SETON HALL LEGISLATIVE JOURNAL

VOL. 2 FALL 1976 NO. 1

A REVIEW OF THE NEW JERSEY TORT CLAIMS ACT: NOTICE PROVISIONS, DAMAGES, AND THIRD-PARTY CLAIMS

The State of New Jersey and its local government units have enjoyed sovereign immunity against tort claims for much of their histories. The roots of such an unqualified immunity can be traced to early common law, but the policy which began as a solid source of protection for the State and local governments against lawsuits sounding in tort, gradually eroded due to the judiciary's interest in avoiding unnecessary harsh judgments. As a result, lawsuits were permitted in certain circumstances.[1]

In an effort to bring some uniformity to the rather erratic development of the law in this area, the State Supreme Court abrogated the doctrine of sovereign immunity to tort claims in its 1970 landmark decision of *Willis v. Department of Conservation and Economic Development*.[2]

The legislative response to *Willis* was the enactment of the New Jersey Tort Claims Act (hereinafter Act),[3] which went into effect on July 1, 1972. The Act was based upon the findings and recommendations submitted by a task force of the New Jersey Attorney General's office (hereinafter Attorney General's Report.)[4] Both the Act and the Attorney General's Report approached the issue

1 *See* Amelchenko v. Borough of Freehold, 42 N.J. 541, 201 A.2d 726 (1964); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313 (1956); Karpenski v. Borough of South River, 83 N.J.L. 149, 83 A. 639 (Sup. Ct. 1912); Hart v. Board of Chosen Freeholders, 57 N.J.L. 90, 29 A. 490 (Sup. Ct. 1894).

2 55 N.J. 534, 264 A.2d 34 (1970).

3 N.J. STAT. ANN. § 59:1-1 *et seq.* (Supp. 1976-77). For further historical background of the Tort Claims Act, *see The New Jersey Tort Claims Act: A Step Forward?*, 5 SETON HALL L. REV. 284, 284-91 (1974).

4 REPORT OF THE ATTORNEY GENERAL'S TASK FORCE ON SOVEREIGN IMMUNITY (May, 1972).

by reestablishing sovereign immunity to tort claims, while providing specific legislative exceptions.[5]

The purpose of this article is to examine several areas of the Act's statutory development under judicial interpretation in the four years since its inception. Specifically, the article deals with the notice provisions of the Act (which have been extensively construed by the courts) and questions involving damages and third party claims (which, in contrast, offer unsettled issues of law).

Legislative Changes

Before reviewing judicial opinions on the Act, it would be helpful to examine the actions of the Legislature concerning the statute subsequent to its enactment. Two amendments of some significance have been added since the Act went into effect.

The first amendment provides a jury trial for plaintiffs making claims under the Act.[6] Previously, cases were to be heard by a judge sitting without a jury.

The second amendment changes the standard of comparative negligence used to determine judgments under the Act.[7] The original statute adopted the so-called Mississippi Plan, whereby a plaintiff could recover a judgment, despite his own contributory negligence, so long as his actions were not the sole proximate cause of his own injuries. The amended provision now calls for what is known as the Wisconsin Plan, which allows a recovery only when a plaintiff's negligence is not greater than the defendant's negligence.

Both the jury trial and comparative negligence amendments were made retroactive to July 1, 1972, the effective date of the Act.

Notice of Claim Provisions

The provision of the Act which establishes the mechanisms by which claims against public entities are to be brought[8] has received the most attention by our courts. Indeed, the first opinion construing the Act was *Lutz v. Semcer*,[9] in which a claimant was

---

5 N.J. STAT. ANN. § 59:2-1a and Comment (Supp. 1976-77).

6 N.J. STAT. ANN. § 59:9-1 (Supp. 1976-77), *amending* N.J. STAT. ANN. § 59:9-1 (Supp. 1975-76).

7 N.J. STAT. ANN. § 59:9-4 (Supp. 1976-77), *amending* N.J. STAT. ANN. § 59:9-4 (Supp. 1975-76).

8 N.J. STAT. ANN. § 59:8-1 *et seq.* (Supp. 1976-77).

9 126 N.J. Super. 288, 314 A.2d 86 (Law Div. 1974).

barred from relief for failing to meet the Act's 90-day notice requirement.[10]

Chapter 8[11] details when and how suit may be brought against public entities. In this process, notice of the claimant's intention to sue is a mandatory first step.[12]

The purpose of the notification requirements is stated to serve two functions: (1) to allow at least six months for administrative review so as to permit settlement of meritorious claims, and (2) to provide prompt notice in order to permit adequate investigation and proper defense.[13]

The required contents of such notice are set out at length in N. J. STAT. ANN. §§ 59:8–4, 59:8–5:

(1) the claimant's name and post office address;
(2) the address of the person to whom the claimant wishes notices to be sent (often an attorney);
(3) the date of and circumstances around which such claim arise;
(4) a description of the loss or injury incurred;
(5) the names of the entity and employee(s) causing such injury;
(6) the amount of the claim; and
(7) the signature of the claimant.

Problems have arisen, however, with regard to the time provision of N. J. STAT. ANN. § 59:8–8. It provides that the claimant shall be forever barred from recovery against a public entity if he fails to file his claim with the public entity within 90 days of accrual of his claim. This requirement is tolled for infants and incompetents until they come to full age or sane mind.[14]

A savings provision, for those claimants who have failed to file timely notice, is found in the following section. Its language has often been set forth in judicial pronouncements, and read as follows:

> A claimant who fails to file notice of his claim within 90 days as provided in section 59:8–8 of this act, may, in the discretion of a judge of the superior court, be permitted

---

10 N.J. STAT. ANN. § 59:8–8 (Supp. 1976-77).

11 N.J. STAT. ANN. § 59:8–1 *et seq.* (Supp. 1976-77).

12 *But see* discussion of third party claims, notes 99-133 *infra* and accompanying text.

13 N.J. STAT. ANN. § 59:8–3, Comment (Supp. 1976-77).

14 Rost v. Board of Education of Fair Lawn, 137 N.J. Super. 76, 347 A.2d 810 (App. Div. 1975); Vedutis v. Tesi, 135 N.J. Super. 337, 343 A.2d 171 (Law Div. 1975), *aff'd sub nom.* Vedutis v. South Plainfield Board of Education, No. 24-75 (App. Div., June 15, 1976).

