MUNICIPAL LIABILITY

PRECEDENTS & STATUTES 2010

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Covering cases from August 15 2009 through August 15 2010

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I ALL COURT OF APPEALS CASES THIS YEAR (Also displayed in the relevant areas of this outline)

Dinardo v. City of New York, 13 N.Y.3d 872, 921 N.E.2d 585, 893 N.Y.S.2d 818 (2009). Special education teacher at a city public school brought action against the city and city board of education for negligence for injuries allegedly sustained when she tried to restrain one student from attacking another student. The student had been verbally and physically aggressive for several months, and plaintiff had repeatedly expressed concerns to her supervisors about her safety in the classroom. The school's supervisor of special education and the principal had both told her that "things were being worked on, things were happening" and urged her to "hang in there because something was being done" to have the student removed. Plaintiff alleged that, with these statements, defendants undertook an affirmative duty to take action with respect to the removal of the student, and that she justifiably relied upon those assurances (i.e., that plaintiff had a "special relationship" with defendants so that defendants were not shielded by governmental immunity). Following a jury verdict in plaintiff's favor, the Board of Education moved to set aside the verdict, Supreme Court denied the motion, and the Appellate Division affirmed the trial court's judgment, but over the dissent of two Justices. The Board of Education argued to the Court of Appeals that the conduct alleged to have constituted a promise to act was a discretionary government action, which cannot be a basis for liability, even if plaintiff establishes a "special relationship, under the recent Court of Appeals *McLean* case. Court of Appeals refused to reach that issue, but rather assumed, *arguendo,* that the school officials' actions in this case were ministerial, and thus that plaintiff could prevail if she established a special relationship. The Court then held there was no rational process by which a jury could have found a "special relationship" between plaintiff and defendant. "The vaguely worded statements by plaintiff's supervisor and principal that 'something' was being done to have the student removed, without any indication of when, or if, such relief would come, do not, as a matter of law, constitute an action that would lull a plaintiff into a false sense of security or otherwise generate justifiable reliance". Judgment reversed. Judge Lippman, concurring, disagreed with the majority's conclusion that a rational jury could not have found that a special relationship existed between plaintiff and defendant Board, finding it was a jury question, and expressed his disagreement with the *McLean* rule. Whether the municipality's act is characterized as ministerial or discretionary should not be, and never has been, determinative in special duty cases. Unfortunately, Judge Lippman said, under the rule announced in *McLean,* a plaintiff will never be able to recover for the failure to provide adequate police protection, even when the police voluntarily and affirmatively promised to act on that specific plaintiff's behalf and he or she justifiably relied on that promise to his or her detriment, because such actions are always

discretionary. The rule in *McLean,* which clearly extends beyond police protection and applies to all discretionary governmental actions, allows public officials to unjustifiably hide behind the shield of discretionary immunity even when their actions have induced a plaintiff to change his or her behavior in the face of a known threat.

Brandy B. v. Eden Central School District, ___ N.Y.3d ___, 2010 WL 2301154 (2010). Five-year-old kindergartener's mother brought action against school district seeking to recover damages for injuries student sustained when she was sexually assaulted on school bus by an 11-year-old student. Court affirmed Appellate Division's granting of summary judgment to defendant on grounds that school district lacked specific knowledge or notice that 11-year-old student had previously engaged in sexually assaultive behavior. Court held that the alleged sexual assault against the kindergartener was an unforeseeable act that, without sufficiently specific knowledge or notice, that could not have been reasonably anticipated by the school district. Although the 11-year old had a troubled history, which included aggressive behavior and exposing himself and masturbating in public, his prior history did not include *any* sexually aggressive behavior. The dissent (Ciparick and Lippman) reasoned that the issue of whether the sexual assault was reasonably foreseeable should have gone to the jury. They found that the 11-year old's troubled history should be read in conjunction with the school's actual knowledge that he was frequently interacting closely with the plaintiff-kindergartner on the school bus and that the plaintiff-mother had written letters and made verbal requests to the bus driver that he separate the two because her kindergartener "seemed to be interacting [too much] with this [older] child". These communications between the mother and the driver, considered along with the 11-year old's troubled history, were enough, according to the dissent, to allow a reasonable jury to find that the school defendants had sufficient notice of a dangerous situation and could have anticipated the sexual assault.

Heslin v. County of Greene, 14 N.Y.3d 67, 923 N.E.2d 1111, 896 N.Y.S.2d 723. In this case, the Court of Appeals decided that the special infancy toll of CPLR 208, applicable in wrongful death actions involving sole infant distributees under *Hernandez v. New York City Health & Hosps. Corp.*, 78 N.Y.2d 687, 578 N.Y.S.2d 510, 585 N.E.2d 822 (1991), is not available for conscious pain and suffering claims. The notice of claim with regard to the conscious pain and suffering claim was here untimely because it was not filed within 90 days after the claim arose. Plaintiff tried to latch onto CPLR 208 due to the infancy of decedent's sole distributes - her sisters – but here the Court, on public policy grounds, limited the *Hernandez* rule to wrongful death claims. Court explained that, in wrongful death cases, where no personal representative was otherwise

available, it was reasonable to look to the distributee's infancy status because the wrongful death claim belonged to the distributee alone, and would compensate him for damages that he directly sustained as a result of family member's death. In effect, the *Hernandez* rule treats the distributee as the plaintiff under the tolling statute because, for all intents and purposes, the claim was his own. Not so in conscious pain and suffering claims. A conscious pain and suffering claim is designed to compensate the decedent for injuries suffered and is personal to the deceased.

Wadler v. City of New York, 14 N.Y.3d 192, 925 N.E.2d 875, 899 N.Y.S.2d 73. Court held that the "firefighter rule" (*see,* GOL 11-106) which bars common-law negligence recovery by firefighters and police officers for injuries that result from risks associated with their employment, required dismissal of this case, in which a police officer was injured by the negligent operation of an anti-terrorist security device. More specifically, the parking lot of the New York City Police Headquarters in Manhattan was protected by an unusual kind of gate, designed to thwart car bombs and similar forms of terrorism. The gate was a concrete barrier that could be retracted into the ground to allow entry to the lot. If it was necessary to stop an entering vehicle (i.e., terrorists) the gate could be raised, automatically and quickly, with enough force to lift a car off the ground. In this case, the gate apparently worked as it was designed to do, but was accidentally engaged. The driver of the car in question was not a terrorist, but plaintiff, the commanding officer of the Police Commissioner's liaison unit, who was arriving at his place of work. Plaintiff sued the City and the Police Department for negligence. Court held that the cause of the injury to plaintiff was a risk "associated with the particular dangers inherent" in police work, and therefore barred by the firefighter's rule. An act taken in furtherance of a specific police function-entry into a protected parking lot, which only plaintiff's police credentials allowed him to enter, exposed plaintiff to the risk of this injury. Although plaintiff emphasized that at the time of his injury he was not "on duty", whether he was on duty or not was not dispositive; police officers often, by the nature of their jobs, face significant risks even when they are not technically at work.

Ayers v. O'Brien, 13 N.Y.3d 456, 923 N.E.2d 578, 896 N.Y.S.2d 295. Police officer brought personal injury action against motorist, alleging motorist's negligence caused her to collide with officer's vehicle as he was making a U-turn with emergency lights activated to pursue a speeding vehicle. Following discovery, plaintiff moved to dismiss defendants' comparative fault defense, arguing that the liability standard for drivers of authorized emergency vehicles under Vehicle and Traffic Law § 1104(e) is "reckless disregard," and that he had not acted recklessly. The Appellate Division held the defense was valid, and the Court of Appeals now affirms, holding that the reckless disregard standard of liability does not apply in determining the culpable conduct of the plaintiff-officer.

