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"Substantial Compliance" with Municipal Tort Notice Requirements: Galbreath v. City of Indianapolis

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RECENT DEVELOPMENTS

"SUBSTANTIAL COMPLIANCE" WITH MUNICIPAL TORT NOTICE REQUIREMENTS: GALBREATH v. CITY OF INDIANAPOLIS

Numerous states have statutes requiring that notice specifying circumstances of an injury must be served on designated officials before a tort action may be brought against a municipality.[1] This special treatment originated to protect the municipality from stale and fraudulent claims, provide an opportunity for timely investigation, and permit settlement of claims without the expense of needless litigation.[2] Although there is no general rule for interpretation of these statutes,[3] Indiana, until recently, has demanded strict compliance with that portion of its tort notice statute governing which officials must be notified. Whether a court "strictly" or "liberally" construes the notice requirement is significant since a valid notice is a prerequisite to hearing the merits of the case.[4]

The Indiana statute requires notice to either the mayor, clerk, or clerk-treasurer of the city or town.[5] However, in *Galbreath v. City of*

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1. *See e.g.*, ILL. ANN. STAT. ch. 24, § 1-4-2 (Smith-Hurd 1962); IOWA CODE ANN. § 420.45 (1949).

2. 2 M. MERRILL, MERRILL ON NOTICE § 784 (1952), E. McQUILLIN, 18 MUNICIPAL CORPORATIONS: § 53.153 (3rd ed. rev. 1963) [hereinafter cited as McQUILLIN]. Aaron v. City of Tipton, 218 Ind. 227, 32 N.E.2d 88 (1941).

3. Antieau, *Statutory Expansion of Municipal Tort Liability*, 4 ST. LOUIS L.J. 351, 353 (1957); McQUILLIN note 2 *supra*, at § 53.152; Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 ,44 (1924). Thus, if a statute is in derogation of common law immunity, it will receive a narrow construction; if there was no common law immunity it will receive a liberal construction. *See* City of Tulsa v. Whittenhall, 140 Okla. 160, 282 P. 322 (1929).

4. Borchard, *Report of the Committee on Municipal Tort Liability*, 7 AM. MUN. L. REV. 250, 253 (1942) [hereinafter cited as REPORT].

5. However, when the *Galbreath* case arose, the statute listed only the mayor and clerk. IND. ANN. STAT. § 48-8001 (Burns Repl. 1963) provided in part:

> Hereinafter no action or actions of any kind for damages arising from any negligence . . . or other tort of any municipal corporation that causes injury to any person . . . shall be brought or maintained against any municipal corporation of this state unless there is first served upon the mayor or clerk of any such city or a member of the board of trustees of any such town, either by delivery thereto in person or by registered mail with return card, a written notice of the occurrence complained of, setting out therein a brief general description of the date and time, the place, the conditions and cause, the nature and extent of the injury to person and loss, injury or damage, if any, to property, the date and cause of any resulting death charged as wrongful and the nature of the damages arising to anyone therefrom, all as associated with and caused

Indianapolis[6] the Indiana Supreme Court, overturning long-standing precedent, held that "substantial compliance" with the Statute was sufficient. Application of this standard resulted in a finding that letters to a legal department investigator and conversations with him and the city attorney satisfied the notice requirement.[7] The court based its determination that the city attorney had authority to accept notice as the mayor's agent[8] on a statute requiring the city attorney to notify the mayor of all important matters.[9] Thus, the court reasoned that the city would be advised of the claim, thereby permitting ample opportunity for investigation of the occurrence.[10]

In the initial proceedings Mrs. Galbreath alleged that while depositing mail at a poorly lit corner she stepped into a hole in a sidewalk and was seriously injured. Her husband called the police, who inspected the site and stated that a barricade would be erected until repairs were made and that a report would be referred to the legal department.[11] Mr. Galbreath then telephoned the City County Building, was referred to a legal department official, and later sent him a letter explaining the accident. Subsequently, Mrs. Galbreath sent a registered letter to the legal department explaining her injuries, and later conferred several times with representatives from this department.[12] Despite these steps, the trial court sustained a demurrer to the complaint on the ground it failed to allege

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by such occurrence . . . within sixty [60] days after the occurrence complained of. . . .

The 1967 amendment substituted "civil city or town" for "municipal corporation" twice in the first sentence, added "or clerk-treasurer" as an official upon whom notice could be served, substituted "shall" for "must" preceding "be served" in the last sentence, and made minor word changes throughout. IND. ANN. STAT. § 48-8001 (Burns Supp. 1970).

6. ——Ind.——; 255 N.E.2d 225 (1970).
7. *Id.* at ——; 255 N.E.2d at 230.
8. *Id.* at——; 255 N.E.2d at 229.
9. *See* IND. ANN. STAT. § 48-1801 (Burns Repl. 1963) which provides in part: . . . [the city attorney] shall have the management, charge and control of the law business of such city and for every branch of its government. . . . He shall report to the mayor, in writing, all such matters as he may deem important, and to the department of finance all judgments for which such city shall be liable.

