate decision was rendered despite the fact that her disability had extended through the duration of the entire notice period. Case after case clearly shows that the logic which various courts apparently use to justify the short notice statutes are bankrupt attempts to justify an unjustifiable position of sovereign immunity.

The shallowness of the arguments upholding the short notice statutes is again shown in the New York case, *Corso v. City of New York,*[19] where the plaintiff was not permitted to file his notice of claim against the city, *nunc pro tunc,* despite a hospital admission diagnosis which consisted of eleven different injuries, including a possible skull fracture. The plaintiff, in addition to all his other injuries, had suffered amnesia and was, at the time of the required notice, in critical condition in the hospital. The court sanctimoniously realized the injustice of the circumstances, but found it necessary to deny the plaintiff's claim under the law. The court was not willing to interpret the legislature's enactment in other than a strict manner. It did, however, urge the legislature to change the law so the courts could cope more equitably with such situations.

A Texas court has gone so far as to deny recovery to a plaintiff for failure to comply with notice provisions even where the injury did not come to light until after the period had run![20] And for a final example, a Kansas court attempted to rationalize a denial of recovery to a plaintiff because she had also failed to file timely notice of claim, despite the fact that she was totally unconscious for the duration of the entire notice period.[21]

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[17] Martinez v. New York City, 33 App. Div. 2d 669, 305 N.Y.S. 2d 34 (1969).

[18] 378 Mich. 79, 142 N.W. 2d 696 (1966).

[19] 20 App. Div. 2d 504, 248 N.Y.S. 2d 816 (1964).

[20] Wagstaff v. City of Groves, 419 S.W. 2d 441 (Tex. 1967).

[21] Workman v. City of Emporia, 200 Kan. 112, 434 P. 2d 846 (1967).

Possible Defenses to Strict Notice Requirements

Some state courts have reacted quite differently to the results of judiciary construction of short notice provisions, and not all courts have been willing to accept the unreasonably harsh results of strict construction of notice provisions.[22] Many courts have turned to several appropriate and valid legal doctrines, including substantial compliance, waiver, and estoppel to circumvent harsh results.

An example of a rational application of substantial compliance is illustrated in a recent New Jersey case.[23] On January 15, 1968, the plaintiff fell on an icy parking lot at Newark airport. He immediately reported the accident to a police officer and was treated at the airport medical clinic. On January 19th a representative from the airport sent a notice to the plaintiff requesting him to call in regard to his fall at Newark Airport. On May 16th of the same year, an attorney for the plaintiff directed a letter to the Port Authority advising that he was representing the plaintiff, alleging the Port Authority's negligence and inquiring as to the Authority's prospectus of disposition. On May 21, of the same year, the defendant sent the requisite forms to the plaintiff's attorney, with an accompanying letter requesting that said forms be filled out, or if the attorney preferred to use his own forms, he could do so as long as he met the requirements of the statute. On June 11th the plaintiff's attorney sent a letter to the Port Authority along with the plaintiff's medical reports, requesting an amicable adjustment of the claim. The attorney had not filled out the forms sent to him. On December 3rd of the year, the plaintiff's attorney sent a letter to the Port Authority confirming a previous telephone call and advising that said phone conversation should be considered a notice of claim. In an ensuing paragraph the attorney set forth the information required by the statute. On January 7, 1969 a claim based on negligence was filed. The defendant Port Authority set forth in their answer as a first defense, that the plaintiff had failed to comply with the notice statute. The trial court agreed and dismissed the action. The appellate court framed the question in terms of substantial compliance and pointed out initially that they could not find any statutory history which would indicate that the legislature intended to exclude the doctrine of substantial compliance. The court then pointed out that the doctrine developed to avoid technical defects destroying otherwise meritorious claims. The court went on to say that the statute should never be construed in such a way as to defeat valid claims on the basis of a mere technicality alone. Finally, the court pointed out that the defendant

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[22] Corso v. City of New York, *supra* n. 19; *see also* Barrso v. Pepin, 261 A. 2d 277 (R.I. 1970); Reich v. State, 17 Mich. App. 619, 170 N.W. 2d 267 (1969); Cooper v. City of Abilene, 416 S.W. 2d 562 (Tex. 1967); Willis v. Reddin, 418 F. 2d 702 (9th Cir. 1969); Powell v. City of Haysville, 203 Kan. 543, 455 P. 2d 528 (1969).

