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Lewis J. Lubell

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PRIOR WRITTEN NOTICE STATUTES IN NEW YORK STATE: THE RESURRECTION OF SOVEREIGN IMMUNITY

INTRODUCTION

This article will present the history of governmental and municipal immunity, its apparent waiver, and an attempt to rescind that waiver by way of “prior written notice” statutes, otherwise known as “pothole laws.” Prior written notice statutes create conditions precedent to commencement of a negligence action against a municipality. These statutes provide that before a person may begin an action against a municipality or a municipal corporation, for a defect in a roadway or sidewalk which caused injury, the entity must have prior written notice of that defect or the action may not be maintained.¹

It has been argued that through the creation of these statutes, a litigant has virtually lost all opportunity to bring a personal injury action against a municipality.² As such, these statutes are arguably unconstitutional as they potentially deny the litigant due process of law.³ This comment will focus on how these laws

1. See *infra* notes 74-76, 78-82 and accompanying text.

2. See Abraham Fuchsberg, “Pothole” Law Described as Penalty on Victims of Municipal Negligence, 183 N.Y. L.J. 34, col. 1 (May 1, 1980). The author described New York City’s prior notice statute as “permit[ing] the City to absolve itself of negligence.” *Id.* In addition, he argued that it is unrealistic to expect that ordinary citizens would ever provide such notice. *Id.* Fuchsberg pointed to such practical difficulties as illiteracy in poor neighborhoods, and the fact that ordinary citizens would not know to whom notice should be sent. *Id.* As a result, New York citizens would “have their right to justice forfeited” *Id.* However, shortly after the law went into effect, Fuchsberg founded the Big Apple Pothole and Sidewalk Protection Committee. See Howard Kurtz, *The City of Deep Potholes and Deep Pockets*, WASHINGTON POST, April 13, 1988, at A3. By performing the task of finding potholes and dangerous sidewalks, and sending detailed maps of their locations, the Big Apple Pothole Corporation addresses many of the practical problems Fuchsberg detailed.

3. See Fuchsberg, “Pothole” Law Described as Penalty on Victims of Municipal Negligence, 183 N.Y. L.J. 34, col. 1. This argument, however, has been largely unsuccessful in New York courts. See, e.g., *Holt v. County of*

affect potential litigants in New York in their attempt to seek redress against municipalities for injuries sustained due to defects in roadways or sidewalks.

Over the years, prior written notice statutes were enacted in an effort to eliminate frivolous lawsuits and limit municipal liability.⁴ The question remains whether a municipal entity may shield itself from liability in areas where it has a firmly established common law duty.

Section I of this comment will begin with a historical discussion of sovereign/governmental immunity from its existence in England, and how it found its way into American jurisprudence. Because this doctrine appears to have outlived its acceptability, this comment will demonstrate how the waiver of this doctrine came about. Section II will focus on the prior notice statutes in New York and how, even though they have withstood numerous constitutional challenges, they appear to deprive a litigant of his or her day in court.

It is the position of this author that these statutes, as they exist in New York, interfere with an injured party's right to seek redress for his or her injuries in a court of law. Therefore, it is necessary to reform these laws so that individuals are not arbitrarily denied a right to redress.

Tioga, 95 A.D.2d 934, 935, 464 N.Y.S.2d 278, 280 (3d Dep't), *appeal denied*, 60 N.Y.2d 560, 49 N.E.2d 195, 471 N.Y.S.2d 195 (1983). In *Tioga*, the court held that "the right to sue a subdivision of the [s]tate for negligence in the performance of a governmental function is founded upon statute and [the legislature] may limit such right as it sees fit." *Id.* at 935, 464 N.Y.S.2d at 280. The law in question granted a right to sue only when prior notice of a defective condition had been given. *Id.* The court interpreted the absence of such notice as indicating that the plaintiff "never possessed a vested right to bring an action." *Id.* at 935, 464 N.Y.S.2d at 281. Additionally, the statute had a rational basis since it enabled the county to "protect the traveling public" *Id.* The court thus found no denial of due process. *Id.*

4. Terri J. Frank, *New York City's Pothole Law: In Need of Repair*, 10 FORDHAM URB. L.J. 323 (1982).

THE HISTORY OF SOVEREIGN/GOVERNMENTAL IMMUNITY

Sovereign immunity was originally associated in England with the idea that the “King can do no wrong.”⁵ In the thirteenth century, during the reign of Henry III, it was recognized that the king was immune from suit in his own courts.⁶ However, it did not follow that the monarch was above the law.⁷ Rather, the king was seen as the source of justice, and thus was duty bound to protect the rights of his subjects, even against wrongs perpetrated by the crown.⁸ The initial formulation of remedies against the king began to solidify during the reign of Edward I.⁹ Although there have not appeared to be any specific cases or instances which bare substantive proof on the matter, historians have isolated this era as the focal point of transition.

While the sovereign was permitted to deny actions seeking redress from wrongs he committed, it seems that assent to suits against the crown “was, in practice, granted or withheld, not as a matter of unfettered royal discretion, but upon the basis of law — that is, upon whether the petition made out a *prima facie* legal claim for redress.”¹⁰ Underlying these claims was a vital principle: a subject seeking to enforce a cause of action against the king should be entitled to relief as if he or she were proceeding against another subject.¹¹

The doctrine of sovereign immunity was recognized by the American judiciary as part of its shared common law heritage with England.¹² Immunities enjoyed by states and their

5. Edwin M. Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1, 17 (1926).

6. CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 5 (1972).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 6.