There is a good reason why the court in *Galbreath* used a theory of statutory agency rather than an analogy to the Indiana Rules of Civil Procedure. In Wellman v. Owensboro, 282 S.W.2d 628 (Ky. 1955) where a plaintiff attempted to apply a procedural rule that service may be made upon a party's attorney, the court quoted "whenever under these rules" from the rule and held the rule inapplicable to documents required to be served by statutory authority outside the rules. In addition, Indiana Trial Rule 4.6(A)(4) limits service to the city attorney to cases where a statute provides for an attorney to represent the local government organization.

10. ——Ind. at——; 255 N.E.2d at 229.
11. ——Ind. App.——; 248 N.E.2d 553, 554 (1969).
12. *Id.* at ——; 248 N.E.2d at 555.

proper statutory notice was served.[13] The appellate court affirmed, relying upon Indiana precedent.[14]

Indiana Precedent

As early as 1848 Indiana municipalities were held responsible to the same extent as natural persons for injuries occasioned by negligence of their agents.[15] Thus, a doctrine of municipal tort liability evolved from common law. Subsequently, *Touhey v. City of Decatur*[16] ignored this theory by holding that no duty was imposed upon municipalities except

13. *Id.* at——; 248 N.E.2d at 556.

14. *Id.* at——; 248 N.E.2d at 558.

15. In Ross v. City of Madison, 1 Ind. 281 (1848), the city was held liable for negligently erecting and maintaining a culvert in connection with a street which resulted in water damage to plaintiff's tanning operations. In Higert v. City of Greenecastle, 43 Ind. 574 (1873), where a lot owner constructed a sidewalk under the direction of the civil engineer of the city, the city was held liable for injuries resulting from negligent failure to keep the street in a reasonable safe condition even in the absence of a statute imposing the obligation of maintaining streets. This duty arose by implication from the exclusive authority over the streets granted the municipality by the legislature and by the ample power of taxation granted the city by law. *See also* Grove v. City of Fort Wayne, 45 Ind. 429 (1874) and Chattin, *Tort Liability of Municipal Corporations in Indiana,* 10 IND. L.J. 329, 332-33 (1935) [hereinafter cited as CHATTIN]. Thus, Indiana followed the New York common law principle that where a power is given and a duty imposed, liability arises from the failure to properly exercise the power and discharge the duty. Ehrgott v. Mayor, 96 N.Y. 264, 48 Am. Rep. 622 (1884). This theory was criticized on the ground that the municipality could not escape liability by delegating the exclusive authority over construction or maintenance to a private person; the majority of states recognized liability for defective streets as an exception to the rule that the municipality was immune in its governmental functions. See Repko, *Legal Commentary on Municipal Tort Liability,* 9 LAW AND CONTEMP. PROB. 214, 226-27 (1942).

Despite the language in the early cases establishing a broad foundation for municipal tort liability in principle, Indiana restricted municipal tort liability in later decisions on the basis of the governmental-proprietary distinction, recognizing liability in regard to streets as an exception. *See* Green, *Freedom of Litigation (III),* 38 ILL. L. REV. 355, 363 and CHATTIN *supra,* at 332. The distinction originated in Stackhouse v. City of Lafayette, 26 Ind. 17 (1866) where the question was whether the city was liable for the unskillfull construction of a culvert by a railroad for its own use simply because it was on one of the public streets. The existence of the street had no relation to the injury, and the court merely limited the *Ross* case to situations where the city had directed the construction of works for public use. However, the broad language was ignored in favor of the dictum. See Brinkmeyer v. City of Evansville, 29 Ind. 187 (1867) and City of Indianapolis v. Williams, 58 Ind. App. 447, 108 N.E. 387 (1914).

> Thus it appears that after a vigorous pioneer judiciary had established the liability of municipal corporations on the same basis as other corporations, false doctrines of immunity based on a groundless dictum were dragged into the common law to save municipal corporations from liability in thousands of cases in which individuals or private corporations engaged in the same activities might have been held liable. Green, *supra* at 359.

16. 175 Ind. 98, 93 N.E. 540 (1911). The court held that a detailed account of the time, place, and nature of the injuries published in two newspapers of general circulation was not compliance with the statute, and that plaintiff's physical incapacitation was irrelevant. IND. ANN. STAT. § 8962 (Burns 1908) was basically the same as the current statute, but dealt only with defective streets, alleys, highways and bridges.

as set forth, either expressly or impliedly, by statute.[17] In effect, the case gave impetus to a policy of tort immunity for municipalities. Under the *Touhey* holding statutory notice provisions were not an aberration of common law liability. Rather, such provisions became a mandatory limitation on the city's statutory liability: a condition precedent to a right of action against the city.[18] Even though the appropriate municipal officers obtained full knowledge of the time, place and nature of the injury a right of action did not arise unless the notice provisions were strictly complied with.[19] The court gave no reasons for this harsh rule which for sixty years established an often insurmountable block to potential plaintiffs.

In 1941, *Aaron v. City of Tipton*[20] presented an opportunity to eradicate the *Touhey* rule. The issue in *Aaron* was whether a failure to verify the notification rendered the notice insufficient and thereby precluded plaintiff's cause of action.[21] The court refused to apply the strict-compliance rule, and reasoned that the statute merely established a procedural step necessary to the common law remedy, not a condition precedent to the liability.[22]

Indiana cases prior to *Aaron* had formulated the test that content requirements were satisfied when there was substantial compliance with the statute.[23] The appellate court in *Galbreath* declined to extend this

17. 175 Ind. 98 at 100-01, 93 N.E. at 541.