Trupia v. Lake George Central School Dist., 14 N.Y.3d 392, 927 N.E.2d 547, 901 N.Y.S.2d 127 (N.Y. 2010). While attending a summer program administered by defendants on their premises, the infant plaintiff rode and ultimately fell from a banister, seriously injuring himself. Plaintiff alleged that the infant plaintiff had been left wholly unsupervised even though he was not yet 12 years old. Defendant moved to amend the Answer to allege assumption of the risk but the lower Court and the Third Department had denied said motion because, under First and Third Department case law, the assumption of risk doctrine is not applicable in general negligence actions, but rather only against liability arising from risks inhering in athletic and recreational activities. (Under second and Fourth Department case law, a broader use of the doctrine had been allowed). The Court of Appeals here traces the history of the primary assumption of the risk doctrine, and found that it is somewhat troublesome that this doctrine has survived the comparative negligence doctrine adopted in New York in 1975. "The doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation." The Court reasoned that, "in the end, its retention is most persuasively justified . . . simply for its utility in "facilitat[ing] free and vigorous participation in athletic activities" because "athletic and recreative activities possess enormous social value". The Court noted that the Court of Appeals had never "applied the doctrine outside of this limited context and it is clear that its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative" negligence. Here, Court held that defendant did not advance a "suitably compelling policy justification" to permit an assertion of assumption of risk in a non-sports or recreational activity activity. The injury-producing activity here at issue was mere "horseplay," not a sport or recreational activity whose social value merits protection. The Court also implied that the doctrine should not generally be applied in school settings. "Allowing the defense here would have particularly unfortunate consequences [because] little would remain of an educational institution's obligation adequately to supervise the children in its charge if school children could generally be deemed to have consented in advance to risks of their misconduct".

II NOTICE OF CLAIM

A. WHO NEEDS TO BE NAMED IN THE NOTICE OF CLAIM?

Rew v. County of Niagara, 73 A.D.3d 1463, 901 N.Y.S.2d 442 (4th Dep't 2010). Shooting victim brought personal injury action against county, county sheriff's department, and unnamed deputy

sheriff who shot him. Deputy Sheriff's motion to dismiss the complaint against him based on plaintiff's failure to name him in the notice of claim was denied. The naming of a county employee in the notice of claim, and thus the service of the notice of claim upon the employee, "is not a condition precedent to the commencement of an action against such person unless the county is required to indemnify such person". A county's duty to indemnify an employee "turns on whether [the employee was] acting within the scope of [his or her] employment" (*see* Public Officers Law § 18[1][a], [b]; [4][a])and whether the obligation to indemnify the employee was formally adopted by a local governing body. Here, even assuming, arguendo, that defendant County was required to indemnify defendant deputy, plaintiff alleged that defendant deputy "did willfully, maliciously, and intentionally discharge his weapon and shoot without provocation." Thus, the conduct of the defendant deputy amounted to an intentional tort that fell outside the scope of his employment and thus is not encompassed within the duty to indemnify.

Zhumi v. County of Suffolk, 68 A.D.3d 775, 889 N.Y.S.2d 670 (2nd Dep't 2009). Father brought action against county and doctors employed at county-owned health care center, for medical malpractice committed against his daughter by doctors during mother's labor and during delivery, which took place at hospital at which doctors also were employed. In their answer, those doctors essentially alleged as an affirmative defense that the plaintiff failed to comply with the notice of claim requirement set forth in GML 50-d(2), entitled "municipal liability for malpractice of certain physicians ... in public institutions". Where GML 50-d(1) is applicable, GML 50-d(2) requires the patient to serve a notice of claim as a condition precedent to suing the physician to recover damages for medical malpractice. The notice of claim would have to be served upon the municipality, which, although not necessarily a defendant in the medical malpractice action, still has an interest in that action, in that the municipality has a "statutory obligation" to indemnify the physician, who is deemed to be the municipality's "employee" (GML 50-d) in that action. Here, however, plaintiff represented that he was not alleging that medical malpractice was committed in connection with the prenatal and postnatal care given at the County-owned health center, but only in connection with the labor and delivery at the non-county owned hospital. Because the alleged medical malpractice did not occur while defendant doctors were "rendering ... medical services ... in a public institution maintained in whole or in part by" the County, the County clearly would not have a statutory obligation under GML 50-d(1) to indemnify them in that action. Hence, plaintiff clearly did not have an obligation under GML 50-d(2) to serve the County with a notice of claim as a condition precedent to commencing that action. Court noted that, even if GML 50-d(2) applied, there would be no requirement of service of a notice of claim upon the doctors themselves.

B. SUFFICIENCY OF NOTICE OF CLAIM

Baker v. Town of Niskayuna, 69 A.D.3d 1016, 891 N.Y.S.2d 749 (3rd Dep't 2010). Plaintiff's notice of claim was sufficient in that it sufficiently advised the Town of the ensuing causes of action premised upon Labor Law violations. "The test of the sufficiency of a notice of claim is merely whether it includes information sufficient to enable the municipality to investigate". Plaintiff's notice of claim set forth, among other things, the date, time and location of the accident, and the way the accident occurred was described. Although it did not reference specific Labor Law sections, it asserted culpable conduct by the Town as a cause of the accident. It is clear from the notice of claim that an accident at a construction site is being alleged. The negligence and Labor Law causes of action asserted by plaintiff were the typical causes of action asserted in a multitude of lawsuits arising from analogous factual scenarios. The notice of claim contained sufficient information to alert the Town of the potential causes of action asserted and, thus, afforded it an ample opportunity for prompt investigation.

Phillipps v. New York City Transit Authority, 68 A.D.3d 461, 890 N.Y.S.2d 510 (1st Dep't 2009).

Plaintiff stated in the notice of claim that "on or about the 17th day of January 2007" while a passenger on a bus owned and operated by defendants, which "was being operated on Fifth Avenue at or near the bus stop at the Southwest corner of 33rd Street in Manhattan, said bus stopped and then went forward and then abruptly came to a final stop, causing plaintiff to be propelled in said bus and to violently hit the floor thereby sustaining severe permanent personal injuries." In contending that the notice of claim was insufficient, defendants argued that it would be overly burdensome for them to "search for bus operators for a 30 minute span on all four bus routes alleged in plaintiff's bill of particulars." But Court held that the notice of claim was not insufficient due to plaintiff's inability to state whether the bus was an M1, M2, M3 or M4 or to recall any identifying information regarding the bus driver. Notably, however, this claim of prejudice was not supported by any factual information bearing on either the number of buses that would have stopped at 33rd Street and Fifth Avenue during this time period or the number of those buses that were of the type identified by plaintiff. "Prejudice will not be presumed", and, given the conclusory character of this claim of prejudice, and defendants failure to make the necessary showing of an attempt to investigate the accident, defendants failed to meet their burden of demonstrating prejudice. Motion to dismiss claim for failure of the notice of claim to provide sufficient information was thus denied.