> to file such notice at any time within 1 year after the accrual of his claim provided that the public entity has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion based upon affidavits showing sufficient reasons for his failure to file notice of claim within the period of time prescribed by section 59:8–8 of this act; provided that in no event may any suit against a public entity arising under this act be filed later than 2 years from the time of the accrual of the claim.[15]

The term "judge of the superior court," in one unpublished Law Division opinion[16] was held to be limited to precisely those terms, and excludes a judge of the county court, or "a judge of a county court temporarily assigned to hear matters in the Superior Court."[17] Thus, under this section, a judge of the Superior Court, weighing the factors of "sufficient reasons" for tardiness and "prejudice" to the public entity, *may* within the *discretion* granted, allow a late filing of such notice. Such discretion is limited initially to a time period of one year from the accrual of the claim.[18]

Secondly, the Superior Court judge must go through a two-step process in determining whether the claimant should be allowed to file a late notice of claim.[19] First, the judge must determine whether there are "sufficient reasons" for plaintiff's failure to timely file such notice.[20]

If these reasons have merit to the judge, the court must then determine whether the granting of such a request will substantially prejudice the public entity. Often, as in the case of "substantial compliance" with these requirements and estoppel[21] these factors are decided together. The issue of prejudice is not reached, "nor is it a relevant inquiry until 'sufficient reasons' are shown."[22]

The statute requires notice 90 days after the *accrual of the cause of action*. *Lutz v. Semcer*[23] notes that this period begins "when facts exist which authorize one party to maintain an action against

---

15 N.J. STAT. ANN. § 59:8–9 (Supp. 1976-77)

16 Cole v. New Jersey, No. 2911-73 (Law Div., Feb. 7, 1974).

17 *Id.*

18 Anaya v. Township of Vernon, 139 N.J. Super. 409, 354 A.2d 338 (App. Div. 1976).

19 In re John R. Roy, No. 3881-74 (App. Div., June 17, 1976). Zwirn v. County of Hudson, 137 N.J. Super. 99, 102, 347 A.2d 822, 823 (Law Div. 1975).

20 N.J. STAT. ANN. § 59:8–9 (Supp. 1976-77).

21 *See* discussion, notes 62-81 *infra* and accompanying text.

22 In re John R. Roy, No. 3881-74 (App. Div., June 17, 1976).

23 126 N.J. Super. 288, 297, 314 A.2d 86, 91 (Law Div. 1974).

another." There, the court refuted plaintiff's claim that his right to sue did not accrue until his medical expenses came to over the $1,000 figure of N.J. Stat. Ann. § 59:9–2(d).[24] *Torres v. Jersey City Medical Center*[25] applies the "discovery rule" as set forth in *Lopez v. Swyer,*[26] to tort claims actions, whereby the action is said to accrue at such time as the claimant knows or has reason to know of the existence of a set of facts which will afford the claimant the right to sue. At *this* point, the mechanisms of the Act come into force.

"Sufficient Reasons"

Beyond the requirement that a claimant seeking permission to file a late notice of claim must submit an affidavit showing sufficient reasons for the failure to file timely notice and the fact that if the public entity is "substantially prejudiced" no late notice should be allowed, even within the one year period,[27] the statute is silent as to mechanisms by which the judge, through the discretion afforded, is to decide whether to grant the motion.

While each claimant's case presents a unique factual pattern, thereby eliminating any steadfast rules as to whether situation *A* presents sufficient reasons while *B* does not, the decisions generally can be catgorized into topical groupings. Serious injury, failure to discover the existence of a claim, and excusable neglect based upon misrepresentations or inability to retain counsel have been held to be sufficient reasons. Note that the filing of a complaint is *not* proper notice.[28] Note too, that the Appellate Division decisions on late notice have indicated that their basic holding was an affirmation of the trial court's lack of abuse of discretion.[29]

A claimant was permitted to file a late notice of claim where the affidavit in support of the motion showed that he was disabled, had been in and out of hospitals and confined to his home for six months, was living out of New Jersey, had not contacted New Jersey counsel for ten months, and was unaware of a possibility of a claim against the public entity until nearly eleven months

24 *See* discussion of related matter, notes 84-98 *infra* and accompanying text.

25 140 N.J. Super. 323, 356 A.2d 75 (Law Div. 1976).

26 62 N.J. 267, 300 A.2d 563 (1973).

27 N.J. STAT. ANN. § 59:8–9 (Supp. 1976-77).

28 Reale v. Township of Wayne, 132 N.J. Super. 100, 332 A.2d 236 (Law Div. 1975).

29 In re John R. Roy, No. 3881-74 (App. Div., June 17, 1976); Keller v. County of Somerset, 137 N.J. Super. 1, 347 A.2d 529 (App. Div. 1975).

after the accident.[30] That case contains several elements which subsequently, have themselves been declared sufficient reasons for the purposes of late notice.

In *Keller v. County of Somerset*[31] the administratrix of the estate of William Keller was granted leave to file late notice. There, a mother, distraught over the death of her son, was unaware of the possibility of a claim against the public entity. She did not contact an attorney until after the 90-day period had elapsed. The decedent's car had gone off a road and struck a tree. About three months later, a friend of the Kellers', who was an engineer, discussed the possibility of such a claim. The remaining time (eight months) was spent contacting an expert, so as to verify the potential claim, and retaining counsel.

Plaintiff's lack of awareness of the possibility for a claim also was noted as a sufficient reason for filing a late notice of claim in *Torres v. Jersey City Medical Center.*[32] In *Torres,* plaintiff became aware of a potential medical malpractice action one year and a half after the alleged incident. It then took the plaintiff ten months to retain willing counsel to undertake "a complex and difficult case of questionable value." Noting that her cause of action accrued at the point of discovery, the court held that her "inability to obtain representation can be as incapacitating as a physical incapability," and "it should not act to bar plaintiff's claim."[33]

A serious injury, which left plaintiff a quadriplegic, was held in *Marino v. City of Union City*[34] to be "excusable neglect" and thereby a sufficient reason for allowing the late claim to be filed. The term "excusable neglect" was also used by the court in *Zwirn v. County of Hudson*[35] in allowing a late notice of claim to be filed. There, plaintiff's decedent was killed in a two-car collision. Plaintiff, based on conversations which had taken place with the *county* police department, believed that the road upon which the accident took place[36] was a *county* road. Appropriate notice was filed with the county. Six months later, plaintiff's attorney first

30 Wade v. New Jersey Turnpike Authority, 132 N.J. Super. 92, 332 A.2d 232 (Law Div. 1975).

31 137 N.J. Super. 1, 347 A.2d 529 (App. Div. 1975).

32 140 N.J. Super. 323, 356 A.2d 75 (Law Div. 1976).

33 *Id.* at 327, 356 A.2d at 77.

34 136 N.J. Super. 233, 345 A.2d 374 (Law Div. 1975).

35 137 N.J. Super. 99, 347 A.2d 822 (Law Div. 1975).

36 Plaintiff alleged the road was improperly designed and maintained. *Id.* at 101, 347 A.2d at 823.

became aware of the fact that the road belonged to the *state*. Faced with the issue of whether excusable neglect or mistake is "sufficient reason" under N.J. Stat. Ann. § 59:8–9, the court held that plaintiff's actions were reasonable under the circumstances, and accordingly the motion was granted.