18. *Id.*, 93 N.E. at 542.

19. *Id.* at 103, 93 N.E. at 542. This is the general doctrine of the states. See McQUILLIN § 53.154.

20. 218 Ind. 227, 32 N.E.2d 88 (1941).

21. *Id.* at 237, 32 N.E.2d at 92. The court held that the Act of 1935, IND. ANN. STAT. § 48-8001 (Burns Repl. 1963), which eliminated the requirement that the notice be verified, was applicable to notices served prior to its effective date. Since the liability was at common law, a change in the procedural step in the remedy could not affect any vested right of the appellee.

22. *Id.* at 235-36, 32 N.E.2d at 89-90. *Aaron* noted that *Touhey* used authority from states having statutory liability.

23. A listing appears in the appellate court opinion, ——Ind. App. at——, 248 N.E.2d at 557-58. These cases followed the first case applying the substantial compliance concept to the notice statute, City of East Chicago v. Gilbert, 59 Ind. App. 613, 108 N.E. 29 (1915), which dealt with the sufficiency of the description of place of injury. The court said the requirements as to notice of time, place and nature of the injury were to receive a liberal construction, and relying on *Touhey*, stated that the requirements that notice be given, within the time specified, and to proper officers were to receive a strict construction. *Gilbert* justified liberal construction of the contents of notice by relying upon non-Indiana cases favoring such construction when by any reasonable interpretation the notice could be found in substantial compliance with the statute. The sufficiency of notice was tested by the statutory purpose. Judd v. City of New Britain, 81 Conn. 300, 70 A. 1028 (1908). The policy was to avoid turning the statute into a pitfall for claimants who had made a bona-fide effort to comply or deprive them of a right of action for failures which caused the municipality no disadvantage. Hammock v. City of Tacoma, 40 Wash. 539, 82 P. 893 (1905). *Hammock* relied on Born v. City of Spokane, 27 Wash.

substantial compliance doctrine to situations where the correct official does not receive notice.[24] *Aaron* was not read as totally rejecting the *Touhey* strict-construction theory. Instead, the court limited the liberal construction established by *Aaron* to insufficient contents of notice.[25]

Judge White's dissent provided the foundation for the plaintiff's later success at the supreme court level. He argued that the city attorney is an agent of the mayor and service upon the former constitutes substantial compliance with the statutory requirements.[26] The supreme court declared that *Touhey* was no longer the law in Indiana. The *Aaron* procedural interpretation of the statute was applied to the requirement of service on the statutory officials. Though no previous Indiana case had applied the substantial compliance doctrine where there was a failure to notify the proper officials, the court stated:

> However, *given the reasons and purpose of the notice requirement* as set out [in *Aaron*], we can see no logical basis upon

719, 68 P. 386 (1902), a case which held that reasonable compliance with the notice provisions was all that was required. No notice at all was served, but the court held that if it appeared it was impossible for the claimant to comply within the time prescribed he would not be held to a literal compliance with the provisions of the law, since if he were it would work a miscarriage of justice. Impossibility was a question of fact for the jury. Pearll v. Bay City, 174 Mich. 643, 140 N.W. 938 (1913) was the basis for the recent decision in Meredith v. City of Melvindale, 381 Mich. 572, 165 N.W.2d 7 (1969) which reasoned that only substantial compliance with the provisions is necessary, since the layman with a valid claim should not be penalized for a technical defect. The court made no distinction between content and service of notice, but rested entirely on whether the statutory purpose, to reveal sources of information, had been satisfied. The city abandoned its position relied upon in the trial court that the plaintiff failed to serve notice upon the proper party; the city admitted that if service upon the city attorney were the only defect, it would be compelled to concede it constituted substantial compliance with the requirement of service to the "mayor, city clerk, or member of the city council." Thus, the cases *Gilbert* relied upon show little basis in policy for limiting the doctrine. *But see* Sollenberger v. Incorporated Town of Lineville, 141 Iowa 203, 119 N.W. 618 (1909), where parol evidence was held insufficient on the ground it would negate the statute's requirement of written notice.

24. *Id.* The court found no case where this liberal construction had been extended to requirements governing the manner of serving notice, and relied upon City of Rushville v. Morrow, 54 Ind. App. 538, 101 N.E. 659 (1913), where notice to the city attorney was held insufficient on the basis of *Touhey,* even though he promised to read it to the mayor and city council.

25. —— Ind. App. at ——, 248 N.E.2d at 558. Plaintiff also contended that the city had actual notice and had waived the notice requirements. The appellate court reaffirmed the *Touhey* holding that actual knowledge was irrelevant, since statutory requirements were not waivable. The court noted that this is the policy of the majority of states. *See* Annot. 65 A.L.R.2d 1278 (1959). The Indiana Supreme Court, though discarding the theoretical base of *Touhey,* did not consider the waiver issue.