Wilson v. New York City Transit Authority, 66 A.D.3d 602, 888 N.Y.S.2d 476 (1st Dep't 2009). In opposition to defendant's prima facie showing of entitlement to SJ, plaintiff offered nothing more than belated speculation that her trip and fall was caused by overcrowded conditions on the stairway to the subway. Plaintiff, who repeatedly denied knowing the reason for her fall, failed to

present any evidence that defendant's negligence had caused her injuries. The assertion that overcrowded conditions formed the basis of liability was not articulated in her notice of claim, thereby precluding her from raising this new theory in opposition to the motion for summary judgment.

C. AMENDING OR CORRECTING NOTICE OF CLAIM

GENERAL RULE: GML 50-e (6) provides that any "mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section ... may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby."

Shufeldt v. City of New York, 67 A.D.3d 429, 889 N.Y.S.2d 546 (1st Dep't 2009). Plaintiff served a notice of claim alleging that he was injured when he drove his vehicle "over severely broken pavement ... into a hole," causing his car to go out of control. Plaintiff testified at his 50-h hearing that there had been construction in the vicinity of his accident, and that he had seen "repaired holes" "right at" the site of his accident. Many years later, plaintiff served an amended bill of particulars, asserting for the first time that defendant had itself created the hole he drove into, and that defendant had been negligent in failing to take adequate steps to cover or otherwise warn drivers about the hole. Court says Supreme Court properly granted defendant's motion in limine and dismissed the complaint. The notice of claim gave no indication that the defect in question was affirmatively created by defendant, rather than being a pothole resulting from neglect. Under the circumstances of this case, where 25 years had passed since commencement of the action, and plaintiff waited more than two decades before seeking construction-related records, it cannot be said that the court abused its discretion in declining to permit plaintiff to supplement the facially deficient notice of claim by reference to testimony elicited at the section 50-h hearing.

Martin v. Village of Freeport, 71 A.D.3d 745, 896 N.Y.S.2d 175 (2nd Dep't 2010). Although the plaintiff was granted leave to serve a late notice of claim upon the defendant, the notice of claim she served upon the defendant did not include a derivative claim. Plaintiff never sought leave to amend that notice of claim to include a derivative claim. Under these circumstances, the plaintiff was foreclosed from asserting a derivative claim. Thus, leave to amend the complaint to include a derivative claim was denied.

DeVerna v. Inc. Village of Lynbrook, 67 A.D.3d 1009, 888 N.Y.S.2d 770 (2nd Dep't 2009). A court, in its discretion, may correct, supply, or disregard a "mistake, omission, irregularity or defect made in good faith in the notice of claim provided the public corporation was not prejudiced thereby", and here the omission and lack of specificity in the original notice of claim appear to have been in good faith and defendants were not prejudiced by the omission or lack of specificity. The defendants were supplied with the accident location and photographs of the location and the defect as it existed at the time of the accident at a 50-h hearing which was held less than two months after service of the notice of claim and approximately four months after the accident Moreover, even if the original notice of claim had more accurately described the location of the defect, the respondents would not have been able to conduct a more meaningful investigation since the sidewalk was repaved by the School District.

D. APPLICATION TO LATE-SERVE NOTICE OF CLAIM

GENERAL RULES: Pursuant to GML § 50-e(5), a court has the discretion to extend a plaintiff's time to serve a notice of claim as long as the extension does not exceed the time limit for commencement of an action against the public corporation (see Lucero v. New York City Health & Hosps. Corp. [Elmhurst Hosp. Ctr.], 33 AD3d 977, 978). "The statute [GML § 50-e(5)] now contains a non-exhaustive list of factors that the court should weigh, and compels consideration of all relevant facts and circumstances. This approach provides flexibility for the courts and requires them to exercise discretion" (*id.* at 539, 814 N.Y.S.2d 580). Since the statute is remedial in nature, it should be liberally construed (*Dubowy,* 305 A.D.2d at 321, 759 N.Y.S.2d 325). Whether to permit a plaintiff to file a late notice of claim under GML §§ 50-e (5) is a discretionary determination (*see Pryor v. Serrano,* 305 A.D.2d 717, 719-720 [2003]). In exercising its discretion, however, the trial court must consider certain statutory factors, including "whether the [defendant] acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter, whether the [plaintiff] offers a reasonable excuse for the delay in filing the application and whether granting the application would substantially prejudice the [defendant]" (*Lemma v. Off Track Betting Corp.,* 272 A.D.2d 669 [2002]; *see* General Municipal Law §§ 50-e [5). In addition, where a plaintiff fails to show that the defendant acquired knowledge of the claim within a reasonable time, it is an improvident exercise of discretion to grant the application (*see e.g. Matter of Cook v. Schuylerville Cent. School Dist.,* 28 AD3d 921, 922-923 [2006]), and this is so even in the absence of substantial prejudice (*see Matter of Carpenter v. City of New York,* 30 AD3d 594, 595-596 [2006]; *Matter of Roberts v. County of Rensselaer,* 16 AD3d 829, 830 [2005]; *Matter of Cuda v Rotterdam-Mohonasen Cent. School Dist .,* 285 A.D.2d 806, 807 [2001]; *compare Matter of Isereau v. Brushton-Moira School Dist.,* 6 AD3d 1004, 1006-1007 [2004] [where there was both actual notice and no substantial prejudice]).

1. Service Of Late Notice Of Claim Without Leave Of Court Is Nullity

Croce v. City of New York, 69 A.D.3d 488, 893 N.Y.S.2d 48 (1st Dep't 2010). Plaintiff's service of an admittedly late notice of claim was a nullity and his failure to seek a court order excusing such lateness within the time limited for commencement of the action i.e., within one year and 90 days after the happening of the accident, required dismissal of the action.

2. Excuse For Delay (One Of The Factors Considered, But Usually Not Very Weighty)

a. Didn't Think I Was Badly Hurt -- Need Medical Evidence

Godfrey v. City of New Rochelle, 74 A.D.3d 1018, 903 N.Y.S.2d 497 (2nd Dep't 2010). Plaintiff's motion to deem her notice of claim timely served, nunc pro tunc, denied. The plaintiff's excuse for failing to timely serve a notice of claim, that she expected her injury to heal quickly, was unacceptable without supporting medical evidence explaining why the seriousness of the injury took so long to become apparent. Further, defendant did not acquire actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter. The plaintiff alleged that she "called the defendant shortly after her accident to tell them about her injury." Even if true, mere general knowledge that an injury has occurred is insufficient to provide the requisite notice. Finally, the plaintiff offered no evidence to rebut the defendant's contention that the two-month delay after the expiration of the 90-day period in serving the notice of claim and the further seven-month delay in moving to deem the notice of claim timely served would substantially prejudice its ability to conduct an investigation of the claim.

Rodriguez v. Western Regional Off-Track Betting Corp., 902 N.Y.S.2d 477 (4th Dep't 2010). Motion to late-serve notice of claim granted where plaintiff established that she was unaware of the severe or permanent nature of her injuries until after the expiration of the statutory time period, and we thus she established a reasonable excuse for the delay. Further, defendant was immediately notified of the accident, prepared an accident report, and took photographs of the sidewalk where claimant fell and, finally, defendant failed to demonstrate any prejudice occasioned by claimant's 29-day delay in serving the notice of claim.