California Law

The *Zwirn* court had looked to California law in its determination. The New Jersey Tort Claims Act is based largely on a similar California law. California's thirteen years of experience in construing its act has often been reviewed for guidance on issues which are novel in New Jersey.[37]

California requires the giving of notice "not later than the 100th day after accrual of the cause of action."[38] Late notice is also statutorily set forth.[39] Leave is granted until one year after the accrual of the cause of action, where the application shows that "the failure to present the claim was through mistake, inadvertence, suprise or excusable neglect unless the public entity establishes that it would be prejudiced. . . ."[40] The standard used by the courts is the same as that for relief of a party from a default judgment.[41] So too, the discretion of the trial court is the key factor viewed by appellate bodies.[42]

This standard was met in *Viles v. State*[43] wherein plaintiff's wife died from an injury sustained in an automobile collision on a state highway. Seeking to file a claim based on the defective condition of the road, plaintiff was informed by his insurance representatives that he had one year in which to file a wrongful death action.[44] It was nine months before he consulted with an attorney and sought to file late notice. Based on this misconception of the law, found to be reasonable for a private party, the Supreme Court granted the requested leave.

---

37 CAL. GOV. CODE § 810 *et seq. See, e.g.*, Zwirn v. County of Hudson, 137 N.J. Super. 99, 104, 347 A.2d 822, 824 (Law Div. 1975); Reale v. Township of Wayne, 132 N.J. Super. 100, 108, 332 A.2d 236, 241 (Law Div. 1975); Dambro v. Union County Park Commission, 130 N.J. Super. 450, 456, 327 A.2d 466, 469 (Law Div. 1974); Lutz v. Semcer, 126 N.J. Super. 288, 292, 314 A.2d 86, 88 (Law Div. 1974).

38 CAL. GOV. CODE § 911.2.

39 CAL. GOV. CODE § 946.6.

40 CAL. GOV. CODE § 946.6(c)(1).

41 Vile v. State, 66 Cal. 2d 24, 56 Cal. Rptr. 666, 423 P.2d 818 (Sup. Ct. 1967). Note that this is also applied in New Jersey. Keller v. County of Somerset, 137 N.J. Super. 1, 11, 347 A.2d 529, 534 (App. Div. 1975).

42 Black v. County of Los Angeles, 12 Cal. App. 3d 670, 91 Cal. Rptr. 104 (Ct. App. 1970).

43 66 Cal. 2d 24, 56 Cal. Rptr. 666, 423 P.2d 818 (Sup. Ct. 1967).

44 Thus ignoring the 100-day provision. CAL. GOV. CODE § 911.2.

Leave was granted in a case where plaintiff's attorney made a calendar error, but upon discovery of the error immediately filed a motion seeking a late claim.[45] So too, where plaintiff sought leave to file on the 101st day, in view of the plaintiff's age and inexperience in legal matters, the brief period of time which had elapsed after the deadline and the calendar mistake of her attorney, the court held that claimant was entitled to the relief sought.[46]

Failure to Show Sufficient Reasons

As cases have defined what are "sufficient reasons" for allowing late notice, cases have also illustrated the denial of claimants' motions for failure to show such reasons.

In *Lutz v. Semcer,*[47] mere ignorance of the law was held not to be such a reason. There, plaintiff was aware of a possible claim. An additional reason forwarded, also held to be insufficient, was that plaintiff was unaware of the seriousness of the injury, and was waiting to incur medical expenses over $1,000. In discussing *Lutz,* the Appellate Division[48] stressed that *Lutz* was correct on its facts since in that context the plaintiff "knew from the day he was injured that he had a cause of action against the police officers."[49] *Lutz* is also important because it points out that notice is *not* required for suits against public *employees,* but merely against the entities themselves.[50]

The Superior Court has *no* authority to grant a late filing after the accrual of a one year period.[51] In *Pinckney v. Jersey City*[52] the court held that a claimant cannot obtain permission to file late notice after a one year period. Additionally, the dicta of the case notes that the reason set forth by plaintiff, the failure to obtain *New Jersey* counsel, would not have been sufficient.

Most recently, the Appellate Division[53] upheld the trial court's denial of leave to file late notice. There, the plaintiff as executor

45 Nilsson v. City of Los Angeles, 249 Cal. App. 2d 976, 58 Cal. Rptr. 20 (Ct. App. 1967).

46 Segal v. State, 12 Cal. App. 3d 509, 90 Cal. Rptr. 720 (Ct. App. 1970).

47 126 N.J. Super. 288, 314 A.2d 86 (Law Div. 1974).

48 Keller v. County of Somerset, 137 N.J. Super. 1, 347 A.2d 529 (App. Div. 1975).

49 *Id.* at 8, 347 A.2d at 532-33.

50 But note that the remainder of the provisions do apply to public employees.

51 Anaya v. Township of Vernon, 139 N.J. Super. 409, 354 A.2d 338 (App. Div. 1976).

52 140 N.J. Super. 96, 355 A.2d 214 (Law Div. 1976). A recent case held that observance of a mourning period by a husband after his wife allegedly committed suicide in a psychiatric hospital was not a sufficient reason for failing to file a notice of claim. Leslie Gudor, administrator *ad prosecuendam,* Estate of Francis Gudor v. New Jersey, motion filed September 29, 1976 (Law Div., November 5, 1976).

53 In re John R. Roy, No. 3881-74 (App. Div., June 17, 1976).

of decedent's estate retained counsel within a month of the death. It was not until seven months from *that* time, however, that leave was sought. The affidavit in support of motion gave as reasons: (1) the difficulty in determining the circumstances of the death (specifically, the public employee's identity); (2) the fact that a grand jury was investigating the matter; (3) plaintiff's investigators were conducting an investigation; (4) plaintiff's attorney's failure to consult with the provisions of the act; (5) the municipality's lack of prejudice; and (6) the reluctance of the municipality's director of public safety to discuss the matter. The court held that Mr. Roy was chargeable with knowledge of the statute after he retained counsel, since he know of a possible claim against the municipality.

California courts have also provided a number of examples of situations in which sufficient reasons (or excusable neglect, etc.) were not shown.[54] Note too, that California courts have required that a claimant act with reasonable diligence after discovering his default.[55]

As practical matter, many claimants seeking to file a late notice of claim contend that motor vehicle accident reports either represent substantial compliance with the notice requirements or indicate that the entity will not be prejudiced because of knowledge of the incident. This argument has never been discussed by any reported decision. However, it should be noted that motor vehicle accident reports are required by statute[56] and are used, not by municipalities, but by the State Division of Motor Vehicles, presumably for traffic control and safety. On their face, they lack the information required by N.J. Stat. Ann. § 59:8–4.5. Additionally, California courts have held[57] that some knowledge of the incident by the entity will not excuse the failure of the claimant to file a timely claim.

Substantial Prejudice

The final aspect of tort claims notice, is prejudice to the entity involved. As discussed above, this issue arises only after a showing of sufficient reasons. So too, New Jersey decisions dealing

54 *See, e.g.*, Dockter v. City of Santa Ana, 261 Cal. App. 2d 69, 67 Cal. Rptr. 686 (Ct. App. 1968); Garcia v. City of San Francisco, 250 Cal. App. 2d 767, 58 Cal. Rptr. 760 (Ct. App. 1967); Martin v. City of Madera, 265 Cal. App. 2d 76, 70 Cal. Rptr. 908 (Dist. Ct. App. 1968).