26. *Id.* at——, 248 N.E.2d at 559. Judge White justified extending the substantial compliance doctrine by noting that under *Touhey's* concept of statutory liability notice requirements are construed strictly against the claimant, while under *Aaron's* common law theory they are construed against the municipality. If *Touhey* were abandoned, the stare decisis effect of *City of Rushville* would vanish.

which this distinction can rest, nor has this court ever recognized such a distinction in its holdings.[27]

To ascertain the implications of *Galbreath,* an examination of the policies favoring the traditional distinction between the requirements for contents of notice and those for recipients is warranted. Furthermore, a determination of the limits of "substantial compliance" and the effect a procedural construction will have on the statute's constitutionality is essential to an understanding of *Galbreath.*

Policy Governing the Distinction Between Content and Service

Galbreath emphasized that the statutory purpose must be satisfied to have substantial compliance.[28] Judge Hunter stated:

> The purpose of the notice statute being to advise the city of the accident so that it may properly investigate the surrounding circumstances, we see no need to endorse a policy which renders the statute a trap for the unwary *where such purpose has in fact been satisfied.*[29]

Prior appellate court decisions had applied a similar test to the sufficiency of the contents of the notice, but had given no policy reason for so limiting the doctrine.[30] Moreover, application of substantial compliance policy to the entire Indiana statute was foreclosed to appellate courts prior to *Aaron* because of *Touhey*; hence, in order to apply the policy, they were forced to limit it to the contents of the notice. The procedural interpretation of *Aaron* made expansion of the policy possible, yet *Galbreath* was the first decision to do so,[31] finding support in a District of Columbia

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27. ——Ind. at——, 255 N.E.2d at 229.

28. The court quoted the purpose as set out in *Aaron*:

> . . . to inform the city officials with reasonable certainty of the time, place, cause and nature of the accident and the general nature and extent of the injuries so that the city might investigate all facts pertaining to its liability and prepare its defense, or adjust the claim. 218 Ind. at 231, 32 N.E.2d at 89.

29. ——Ind. at——, 255 N.E.2d at 229.

30. City of East Chicago v. Gilbert, 59 Ind. App. at 622, 108 N.E. at 32 (1915), stated it as:

> If the statement so designates the place that the officers of the town, being men of common understanding and intelligence, can, by the exercise of reasonable diligence and without other information from the plaintiff, find the exact place where it is claimed the damage was received, it is in this respect sufficient because it fully answers the purpose of the statute.

This statement avoided allowing outside information which was barred by *Touhey* and was relied on by the appellate courts. *See e.g.,* Gary v. McNulty, 99 Ind. App. 641, 194 N.E. 193 (1935).

31. The procedural interpretation of *Aaron* implied that all the requirements of the statute were in derogation of the common law, so that courts should construe them

case.

In *Stone v. District of Columbia,*[32] like *Galbreath,* notice was delivered to the legal department rather than the designated statutory official. This procedure was held "equivalent" to the required process.[33] However, Judge Prettyman, dissenting, suggested a claim might require action by many city departments, and thus the decision hindered the ability of the designated statutory officials to channel various claims to appropriate departments.[34] These contentions deserve analysis.

Claims investigation necessitates cooperation between other city offices and the legal department, because the former may have special facilities for receiving information which the legal department cannot obtain independently.[35] However, the first responsibility for investigating a claim and judging its merits falls on the city attorney.[36] Consequently, he is in the best position to coordinate and evaluate the actions of other departments. Efficient division of municipal responsibility is inconsistent with burdening other departments with independent and unnecessary investigative functions.

Though the legal department is the logical recipient of notice, the *Stone* dissent claimed the statutory official should have discretion to channel claims for other reasons. One channeling function is to direct appropriate departments to eliminate the risk which caused injury.[37] In *Galbreath,* police arranged for a barricade, but the *Stone* dissent claimed that nothing short of delivery of notice to the named statutory official could guarantee elimination of the hazard.[38] Indiana has provided for this contingency through a statute requiring the city attorney to report

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against limiting the common law. However, *Gilbert* was still cited after *Aaron* by the appellate court decisions. These cases, like *Gilbert,* dealt with the contents of notice. City of Gary v. Russell, 123 Ind. App. 609, 112 N.E.2d 872 (1953), held that a typewritten signature was sufficient compliance with the statute; City of Logansport v. Gammill, 128 Ind. App. 53, 145 N.E.2d 908 (1957), dealt only with the sufficiency of the place of injury, as did Volk v. City of Michigan City, 109 Ind. App. 70, 32 N.E.2d 724 (1941).

32. 237 F.2d 28 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 934 (1956). *See* Note, *Municipal Corporations—In an Action For Unliquidated Damages Against a Municipality, Statutory Requirement of Notice to Highest Official of the Municipality is Satisfied by Notice Given to the Legal Officer,* 45 GEO. L.J. 708 (1957), for a background of District of Columbia cases.

33. 237 F.2d at 29-30. The District of Columbia statute, D.C. Code § 12-309 (1966), required notice to the District Commissioner.

34. *Id.* at 34.

35. David & French, *Public Tort Liability Administration: Organization, Methods, and Expense,* 9 LAW AND CONTEMP. PROB. 348, 350 (1942) [hereinafter cited as PUBLIC TORT LIABILITY].

36. REPORT, *supra* note 4, at 254.

37. 237 F.2d at 33. *See* David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit,* 6 U.C.L.A. L. REV. 1, 32 (1959).

38. 237 F.2d at 34.

to the mayor all matters he deems important.[39] He is unlikely to overlook his duty to report hazards not within his authority to rectify, since a continuing risk threatens additional litigation. If he does neglect his duty, he must answer to the mayor.