11. *Id.*

12. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 798 (1824). The Court in *Osborn* stated that “[t]he immunity of one of the

subdivisions are akin to those retained by the federal government.¹³ The doctrine was carried over on the ground that it seemed illogical to enforce a claim against the very authority that created the claim in the first place.¹⁴

Municipal immunity was recognized as early as 1798 in *Russell v. Men of Devon*.¹⁵ Because municipalities were not considered to be separate entities, a claim against one was treated as a claim against England as a whole.¹⁶ The courts frowned upon such actions for many reasons, including lack of precedent, lack of funds, or because they would divert tax funds from public purposes.¹⁷

The trend of judicial decisions in this country has led to the restriction, rather than the expansion of municipal immunity.¹⁸ Various justifications for municipal liability have been grounded on the principal “that a remedy should be provided for every wrong.”¹⁹ To allow an individual to remain uncompensated for injuries sustained by the negligence of a municipality cuts against the grain of common law negligence and equity. “That an individual injured by the negligence of . . . a municipal corporation should bear his loss himself . . . instead of having it borne by the public treasury to which he and all other citizens

States . . . is not greater than that of the crown in England. The constitution merely ordains, that a State, in its sovereign capacity, shall not be sued.”

13. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §131, at 1043 (5th ed. 1984).

14. *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907). Justice Holmes stated that “there can be no legal right as against the authority that makes the law on which the right depends.” *Id.* at 353.

15. 100 Eng. Rep. 359 (K.B. 1788) (holding that unincorporated county was not liable for damages caused by defective bridge).

16. KEETON ET AL., *supra* note 13, § 131 at 1051.

17. See Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 129, 132-33 (1924).

18. See, e.g., *Krantz v. City of Hutchinson*, 196 P.2d 227, 233 (Kan. 1948) (“[T]he immunity of municipalities from liability does not extend to the creation or maintenance of nuisances”).

19. *Spaur v. Pawhuska*, 43 P.2d 408, 409-10 (Okla. 1935) (holding that a municipal employee in negligence action was entitled to immunity because street cleaning was a “governmental function” as opposed to a corporate duty).

contribute, offends the basic principles of equality of burdens and of elementary justice.”²⁰ Although public policy was seen as supporting full immunity, broad governmental protection from liability has fallen from favor with both legislative bodies and courts.²¹

The vast majority of states have now consented to at least some liability for municipal torts.²² Courts, however, have upheld sovereign immunity for decisions which are discretionary in nature.²³ The theory is that a municipal corporation typically performs two classes of functions: 1) those which are described as governmental or discretionary and 2) those which are characterized as private or proprietary.²⁴ A governmental

20. *Merrill v. City of Manchester*, 332 A.2d 378, 380 (N.H. 1974). The court stated that to require an injured person to bear the loss himself “is foreign to the spirit of [the New Hampshire Constitution’s] guarantee that every subject is entitled to a legal remedy for injuries he may receive” *Id.*

21. *See Note, Tort Liability of Municipal Corporations in New York*, 43 COLUM. L. REV. 84, 87 (1943).

22. *See* 18 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.01.10 (3d ed. 1993).

23. *See* KEETON ET AL., *supra* note 13, § 132 at 1062-66.

24. *See* RESTATEMENT (SECOND) OF TORTS § 895D(3)(a) (1965). Section 895D(3)(a) provides, in relevant part: “A public officer acting within the general scope of his authority is not subject to tort liability for an administrative act or omission if he is immune because engaged in the exercise of a discretionary function.” An act is ministerial if it is “done by officers and employees who are required to carry out the orders of others or to administer the law with little choice as to when, where, how or under what circumstances their acts are to be done.” *Id.* at cmt. h. These acts are sometimes referred to as “operational,” and they operate as a shield against liability. The Restatement lists seven factors which should be considered in determining whether a function is discretionary, and if liability should be imposed:

- (1) The nature and importance of the function that the officer is performing
- (2) The extent to which passing judgment on the exercise of discretion by the officer will amount necessarily to passing judgment by the court on the conduct of a coordinate branch of government
- (3) The extent to which the imposition of liability would impair the free exercise of his discretion by the officer

function is one in which the municipal entity discharges a duty owed to the general public and can only be performed adequately by a governmental unit, for example, the operation of a police or fire department, or the making of planning level decisions.²⁵ Proprietary functions, on the other hand, are those which a municipal entity performs but could be supplied as well by a non-governmental organization.²⁶ In the proprietary context, the municipality is acting primarily for its own inhabitants, although the general public may derive a common benefit from the activity, such as in the maintenance and operation of streets and sidewalks.²⁷

Discretionary functions have been described as “those requiring the exercise of independent judgment in arriving at a decision or choosing a course of action.”²⁸ Common law immunity protects governmental entities against liability for these actions.²⁹ The principal of separation of powers cautions against courts second-guessing discretionary determinations made by

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- (4) The extent to which the ultimate financial responsibility will fall on the officer
 - (5) The likelihood that harm will result to members of the public if the action is taken
 - (6) The nature and seriousness of the type of harm that may be produced
 - (7) The availability to the injured party of other remedies and other forms of relief

Id. at cmt. f.