55 Viles v. State, 66 Cal. 2d 24, 56 Cal. Rptr. 666, 423 P.2d 818 (Sup. Ct. 1967).

56 N.J. STAT. ANN. § 39:4–130.

57 Peterson v. Vallejo, 259 Cal. App. 2d 757, 66 Cal. Rptr. 776 (Ct. App. 1968).

with substantial compliance and estoppel indicate how all the above factors have been present and have merged to some degree. In both *Keller v. County of Somerset*[58] and *Wade v. New Jersey Turnpike Authority*[59] the public entities did not deny that they were not prejudiced. The *Wade* case arose out of the massive turnpike accidents which occurred in late October, 1973, involving 66 vehicles, and responsible for nine deaths. There, extensive media coverage and extensive investigation by the defendants overcame any prejudice the entities might have claimed.

In *Marino v. City of Union City*[60] the accident was well publicized and the subject of a number of local fund-raising projects, created to aid the plaintiff with the financial problem created by his injury.

In *Torres v. Jersey City Medical Center*[61] the facts surrounding plaintiff's injury were well documented by the defendant medical center, which had complete records of her treatments.

Substantial Compliance and Estoppel

Apart from the issue of failure to comply with the statutory notice provisions, a perhaps even more perplexing question has arisen concerning the mandates of these provisions. Completely failing to comply is one thing. Attempting to comply, but failing technically to do so, was another. How should the courts deal with the person who, in good faith, attempts to notify a public entity of a prospective law suit, but does not follow to the letter the requirements of N.J. Stat. Ann. § 59:8–4?

New Jersey courts have responded by applying the concept of "substantial compliance" to the notice requirements. If a person has notified a public entity in a manner which fulfills the underlying purposes of the notice requirements, he may escape a motion to dismiss his claim even if he has been technically deficient in following the notice provisions.

Furthermore, if the deficiency is the result of misinformation supplied by an employee or official of a public entity, the public entity may be estopped from relying on the deficiency in making a motion to dismiss the claim.

These principles were first recognized in *Dambro v. Union County Park Commission.*[62] The plaintiff in that case dove into a stream while swimming on May 28, 1973 and received a broken

58 137 N.J. Super. 1, 347 A.2d 529 (App. Div. 1975).
59 132 N.J. Super. 92, 332 A.2d 232 (Law Div. 1975).
60 136 N.J. Super. 223, 345 A.2d 374 (Law Div. 1975).
61 140 N.J. Super. 323, 356 A.2d 75 (Law Div. 1976).
62 130 N.J. Super. 450, 327 A.2d 466 (Law Div. 1974).

neck when his head hit certain rock and debris. The municipal police department was sent a letter by plaintiff's counsel two days later, advising of his representation of plaintiff in connection with the accident. A copy of the police report, which contained identification of the plaintiff and information concerning the accident, was sent to the plaintiff's counsel.

Two weeks after the accident, the plaintiff's attorney sent a similar letter to the municipal tax assessor. The letter contained a request for the name of the owner of the property on which the incident occurred. The letter was returned with a notation indicating that the land was owned by the county park commission. The plaintiff notified the park commission on August 14, 1973 and started suit on April 30, 1974.

In mid-June, however, the plaintiff received notice that the county park commission had alleged that the land in question was owned by the municipality in which it was located. The county park commission had filed a third party complaint against the municipality. Plaintiff was thereafter permitted to join the third-party defendant, the municipality, as a direct defendant.

The municipality argued that the plaintiff had failed to comply with the notice provisions of the Act. Plaintiff's position was that compliance need not be made by a formal filing of claim, but that his letters to the municipal police department and tax assessor were sufficient to satisfy the notice requirements.

Noting that the Act was modeled upon California's Tort Claims Act[63] the court pointed out that California courts have held that substantial compliance with the notice of claim provisions is sufficient. Thus, where the plaintiff files notice in good faith, but fails to obtain proper verification, gives unclear descriptions of the place of the accident, or files with the wrong agency, he may, if the surrounding circumstances are favorable, still satisfy the notice requirements. Citing a California case,[64] the court stated:

> The doctrine of substantial compliance has frequently been invoked to validate a claim in fact filed under the claims statute, although incomplete or defective or presented to the wrong agency, where claimant has made a bona fide attempt to comply with the statutory requirements . . . but we know of no case in which it has been invoked to cure an omission to file a claim.[65]

---

[63] Cases cited note 37 *supra*.

[64] Stromberg, Inc. v. Los Angeles County Flood Control District, 270 Cal. App. 2d 759, 76 Cal. Rptr. 183 (Sup. Ct. 1969).

[65] 130 N.J. Super. at 456, 327 A.2d at 469-70.

Within these broad guidelines, the court narrowed its discussion to the specific requirements of N.J. Stat. Ann. § 59:8–4.[66] The court held that plaintiff's actions satisfied all the statutory requirements.[67] The plaintiff's name and address were included on the letter to the tax assessor. The police department's own records indicated that plaintiff had suffered a broken neck, thereby giving the municipality constructive notice of the nature of the injury. The name of the public entity was not known to plaintiff. Finally, the court held that failure to give a statement of damages would not bar a cause of action if the amount of damages is not known at the time the claim is presented.

The decision in *Dambro* also was grounded upon the doctrine of estoppel. The tax assessor had provided the plaintiff with information in the course of his duties as a municipal employee. If the information turned out to be faulty, the municipality was not permitted to "insulate itself from possible tort liability by the mistake or inadvertence of its employee tax assessor."[68]

In view of the "totality of the facts",[69] the court felt that the legislative purposes of the claims provisions were satisfied, even though the literal requirements were not.[70] This reasoning indicated that the decision was not based solely on the existence of a good faith attempt by a claimant to notify the public entity. The public entity must also have sufficient actual or constructive notice of the existence of a claim and the substance of the claim.

A subsequent Law Division case was more explicit in defining this concept:

> Substantial compliance . . . is based on the notion that substantially all of the required information has been given to those to whom the notice should be given and that it has been given in a form which should alert the recipient to the fact that a claim is being asserted against

---

66 *See* text following note 13 *supra*.

67 130 N.J. Super. at 458, 327 A.2d at 470-71.

68 *Id.* at 457, 327 A.2d at 470.

69 *Id.* at 459, 327 A.2d at 471.

70 *See* note 13 *supra*. The court in *Dambro* stated:

> [The municipality] will have to prepare a proper defense as a third-party defendant. An investigation of the facts is possible in that the police department report of the accident exists. This court finds that [the municipality] had an opportunity to prepare a defense, as well as investigate all facts and thereby was afforded an opportunity to settle plaintiff's claim before litigation commenced. Thus, the legislative purposes as stated in the comment to N.J.S.A. 59:8–3 are satisfied.