Another channeling function is to determine potential financial liability for budgetary purposes.[40] The number of adverse judgments and settled claims determines this liability.[41] Since the city attorney is best qualified to evaluate the likelihood of success in either instance,[42] it serves no purpose to insist upon the statutory official's discretionary power to channel claims. Moreover, the claim is usually "channeled" to the city attorney anyway,[43] and any additional "channeling" can be accomplished when necessary once the mayor is informed.

Judge Prettyman also contended *Stone's* substantial compliance doctrine substituted a general doctrine of equity, non-prejudice and acquired knowledge for plain and specific requirements.[44] Judge Danaher, in a separate dissent, expressed the same fear:

> [The court's] opinion says that so long as the District can prepare its defense, it is "most unreasonable" to require a sufficient notice. Such reasoning would sustain any claim,

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39. See note 9 *supra*. Thus, cases like Gilkey v. City of Memphis, 159 Tenn. 220, 17 S.W.2d 4 (1929), which held notice to the city attorney insufficient notice to the mayor on the theory that the purpose of the statute was that there be in the mayor's office a written record of the claim, are not persuasive authority.

40. 237 F.2d at 34. PUBLIC TORT LIABILITY, *supra* note 35, at 351. REPORT, *supra* note 4, at 253.

41. Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 455 (1941).

42. *Id.* at 447.

43. *Id.* at 446.

44. 237 F.2d at 34-35. He argued that other jurisdictions had applied substantial compliance only in cases dealing with the particularity of the description of the accident or with some trivial variation in service. *Gilbert* was cited as the best expression of the former.

Actual receipt of the notice of claim by the designated official through intermediaries was accepted as compliance with the statute as long ago as 1899. In Missano v. Mayor of New York, 160 N.Y. 123, 54 N.E. 744 (1899), actual receipt by the corporation counsel, the statutory official, was held sufficient though notice was filed with the comptroller. Although the court said the direction of the statute must be strictly followed, it reasoned that the provision affected not the cause of action, but the remedy by regulating the procedure; it was not so rigid as to invalidate notice actually received merely because it was received through another official. Soper v. Greenwich, 48 App. Div. 354, 62 N.Y.S. 1111 (1900), held notice sufficient when mailed to the town clerk or town board, of which the supervisor was a member, and actually received by him. The court said the statute must be substantially complied with, and where an effort to comply was made and the notice when reasonably construed accomplished the object of the statute it was sufficient. The actual receipt doctrine is now incorporated in N.Y. GEN. MUN. LAW § 50-e (McKinney 1965), providing the party in interest has the claimant examined.

Prettyman arged that this substantial compliance doctrine should not be expanded to allow omission of specific requirements.

> whether in writing or not, no matter what the source of the District's information, no matter when the suit is brought.[45]

This judicial fear of usurping legislative power[46] and a related desire to make the limits of substantial compliance certain,[47] may explain *Galbreath's* care to base the legal department's authority on statutory delegation.[48] However, the opinion contains language[49] which indicates

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45. *Id.* at 32.

46. Blair v. City of Fort Wayne, 51 Ind. App. 652, 98 N.E. 736 (1912, and People v. City of Valparaiso, 178 Ind. 673, 100 N.E. 70 (1912), argued that it is for the legislature to delineate what exceptions will be allowed. Cardozo expressed the same thought while Chief Judge of the New York Court of Appeals: "The Legislature has said that a particular form of notice, conveyed with particular details to particular public officers, shall be a prerequisite to the right to sue. The courts are without power to substitute something else." Thomann v. City of Rochester, 256 N.Y. 165, 172, 176 N.E. 129, 131 (1931). *See also* City of Knoxville v. Felding, 153 Tenn. 586, 285 S.W. 47 (1926) and Reid v. Kansas City, 195 Mo. App. 457, 192 S.W. 1047 (1917).

In Indiana, the statute has been construed as to the contents in the past, so it is unrealistic to say it is plain and unambiguous and not capable of construction; the question is rather, why construction should not also be applied to the service requirement.

47. *See* Van Alstyne, *Claims Against Public Entities: Chaos in California Law,* 6 U.C.L.A. L. REV. 205, 208 (1959): "Such provisions, being fundamentally procedural in nature, should conform to the desiderata of simplicity and effectiveness which society has a right to expect of the means by which legally recognized rights are enforceable."

In Cole v. City of St. Joseph, 50 S.W.2d 623 (Mo. 1932), substantial compliance was held inapplicable to service of notice, since notice statutes must be uniform and definite in order to achieve their purpose. *See* Sahm, *Tort Notice of Claim to Municipalities,* 46 DICK. L. REV. 1, 10 (1941):

> To permit any departure from its clear terms is to introduce into it an element of uncertainty, and to open the way for a complete breaking down and nullification of the statute; and instead of having a uniform interpretation applicable to all cases, there will be no settled rule. As a consequence, the courts will be called upon, over and over again, to determine whether upon the facts in each particular case the statute has been substantially complied with, or its spirit and purpose subserved, thus leading to endless confusion.