25. See *Bolste v. Lawrence*, 114 N.E. 722, 724 (Mass. 1917) (“The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit.”). See also MCQUILLIN, *supra* note 22, § 53.02.10; CHESTER JAMES ANTIEAU, 1A MUNICIPAL CORPORATION LAW § 11.41 (1993).

26. See MCQUILLIN, *supra* note 22, § 53.02.10; see also CHESTER JAMES ANTIEAU, 1A MUNICIPAL CORPORATION LAW § 11.41 (1993).

27. See ROGER W. COOLEY, HANDBOOK ON THE LAW OF MUNICIPAL CORPORATIONS §§ 115-17 at 376-82 (1914).

28. RUSSELL M. LEWIS, NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM, 106 PRACTICAL GUIDELINES FOR MINIMIZING TORT LIABILITY 9 (December 1983).

29. LEWIS, *supra* note 28, at 9.

executive entities, and there is a belief that juries are not able to properly analyze discretionary governmental decisions.³⁰

Ministerial functions are tasks which are explicitly defined.³¹ These functions do not receive the immunity which is afforded to discretionary functions because there is no requirement to weigh the alternatives, and the performance of these functions requires little exercise of personal judgment.³² When, by statute, a municipality undertakes the duty to maintain roadways and sidewalks, this function has often been classified as a ministerial function, and therefore, the municipal entity is generally subject to suit.³³ However, unless the entity's duties are clearly defined, it is arguable that such a function may fall under the discretionary category.

In assigning a dual character to the functions of municipal corporations, the courts have held that when a municipality or other governmental entity exercises a governmental function, it will be immune from liability in tort.³⁴ However, when a municipality acts in a proprietary capacity, tort liability is determined under the same principles applied to private persons or to private corporations.³⁵

By the early to mid-twentieth century, state after state began abrogating the rule of governmental and municipal immunity. As the Illinois Supreme Court pointed out in *Molitor v. Kaneland Community Unit District No. 302*,³⁶ the doctrine of governmental immunity runs "directly counter to the basic concept . . . underlying the whole law of torts that liability

30. LEWIS, *supra* note 28, at 9.

31. LEWIS, *supra* note 28, at 9.

32. LEWIS, *supra* note 28, at 9.

33. LEWIS, *supra* note 28, at 9.

34. MCQUILLIN, *supra* note 22, § 53.02.

35. See *Chafor v. City of Long Beach*, 163 P. 670, 675 (Cal. 1917) (stating that the defendant municipality acted in a private capacity and was held to the same legal standard as a private owner); see also *Munick v. City of Durham*, 106 S.E. 665, 669 (N.C. 1921) (holding that a municipality acting in business capacity was liable as though it was a business corporation).

36. *Molitor v. Kaneland Community Unit Dist. No. 302*, 163 N.E.2d 89 (Ill. 1959), *cert. denied*, 362 U.S. 968 (1960).

follows negligence.”³⁷ The court concluded that the doctrine was “unjust, unsupported by any valid reason, and has no place in modern day society.”³⁸ Similarly, after the governmental immunity rule regarding tort liability was re-evaluated, in *Muskopf v. Corning Hospital District*, the Supreme Court of California held that “it must be discarded as mistaken and unjust.”³⁹

The majority rule holds that absent a statute which provides immunity, the municipality will be liable for negligence in the identical capacity as a corporation or private individual.⁴⁰ Common law governmental or sovereign immunity, previously available to municipalities as an affirmative defense in tort claims, is now a viable defense in only a few states.⁴¹

Although the doctrine of sovereign immunity found its way into our legal system, it has never been accepted without limitations imposed by the courts.⁴² The principle that a sovereign, governmental, or municipal entity may consent to suit and thereby waive its immunity is an ancient axiom of western jurisprudence, and this principle was expressed in a variety of court opinions during the early years of the republic.⁴³ It has become increasingly accepted that public policy supports a more expansive view of municipal liability: “Considerations of fair play and justice suggest that those injured by the negligence of a

37. *Id.* at 93.

38. *Id.* at 96.

39. *Muskopf v. Corning Hospital District*, 359 P.2d 457, 458 (Cal. 1961). The court held that “the doctrine of governmental immunity for torts for which its agents are liable has no place in our law” *Id.* at 463.

40. *See* MCQUILLIN, *supra* note 22, at 126.

41. *See* MCQUILLIN, *supra* note 22, at 126.

42. *See* MCQUILLIN, *supra* note 22, at 133.

43. *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821) (stating that an independent sovereign state can be sued when it gives consent as well as when it is stated in a law); *see also* *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837). The Court in *Briscoe* stated that a sovereign state cannot be sued unless it gives consent, and that pursuant to the Articles of Confederation, the only time a state may be sued is in boundary conflicts. *Id.* at 321.

municipality should be compensated on equal terms with those injured by individuals or private corporations.”⁴⁴ This is due to the fact that the underlying principle of sovereign or governmental immunity has been deemed contrary to the proposition that liability follows negligence.⁴⁵ Further, the doctrine directly contradicts the constitutional guarantee that each person is to be afforded legal recourse for injuries sustained to his person or property.⁴⁶

The immunity of municipalities from tort liability has been eroded by statutes which waive substantive immunity in certain arenas of activity, such as the operation of vehicles, defective or dangerous streets, alleys, or other public thoroughfares and public property.⁴⁷ As early as 1861, the Supreme Court noted that “[c]ities and towns are required, by statute, in most or all of the . . . States, to keep their highways safe and convenient for travelers . . . and if they neglect that duty, and suffer them to get out of repair and defective, and anyone receives injury through such defect . . . the delinquent corporation is responsible in damages to the injured party.”⁴⁸

Municipal liability is predicated on a statutory waiver of sovereign immunity, which can only be accomplished by legislative action.⁴⁹ After realizing the severe consequences of

44. *Kirksey v. City of Fort Smith*, 300 S.W.2d 257, 261 (Ark. 1957) (affirming trial court’s decision which held that the maintenance of a municipal airport was a governmental function and thus the defendant municipality was not liable).