Laguna v. New York City Housing Authority, 902 N.Y.S.2d 88 (1st Dep't 2010). Parents were assaulted in hallway of defendant's apartment building while child looked on. Father timely served a notice of claim for his own injuries. Infant later moved to late serve. At first it did not appear the infant had any significant injuries, which did not manifest themselves until more than 90 days after the attack. Leave to late-serve notice of claim was granted, even though the post-90-day first manifestation of illness and subsequent diagnosis of PTSD did not excuse the subsequent 10- to 12-month delay in moving for leave. Court said it would have granted leave even if the infant's injuries had immediately manifested themselves because it would be "unfair and unjust to deprive the infant of a remedy based on his mother's ignorance of the law" where (and this is the important thing) the *father's timely notice of claim gave defendant actual knowledge of the essential facts* constituting the infant's and mother's claims of negligent maintenance of building security. Defendant had actual notice of the infant's and mother's claims of injuries and damages within a reasonable time after the 90-day period late notice of claim served without leave provided City with actual knowledge of essential facts; and defendant failed to explain why the delay caused it prejudice.

b. Physical Or Mental Disability As Excuse

Hubbard v. County of Madison, 71 A.D.3d 1313, 897 N.Y.S.2d 538 (3rd Dep't 2010). Motorist lost control of vehicle on County road, crossed over, and was struck by on-coming vehicle. Suffered TBI and quadriplegia. Plaintiffs filed an application for leave to file a late verified notice of claim and simultaneously filed a summons and complaint and a proposed notice of claim that alleged, in general terms, that respondent County, among other things, negligently maintained, designed and constructed and provided signage for the subject roadway. A revised verified notice of claim was later served that alleged, among other things, that the accident on the northern shoulder of the subject roadway was caused by the "negligent construction of the pavement and shoulder which left an extended lip/lack of taper on the edge of the pavement and a precipitous drop as the shoulder was being driven onto causing and creating a dangerous condition." Motion granted, as there was a reasonable excuse for the delay in that plaintiff was mentally and physically disabled. There was no prejudice by the delay because plaintiff's TBI made her unable to recollect the details of the accident, and thus an earlier notice of claim would not have improved defendant's ability to gain her first-hand account of the accident. Further, the transitory nature of an accident scene, standing alone, does not prevent physical inspection or demonstrate substantial prejudice". The Sheriff's Department had taken numerous photographs of the accident scene shortly after the collision occurred and defendant was still free to interview. Even though the County did not have actual notice of the facts constituting the claim until long after the 90-day time period, the Court bent over backwards to excuse the day, stating that "while there is no question that the issue of timely notice is an important factor, we cannot conclude that its absence, or the absence of any factor, standing alone, is dispositive herein. The Court of

Appeals has emphasized that, in reviewing the "nonexhaustive list" of factors, courts should consider "all relevant facts and circumstances". . . . Depending upon the particular facts of each case, the weight to be given to any one factor may be lesser or greater.

Valentine, etc. v. City of New York, 72 A.D.3d 981, 898 N.Y.S.2d 515 (2nd Dep't. 2010). The petitioner's excuse for his delay was unreasonable since he failed to demonstrate that his injury, a fractured wrist, incapacitated him to such an extent that neither he nor his mother could have complied with the statutory requirement to serve a timely notice of claim. Furthermore, there was no indication that the City of New York acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter. Also, plaintiff failed to demonstrate that the City would not be prejudiced by the nine-month delay, especially given the transitory nature of the defect in the sidewalk.

c. Long, Unexcused Delays Are Frowned Upon

Devivo v. Town of Carmel, 68 A.D.3d 991, 891 N.Y.S.2d 154 (2nd Dep't 2009). Plaintiff served a late notice of claim, without seeking leave, upon the City approximately 21 months after the infant was found to have an elevated lead level in her blood. Following service of the original and untimely notice of claim, another nine years passed before the application to late-serve the notice of claim. This delay, like the original delay of 21 months, was not the product of the child's infancy and plaintiff failed to offer a reasonable excuse for the delays. Ignorance of the law does not excuse the failure to file a timely notice of claim. Plaintiff also failed to show that the City had actual notice of her claim within the requisite 90-day period or within a reasonable time. In addition, plaintiff failed to establish that the lengthy delay at issue did not prejudice the City's ability to investigate her claim and to maintain a defense on the merits. Motion to for permission to late serve *nunc pro tunc* denied.\

Turner v. City of New York, 25 Misc.3d 1235, (Kings Co. Sup.Ct. 2009). Plaintiff, who was 17 when arrested, argued that he did not file a notice of claim within the requisite time period as to the civil charges arising out of the false arrest and assault claims because he was fearful that the criminal proceedings against him would be adversely affected. Court noted that, normally, this cannot be accepted as a "reasonable excuse" for not filing the notice of claim, because if it were, in all cases where there are criminal charges pending there would be a reasonable excuse for the delay. But here plaintiff was an infant of seventeen years of age at the time of his arrest. In determining whether to grant leave to serve a late notice of claim, the court must consider among other factors, whether the claimant was an infant (GML 50-e[5[). As an infant, she had a reasonable fear that filing a notice of claim would worsen her criminal situation. Further, the

City had actual knowledge of the facts constituting the claim because a member of the police department was involved in the acts giving rise to the claim, the police department was in possession of the records of the incident.

3. Although Merits Usually Not Considered, Leave Denied For Patently Meritless Claims

Hess v. West Seneca Cent. School Dist. 71 A.D.3d 1568, 899 N.Y.S.2d 490 (4th Dep't 2010). Although claimant did not offer a reasonable excuse for her failure to serve a timely notice of claim, "that failure is not fatal where ... actual notice was had and there is no compelling showing of prejudice to defendant". But two-members of panel dissenting, finding that the lower Court abused its discretion inasmuch as the School District demonstrated that the claim was "patently meritless". Claimant, a school boy who was struck by a vehicle while crossing a street after school, had alleged that there was no crosswalk, crossing guard or traffic control device directing traffic at the intersection. The dissent found that the School District established that the accident occurred after school hours and off school property on a public roadway that was neither owned nor controlled by School District and it was not involved with the design, construction or maintenance of the intersection or adjoining sidewalks and that it had no authority to provide traffic control devices or take other measures to control vehicular or pedestrian traffic at the intersection. Further, although General Municipal Law § 208-a authorizes a city, town or village to appoint "school crossing guards to aid in protecting school children going to and from school," such authority is not conferred upon a school district. Likewise, the municipality that owns or controls the roads, not this defendant, is responsible for operating and maintaining traffic control devices and warning of any existing hazards on those roads. The majority apparently found that this claim was not so "patently meritless" so as to deny the motion for late notice of claim.

4. Actual Knowledge Of The Essential Facts Constituting The Claim Within 90 Days Or A Reasonable Period Of Time Thereafter (Factor Usually Given The Most Weight)

Erichson v. City of Poughkeepsie Police Dept., 66 A.D.3d 820, 888 N.Y.S.2d 77 (2nd Dep't 2009). Here, the City of Poughkeepsie Police Department had actual knowledge of the facts underlying the plaintiff's claim, as its own employees engaged in the conduct which gave rise to the claim. In addition, the original notice of claim, which was served only six days beyond the statutory period, was sufficiently particular to apprise the City of the plaintiff's claim of assault within a

reasonable time after the claim accrued. Since the City acquired timely knowledge of the essential facts of the claim, the plaintiff met his initial burden of showing a lack of substantial prejudice to the City's ability to maintain a defense on the claim. In opposition, the City failed to demonstrate substantial prejudice.