130 N.J. Super. at 458-59, 327 A.2d at 471.

> the sovereign. To put it another way, substantial compliance means that the notice has been given in a way, which though technically defective, substantially satisfies the purposes for which notices of claim are required.[71]

In this regard, it has been held that, regardless of the sufficiency of the information, a writing is essential to comply with the statute.[72] In addition, the filing of a complaint cannot be substituted for a notice of claim nor can it serve as substantial compliance with the notice provisions.[73]

Simply because a public entity is notified of an accident by a writing within the 90-day period does not by any means guarantee that the notice provisions have been substantially complied with. *Lameiro v. West New York Board of Education*[74] concerned a fourth grade student who, on April 10, 1974 received an injury when he was pushed down the stairs by another student. Suit was started December 18, 1974. Although formal notice of a claim was never given to the local board of education before suit was commenced, plaintiff's attorney had sent a letter to the school principal on April 26, 1974. The letter requested certain information about the incident, including the name and address of the student who had pushed the plaintiff.[75]

The court held that this failed to measure up to the threshold of information needed to support an argument that the notice provisions had been substantially complied with:

> There is nothing about this letter that would give any notice of any intention to assert a claim against the public entity nor is there anything in the letter to suggest that the public entity has done anything wrong. The letter suggests, rather, that there is an intention by one infant to assert a claim against another infant.[76]

---

71 Lameiro v. West New York Board of Education, 136 N.J. Super. 585, 588, 347 A.2d 377, 379 (Law Div. 1975).

72 Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 348, 354 A.2d 87, 90 (App. Div. 1976).

73 Reale v. Township of Wayne, 132 N.J. Super. 100, 112, 332 A.2d 236, 242 (Law Div. 1975).

74 136 N.J. Super. 585, 347 A.2d 377 (Law Div. 1975).

75 The text of the letter was as follows:

> I represent the above named in connection with a claim for personal injuries sustained as a result of being pushed down a stairs.
>
> I would appreciate you would mailed [sic] me the name and address of the student who pushed Jose Lameiro and also any details of the accident that are available.
>
> Thank you for your kind cooperation.

136 N.J. Super. at 587, 347 A.2d at 378.

76 136 N.J. Super. at 587-88, 347 A.2d at 378.

However, as *Dambro* showed, the doctrine of estoppel may be helpful in supporting an argument of substantial compliance in an otherwise weak fact pattern. In fact, even where substantial compliance is missing altogether from the case, estoppel may be an appropriate device, on its own, to avoid a dismissal. In *Anske v. Borough of Palisades Park,*[77] the plaintiff had fractured an ankle when he stepped into a pothole near a curb. About two weeks later he personally reported the accident to the local municipal clerk. Plaintiff was told "not to worry about it" and that it would be "taken care of by the insurance company."[78]

About a week later, he was contacted and questioned by the municipality's liability carrier. Apparently hearing nothing further, plaintiff started suit approximately five months after the accident.

The court held that since notice had not been put in written form, the plaintiff had not substantially complied with the notice provisions.[79] If this were all that the court had before it, the case could have been decided at that point. However, the court went further and applied the doctrine of estoppel against the municipality:

> On the basis of the particular facts in this case—the actions of plaintiff in reporting the incident to the borough clerk's office, the visit by the insurance company representative, the failure of defendant to plead the defense until over a year had elapsed,[80] plaintiff's reliance on the conduct of defendant's representatives and the lack of prejudice to the borough—we hold that defendant is estopped to raise the defense of failure to comply with the notice provisions of the Tort Claims Act.[81]

Two-Year Statute of Limitations

N.J. Stat. Ann. § 59:8–8, 9 indicate that in no event may any suit against a public entity be filed more than two years from the time of the accrual of the claim. Note that this was expanded in *Torres*

---

77 139 N.J. Super. 342, 354 A.2d 87 (App. Div. 1976).

78 *Id.* at 344, 354 A.2d at 88.

79 *Id.* at 348, 354 A.2d at 90.

80 The court noted that defendant's original answer, filed about seven months after the accident, made no mention of the defense of failure to give timely notice. This defense was added by amended answer over one year after the accident. A year having elapsed from the date of the accident, the plaintiff was precluded from moving for leave to file a late claim under N.J. STAT. ANN. § 59:8–9. 139 N.J. Super. at 349-50, 354 A.2d at 91.

81 139 N.J. Super. at 350-51, 354 A.2d at 91.

v. Jersey City Medical Center[82] where a late notice of claim was allowed to be filed over two years after the alleged injury, in a medical malpractice suit. Relying on *Lopez v. Swyer*[83] the court held that the "discovery rule" has application to the Tort Claims Act, whereby a medical malpractice action accrues when the claimant knows or has reason to know of the alleged injury. Accordingly, this suit, to be filed six months after the giving of notice, as per N.J. Stat. Ann. § 59:8–8, will be filed beyond the two-year period.

This two-year statute of limitations for claims against public entities is at variance with the limitations of N.J. Stat. § 2A:14–1, which gives plaintiffs a six-year period in which to sue for injury to real property, conversion and those tortious injuries not included in N.J. Stat. § 2A:14–23.

Damages and Third-Party Complaints

Limitations on Damage Awards

Chapter 9[84] of the Act sets forth conditions of suit and judgment. N.J. Stat. Ann. § 59:9–1 allows for jury trials in suits against public entities. Contribution by public tortfeasors is discussed in N.J. Stat Ann. § 59:9–3, and the "Wisconsin" rule of comparative negligence (the 50% rule) is provided for in N.J. Stat. Ann. § 59:9–4.[85]

Most interesting among these is N.J. Stat. Ann. § 59:9–2, which sets forth limitations on judgments. This section represents a marked departure from the law governing judgments against non-public entities. Prejudgment interest,[86] products liability actions,[87] punitive damages[88] and subrogation by insurance carriers[89] are precluded against public tortfeasors by the provisions of this section.

The section which stipulates a $1,000 threshold before recovery can be had for pain and suffering has proven to be one of the most burdensome aspects of the act:

---

82 140 N.J. Super. 323, 356 A.2d 75 (Law Div. 1976). *See also* Martin v. Township of Rochelle, 99 N.J.L.J. 1026 (1976).

83 62 N.J. 267, 300 A.2d 563 (1973).

84 N.J. STAT. ANN. § 59:9–1 *et seq.* (Supp. 1976-77).

85 *See* note 7 *supra* and accompanying text. *See also* IAVICOLI, NO FAULT AND COMPARATIVE NEGLIGENCE IN NEW JERSEY (1973).