45. *Molitor*, 163 N.E.2d at 93.

46. See *MCQUILLIN*, *supra* note 22, at 132.

47. See *Snyder v. City of Binghamton*, 138 Misc. 259, 261, 245 N.Y.S. 497, 499 (Sup. Ct. Broome County 1930) (citing statute enacted to hold the city liable for the negligence of a person who operated a municipally-owned vehicle), *aff’d*, 233 A.D. 782, 250 N.Y.S. 917 (3d Dep’t 1931).

48. *Weightman v. Corporation of Washington*, 66 U.S. (1 Black) 39, 52 (1861). Because by statute, the District of Columbia had affirmatively undertaken the duty to maintain its bridges and roadways in a reasonably safe condition, it could not escape liability by seeking to hide behind the doctrine of sovereign immunity. *Id.* at 49-50

49. See Harry H. Lipsig, *Sovereign Immunity*, 190 N.Y. L.J., December 22, 1983 at 1.

absolute sovereign immunity, the New York Legislature passed laws which eliminated this immunity,⁵⁰ culminating in the passage of Section 8 of the Court of Claims Act in 1929,⁵¹ which made the state and municipalities liable for torts occurring in the exercise of governmental functions.⁵² Section 8 of the Court of Claims Act provides that: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations" ⁵³

Section 8 has been interpreted as evidencing a strong legislative intent that no wronged individual should be forced to contribute the whole of his loss to society, and that the entity who performs or profits by the service, and whose performance has caused that loss should contribute to restore the individual party.⁵⁴ However, the specific effect of this waiver as applied to municipalities has confounded the courts.⁵⁵ While it was clear that municipal immunity was a derivative of state liability, it appeared that the legislature did not intend to abrogate municipal immunity with

50. See Jill A. Abramow, *Survey of New York Practice; Court of Claims Act*, 58 ST. JOHN'S L. REV. 199, 200 n.66 (1983).

51. N.Y. CT. CL. ACT § 8 (McKinney 1989); see also Act of April 10, 1929, ch. 467, § 12-a, 1929 N.Y. Laws 994.

52. See Abramow, *supra* note 50; see also *Steitz v. City of Beacon*, 295 N.Y. 51, 54, 64 N.E.2d 704, 705 (1945). The court in *Steitz* stated that:

"The waiver of sovereign immunity by section 8 (formerly s 12-a) of the Court of Claims Act has rendered the defendant municipality liable, equally with individuals and private corporations, for the wrongs of its officers and employees. In each case, however, liability must be 'determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations.'"

Id. at 54, 64 N.E.2d at 705.

53. N.Y. CT. CL. ACT § 8 (McKinney 1989); see also Act of April 10, 1929, ch. 467, § 12-a, 1929 N.Y. Laws 994.

54. *Sheehan v. North Country Community Hosp.*, 273 N.Y. 163, 166, 7 N.E.2d 28, 29 (1937).

55. William J. Lloyd, *Municipal Tort Liability in New York*, 23 N.Y.U. L. REV. 278, 285 (1948).

the enactment of section 8.⁵⁶ The statute intends “to bind the state,” however, it does not necessarily follow that the legislature also wanted the statute to apply to municipal subdivisions.⁵⁷ Without language which specifically included these subdivisions within its scope, municipalities which conducted governmental functions were arguably not within the purview of the statute.⁵⁸

The New York Court of Appeals resolved the issue in *Bernardine v. City of New York*.⁵⁹ The court held that because the city’s immunity was an extension of the state’s, it naturally ceased by virtue of section 8 of the Court of Claims Act, and therefore the “civil divisions of the State are answerable equally with individuals and corporations.”⁶⁰ It was with *Bernardine* that municipal immunity in New York finally terminated.⁶¹ Thus, when immunity was waived by the state, the immunity enjoyed by subdivisions was also abrogated,⁶² because “since civil divisions of the State . . . have no independent sovereignty, when the State waived its immunity. . . [the] immunity of municipal components disappeared to the same extent.”⁶³

56. Chester James Antieau, *Statutory Expansion of Municipal Tort Liability*, 4 ST. LOUIS U. L.J. 351, 370 (1957).

57. *Engels v. City of New York*, 256 A.D. 992, 993, 110 N.Y.S.2d 641, 642 (2d Dep’t), *aff’d*, 281 NY 650, 22 N.E.2d 481 (1939) The court in *Engles* stated that “Statutes in derogation of the sovereignty of a State must be strictly construed and a waiver of immunity from liability must be clearly expressed.” *Id.*

58. *Id.*

59. 294 N.Y. 361, 62 N.E.2d 604 (1945). In *Bernadine*, plaintiff was injured when struck by a runaway police horse. *Id.* at 364, 62 N.E.2d at 604-05. The Court rejected as unnecessary the governmental/proprietary distinction, thus making municipalities subject to the same negligence liabilities as private persons and corporations. *Id.* at 365, 62 N.E.2d at 605.