Whittaker v. New York City Bd. of Educ., 71 A.D.3d 776, 896 N.Y.S.2d 171 (2nd Dep't 2010). Application for late-serving claim where student was assaulted by the parent of another student during school hours in the cafeteria of the public school she attended. At least one school employee saw the attack, and plaintiff was taken to the hospital for treatment. The police were summoned and the assailant was prosecuted. There was evidence that, a week before the attack, the petitioner's father had complained to the school's principal and vice principal about threats made by the assailant against the petitioner inside the school. School district thus acquired actual knowledge of the facts constituting the claim within the statutory period or within a reasonable time thereafter.

Place v. Beekmantown Cent. School Dist., 69 A.D.3d 1035, 892 N.Y.S.2d 638 (3rd Dep't 2010).

Elementary school student filed an application for leave to file a late notice of claim against a school district and a board of education regarding a failure to timely act on the child's allegations of sexual abuse by his stepfather. Motion was granted since defendants had knowledge during the relevant time of serious allegations by the child regarding his stepfather. Plaintiff's excuse as to the delay in pursuing a civil action included the young age of the child and, after criminal proceedings were commenced, the distress the child endured during said proceedings. Despite the passing of considerable time, there was no significant prejudice to respondents. The key witnesses are identifiable and still available.

Mitchell S. v. Arlington Cent. School Dist., 27 Misc.3d 1238 (Dutchess Co. Sup. Ct. 2010). High school student sexually harassed by a teacher claimed, among other things, that the School District knew or should have known of the harassment and were therefore liable. The School District failed to submit an affidavit of any district official who denied that the student had informed the school band director about the details of the teacher's harassing behavior sexual and that the school principal was informed, and therefore the school district had actual knowledge of the essential facts which constitute the instant claim well within the relevant accrual period. There was no prejudice to school district by the late notice of claim since the district had conducted an investigation of the allegations within 90 days of the alleged harassment. Motion to late serve granted.

Billman v. Town of Deerpark, 73 A.D.3d 1039, 900 N.Y.S.2d 658 (2nd Dep't 2010). A notice of claim was served upon the City of Port Jervis and the Port Jervis School District within 90 days

after the accident. After discovering that the Town of Deerpark might also be a proper party, the plaintiff moved for leave to serve a late notice of claim upon the Town. The Town acquired actual knowledge of the essential facts constituting the claim within 90 days after the accident and the Town's attorneys, who are also Corporation Counsel for the City of Port Jervis, were involved in defending the identical claims asserted against the City of Port Jervis. Thus, motion to late-serve granted, even though plaintiffs failed to explain the two-month delay between discovering their error concerning the identity of the proper governmental entity to be served and commencing the proceeding.

a. "Mere General Knowledge That Injury Has Occurred" Is Not Enough

Godfrey v. City of New Rochelle, 74 A.D.3d 1018, 903 N.Y.S.2d 497 (2nd Dep't 2010). Plaintiff's motion to deem her notice of claim timely served nunc pro tunc was denied because, among other things, her excuse for failing to timely serve a notice of claim, that she expected her injury to heal quickly, was unacceptable without supporting medical evidence explaining why the seriousness of the injury took so long to become apparent More important, though, the defendant did not acquire actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter. Although plaintiff alleged that she "called the defendant shortly after her accident to tell them about her] injury, mere general knowledge that an injury has occurred is insufficient to provide the requisite notice. Finally, the plaintiff offered no evidence to rebut the defendant's contention that the two-month delay after the expiration of the 90-day period in serving the notice of claim and the further seven-month delay in moving to deem the notice of claim timely served would substantially prejudice its ability to conduct an investigation of the claim.

b. Knowledge Of Essential Facts Of Claim Through Medical Records

Indar v. City of New York, 71 A.D.3d 635, 897 N.Y.S.2d 156 (2nd Dep't 2010). While the Board was arguably on notice that the plaintiff had been involved in an accident and sustained injuries, there was no information in the documents submitted by the plaintiff in support of her motion that would have informed the Board of the essential facts constituting her claim. The plaintiff also failed to demonstrate a reasonable excuse for her delay in seeking to serve a notice of claim on the Board. The plaintiff knew immediately after the accident that she had injured her left knee, which ultimately rendered her unable to work for almost eight months after the accident. Moreover, her ignorance of the need to sue the Board, instead of the defendant City of New York, was not a reasonable excuse for her failure to timely serve the notice of claim. Motion to late serve denied.

c. Knowledge Through Treatment With School Nurse

Allende v. City of New York, 69 A.D.3d 931, 894 N.Y.S.2d 472 (2nd Dep't 2010). City correctly contends that it is not liable to the petitioners for this incident, which occurred on public school premises, since it does not operate, maintain, or control the public schools. While the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, where the proposed claim is patently without merit, leave to serve a late notice of claim should be denied, as it was here. However, motion for leave to serve a late notice of claim on the New York City Department of Education was granted since the record indicates that the it received actual knowledge of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter. Immediately after the incident, the school nurse treated the infant petitioner's injury and sent him to the hospital, and the assistant principal prepared an occurrence/comprehensive injury report on the day of the incident and updated that report five days after the incident. In addition, the infant petitioner's mother met with the principal and assistant principal on the next school day after the incident and reiterated her prior complaints regarding the school's supervision of her son and the other student involved in this incident.

d. Knowledge Through Hospital Records

Argueta v. New York City Health & Hospitals Corp., 74 A.D.3d 713 (2nd Dep't 2010). Contrary to the infant plaintiff's contention, the defendant New York City Health and Hospitals Corporation (Coney Island Hospital) (NYCHHC) did not acquire actual knowledge of the facts constituting her claim within the requisite 90-day period, or a reasonable time thereafter, by virtue of its possession of hospital records relating to her delivery and follow-up care. "Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury" on the claimant. Furthermore, the infant plaintiff did not move to deem her late notice of claim timely served nunc pro tunc, or, in the alternative, for leave to serve a late notice of claim until more than six years after she was last treated at the hospital, and this delay was not a product of her infancy. Moreover, the infant plaintiff failed to offer a reasonable excuse for her failure to serve a timely notice of claim on the NYCHHC. Motion denied!

Velazquez ex rel. Segarra v. City of New York Health and Hospitals Corp. (Jacobi Medical Center), 69 A.D.3d 441 (1st Dep't 2010). Infant patient and his mother were not entitled to serve late notice of claim against city hospital on their claims for negligence, medical malpractice, and failure to obtain informed consent in connection with his neonatal care, where fact that patient experienced complications due to premature birth did not alert hospital that, years later, he would

develop spastic cerebral palsy and asthma alleged to be result of negligence in his perinatal care and treatment, and plaintiffs did not provide any excuse for delay of over eight years in serving a notice of claim or show that hospital was not prejudiced by the delay. Fact that the infant experienced complications due to premature birth did not serve to alert defendant that, years later, he would develop cerebral palsy and other conditions now alleged to be the result of negligence in his perinatal care and treatment. Plaintiffs stated no excuse for the 8 1/2-year delay in serving a notice of claim or for the additional 1-year delay in seeking leave to file late notice.