86 N.J. STAT. ANN. § 59:9–2a (Supp. 1976-77).

87 N.J. STAT. ANN. § 59:9–2b (Supp. 1976-77).

88 N.J. STAT. ANN. § 59:9–2c (Supp. 1976-77).

89 N.J. STAT. ANN. § 59:9–2d (Supp. 1976-77).

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that his limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $1,000. For purposes of this section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease, including prosthetic devices and ambulance, hospital or professional nursing service.
>
> * * * * * * *
>
> The limitation on the recovery of damages . . . reflects the policy judgment that in view of the economic burdens presently facing public entities a claimant should not be reimbursed for non-objective types of damages, such as pain and suffering, except in aggravated circumstances—cases involving permanent loss of bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $1,000. The limitation that pain and suffering may only be awarded when medical expenses exceed $1,000 insures that such damages will not be awarded unless the loss is substantial.[90]

Plaintiffs seeking awards for pain and suffering must reach the threshold *and* have one of the permanent injuries set forth in the statute in order to be awarded pain and suffering damages. The key to understanding this section is reflected in the Attorney General's Report:

> A major premise underlining the proposals for recovery contained in this report is that while an individual should be reimbursed for his *full net economic loss,* he should not be permitted in a suit against a public entity to collect for damages above and beyond those which are necessary to effectively restore him to the economic position he occupied prior to his injury or claim.[91]

---

90 N.J. STAT. ANN. § 59:9-2d and Comment (Supp. 1976-77).

91 ATTORNEY GENERAL'S REPORT, *supra* note 4, at 16.

This differs from the "private" standard, as reflected in *Theobold v. Angelos,*[92] which seeks to "give to the plaintiff the total sum which represents reasonable compensation for his injuries or losses."[93] The whole tenor of N.J. Stat. Ann. § 59:9–2 reflects this intention to hold public entities to a different standard.

A *non-objective* type of damage is one which is not an element of economic loss to the plaintiff. Pain and suffering most clearly exhibit this quality.

English v. Newark Housing Authority[94] affirmed the trial court's dismissal of an action "on the ground that the Tort Claims Act barred suits against the Authority for claims entailing a non-permanent injury and medical expenses of less than $1,000."[95] Other decisions have struggled desperately with damage awards.

Peterson v. Edison Township Board of Education[96] reversed a dismissal of an action where the medical expenses failed to exceed the threshold. While holding that under such conditions awards for pain and suffering were barred, the court held that this does not eliminate the potential award in a case where a permanent deformity is alleged. Citing *Reale v. Township of Wayne,*[97] the court held that N.J. Stat. Ann. § 59:9–2(d) was clear on its face. Accordingly, reference to outside materials in order to determine the legislative intent, such as the comment thereto which appears to reflect a policy of eliminating all recovery in such a situation, is unnecessary. It might be useful to note that a pretrial motion for limitations on damage recoveries might be premature (especially for infants) where the potential for additional medical expenses is shown to the court.

Labarrie v. Housing Authority of the City of Jersey City[98] re-examines both N.J. Stat. Ann. § 59:9–2(d) and the *Peterson* decision. In *Labarrie,* plaintiff fell on defendant's sidewalk and sustained a bruise on her right shoulder. At the time of the adjourned trial date her medical bills totalled less than $500. Discovery "disclosed that there (would) be no evidence of objective findings of injury to plaintiff related to the falldown accident." So too, plaintiff's doctor "found no objective abnormalities in the

92 40 N.J. 295, 191 A.2d 465 (1963).

93 *Id.* at 304, 191 A.2d at 469.

94 138 N.J. Super. 425, 351 A.2d 368 (App. Div. 1976).

95 *Id.* at 427, 351 A.2d at 369.

96 137 N.J. Super. 566, 350 A.2d 82 (App. Div. 1975).

97 132 N.J. Super. 100, 332 A.2d 236 (Law Div. 1975).

98 No. 83438 (Law Div., Hudson County, June 28, 1976).

X-rays or his physical examination." Relying on *Peterson,* plaintiff sought damages for her permanent injuries, i.e. the impairment of her faculties, health and ability to participate in activities as distinguished from physical discomfort and distress, although she failed to reach the threshold needed to recover for pain and suffering. The alleged permanency in *Labarrie* was purely *subjective,* consisting entirely of plaintiff's complaint of physical discomfort and distress.

While not criticizing *Peterson, Labarrie* does affirmatively cite the comment to N.J. Stat. Ann. § 59:9–2(d) in noting that allowing recovery for *non-objective* complaints would contravene the legislative mandate, which the court said deserves recognition and implementation.

Accordingly, only objective losses, indicative of plaintiff's economic losses, either in terms of medical expenses, lost income or other quantitative factors, are recoverable under the Act.

Contribution and Third-Party Practice

On March 1, 1975 Smith is driving on State Highway No. 1 when he suddenly drives through an enormous pothole. His car careens into another car, injuring Jones, the driver. Jones starts a lawsuit against Smith on April 1, 1976. On April 10 Smith seeks to file a third party complaint against the State on the basis of its negligent maintenance of the roadway. Smith alleges that had it not been for such negligence, the accident would not have occurred. Smith also wants to avoid shouldering the entire bill if a judgment is entered in favor of Jones.

In view of the fact that Jones never gave the State notice of a claim against it,[99] can Smith now bring the State into the action on a claim for contribution?

New Jersey Superior Court has produced split opinions on this question.[100] The Act, itself, is silent on the subject.

The Act recognizes expressly, and makes provision for, cases where public entities or employees are required to contribute to

[99] *See* N.J. STAT. ANN. § 59:8–1 *et seq.* (Supp. 1976-77).

[100] Kingan v. Hurston, 139 N.J. Super. 383, 354 A.2d 109 (Law Div. 1976) (claim not allowed); Cancel v. Watson, 131 N.J. Super. 320, 329 A.2d 596 (Law Div. 1974) (claim not allowed); Markey v. Skog, 129 N.J. Super. 192, 322 A.2d 513 (Law Div. 1974) (claim allowed).

a joint tortfeasor.[101] Beyond the simple recognition in the Act of the potentiality of a public entity's status as a joint tortfeasor, there is little that is not the subject of dispute on this issue.

The division of opinion can be seen in the differing interpretations of the Act's own express statement of purpose:

> The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand, the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. *Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein.* All of the provisions of this act should be construed with a view to carrying out the above legislative declaration. (emphasis added.)[102]

The State is thus immune from tort actions unless a set of facts falls under the limited instances of liability found within the Act. This may appear to be fairly straightforward. However, what is a "limitation" of the Act? In *Cancel v. Watson*[103] this word was held to include the requirement that a notice of claim be sent to a public entity before a plaintiff may proceed with a lawsuit.[104] Thus, if a plaintiff has not sent such notice within the specified 90-day period, the public entity is not liable for its negligence, whether the claim thereafter comes from the plaintiff or any other aggrieved party.

---

101 N.J. STAT. ANN. § 59:9-3 (Supp. 1976-77) reads as follows:
Notwithstanding any other law, in any case where a public entity or public employee acting within the scope of his employment is determined to be a joint tortfeasor:
a. The public entity or public employee shall be required to contribute to a joint tortfeasor only to the extent of the recovery provided for under this act;
b. Any payment received by the injured party on account of a settlement or a judgment paid by an alleged tortfeasor shall be reduced pro tanto from the injured party's judgment against any other tortfeasor.

102 N.J. STAT. ANN. § 59:1-2 (Supp. 1976-77).

103 131 N.J. Super. 320, 329 A.2d 596 (Law Div. 1974).

104 *See* N.J. STAT. ANN. § 59:8-1 *et seq.* (Supp. 1976-77).