60. *Id.* at 365, 62 N.E.2d at 605.

61. *Id.*

62. *See* *Berean v. Town of Lloyd*, 5 A.D.2d 924, 925, 172 N.Y.S.2d 301, 302 (3d Dep’t 1958) (“When the State waived its immunity the civil divisions of the State likewise waived a derivative immunity.”).

63. *Sharapata v. Town of Islip*, 82 A.D.2d 350, 357, 441 N.Y.S.2d 275, 279 (2d Dep’t 1981), *aff’d*, 56 N.Y.2d 332, 339, 437 N.E.2d 1104, 1108, 452 N.Y.S.2d 347, 351 (1982) (holding that the State of New York and its subdivisions are not subject to punitive damages).

PRIOR WRITTEN NOTICE STATUTES

According to common law, municipalities have a duty to keep their streets and sidewalks in a reasonably safe condition.⁶⁴ Maintaining public streets and ways so that they are reasonably safe for use by the general public is usually considered to be a proprietary function.⁶⁵ As a result, a municipality is liable for the negligent performance of this duty.⁶⁶

Statutes can limit both a municipality's liability due to defects in the streets and sidewalks, and the rights enjoyed by persons who travel.⁶⁷ Liability under such statutes is limited by the provisions of the statutes.⁶⁸ At common law in most jurisdictions, if a municipality causes a defect in a street or a sidewalk, it is liable regardless of whether it has received notice of the defect.⁶⁹ Even today, a municipal defendant is not entitled to raise a prior written notice defense where the municipality itself caused or created the condition led to the plaintiff's injuries.⁷⁰ However, without a statute imposing absolute liability, a public corporation may not be held liable for injuries resulting from conditions which it has not created unless it had actual knowledge, or notice of the defect for a sufficient length of time prior to the accident to have remedied the condition.⁷¹

64. 19 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 54.03b at 16 (3d ed. 1985).

65. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 131, at 1054 (5th ed. 1984).

66. *See* MCQUILLIN, *supra*, note 64, § 54.03b at 16.

67. 3 E.C. YOKELY, *MUNICIPAL CORPORATIONS* § 461 at 82 (1958).

68. *Id.*

69. *Rupp v. New York City Transit Auth.*, 15 A.D.2d 800, 801, 224 N.Y.S.2d 1007, 1009 (2d Dep't 1962) (holding that city was liable for injuries sustained by infant when street collapsed under bus because the city had a nondelegable duty to maintain public thoroughfares).

70. *Parks v. Hutchins*, 78 N.Y.2d 1049, 1051, 581 N.E.2d 1339, 1340, 576 N.Y.S.2d 84, 85 (1991).

71. *See* *Cohen v. New York*, 204 N.Y. 424, 426-27, 97 N.E. 866, 867 (1912) (holding that a city was not liable for failure to correct defect caused by severe storm only four hours prior to accident); *see also* *DuPont v. Port Chester*, 204 N.Y. 351, 355, 97 N.E. 735, 736-37 (1912) (holding that a

Some statutes and charter provisions require actual rather than constructive notice of the defect to the municipality as a pre-condition to municipal liability.⁷² Constructive notice, in some situations, has also been deemed good and sufficient notice by specific statutory provisions.⁷³ For example, certain statutes, such as Town Law section 65-a,⁷⁴ Second Class Cities Law

municipality was not liable where snowstorms had temporarily caused all crosswalks to be covered with snow); *Clemmons v. Cominsky*, 1 A.D.2d 933, 934, 149 N.Y.S.2d 559, 560 (holding that a municipality was not liable for failure to correct sunken blacktop on sidewalk because a reasonably prudent person would not have walked over it), *aff'd*, 2 N.Y.2d 958, 142 N.E.2d 425, 162 N.Y.S.2d 360 (1957).

72. *Nicholson v. City of Los Angeles*, 54 P.2d 725, 726 (Cal. 1936). The court in *Nicholson* held that where a sidewalk defect was inconspicuous, and no actual notice was given to the municipality, plaintiff failed "to bring home to the defendant city a neglect of its duty of inspection or knowledge of facts which would have put it upon inquiry, [and] the city cannot be held to have had constructive notice of the defect." *Id.* at 728.

73. Constructive notice is said to exist when a municipality is aware of facts and circumstances which, by the exercise of reasonable diligence, would lead to the knowledge required. See 19 EUGENE MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS*, § 54.109 at 339:

"Unless required by statute, ordinance or charter provision . . . [c]onstructive notice [of a defect] is sufficient. Constructive notice means notice which the law imputes from the circumstances of the case and is based on the theory that negligent ignorance is no less a breach of duty than willful neglect, and that negligence in not knowing of the dangerous condition may be shown by circumstances."

Id.