Diaz v. Coney Island Hosp., 24 Misc.3d 1248, 901 N.Y.S.2d 905 (Kings Co. Sup. Ct. 2009). To establish notice within the 90 day period, plaintiffs rely on the hospital records which were completed by the Coney Island Hospital staff in the treatment of Diaz on the date of the accident. The hospital records state that "36 y/o lady here c pain in Rt ankle after she tripped & fell in a pothole @ CIH where she twisted an ankle (rt)". The HHC argued that courts have held that document or record evidence to establish knowledge on the part of the municipality must connect the occurrence with the alleged negligence and that knowledge on the part of the municipality must contain the essential facts of the claim. The HHC also relies on case law holding that "mere knowledge by a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of the claim". However, here the Court found that HHC received more than general information and that the information contained in the hospital reports provided HHC with sufficient knowledge of the nature of the claim of negligence, including the date, place, time and nature of injury to Cruz, as well as the specific reason for the fall i.e., that there was a "pothole @ CIH" (Coney Island Hospital).

(e) Knowledge Through Police And Other Accident Reports

Castro ex rel. Sanabria v. Clarkstown Central School Dist., 65 A.D.3d 1141, 885 N.Y.S.2d 508 (2nd Dep't 2009). Plaintiff sought leave to serve a late notice of claim on a school district and an elementary school in connection with an incident in which a student was injured on a jungle gym during recess, but plaintiff did not proffer any excuse for her failure to serve a timely notice of claim. Furthermore, while a school official prepared an accident claim form on the day of the incident, that report, which merely indicated that the child was injured on the jungle gym during recess, did not establish that the defendants had actual knowledge, within 90 days of the incident or a reasonable time thereafter, of the essential facts underlying the petitioner's claim of negligent supervision.

Liebman v. New York City Dept. of Educ., 69 A.D.3d 633, 893 N.Y.S.2d 141 (2nd Dep't 2010). While plaintiff alleged that an accident investigation report was provided to him several days after the accident at the job site where he was injured, there was no evidence that this report was served upon any one of the defendants within 90 days of the accident or a reasonable time thereafter. Furthermore, plaintiff failed to establish that the 3 1/2-month delay after the expiration

of the 90-day period would not substantially prejudice the respondents in maintaining their defenses on the merits.

Mounsey v. City of New York, 68 A.D.3d 998, 891 N.Y.S.2d 440 (2nd Dep't 2009). Victim of an accident in a stairwell was properly granted leave to serve late notice of claim on city housing authority regarding the incident, despite a lack of reasonable excuse for the delay; authority's development manager was provided with a copy of a field report prepared by police on the day of the accident, which provided timely actual knowledge of the essential facts, police also prepared, on same day, a line-of-duty injury report, a witness's statement, and an aided report worksheet, and the authority took photographs of the defective stairwell within 90 days after the accident.

Harper v. City of New York, 69 A.D.3d 939, 896 N.Y.S.2d 78 (2nd Dep't 2010). Plaintiff not entitled to serve a late notice of claim on a city; neither a police accident report nor a city department of transportation repair work order record provided the city with actual knowledge of the facts constituting the claim, and the city would have been prejudiced by the delay.

Barnes v. New York City Health and Hospitals Corp., 69 A.D.3d 934, 893 N.Y.S.2d 613 (2nd Dep't 2010). Plaintiffs failed to establish that the New York City Health and Hospitals Corporation acquired actual knowledge of the facts constituting the claim within the requisite 90-day period, or a reasonable time thereafter, by virtue of its possession of hospital records relating to the infant petitioner's treatment. Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury. Thus, motion to late-serve notice of claim denied.

Devivo v. Town of Carmel, 68 A.D.3d 991, 891 N.Y.S.2d 154 (2nd Dep't 2009). The Town obtained actual knowledge of the essential facts by virtue of a police accident report made by the responding police officer and an ambulance call report. However, in order for a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the municipal corporation. Here, the subject reports did not provide the appellant with actual notice of the essential facts constituting the claim. The reports merely described the response to the scene, the treatment of the injuries at the scene, and the transport of the petitioner to the hospital, but did not describe the accident and made no connection between the petitioner's injuries and any alleged negligence of defendant. As for "reasonable excuse" for the delay, plaintiff's failure to ascertain the appellant's ownership of the subject property herein was due to a lack of due diligence in investigating the matter

Hill v. New York City Transit Authority, 68 A.D.3d 866, 890 N.Y.S.2d 627 (2nd Dep't 2009). Plaintiff failed to offer a reasonable excuse for failing to serve a timely notice of claim. While the petitioner may have been physically incapacitated during the first 4 1/2 months after the accident, due to an unrelated illness, he failed to proffer a reasonable excuse as to why his

attorney waited an additional 8 1/2 months after he was retained before seeking leave to serve the late notice of claim. Furthermore, the defendant did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter because neither the incident report completed by the bus driver involved in the underlying incident nor the accident/crime investigation report completed by a manager employed by the defendant on the date of the accident, both of which indicated that the plaintiff lost his balance, slipped on the last step, and then tripped and fell on the sidewalk. This did not provide the defendant with actual knowledge of the essential facts constituting the plaintiff's present claim that he was caused to trip and fall by reason of the hazardous sidewalk and that the defendant was negligent in discharging the petitioner onto the hazardous sidewalk. Plaintiff also failed to establish that the 10-month delay after the expiration of the 90-day statutory period would not substantially prejudice the appellant in maintaining a defense on the merits.

Kirtley v. Albany County Airport Authority, 67 A.D.3d 1317, 889 N.Y.S.2d 128 (3rd Dep't 2009). Plaintiff slipped and fell on a wet floor at the Albany International Airport. In this case, plaintiff notified defendant Albany County Airport Authority of the accident shortly after it occurred, but the incident report did not describe her accident beyond stating that she "did not know the floor was wet and slipped." Prior to the commencement of this action, defendants were unaware of any facts to suggest that they were responsible for that wet floor or were otherwise liable because of it. As a result, plaintiffs failed to show that defendants had actual knowledge of the essential facts constituting the claim. Further, plaintiffs did not explain why they failed to timely file a notice of claim. Motion to late serve denied.

Wright v. City of New York, 66 A.D.3d 1037, 888 N.Y.S.2d 125 (2nd Dep't 2009). Police accident report did not provide city with actual notice of essential facts constituting plaintiffs' claim as would permit service of late notice of claim; report merely described the circumstances surrounding the accident, and made no connection between injuries alleged by plaintiffs and the allegedly negligent conduct of the city. Generally, the phrase "facts constituting the claim" is understood to mean the facts which would demonstrate a connection between the happening of the accident and any negligence on the part of the municipal corporation. The report merely described the circumstances surrounding the accident, and made no connection between the injuries alleged by the petitioners and the allegedly negligent conduct of the City.

(f) Knowledge Through Previously Served Late Notice Of Claim W/O Leave

Peterson v. New York City Dept. of Environmental Protection, 66 A.D.3d 1027, 887 N.Y.S.2d 269, (2nd Dep't 2009). In-line skater petitioned for leave to file a late notice of claim against state Office of Parks, Recreation and Historic Preservation, state Department of Environmental Conservation, and city department of environmental protection, alleging he sustained injuries to his shoulder as a result of defendants' alleged negligence in their ownership and/or maintenance

of roadway where he fell. Plaintiff did not establish that the defendants had "actual knowledge of the essential facts constituting the claim," within 90 days after his accident or within a reasonable time thereafter. Although the some of the defendants were served with a petition for leave to serve a late notice of claim within three weeks after the expiration of the 90-day period for the service of a notice of claim upon them, neither the petition nor the proposed notice of claim specified the precise location of the accident. In describing how the accident occurred, the proposed notice of claim and accompanying affidavits only stated that the petitioner tripped and fell in a "sink hole" on a " roadway" while inline skating at Kensico Dam Park, allegedly sustaining injuries to his shoulder. This proposed notice did not describe how the remaining defendants acquired actual notice of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter. Moreover, the plaintiff's contention that the remaining defendants had actual or constructive notice of the roadway defect and/or affirmatively created it does not establish that the defendants had actual knowledge of the accident itself.

