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Municipal Corporations—Municipal Tort Liability

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best serve the interests of the people of the State as well as its civil service employees. Furthermore there still remain alternative measures to remedy any abuse in the immediate case. Granted a total inadequacy of the qualifying examinations, this does not mean per se that those appointees are unfit. While in a practical sense not fully adequate, removal may be effected under the Civil Service Law for incompetency or unfitness. The proper precautions should better lie in a close and punctual scrutiny of the municipal commissions rather than jeopardizing the desirable stability and security of the civil service system to remedy a past neglect.

Municipal Tort Liability

To bring a tort action against a municipal corporation, a notice of claim must be served in person or by registered mail on the proper municipal party within 90 days after the claim arises as required by General Municipal Law § 50-e.[22] Service of such claim must strictly comply with the statutory requirements.[23] The court in dealing with the exact statutory wording, delivered two somewhat contradictory decisions.

In *Teresta v. City of New York*,[24] the city having been served a notice of claim by ordinary mail, rather than registered mail, notified claimant to appear for examination, examined claimant and did not raise the issue of improper service until the trial commenced. The Appellate Division had held[25] service was improper for lack of strict statutory compliance,[26] but the Court of Appeals reversed (5-2) on the ground that "present here, in addition to an unequivocal waiver, are elements of estoppel."[27] The basis of the dissent by Judge Lewis was that of strict statutory compliance. Subsequent to the litigated service, but prior to the court's opinion, as noted in the majority opinion,[28] the Legislature had amended § 50-e so as to validate service by ordinary mail

22. The purpose of such claim notice is to afford municipalities protection against needless litigation, stale claims and possible connivance of corrupt officials. *Brown v. Board of Trustees of Town of Hamptonburg*, 303 N. Y. 484, 490, 104 N. E. 2d 866, 869 (1952).

23. *Thomann v. City of Rochester*, 256 N. Y. 165, 172, 176 N. E. 129, 131 (1931); *Matter of Merkle v. County of Nassau*, 197 Misc. 560, 95 N. Y. S. 2d 673 (Sup. Ct. 1950).

24. 304 N. Y. 440, 108 N. E. 2d 397 (1952).

25. *Teresta v. City of New York*, 277 App. Div. 787, 97 N. Y. S. 2d 335 (1st Dep't 1950).

26. One year later the 2d Dep't went directly contrary to the 1st Dep't in the *Teresta* case. *Drake v. Comptrolier of City of New York*, 278 App. Div. 317, 318-319, 104 N. Y. S. 2d 774 (2d Dep't 1951), per Justice Van Voorhis.

27. *Teresta v. City of New York*, *supra* note 24 at 433, 108 N. E. 2d at 398.

28. *Id.* at 442, 108 N. E. 2d at 397.

where the claimant had been examined.[29] Some eight months later in *Munroe v. Booth*[30] the court dealt with service of notice of claim on the proper party for a school district.[31] Here service was made by the plaintiff's attorney in person on the clerk in charge of the school district office, who had run and supervised the school's business for forty-two years. Following her usual office procedure the clerk endorsed the notice and forwarded it to the school attorney. The notice was prompt, and handled in the same way as if served in any other manner. The Court of Appeals in a (5-2) per curiam opinion, stated "desirable though relaxation of statutory provisions relating to service may appear, to avoid a seemingly harsh result, the courts may not disregard clear and explicit requirements imposed by the legislature" but that "it was in keeping with that legislatively declared policy that we recently held sufficient and proper the sending of a notice of claim by ordinary mail, even though the statute prescribed that it be forwarded by a 'registered' letter. See *Teresta v. City of New York* . . . The legislature having spoken unequivocally, the court may not disregard its pronouncement . . ."[32] The dissenting opinion by Judge Froessel argued that it was a question of fact as to whether the party actually served was an agent to the proper parties.[33]

Where claimant is an infant, or is mentally or physically incapacitated and by reason of such disability fails to serve notice of claim, or dies, within the 90 day limitation for such service, the court at its discretion may grant leave to serve notice of claim on application of claimant within one year of the time of the event from which the claim arose.[34] In *Gehr v. Board of Education of the City of Yonkers*[35] such an application was referred to a referee who found that neither on the facts nor the law could it be held that the claimant's failure to serve notice within 90 days was due solely to her disability. The trial court found differently but deferred to the referee's findings. The Court of Appeals in reversing the trial court and the Appellate Division stated that the

29. GENERAL MUNICIPAL LAW § 50-e subd. 3 as amended by L. 1951 c. 393.

30. 305 N. Y. 426, 113 N. E. 2d 546 (1953).