74. N.Y. TOWN LAW § 65-a (McKinney 1987) provides in pertinent part:

1. No civil action shall be maintained against any town . . . for damages or injuries to person or property sustained by reason of any highway . . . being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway . . . was actually given to the town clerk or town superintendent of highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or, in the absence of such notice, unless such defective, unsafe, dangerous, or obstructed condition existed for so long a period that the same

section 244,⁷⁵ and Highway Law section 139⁷⁶ have a requirement of either constructive notice or prior written notice as a prerequisite to maintaining an action for damages.⁷⁷ Conversely, Village Law section 6-628,⁷⁸ and the infamous New York City “Pothole” Law⁷⁹ will impose liability only after a

should have been discovered and remedied in the exercise of reasonable care and diligence

2. No civil action shall be maintained against any town . . . for damages or injuries to person or property sustained by reason of any defect in its sidewalks . . . unless written notice thereof, specifying the particular place, was actually given to the town clerk or to the town superintendent of highways, and there was a failure or neglect to cause such defect to be remedied . . . or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

Id.

75. N.Y. SECOND CLASS CITIES LAW § 244 (McKinney 1987 and Supp. 1994).

76. N.Y. HIGH. LAW § 139 (McKinney Supp. 1994).

77. Brian J. Shoot, PRIOR WRITTEN NOTICE, 19 TRIAL LAW. Q. 27 (Spring 1988).

78. N.Y. VILLAGE LAW § 6-628 (McKinney 1983). Section 6-628 provides in pertinent part:

No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway . . . sidewalk or crosswalk being defective, out of repair, unsafe, dangerous, or obstructed . . . unless written notice of the defective, unsafe, dangerous or obstructed condition . . . was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of . . . or the place otherwise made reasonably safe.

Id.

79. N.Y. CITY ADMIN. CODE § 7-201(c)(2) (1985). Section 7-201(c)(2) provides in pertinent part:

2. No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway . . . sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually

showing of prior *written* notice.⁸⁰ In any event, New York courts have consistently required that municipal entities be given notice of a defect, either actual or constructive, before being held liable for damages.⁸¹

New York prior written notice provisions are statutory offspring of General Municipal Law section 50-g, which sets forth and delineates the applicable guidelines for a municipal entity to adhere to in conjunction with the statutory provisions.⁸² Because a municipal corporation is an agent of the state and exercises part of the state's sovereign power, the New York

given to the commissioner of transportation . . . and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Id.

80. See Shoot, *supra* note 77, at 27.

81. See, e.g., *Rothenberg v. City of New Rochelle*, 285 A.D. 817, 818, 136 N.Y.S.2d 466, 467-68 (2d Dep't 1955) (holding that either actual or constructive notice of a hole in the sidewalk must be given to a municipality before it can be held liable).

82. N.Y. GEN. MUN. LAW § 50-g (McKinney 1986 and Supp. 1994). Section 50-g provides in pertinent part:

1. Wherever any statute, city charter or local law provides that no civil action shall be maintained against a city for damages or injuries to person or property sustained in consequence of any street, highway . . . sidewalk or crosswalk being out of repair, unsafe, dangerous or obstructed . . . unless it appear that written notice of the defective, unsafe, dangerous or obstructed condition . . . was actually given . . . and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of. . . . or the place otherwise made reasonably safe, the city shall keep an indexed record . . . of all written notices which it shall receive . . . which record shall state the date of receipt of the notice, the nature and location of the condition stated to exist, and the name and address of the person from whom the notice is received
3. This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provision of any city charter.

Id.

Court of Appeals has held that a municipality may grant, deny, or restrict the power to maintain a private action against it.⁸³

It has been argued that prior written notice statutes put a harsh and extraordinary burden on an injured person,⁸⁴ “are in derogation of the common law,”⁸⁵ are unconstitutional,⁸⁶ and are simply devices to reinstate governmental immunity.⁸⁷ However, in examining the New York State Constitution together with local statutes, it can be demonstrated that, although the prior written notice statutes are valid under the state constitution, they serve no purpose other than to insulate municipal corporations from liability, undermining the waiver of governmental immunity.⁸⁸

The New York State Constitution provides, in pertinent part: “[E]very local government shall have power to adopt and amend local laws not inconsistent with . . . [the] constitution or any general law [of the state] . . . relating to . . . [t]he acquisition,

83. See *MacMullen v. City of Middletown*, 187 N.Y. 37, 47-48, 79 N.E. 863, 866 (1907) (concluding that the legislature conditioned a municipality’s liability for sidewalk defects upon the receipt of written notice).

84. See *Doremus v. Inc. Village of Lynbrook*, 18 N.Y.2d 362, 365, 222 N.E.2d 376, 377, 275 N.Y.S.2d 505, 507 (1966) (holding that prior written notice statutes are to be construed strictly against a municipality because “they are in derogation of the common law”). In *Doremus*, a defective stop sign was found not to fall within a local statute requiring written notice to the municipality of roadway defects. *Id.* But see *Weisman v. Town of Brookhaven*, 197 A.D.2d 617, 618, 602 N.Y.S.2d 697, 698 (2d Dep’t 1993) (noting that town’s notice provisions regarding stop signs would not retrospectively apply to plaintiff’s claim).

85. See *Zumbo v. Town of Farmington*, 60 A.D.2d 350, 354, 401 N.Y.S.2d 121, 123 (4th Dep’t 1978) (holding that prior written notice of a baseball field’s unsafe condition was not a requirement in order to sue the town).