48. If the case is limited to its facts in the future, statutory authority to act on behalf of statutory officials may be required to prove the statutory purpose has been satisfied. But *Galbreath* is a laudable move to eliminate inequities which result from strict construction of the statute, and there is no reason to limit that policy to statutory officials. The mayor's power to delegate authority and the power of city officials to waive notice provisions are problems only under a strict construction theory. Arguments for disallowing waiver—that a law established for a public reason cannot be contravened by private agreement, Aune v. City of Mandan, 167 N.W.2d 754 (N.D. 1969), that the mayor cannot waive notice by exercising a power not conferred upon him, White v Mayor and City Council of Nashville, 134 Tenn. 688, 185 S.W. 721 (1916), that the city will be put to the annoyance and expense of litigation at the mayor's whim, Fisher v. City and County of Denver, 123 Colo. 158, 225 P.2d 828 (1950), and that such practices will result in favoritism, scandal, and political manipulation, McCarthy v. City of Chicago, 312 Ill. App. 268, 38 N.E.2d 519 (1941)—are not persuasive since the mayor has power to settle claims and the notice statute is procedural. Farrell v. Placer County, 23 Cal.2d 624, 145 P.2d 570 (1944).

Even in states with strict construction, courts have asserted power to determine what constitutes "delivery" to the mayor, using the test of whether notice is relinquished into his control. Powers v. Kansas City, 224 Mo. App. 70, 18 S.W.2d 545 (1929), City of Tulsa v. Whittenhall, 140 Okla. 160, 282 P.2d 322 (1929).

the doctrine may be extended to include receipt of notice by officials with no legislative authority, oral notice, late filing, or even no notice at all. A broad reading of *Galbreath* indicates the court espoused a doctrine analogous to harmless error.[50] Under such a reading, a plaintiff who fails to notify the named statutory official will not be denied a remedy unless the city is prejudiced. As a result, courts will protect the city's interest without hindering legitimate claimants who are unaware of the proper procedure. A logical corollary to *Galbreath's* recognition that notice requirements are a procedural limitation on plaintiff's common law right, is that the city should bear the burden of proving it has been prejudiced.[51]

Of course, for statutory officials to have adequate opportunity to respond to claims, it may be necessary that the official receiving notice have authority to act on their behalf. *See* McQUILLIN, § 53.156; Quinn v. Graham, 428 S.W.2d 178 (Mo. App. 1968); and, Heck v. City of Knoxville, 249 Iowa 602, 88 N.W.2d 58 (1958).

The legislature has recognized administrative problems by limiting the number of officials designated to receive notice. However, per se rules based on delegation of authority sacrifice equitable results for a desire for predictability which serves neither the claimant's nor the city's interest.

Even if *Galbreath* is confined to its facts, actual receipt of written notice by the city attorney through another city office or other indirect means will not be an extension of the holding. *See* Hirshfield v. District of Columbia, 254 F.2d 774 (D.C. Cir. 1958).

49. *See* text accompanying note 29 *supra.*

50. *See* FED. R. CIV. PROC. R. 61 and IND. R. PROC. T.R. 61 which provide: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Such a doctrine differs from one of the traditional escape mechanisms from the statute, equitable estoppel, in that the claimant need not rely on affirmative actions of the city to be excused from compliance. *See* Rabinowitz v. Town of Bay Harbor Islands, 178 S.2d 9 (Fla. 1965).

51. The precedent of Indianapolis v. Evans, 216 Ind. 555, 24 N.E.2d 776 (1940) that notice must be alleged in the complaint or be insufficient on demurrer was followed without regard to *Aaron's* theory. *See* March v. Town of Walkerton Electric Department, 135 Ind. App. 30, 191 N.E.2d 519 (1963) and Wellmeyer v. City of Huntingburg, 139 Ind. App. 64, 213 N.E.2d 709 (1966). Several cases, however, noted that *Aaron* made the rule doubtful law. In Lynch v. City of Terre Haute, 123 Ind. App. 282, 109 N.E.2d 437 (1952) the court held insurance obtained by the city did not abrogate the notice requirement, and held a demurrer properly sustained where the complaint alleged on its face that no notice was given. But the court expressed doubt that, under *Aaron,* failure to allege notice would have been sufficient to sustain a demurrer, though it was not necessary to decide. *See also* Hardebeck v. City of Anderson, 137 Ind. App. 455, 209 N.E.2d 769 (1965) where the policy of *Aaron* was applied to the requirement that notice be proven where notice had not been formally introduced into evidence.

Ordinarily it is not necessary for the plaintiff to show that a cause of action is not barred by the statute of limitations, and it must be affirmatively pleaded by the defendant with specific facts stated, rather than a mere reference to the statute or a general denial. But when a statute creates a cause of action and contains a limitation on its enforcement, it may be considered a limitation on the right itself, barring the right as well as the remedy; thus the plaintiff will be required to plead facts showing his case is within the terms of the statute. *See* CLARK, CODE PLEADING § 96 (2d ed. 1946) and Littel, *A Comparison of the Statutes of Limitations,* 21 IND. L.J. 23, 27 1945). A more plausible reason is that statutory rights of action are disfavored to the extent of burdening the plaintiff with pleading and proving the additional operative facts. The only really adequate ground for permitting demurrer in these actions is that there are

The city's reliance on the literal terms of the statute when the statutory purpose has been served penalizes unwitting claimants and grants special immunity to the city for no reason. Such a result is inconsistent with the trend towards abolition of governmental tort immunity,[52] which is based on the realization that the city is the best loss-shifter through taxes and insurance. Nor will the city have to bear increased administrative costs; it is not forced to use more effort to learn of claims under an equitable theory, because recovery will only be allowed when it has received the benefit of the statute. Finally, the argument that such an equitable theory, in effect, judicially repeals the statute ignores the fact that all of the underlying reasons for the statute must be met before the court permits recovery.