Markey v. Skog[105] held otherwise. It was stated in that case that the declaration of purpose deals with substantive limitations on the State's immunity and not with procedural bars:

> (The above emphasized sentence) is obviously not intended to qualify the entire scope of the State's tort liability, but rather constitutes a qualification of the preceding sentence of the section, the clear intention of which is to continue the State's immunity only with respect to those areas of governmental activity recognized by (*Willis v. Dept. of Cons. & Ec. Dev.*)[106] as properly excluded from tort claim susceptibility, such as legislative and judicial action or inaction, and decisions calling for the exercise of official judgment or discretion.[107]

Under the *Markey* view, then, procedural requirements, such as the notice of claim provisions, are not the subject of the declaration of purpose. If a public entity is negligent, and that negligence is listed as an exception to the public entity's general grant of immunity, liability arises, regardless of any failure to comply with the notice of claim provisions.

Markey v. Skog

Markey held that a claim for contribution would not be barred when the plaintiff had failed to comply with the notice provisions. The court held that this conclusion was evident from a reading of the Joint Tortfeasors Contribution Act,[108] as well as the Tort Claims Act. The Contribution Act gives a defendant the right to contribution from a joint tortfeasor and allows a tortfeasor who satisfies a judgment "to be put on the same footing with those who are equally liable for the wrong remedied by the judgment."[109]

Markey pointed out that the right to contribution is inchoate and does not ripen into a cause of action until a joint tortfeasor pays more than his pro rata portion of a judgment.[110] The right to implead a joint tortfeasor by a third party complaint before a plaintiff's cause of action is reduced to judgment is merely a procedural device of convenience. The substantive basis of the right of contribution remains the common liability of the joint tortfeasors.[111]

---

105 129 N.J. Super. 192, 322 A.2d 513 (Law Div. 1974).
106 55 N.J. 534, 264 A.2d 34 (1970).
107 129 N.J. Super. at 204, 322 A.2d at 519.
108 N.J. STAT. ANN. § 2A:53A-1 *et seq.*
109 Kennedy v. Camp, 14 N.J. 390, 398, 102 A.2d 595, 600 (1954).
110 129 N.J. Super. at 200, 322 A.2d at 517.
111 *Id.*

And it is this common liability, the *Markey* court noted, and not the procedural right of the plaintiff to proceed, that governs the contribution rights among joint tortfeasors:

> If there is common liability to plaintiff (at the time of accrual of plaintiff's cause of action)—that is, common liability as a matter of fact even although, necessarily, then unadjudicated—defendant cannot be deprived of his inchoate right by reason of plaintiff's loss thereafter of his own right of direct action against the joint tortfeasor.[112]

The court analogized the notice of claim provisions to a statute of limitations. If common liability among joint tortfeasors exists at the accrual of plaintiff's cause of action, and thereafter the plaintiff brings an action against only one tortfeasor, that tortfeasor has a right of contribution when he pays more than his pro rata share of the judgment *even if* the plaintiff's further action against the remaining tortfeasors is barred by the statute of limitations.[113]

The *Markey* opinion found further support for its position in the language of the Tort Claims Act, itself. As noted, the court said that the declaration of purpose set substantive limitations on the State's immunity, rather than procedural bars. The State had also argued that it had no independent liability to plaintiff's under N.J. Stat. Ann. § 59:8–8 because of their failure to have filed a notice within 90 days. If so, there could not exist any liability for contribution to a defendant. However, the court held that, as noted, common liability for contribution purposes is determinable as of the date of the accrual of the plaintiff's claim:

> That is to say, the 90-day notice is not a condition precedent to the existence of liability on the part of the State. It is a condition only upon a plaintiff's right thereafter to pursue his remedy against the State.[114]

Finally, it was noted by the State that the section of the statute recognizing a public entity's status as a potential joint tortfeasor, by its own words, authorized a public entity to contribute to a joint tortfeasor "only to the extent of the recovery provided for under this act."[115] The State argued that this limitation included

---

[112] *Id.* at 200-201, 322 A.2d at 518.

[113] *Id.* at 201, 322 A.2d at 518.

[114] *Id.* at 204, 332 A.2d at 520.

[115] N.J. STAT. ANN. § 59:9–3a (Supp. 1976-77).

cases where notice had not been given by the plaintiff. The court, however, held that this did not limit the substantive right to seek contribution, "but rather is a monetary limitation on the remedy of contribution after the right is established."[116]

Cancel v. Watson

The court in *Cancel v. Watson*[117] had its own views of how to interpret the apparent silence in the Act on the question of third party practice:

> (N)owhere in the act is the commencement of third-party proceedings against a public entity exempted from the general procedures set forth therein. It therefore appears that a party defendant may not join a public entity as a third-party defendant unless the party plaintiff has acted affirmatively against the public entity under 59:8–8.[118]

In addition to this negative inference, the court held, the Act clearly was intended to discourage the joinder of public entities as third-party defendants. A number of special limitations on actions against public entities would cause problems where a public entity and a private entity found themselves as co-defendants in a proceeding. *Cancel* viewed the inclusion of these complicating factors as a sign from the legislature that it held a dim view of third-party practice under the Act.

First, the Act initially required that all tort claims against a public entity be heard by a judge sitting without a jury.[119] A plaintiff in other tort actions has the right to demand a jury trial.[120] Thus, where a public entity and a private entity were joined as defendants in a proceeding, a jury might be required to determine facts in some aspects of the case while the judge would be the factfinder in other aspects of the case.

A second complicating factor the court pointed to was the use of differing standards of comparative negligence for public and private defendants. Actions against private entities are governed by the so-called "Wisconsin" rule of comparative negligence,[121]

---

116 129 N.J. Super. at 205, 322 A.2d at 520.

117 131 N.J. Super. 320, 329 A.2d 596 (Law Div. 1974).

118 *Id.* at 323-24, 329 A.2d at 597.

119 *See* note 6 *supra* and accompanying text.

120 N.J. CONST. (1947), ART. I, PAR. 9.

121 N.J. STAT. ANN. § 2A:15–5.1 (Supp. 1976-77).

while the Act originally applied the "Mississippi" rule to public entities.[122]

Joinder of public and non-public parties is further complicated by prohibitions against recovery from public entities for claims based on strict liability, implied warranty or products liability, and certain categories of damages.[123]

The *Cancel* decision was also grounded on what the court viewed as a public policy against joinder of public entities as an "afterthought" to a tort action in order to spread out the costs of liability.[124] Even where there is no real wrongdoing on the part of a public entity, if a legal theory can be devised to bring the public entity into a tort action, it certainly rarely harms either plaintiff or the original defendant to have the government treasury backing up any judgments entered against the co-defendants.

Of the two schools of thought, *Markey* appears to have more support from courts in other jurisdictions.[125] In California, the question is not at issue, due to the particular nature of that state's contribution laws.[126] Curiously, in New Jersey, *Markey* has found its strongest support in the cases in which substantial compliance with the notice provisions has been the main issue.[127]

This support may be the result of judicial distaste for the results which would develop in the absence of third-party practice. If the argument is accepted that failure by plaintiff to send notice to a public entity prevents liability from arising, the public entity could not then be liable for contribution to a co-defendant. Thus, even if a defendant were sued within 90 days after a cause of action accrued and was able to notify the public entity of his intent to

---

122 *See* notes 7 and 85 and accompanying texts.