Mullins v. East Haven Nursing and Rehabilitation Center, LLC, 66 A.D.3d 578, 886 N.Y.S.2d 602 (1st Dep't 2009). While plaintiff's decedent was still living, a notice of claim alleging medical malpractice was filed more than 90 days after his last scheduled medical appointment. Thereafter, an action alleging conscious pain and suffering was brought on his behalf in the name of a guardian. Plaintiff had not only failed to timely file a notice of claim, but never made an application for leave to file a late notice of claim, and thus such service was a nullity. Although plaintiff's decedent may have been under a disability (insanity), this did not toll the necessity of filing a timely notice of claim; it tolled only the time in which to apply for leave to serve a late notice of claim. Even with the toll, plaintiff's time to seek leave to serve a late notice expired, at the latest, one year and 90 days after decedent's death. Having failed to move within that time, the court was without discretion to excuse the failure to file a notice of claim within 90 days of the alleged malpractice, and the complaint alleging conscious pain and suffering was properly dismissed.

Contreras v. KBM Realty Corp., 66 A.D.3d 627, 887 N.Y.S.2d 172 (2nd Dep't 2009). Without leave of the court, the infant-plaintiff served a late notice of claim on the defendant New York City Health and Hospitals Corporation (Woodhull Medical and Mental Health Center) alleging that Woodhull's medical staff had committed malpractice by failing to give the infant-plaintiff's mother anticipatory guidance to prevent lead poisoning. More than two years later, plaintiff moved to deem her late notice of claim timely served nunc pro tunc or for leave to serve a late notice of claim, which motion was denied. The plaintiff did not move for leave to deem her late notice of claim timely served until more than nine years after she was last diagnosed at Woodhull with an elevated blood lead level. The plaintiff also failed to show that NYCHHC had actual

notice of her claim within the requisite 90-day period, or within a reasonable time thereafter. Although NYCHHC was in possession of the plaintiff's pediatric medical records, these records showed that her blood lead level declined during the period when Woodhull's medical staff allegedly failed to provide anticipatory guidance, and did not suggest that the plaintiff suffered an injury attributable to any acts of medical malpractice.

5. Prejudice (another factor)

Gitis v. City of New York, 68 A.D.3d 489, 891 N.Y.S.2d 39 (1st Dep't 2009). Court denied motion to late serve brought some three months after expiration of the applicable 90-day time period. The record showed that plaintiff not only failed to demonstrate that City had timely actual notice of her claim, but she also failed to establish a reasonable excuse for failing to meet the statutory deadline. Plaintiff possessed the Big Apple Map reflecting defects at the subject location, and while she asserted that the delay in filing a timely notice of claim was attributable to the fact that she was awaiting documents from the Department of Transportation, those records were not necessary for preparing and filing the notice of claim. City was prejudiced by the delay since the photographs of the accident location taken by plaintiff shortly after the accident depict the sidewalk in its original condition, while photographs taken by her investigator after the expiration of the 90-day period revealed that repairs had been made. Had timely notice been filed, the City may have been able to perform an inspection of the sidewalk in its original condition.

E. TIME LIMIT FOR MOVING TO SERVE LATE NOTICE OF CLAIM

McShane v. Town of Hempstead, 66 A.D.3d 652, 886 N.Y.S.2d 751 (2nd Dep't 2009). The plaintiff served a notice of claim upon Long Island Power Authority one year and six months after her claim accrued. The prior late service of the notice of claim was a nullity since it was made without leave of court. Furthermore, the plaintiff's failure to move for leave to serve a late notice of claim within one year and 90 days of the date that her claim accrued deprived the Supreme Court of authority to deem the notice of claim timely served nunc pro tunc or permit late service of a notice of claim. Case dismissed.

III. OTHER CONDITIONS PRECEDENT TO COMMENCING ACTION AGAINST PUBLIC CORPORATIONS

A. THE 30-DAY WAITING PERIOD

Inzerillo v. Town of Huntington, 67 A.D.3d 736, 889 N.Y.S.2d 74 (2nd Dep't 2009). Complaint dismissed because plaintiff failed to comply with GML 50-I in that he commenced the action less than 30 days after service of his notice of claim. The court erred, however, in determining that the dismissal should be with prejudice. Inasmuch as the plaintiff served the notice of claim and amended notice of claim within 90 days after the claim arose, and commenced the action within the time prescribed by the statute of limitations, the action was timely commenced against the Town defendants within the meaning of CPLR 205(a). Consequently, the dismissal should have been without prejudice to plaintiff's commencement of a new action.

B. THE 50-H HEARING

Billman v. City of Port Jervis, 71 A.D.3d 932, 897 N.Y.S.2d 507 (2nd Dep't 2010). Parents of a student who died from injuries sustained from a fall through a skylight situated on the roof of a high school sued school district for wrongful death based on negligence and attractive nuisance. Lower court dismissed plaintiff's case based upon his failure to appear for a 50-h hearing. A plaintiff who has failed to comply with a demand for a hearing served pursuant to GML 50-h(2) is precluded from commencing an action against a municipality. However, the Appellate Division reversed, noting that dismissal of the complaint was not warranted where the hearing had been postponed indefinitely beyond the 90 days after service of the demand and the municipality did not reschedule the hearing. Here, the parties agreed to adjourn the scheduled hearing date and the defendant failed to reschedule the hearing for the earliest possible date available. Under the circumstances of this case, the failure of plaintiff to appear for a hearing did not warrant dismissal of the complaint insofar as asserted by him.

Gold v. Rockville Centre Police Dept., 71 A.D.3d 632, 896 N.Y.S.2d 391 (2nd Dep't 2010). At the 50-h hearing, while the criminal charges against the plaintiff were pending, the plaintiff invoked his Fifth Amendment privilege against self-incrimination. After he was acquitted, the plaintiff promptly informed the County defendants of the disposition of the criminal case against him, and requested that the 50-h hearing be rescheduled. Under these circumstances, the Appellate Division held that the motion Court had correctly denied the County defendants' motion to dismiss the complaint, but noted that the court should also have directed a continuation of the 50-h hearing.

Bednoski v. County of Suffolk, 67 A.D.3d 616, 886 N.Y.S.2d 912 (2nd Dep't 2009). The defendant's motion to dismiss the complaint was based on the plaintiffs' failure to comply with a 50-h hearing demand. In support of the motion, the defendant submitted an affidavit of service by mail, which did not contain the name or address of the person to whom the demand was mailed. In opposition to the motion, the plaintiffs' attorney alleged, inter alia, that he never received the demand. Court noted that, when a claimant is represented by an attorney, a demand for a 50-h hearing shall be served personally or by mail upon his or her attorney (GML 50-h[2]). Thus, defendant's affidavit of service was insufficient to establish, prima facie, that the plaintiffs were validly served. Since there was no adequate proof that the defendant served a demand for such examination within 90 days of the plaintiffs' filing of a notice of claim, the plaintiffs' failure to appear for an examination did not warrant dismissal of the complaint.