[23] Zamil v. Port of New York Authority, 56 N.J. 1, 264 A. 2d 201 (1970).

was in no way prejudiced by the plaintiff's failure to comply with the claim notice requirements and that there was in fact substantial compliance with the intent of the 60 day statute.

The court could have strictly construed the statute and technically defeated the claim. However, the eye of the court was not focused simply on the letter of the law. It refused to impose a 60 day de facto statute of limitations on a meritorious claimant.

This New Jersey decision is not alone in the application of the doctrine of substantial compliance. An Idaho court in *Jorstad v. County of Lewiston,*[24] made a similar application where the plaintiffs, seven minors, were awarded judgment in a wrongful death action despite a 12 month and 27 day delay in notice. The court logically reasoned that the most important criteria should be whether the goal of a notice statute had been achieved, and further noted that the statute should not be construed in an unconscionable manner. Similarly a Utah court in *Hatch v. Webber County,* refused to strictly interpret the notice statute in question because to do so "would be to sanction a miscarriage of justice."[25] The Michigan[26] and Indiana[27] courts are also committed to a similar rule.

Another principle used by the courts to circumvent the harsh results of strict construction of notice provisions is that of waiver. Although the authorities are in conflict,[28] courts have seen fit to hold that such provisions can be waived by certain governmental conduct. For example, a section of the Municipal Code of Detroit, Michigan provides that when computing the 60 day notice statute, if the last day falls on a Sunday or legal holiday, the plaintiff has an additional day in which to file his claim.[29]

The Texas court in *Smith v. City of Dallas,*[30] initially discussing notice as a condition precedent to any action, pivoted and held that such a condition precedent could be waived. The court agreed with the appellants who contended that the acts of a city agent who had investigated the accident lulled them into a feeling of security, and this constituted a waiver of notice. This view was reiterated in *City of Denison v. Fulce.*[31] In that case the court cited *Smith v. City of Dallas,*[32]

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[24] Jorstead v. County of Lewiston, *supra* n. 13.

[25] 23 Utah 2d 144, 459 P. 2d 436 (1969).

[26] Stacey v. Sankovich, 173 N.W. 2d 225 (1969).

[27] Galbreath v. City of Indianapolis, *supra* n. 12.

[28] Multi-volume: 18 McQuillin, Municipal Corporations 53.156 (rev. 3d ed., 1963; 1969, Supp.).

[29] Murphy v. City of Detroit, 2 Mich. App. 473, 140 N.W. 2d 473 (1966).

[30] 404 S.W. 2d 839 (Tex. App. 1966).

[31] 437 S.W. 2d 277 (Tex. App. 1969).

[32] Smith v. City of Dallas, *supra* n. 30.

and *Cawthorne v. City of Houston*,[33] as the two Texas examples of an exception to the general rule in Texas of strict compliance with notice statutes.

Another argument for a more logical approach by the government agency to this problem is a waiver of sovereign immunity up to the amount of insurance. This view was presented in *City of Knoxville, Tennessee v. Bailey*,[34] where the court intimated that it would be totally nonsensical for the taxpayers to purchase private insurance and then have the carrier deny liability on the principle of immunity.

A third rule applied by courts to circumvent the harsh results of strict construction of notice statutes is the doctrine of equitable estoppel. A California court in *Shoban v. The Board of Desert Center Unified School District*,[35] echoes the thoughts of Mr. Justice Holmes and, in harmony with his concept of justice, held that equitable estoppel may be invoked against the government, particularly in this case where the tort claimant had been misled by governmental employees in respect to procedural or time requirements of a claim statute. A Florida court, while refusing to apply the doctrine on the facts in the case, did comment that a city may be estopped from pleading failure to file notice if the facts of the case dictate.[36] A Georgia court in *City of Atlanta v. Frank*,[37] denied the protection of the immunity where it appeared that an attorney acting on behalf of a city had plenary powers to act on the matter in question, and said attorney had solemnly acted to assure the plaintiff that he had received notice and made investigation and had advised the plaintiff that the investigation revealed that the city should deny the claim, such assertions by the attorney estopped the city from successfully pleading noncompliance with the claims statute.

Similarly a Colorado court held that where the city attorney had acknowledged receipt of a letter notifying the city as to the incidence of the cause of action, the city was estopped from pleading noncompliance with the statute even though the notice provision was not complied with to the letter of the statute.[38]

There are, fortunately, other doctrines available to the courts to reach equitable results when injured plaintiffs have failed to comply with notice provisions. The doctrine of excuse by reason of infancy was adhered to in *Simpson v. City of Abilene*.[39] The plaintiff, a seven year old, was excused from complying with Abilene's notice provision as

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[33] 231 S.W. 701 (Tex. App. 1921).