There remain, however, situations where an application of the purpose test set forth in *Galbreath* will result in hardship to individual claimants. These situations give rise to problems such as inaccurate information and conflicting accounts of the occurrence. For example, actual knowledge by the city of circumstances surrounding an injury is not notice that the injured person intends to present a claim for damages.[53] Therefore, city officials are not given an opportunity either to settle the claim or prepare a defense. If the party is an infant or incapacitated, the situation is compounded,[54] because officials may not even have knowledge

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usually no exceptions by which a plaintiff might excuse delay and the exceptions of the general statutes of limitations do not apply. *See* Atkinson, *Pleading the Statute of Limitations*, 36 YALE L.J. 914, 927 (1927). The effect is to prevent plaintiffs recovery in any case. The principal differences are procedural; to say that the limitations of special statutory actions bar the right as well as the remedy is not a reason for different procedural treatment, but a conclusion that a difference will be made. *Id.* at 937.

Under *Galbreath* the statute is no longer recognized as creating a cause of action, nor as barring the right. There is no reason to disfavor the right when municipal tort immunity is rejected, and under a general equitable theory there are many excuses and exceptions possible. Thus, no matter what rationale is used to justify the difference in treatment, it is no longer acceptable under *Galbreath*.

Admittedly, such a doctrine may undercut the city's reliance and repose interests, since the notice statute will no longer be uniformly applied. *See* note 47 *supra*. However, attorneys are familiar with the notice requirements, thus, this equitable approach for nonrepresented victims who fail to follow the proper procedure will apply to only a small fraction of possible suits.

52. *See generally*, Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Borchard, *Governmental Responsibility in Tort VI*, 36 YALE L.J. 1 (1926); Borchard, *Governmental Responsibility in Tort VII*, 28 COLUM. L. REV. 577 (1928); REPORT, *supra* note 4; Note, *The Decline of Sovereign Immunity in Indiana*, 36 IND. L.J. 223 (1961); Comment, *Governmental Tort Liability*, 23 IND. L.J. 468 (1948); and Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967).

53. Thomann v. City of Rochester, 256 N.Y. 165, 176 N.E. 129 (1931). *See* 76 CONG. REC. 3988 (1933) (remarks of Rep. Stafford).

54. *See* David, *Tort Liability of Local Government: Alternatives to Liability or Suit*, 6 U.C.L.A. L. REV. 1, 34 (1959). This problem has been solved by statute; *see* N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1965). Under the *Touhey* theory infancy or incapacitation of the plaintiff was no defense. *See* People v. City of Valparaiso, 178

of the defect causing the injury.

Under the *Galbreath* rule, all these claimants would be denied recovery, since the city has been prejudiced by the claimant's failure to comply with the statutory notice requirements. However, a recent Michigan Supreme Court decision has taken the position that municipalities no longer need the protection afforded by a sixty day notice requirement. In *Grubaugh v. City of St. Johns*[55] a minor plaintiff failed to give the required statutory notice. He claimed it would be a denial of due process to deny him recovery for such failure, since he had been rendered physically and mentally incapacitated by the accident. The court instead held the notice provision violative of due process of law because it served no useful purpose:

> In recent years most governmental units and agencies have purchased liability insurance as authorized by statute. . . . In addition to insurance investigators, they have police departments and full-time attorneys at their disposal to promptly investigate the causes and effects of accidents occurring on streets and highways. As a result these units and agencies are better prepared to investigate and defend negligence suits than are most private tortfeasors to whom no special notice privileges have been granted by the legislature.[56]

This rationale applies with equal force to competent adults as to minors or those suffering legal disability or physical incapacity.[57] The *Galbreath* court's care to allow relief when the statutory purpose was

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Ind. 673, 100 N.E. 70 (1912). When the action was based on preexisting common law right, Sherfey v. City of Brazil, 213 Ind. 493, 13 N.E.2d 568 (1938), extended the *Touhey* reasoning to common law actions. The court concluded that even common law actions are subject to statutes of limitations, but the logic is questionable since statutes of limitations are subject to exceptions.

55. 384 Mich. 165, 180 N.W.2d 778 (1970).

56. *Id.* at——, 180 N.W.2d at 784. Indiana has a similar statute. IND. ANN. STAT. § 39-1819 (Burns Repl. 1965). The court reasoned that the right of action, though statutory in origin, was a vested right which could not be deprived the plaintiff without due process of law. The notice requirement was arbitrary and capricious, since it served no useful purpose, and the arbitary extinguishing of plaintiff's remedy thus deprived him of his property without due process of law. In the process, the court overruled Moulter v. City of Grand Rapids, 155 Mich. 165, 118 N.W. 919 (1908), a case which *Touhey* had relied upon, which held that the legislature which created the right of action could attach any limitations it chose, and the question of reasonableness was not for the courts. The argument would apply with even more weight in Indiana, since *Galbreath* has recognized the right to sue municipalities in tort as a common law right.