86. See Frank, *supra* note 4, at 334.

87. See Frank, *supra* note 4, at 334.

88. See *Fullerton v. City of Schenectady*, 285 A.D. 545, 548, 138 N.Y.S.2d 916, 919-20 (3d Dep’t), *aff’d*, 309 N.Y. 701, 128 N.E.2d 413 (1955). The *Fullerton* court stated that although local laws of this type are basically attempts to bar tort action by requiring specific procedures to be followed, the law in question did not violate the state constitution or statutes present at the time of its enactment, and was therefore valid. *Id.* at 545, 138 N.Y.S.2d at 919-20.

care, management, and use of its . . . streets . . . and property.”⁸⁹ Similarly, the City Home Rule Law mirrors the language of the New York State Constitution.⁹⁰ And even though the Court of Claims Act⁹¹ waives immunity of the state and its subdivisions so that each is amenable to suit, the statutory authority which permits political subdivisions to limit their liability in suits arising from street and sidewalk defects of which they had no prior written notice prevails.⁹²

General Municipal Law controls in this argument. Because section 50-g of the General Municipal Law⁹³ authorizes such statutory creations, one must read into the entire statute. The law specifically states that “this section shall be applicable notwithstanding any inconsistent provisions of law, general, special, or local, or any limitation contained in the provisions of any . . . charter.”⁹⁴ And furthermore, New York Construction and Interpretation Law provides, in part, that “whenever there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular enactment is inapplicable.”⁹⁵ Accordingly, statutory authority prevails over any waiver which the state has made. New York State courts have often characterized prior notice statutes as harsh, but have consistently upheld them.⁹⁶

The constitutionality of laws requiring notice of defects as a condition precedent to liability for damages or injury has

89. N.Y. CONST. art. IX, § 2(c)(i) and (6) (McKinney 1987).

90. N.Y. MUN. HOME RULE LAW § 10(1)(a)(6) (McKinney 1987). Section 10(1)(a)(6) provides that local governments shall have the “power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to . . . [t]he acquisition, care, management and use of its highways, roads, streets, avenues and property.” *Id.*

91. N.Y. CT. CL. ACT § 8; *see also* Act of April 10, 1929, ch. 467, § 12-a, 1929 N.Y. Laws 994.

92. *See* N.Y. SECOND CLASS CITIES LAW § 244.

93. *See* N.Y. GEN. MUN. LAW § 50-g.

94. N.Y. GEN. MUN. LAW § 50-g(3).

95. N.Y. CONST. & INTERP. LAW (McKinney 1971 and Supp. 1994).

96. 3 YOKELY MUN. CORPS. *supra* note 67 at § 2.461.

consistently been upheld in other jurisdictions.⁹⁷ Additionally, local statutes which are more rigid than the general laws of the State have been upheld as well.⁹⁸ Where a municipality exercises the legislative power delegated to it by the state constitution, there is “an exceedingly strong presumption that the local law enacted is constitutional.”⁹⁹ Therefore, in order to successfully challenge a local law, a plaintiff must overcome the strong presumption of constitutionality that attaches to such a law.¹⁰⁰

The Municipal Home Rule Law¹⁰¹ allows municipal corporations to override state statutes that “relate to matters which . . . are proper subjects for local legislation unless the Legislature is shown to have expressly prohibited the enactment of such a local law.”¹⁰² Furthermore, a municipal corporation may, under certain conditions, enact laws that conflict with a

97. *See Neuenschwander v. Washington Suburban Sanitary Comm’n*, 48 A.2d 593, 598 (Md. 1946) (stating that the legislature has the authority to require written notice before an action against a municipal corporation for damages is commenced); *Schigley v. City of Waseca*, 118 N.W. 259, 262 (Minn. 1908) (holding that a charter provision requiring that actual notice in writing be given to a municipality before a person may recover damages was an effective act of the legislature).

98. *See Holt v. County of Tioga*, 56 N.Y.2d 414, 437 N.E.2d 1140, 452 N.Y.S.2d 383 (1982). The *Holt* court stated that although the local law was more rigid than the general law, the purpose for not specifically addressing prior notification in the general laws was to give local governments the chance to address this issue themselves. *Id.* at 420, 437 N.E.2d at 1142-43, 452 N.Y.S.2d at 385-86. The court upheld the local law, finding that it was constitutional, and not inconsistent with the general law. *Id.*

99. *Id.*

100. *See Zumbo*, 60 A.D.2d at 352, 401 N.Y.S.2d at 122. *See also Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7, 11, 359 N.E.2d 337, 340-41, 390 N.Y.S.2d 827, 830 (1976) (stating that there is an “exceedingly strong presumption of Constitutionality” that applies to both legislative enactments and municipal ordinances).

101. N.Y. MUN. HOME RULE LAW § 10(1)(a)(6) (McKinney 1987).

102. *Walker v. Town of Hempstead*, 190 A.D.2d 364, 371, 598 N.Y.S.2d 550, 554 (2d Dep’t 1993) (reinstating plaintiff’s cause of action for injuries sustained on town property despite lack of written notice because local law did not express intent to supersede state statute).

general law.¹⁰³ “In the absence of any clear expression of legislative intent to prohibit [municipal corporations] from superseding [state statutory law], the enactment of local laws in these and other defined areas is generally permitted.”¹⁰⁴ “And by not specifically addressing the question of prior notification, it appears that the legislature deferred to the judgment of local governments.”¹⁰⁵

Although New York has held that prior written notice statutes pass muster under the New York State Constitution, others have argued that they should not survive a challenge pursuant to the Equal Protection Clause¹⁰⁶ of the United States Constitution. The prior written notice statutes fail to see and treat all tortfeasors equally under the law “by arbitrarily dividing all tortfeasors into two classes: private . . . to whom no prior notice of defect is owed and municipal . . . to whom prior notice is owed.”¹⁰⁷ Accordingly, the victims are denied equal protection under the law. However, the equal protection argument fails because all victims in these types of cases are required to show prior written notice, and the burden is thus not randomly and arbitrarily apportioned.¹⁰⁸

A state statute will pass constitutional muster if its purpose serves a rational basis.¹⁰⁹ Several courts in other states have held that the creation of such classes does not bear a rational relationship to the purposes underlying the statutes.¹¹⁰

103. *Holt*, 56 N.Y.2d at 419, 452 N.Y.S.2d at 385.