[34] 222 F. 2d 520 (6th Cir. 1955).

[35] 81 Cal. Rptr. 112 (Cal. App. 1969).

[36] Matthews v. City of Tampa, Fla., 227 S. 2d 211 (Fla. App. 1969).

[37] 120 Ga. App. 273, 170 S.E. 2d 265 (1969).

[38] Wilson v. City and County of Denver, 449 P. 2d 822 (Colo. 1969).

[39] 388 S.W. 2d 760 (Tex. App. 1965).

a matter of law. This view, however, was not shared in a similar situation by the New York court in *Anderson v. County of Nassau.*[40] The court held as a matter of law that the delay was not attributable to the child's infancy and therefore was not excused. The court however, pointed out that the statute in question has been interpreted inconsistently by New York courts. Further the court urged a uniform judicial interpretation of the statute and suggested that it would favor a broad construction which would allow the court the reasonable discretion to excuse untimely notice due to infancy.

The rationale commonly used by the courts to excuse notice on the basis of infancy is that realistically speaking notice presupposes the existence of one legally capable of giving notice. A child is normally deemed as one not able to give legal notice, hence notice must be excused.[41] The question whether notice of an infant is excusable may hinge on the age of the minor. The disability of a mature twenty year old though a legal minor in some states will not be weighed in the same light as that of an immature fifteen year old, or that of a seven year old. The concept is variable. Where one is excused in a specific instance, another may not be excused, despite the age of minority.[42]

Infancy is not the only disability which the courts recognize as sufficient to excuse compliance with the notice provisions. Mental and or physical incapacity denied the immunity in a New York court. With two justices dissenting, it was held that a delay of 175 days was excusable where the plaintiff had suffered a double leg amputation, had endured large doses of drugs and the natural shock which would accompany such an ordeal.[43] Similarly Alaskan courts, recognizing the necessity of essential justice, have held that notice is excused any time the incapacity to give notice is a result of an injury caused by the sovereign. To hold otherwise would:

> Make it possible for the city to take advantage of and benefit from its own wrong.[44]

Or in the words of Mr. Justice Butler:

> Be equivalent to offering this suggestion to municipalities: If you are negligent on any occasion, see to it that your negligence is sufficiently gross to insure the complete physical and mental disability of the victim; for by doing so, you will avoid the necessity of pay-

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[40] 31 App. Div. 2d 761, 297 N.Y.S. 2d 665 (1969).

[41] Annot., 34 A.L.R. 2d 725 (1954). Illinois, Montana and New York have allowed infancy as an excuse. Infancy is not an excuse in Alabama, California, Colorado, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Tennessee, Utah and Washington.

[42] Anderson v. County of Nassau, *supra* n. 40.

[43] Millington v. New York City Transit Authority, 33 App. Div. 2d 737, 305 N.Y.S. 2d 810 (1969).

[44] Maier v. City of Ketchikan, 403 P. 2d 34 (Alaska 1965).

ing damages, which you would be required to pay if the victim were left in possession of his faculties.[45]

Pennsylvania courts have followed a rule of "reasonable excuse" as set forth under Pennsylvania statute.[46] An example of an application of this rule is seen in *Yurecho v. County of Allegheny*.[47] The plaintiff had failed to give timely notice due to his own ignorance of the law. The court excused the delay reasoning that ignorance of either the plaintiff or his attorney, coupled with no prejudice to the municipality constituted a "reasonable excuse."

Conclusion

It seems apparent that claim provisions are another example of "blind (in) justice." It is this author's opinion that the "Lady" open at least one of those eyes and do what many legislators have failed to do, reform the law of notice of claim. The reformation should be complete. To make it complete would require total abolition of claim of notice provisions. The government is protected from stale claims in the same manner as the private sector, that is by the statute of limitations. There is no good reason for it to enjoy an additional protection. The King is dead, long live the People!

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[45] City and County of Denver v. Taylor, 88 Colo. 89, 292 P. 2d 594, 72 A.L.R. 833 (1930).

[46] Pa. Gen. Laws, C. 53, § 53101.

[47] 430 Pa. 325, 243 A. 2d 372 (1968).