31. C. P. A. § 228 (6) requires service on "any member of the board of education, to any trustee, or the clerk thereof."

32. *Munroe v. Booth, supra* note 30 at 428, 113 N. E. 2d at 547.

33. Factual point of consideration: In *Teresta* case, plaintiff, a laborer over 60 years old personally inquired and mailed in the notice of the claim.

In the *Munroe* case notice of claim was served by plaintiff's attorney.

Legal point of consideration not discussed in either case: the plaintiff in the *Teresta* case was injured in a city-owned street car, a proprietory interest where there is no common law sovereign immunity, *Drake v. Comptroller, supra* note 26. In the *Munroe* case a child was injured playing in a schoolyard, a governmental function enjoying sovereign immunity, *Brown v. Board of Trustees, supra* note 22.

34. GENERAL MUNICIPAL LAW § 50-e subd. 5. See note, 1 BFLO. L. REV. 64 (1951). for discussion as creating exception to C. P. A. § 60.

35. 304 N. Y. 436, 108 N. E. 2d 371 (1952).

referee's report was not binding, but merely "to inform the conscience of the court."[36]

Home Rule

The New York Constitution expressly prohibits the Legislature from passing any law in relation to the "property, affairs or government" of cities, except by general law which in terms and effect apply alike to all cities or by special request of the particular city.[37] The purpose of these so-called home rule provisions is to prevent special pork-barrel legislation and undue rural influence in respect to cities.[38] As to just what acts constitute such infringement upon the "property, affairs or government" of cities has been a constant source of litigation. *Adler v. Deegan*[39] is the leading case in New York, stating that "property, affairs or government" are words of art, defined not by the common meaning of the words, but as defined by the Court of Appeals. In 1953 the Legislature authorized New York City to turn over its transit facilities to the New York City Transit Authority if the city would comply with certain conditions.[40] Favorable tax provisions would thereby accrue to New York City. A taxpayer's action was brought in *Salzman v. Impellitteri*[41] to enjoin the city from this legislatively authorized transaction and a declaratory judgment was sought as to the constitutionality of the transaction. The Court of Appeals held, per curiam, that "the statutes in question are permissive only,[42] in a field in which the State is concerned[43] . . . and assuming that any transfer will not be by absolute conveyance, but by a lease of limited term with reversion to the city,[44] we cannot say that the legislation is on its face unconstitutional." Judge Dye dissented on the ground that New York City's straightened tax structure made any choice purely illusory, that the legislation deals solely with a proprietory interest of New York City and is thus in violation of the constitutional home-rule provisions.

36. The instant case citing *Bannon v. Bannon*, 270 N. Y. 484, 493, 1 N. E. 2d 975, 979 (1936).

37. NEW YORK CONST. Art. IX, § 11.

38. 1 MCQUILLAN, MUNICIPAL CORPORATIONS § 1.93 (3d ed. 1949); FORDHAM, LOCAL GOVERNMENT LAW 74-79 (1st ed. 1949).

39. 251 N. Y. 467, 167 N. E. 705 (1929).

40. L. 1953, cc. 200-208.

41. 305 N. Y. 414, 113 N. E. 2d 543 (1953).

42. For analogous case of permissive federal legislation not impinging upon state sovereignty see *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

43. *Matter of McAneny v. Board of Estimate*, 232 N. Y. 377, 134 N. E. 187 (1922) held that the New York City transportation system was a matter of state concern and the legislature may therefore act under the police power.

44. N. Y. Const. Art. VIII, § 1 prohibits a city from giving or loaning its credit to a public or private corporation. The transit authority would be a public corporation. GEN. CORP. LAW §§ 2, 3. *Deady v. Lyons*, 39 App. Div. 139, 57 N. Y. Supp. 448 (4th Dep't 1899) held that a village could not give funds for repair of a county courthouse because this would be a gift to a public corporation.