104. *Walker*, 190 A.D.2d at 369, 598 N.Y.S.2d at 553.

105. *Holt*, 56 N.Y.2d at 420, 452 N.Y.S.2d at 385.

106. U.S. CONST. amend. XIV. The Fourteenth Amendment provides, in relevant part: “[N]o state shall deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

107. *Frank*, *supra* note 4, at 338.

108. *Holt*, 95 A.D.2d at 935, 464 N.Y.S.2d at 281 (3d Dep’t 1983).

109. *See Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (stating that a contested state statute will be considered to be within the powers of the state with respect to the Equal Protection Clause of the Fourteenth Amendment unless it has no reasonable basis and is purely arbitrary).

110. *See Reich v. State Highway Dep’t*, 194 N.W.2d 700, 702 (Mich. 1972) (holding that the class division of governmental or private tortfeasors was not rationally related to the purpose of a prior notice statute); *see also*

Furthermore, the Washington Supreme Court announced in *Hunter v. Mason High School*¹¹¹ that by waiving sovereign immunity, the government places itself in a position equal to that of private persons and corporations, and forfeits the right to a special status separate from that of individuals.¹¹²

Prior written notice statutes were enacted to limit municipal liability,¹¹³ and to reduce the amount of money paid out in sidewalk and roadway claims.¹¹⁴ Courts in other jurisdictions have stated that a municipality's financial problems do not justify shielding it from liability.¹¹⁵ Additionally, *Hunter* also held that protection of the public treasury is not a valid purpose for upholding notice statutes.¹¹⁶ Accordingly, in light of such holdings, it is hard to fathom that the New York State notice statutes are supported by a constitutionally legitimate basis.

CONCLUSION

It is clear that there is a definite call for reform with regard to the prior written notice statutes. Even though budgetary problems, in some way, created the need for change in "common

Turner v. Staggs, 510 P.2d 879, 883 (Nev. 1973) (holding that the arbitrary line drawn between the requirement of written notice for victims of a governmental tort but not a private tort violates the Equal Protection Clause of the Fourteenth Amendment), *cert. denied*, 414 U.S. 1079; *Hunter v. North Mason High School*, 539 P.2d 845, 850 (Wash. 1975) (stating that the governmental purpose of protecting the public treasury is not sufficient to save a notice requirement in governmental tort actions statute from violating the Equal Protection Clause of the Constitution).

111. 539 P.2d 845 (Wash. 1975).

112. *Id.* at 850.

113. *See* Shoot, *supra* note 77, at 27.

114. *See* Durst, *Prior Written Notice for Municipal Liability*, 13 Trial Lawyer's Q. 52 (1980).

115. *See* Parish v. Pitts, 429 S.W.2d 45, 50-51 (Ark. 1968) The court in *Parish* stated that "[a]nything short of financial disaster . . . is insufficient reason for exempting the cities from the rule of tort liability." *Id.* at 50. *See also* Ayala v. Philadelphia Bd. of Pub. Educ., 305 A.2d 877, 882 (Pa. 1973) (stating that empirical data does not support the finding that governmental functions would be obstructed if funds were diverted to pay tort claims).

116. *Hunter*, 539 P.2d at 850.

law principles of municipal liability,”¹¹⁷ one must question whether these statutes limit a municipality’s liability in the most efficient and equitable manner possible.

This author has found no states other than New York which require written notice of a defect before the injury occurs. Therefore, it seems logical, according to the common law rules of negligence, to impose a standard on a municipality similar to that imposed on individuals and corporations. To do anything less would truly run counter to the spirit and meaning behind section 8 of the New York Court of Claims Act.¹¹⁸

By placing the same standard of negligence on municipalities, a stronger incentive exists to inspect and repair the roadways and sidewalks in order to avoid liability. As it stands now, unless a good citizen has the decency to report every defect he or she sees, the municipality enjoys a legal windfall at the expense of individuals who become injured due to an unreported defect. And although certain municipalities do accept less than written notice, the procedural hurdles imposed on a litigant nearly as burdensome as those which require strictly written notice.¹¹⁹

By creating a more efficient manner of receiving notice, combined with a fairer standard imposed on both the municipality and litigant, the balance between the hardships placed on litigants and the benefits to the municipalities will be brought into much closer harmony. Anything less results in a sham of our legal system as we know it today. Yes, there must be some latitude granted to municipal corporations in attempting to deal with the everyday management and maintenance of its roadways and sidewalks, but not to an extent which results in an inordinate degree of prejudice to injured individuals.

Lewis J. Lubell

117. See Frank, *supra* note 4, at 348.

118. N.Y. CT. CL. ACT § 8; *see also* Act of April 10, 1929, ch. 467, § 12-a, 1929 N.Y. Laws 994.

119. See *supra* notes 74-76, and 78-79.