123 N.J. STAT. ANN. § 59:9-2 (Supp. 1976-77).

124 131 N.J. Super. at 325-26, 329 A.2d at 598-99.

125 Cases supporting *Markey* include: Minneapolis, St. P. & S.S.M.R. Co. v. City of Fond du Lac, 297 F.2d 583 (7th Cir. 1961); Howey v. Yellow Cab Co. 181 F.2d 967 (3rd Cir. 1950), *aff'd* 340 U.S. 543 (in a case arising under the Federal Tort Claims Act); Olsen v. Jones, 209 N.W.2d 64 (Iowa Sup. Ct. 1973); Geiger v. Calumet Cty., 18 Wis.2d 151, 118 N.W.2d 197 (Sup. Ct. 1962); Zillman v. Meadowbrook Hosp. Co., Inc., 73 Misc.2d 726, 342 N.Y.S.2d 302 (Sup. Ct. 1973); Roehrig v. Louisville, 454 S.W.2d 703 (Ky. Ct. App. 1970); Cotham v. Bd. of Cty. Comm'rs., 260 Md. 556, 273 A.2d 115 (Ct. App. 1971); Royal Car Wash Co. v. Mayor, etc. of Wilmington, 240 A.2d 144 (Del. Super. Ct. 1968).

Cases contra include: Jensen v. Downtown Auto Park, Inc., 289 Minn. 436, 184 N.W.2d 777 (Sup. Ct. 1971); Powell v. Brady, 30 Colo. App. 406, 496 P.2d 328 (Ct. App. 1972).

126 *See* Markey v. Skog, 129 N.J. Super. 192, 205-6, 322 A.2d 513, 520 (Law Div. 1974).

127 Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 348, 354 A.2d 87, 90 (App. Div. 1976); Lameiro v. West New York Board of Education, 136 N.J. Super. 585, 590, 347 A.2d 377, 380 (Law Div. 1975); Dambro v. Union County Park Commission, 130 N.J. Super. 451, 458, 327 A.2d 466, 471 (Law Div. 1974).

file a third-party claim within that 90-day period, the failure of the plaintiff to file notice against the public entity would bar such a suit. This would certainly not be putting joint tortfeasors "on the same footing as those who are equally liable."[128]

The *Markey* position was also made relatively stronger than the *Cancel* decision, when the State Legislature, by amending the Act, pulled the rug out from underneath much of the *Cancel* argument. *Cancel,* as noted, stated that by establishing differing standards for tort actions against public entities and private entities, the Legislature intended to discourage joinder of public and private defendants. Since that case was decided, the Legislature has enacted two amendments with retroactive application.[129] One amendment provided for jury trials where demanded, rather than requiring actions to be heard by a judge sitting without a jury. Another amendment changed the Act to apply the same standard of comparative negligence as is found in the general law to apply to tort claims cases against private entities. While there are still differing standards, a proceeding in which public and non-public defendants are joined is certainly no longer the complicated affair that *Cancel* envisioned and based its reasoning upon.

Cancel, however, is not without support of its own. While *Cancel* represents a minority view in other jurisdictions, it by no means stands alone.[130] In addition, *Cancel* has been directly followed in a New Jersey case arising after enactment of the amendments noted above.[131]

Cancel appears also to be more in keeping with the basic objectives of the notice requirements themselves, i.e. (1) allowing time for review of a case in order to promote settlement of meritorious claims, and (2) providing a public entity with sufficient notice to adequately investigate the facts and prepare a defense.[132]

Where suit has already been instituted, and a public entity is brought in as a third-party defendant, the first purpose is certainly not served. The second purpose is also defeated since the public entity may be notified of the claim months and even years after the incident upon which the plaintiff's claim is based.

---

128 Case cited note 109 *supra.*

129 *See* notes 6-7 *supra* and accompanying text.

130 *See* cases cited note 125 *supra.*

131 Kingan v. Hurston, 139 N.J. Super. 383, 354 A.2d 109 (Law Div. 1976). Note, however, that both *Cancel* and *Kingan* were decided by the same judge.

132 N.J. STAT. ANN. § 59:8-3, Comment (Supp. 1976-77).

Although *Cancel* never addressed itself to the analogy between the statute of limitations and the notice provisions, such an analogy may not be as strong as *Markey* made it appear. A valid argument can be made that a statute of limitations and a notice of claim requirement are quite distinguishable. The Oregon Court of Appeals, for instance, has held:

> A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits.[133]

Third-Party Evaluation

The Legislature's failure to specifically provide for third party actions, regarding notice to the public entity has created the difficulty as described above. The harshness of the *Cancel* position, which would deny *all* third party actions wherein the plaintiff has not sought relief against the entity, could lead courts to the other extreme, as set forth in *Markey,* i.e., allowing the action, *even* absent notice to the entity.

As discussed above, there are various reasons why the Legislature provided the 90-day notice requirement. Ignoring this provision would contravene the very purpose of the Act. Alternatively, denying third party actions would also run contra to the spirit of *Willis* and of the Act. While *Cancel/Kingan* notes that many of these third party actions should be denied as being overly speculative, the substantive portions of the Act provide for various governmental immunities and a higher burden of proof on plaintiffs ("palpably unreasonable") thereby achieving that end.

According, the Act should be amended to indicate that those defendants who wish to bring public entities into a suit by way of a third party action (where the plaintiff has not acted affirmatively against the entity) must do so within 90 days of the time they are made a party to the suit, subject to savings provision similar to N.J. STAT. ANN. § 59:8–9. This would further the legislative intent shown in creating the Act, and would place an outside limit on the

---

133 Fry v. Williamalane Park and Recreation District, 4 Or. App. 575, 481 P.2d 648, 651-52 (Ct. App. 1971).

time in which the entity can be made party to an action, as well as placing the entity in a superior position to private tortfeasors, in that this period is potentially shorter than that of private parties.

While this, on its face, seems to contravene N.J. Stat. Ann. § 59:8–8, 9, the two-year limit, it must be emphasized that this time period involved is *not* from the date of the accident or incident which gives rise to the original suit, but from the time in which a series of facts exist which allow the *claimant* to sue the public entity.

For a non-public tortfeasor the claim under such circumstances would accrue at the time of payment of a judgment as a greater than pro rata proportion. However, in respect to the notice provision and the reasons for their establishment, the claimant, once aware of the suit against public entities should be held to the 90-day standard, thus balancing the equities of *Cancel* and *Markey*. Here, as in the provisions of N.J. Stat. Ann. § 59:9–2, the entity is placed in a different light than private tortfeasors; but this is useful to fulfill the purposes of the Tort Claims Act.

It must be remembered, that the third party plaintiff seeking to file late notice will be subject to a very strong prejudice argument by the entity, except in extraordinary situations, further limiting the time within which claims can be made.

David J. Klinger
Gene Truncellito