57. *Id* .at —, 180 N.W.2d at 787 (Brennan J., dissenting). The court disposed of the case on the basis of plaintiff's right to due process, but refused to discuss whether the requirement violated the equal protection clauses of the state and federal constitutions in all cases: "Such questions will undoubtedly arise in some new case where a fully competent adult is the victim."

served avoided the constitutional issue.[58] However, should Indiana courts evaluate the historical purposes of the Indiana statute when situations arise where the city has been prejudiced,[59] they may likewise find it violative of the due process clause. Although the Michigan court did not substantiate its premises, the arguments used are those advanced in the movement to abolish governmental immunity.[60] Indiana is committed

58. *Touhey* held the statute did not violate the 14th amendment to the Federal Constitution or Article 1, § 23 of the Indiana Constitution prohibiting the granting to any citizen or class of citizens privileges and immunities which do not equally belong to all citizens upon the same terms, because a liability created by the legislature could be qualified, limited, or removed by them. 175 Ind. at 100-01, 93 N.E. at 542. Gribben v. City of Franklin, 175 Ind. 500, 94 N.E. 757 (1911), held the statute did not violate Article 4, § 22 prohibiting local or special laws regulating the practices in courts of justice, since it had nothing to do with practice but was a condition precedent to the right of action. Since *Galbreath* affirmed that the right of action against the city is a common law right, a distinction exists between those having common law rights against a city and those possessing common law rights against others. Only if the classification is based on substantial distinctions for a valid reasonable purpose can the statute be other than arbitrary and capricious. *See* Note, *Municipal Corporations—Torts—Power to Restrict Liability for Injuries from Defect in Sidewalk,* 51 HARV. L. REV. 1301 (1938).

In Lorton v. Brown County Comm. Unit School Dist. No. 1, 35 Ill.2d 362, 220 N.E.2d 161 (1966), the Illinois Supreme Court held a notice statute applying only to negligence in schools invalid as special legislation, because no such notice requirement existed as to similar municipal corporations, and thus the act provided procedures applicable to some and not others under substantially like circumstances with no discernible reasons. For the background of this development, *see* Note, *Torts—Governmental Immunity—Special Procedural Requirements Unconstitutional,* 17 DEPAUL L. REV. 236 (1967).

59. It has been suggested that when municipal tort liability is expanded, notice requirements are even more essential to protect municipalities against stale and fraudulent claims. *See* Sahm, *Tort Notice of Claim to Municipalities,* 46 DICK. L. REV. 1, 11 (1941) and Note, *Tort Actions Against Municipalities—Desirability of Uniform Period Following Accident Within Which Notice Must be Given,* 24 VA. L. REV. 86, 88 (1937). Otherwise, the city may not know of an accident until the claimant files suit, when witnesses are scattered and information hard to obtain. *See* REPORT *supra* note 4, at 250. *See also Public Tort Liability, supra* note 35, at 350. However, the purposes of the statute are the same as the purposes of general statutes of limitations. *See generally,* Littel, *A Comparison of the Statutes of Limitations* 21 IND. L.J. 23, 24 (1945). The question is whether the city still needs a shorter period of time than any other tortfeasor.

60. Municipal liability is a matter of policy, in whatever form it takes:

> On the one side is the interest of the taxpayers, who ultimately bear the burden when the municipality is held liable, and the interest of the state in having certain functions adequately carried out without interference. On the other side is the interest of the individual in freedom from losses caused by the torts of the municipality. *See* CHATTIN note 15 *supra,* at 332-33.

See Green note 15, *supra* at 379-81 where he argues that the same policy which would protect municipalities from payments of tort damages would be equally applicable to protect private corporations; that taxation is not the subject matter of judicial concern when justice to the individual is involved; that groundless claims can be dealt with by the courts without "burning the ship to get rid of the rats"; that the arguments favoring immunity are like the parade of horribles in early tort cases, thrown in because there was nothing better at hand, and that immunity was the result of a dominating desire for municipal adequacy and efficiency for the benefit of the whole group at the expense of the individual:

> Now, however, that municipalities have grown stronger and are more securely organized, now that their activities have expanded far beyond their original

to the trend away from governmental tort immunity,[61] and it is questionable whether notice statutes, a remnant of the days of tort immunity, should continue to be applied. Notice statutes were merely a means to retain some municipal tort immunity in the areas in which liability was allowed.

Of course, if the public cannot afford the necessary machinery to deal with claims on the same basis as any other tortfeasor, the hardship to the community may outweigh the benefits of protecting individual rights.[62] However, empirical studies have shown it likely that cities receive more efficient legal services than the average plaintiff. Public attorneys rapidly become specialists in tort practice, with legal departments devoting their entire attention to tort claims; consequently, they may possess the principal facts necessary to defend an action even before the plaintiff has consulted a lawyer or collected evidence.[63] These studies do not substantiate the fear which has upheld immunity since its inception. The basis of liability applicable to private corporations should give municipal corporations all the protection they require.[64]

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functions, now that doctrines have been developed through which the hurts and dangers incident to their activities can be handled with some success, now that the public attitude for the protection of the individual has radically changed, these early doctrines of immunity appear foolish, and the courts in seeking to administer them at the expense of the victims cannot escape the indictment that they are failing to perform their functions.

61. Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967).

62. Fuller & Casner, *Municipal Tort Liability in Operation,* 54 HARV. L. REV. 437, 445 (1941).

63. *Id.* at 446-47.

64. *See* Green *supra* note 15, at 381.