C. CAN'T SUE BEFORE SERVING NOTICE OF CLAIM

Briganti v. Rye City School Dist., 27 Misc.3d 1224 (Rye City Ct. 2010). Plaintiff's vehicle was parked in the parking lot owned by the defendant Rye City School District. A tree limb fell upon plaintiff's vehicle resulting in damage to the vehicle. Plaintiff filed this Small Claims action and later served a Notice of Claim. Court noted that the action was procedurally defective because, while plaintiff timely filed Notice of Claim (within 90 days of the event), they sued the case before serving the notice of claim. This does not comply with GML 50-e. In any event, the Court saw no merit to the claim, and granted defendant summary judgment.

IV. STATUTE OF LIMITATIONS ISSUES

A. SOL IS ONE YEAR AND 90 DAYS, NOT ONE YEAR AND THREE MONTHS

Government Employees Isn. Co. v. Agostino, 27 Misc.3d 1220 (Westchester Co. Sup. Ct. 2010). This was an action for property damage arising from an automobile accident involving plaintiff's insured and a vehicle owned by defendant the City of Yonkers. Defendant moved to dismiss the complaint on the grounds that plaintiff commenced this action one year and 92 days after the date of loss, in violation of GML 50-i. Plaintiff contended that it timely commenced the action "one year and three months" after the accident. Plaintiff cited to no authority for its interpretation of the one-year and "three month" rule.

B. USING OLD INDEX NUMBER TO FILE NEW SUMMONS & COMPLAINT

MacLeod v. County of Nassau, 75 A.D.3d 57, 903 N.Y.S.2d 411 (2nd Dep't 2010). Within 90 days of her accident, plaintiff served the defendant with a notice of claim because they believed the County owned the parking lot where she tripped and fell. She then commenced a special proceeding for leave to conduct pre-action disclosure, which was denied. They then commenced an action against the County and certain other defendants, but did not pay the filing fee, and failed to obtain a new index number. Instead, they filed the summons and complaint under the index number assigned to the disclosure proceeding. The County's Answer did not raise any affirmative defense based on plaintiff's mistake with respect to the commencement of a personal injury action. Subsequently, one of the parties attempted to file a request for judicial intervention, in order to schedule a preliminary conference. At that point, it was discovered that the summons and complaint bore the index number assigned to the disclosure proceeding, which had been terminated upon the issuance of the judgment. Plaintiff then paid the additional index number filing fee, obtained a new index number, and filed a new summons and complaint (more than a year and 90 days after the accident) under that index number. The complaint was identical to the complaint filed by the MacLeods under the index number assigned to the disclosure proceeding. They moved, with their filing of the summons and complaint under the new index number, to deem the date of the previously filed lawsuit to be the date of the commencement of the personal injury action. The Court gave a complex analysis of the case law and statutes, and granted the motion. In summary, as with the mistake made by the plaintiff in _John M. Horvath, D.C., P.C. v. Progressive Cas. Ins. Co._, 24 Misc.3d 194, 202, 882 N.Y.S.2d 822, where the court engaged in a thoughtful analysis of the amendment to CPLR 2001, the MacLeods' mistake with respect to the commencement of this action was described as a technical, nonprejudicial procedural misstep that a court is obligated to disregard (*see* _Matter of United Servs. Auto. Assn. v. Kungel_, 72 A.D.3d 517, 899 N.Y.S.2d 190 [1st Dept. 2010]).

V. THOSE ODD, PESKY PUBLIC AUTHORITIES

A, WATCH FOR SHORTER TIME LIMITS!

Mayayev v. Metropolitan Transp. Authority Bus, 74 A.D.3d 910, 904 N.Y.S.2d 84 (2nd Dep't 2010). Bus passenger brought action against subsidiary of metropolitan transportation authority, seeking recovery for personal injuries allegedly sustained during fall when bus made sudden and violent maneuver. Complaint dismissed as time-barred pursuant to the applicable one-year-thirty-day SOL of Public Authorities Law 1276. The plaintiff's contention that defendant induced her to commence a prior action against its "alter-ego," the Metropolitan Transportation Authority, which delayed her commencement of the instant action until after the statute of

limitations had expired, was without merit. The Metropolitan Transportation Authority and its subsidiaries must be sued separately, and are not responsible for each other's torts. The fact that the defendant and the Metropolitan Transportation Authority have similar names and operate, in part, out of the same address, does not change the legal conclusion that they are two separate entities.

Gruber v. Erie County Water Authority, 71 A.D.3d 1572, 896 N.Y.S.2d 786 (4th Dep't 2010). In this small claims action for damages caused by negligence in replacing a water meter, defendant contended that the action was time-barred because it was not commenced within the limitations period of one year and 90 days pursuant to General Municipal Law § 50-i(1)(c). But even though defendant was a public authority, and the 90-day notice of claim requirements applied (which here were complied with), the provisions of section 50-i(1)(c) (1 year 90-day sol) did not apply. Although the Public Authorities Law sets forth specific limitations periods for many other public authorities (*see* § 1342 [2]), section 1067 fails to do so with respect to "water authorities" and thus the three-year limitations period pursuant to CPLR 214(2) applies.

B. WHICH AUTHORITY/AGENCY TO SERVE WITH NOTICE OF CLAIM?

Johnson v. New York State, 71 A.D.3d 1355, 897 N.Y.S.2d 748 (3rd Dep't 2010). Plaintiff's decedent suffered fatal injuries as a passenger in an automobile accident on the New York State Thruway. Shortly after being appointed administrator of decedent's estate, claimant served a notice of intention to file a claim on the Attorney General and defendant New York State Thruway Authority. Although claimant subsequently filed a wrongful death claim and served the Attorney General, no such claim was served on the Thruway Authority. Defendants moved to dismiss the claim on the grounds that the Court of Claims lacked personal and subject matter jurisdiction over the Thruway Authority and that the statute of limitations within which to serve the Thruway Authority had expired. Concluding that defendants had waived such defenses by failing to plead them with the particularity required by Court of Claims Act § 11(c), the Court of Claims denied the motion, but the Appellate Division reversed. In order to properly commence an action against it in the Court of Claims, the Thruway Authority must be timely served with a copy of the claim (*see* Court of Claims § 11[a][ii]). Claimant's failure to serve a copy of the claim with the Thruway Authority resulted not in a failure of personal jurisdiction, but in a failure of subject matter jurisdiction, which may not be waived. Moreover, service upon the Attorney General does not qualify as service on the Thruway Authority. Accordingly, inasmuch as claimant did not fulfill the literal service requirements of Court of Claims Act § 11, the claim was dismissed based on a lack of subject matter jurisdiction.

Santandrea v. Board of Trustees of Hudson Valley Community College, 70 A.D.3d 1238, 894 N.Y.S.2d 585 (3rd Dep't 2010). Plaintiff brought action against community college and its board of trustees after she allegedly slipped and fell on the community college's campus. Plaintiff allegedly slipped and fell on the campus of defendant Hudson Valley Community College (hereinafter HVCC). The following month, she served the Rensselaer County Attorney with two notices of claim, but did not separately serve HVCC or defendant Board of Trustees of Hudson Valley Community College (hereinafter Board). Plaintiff subsequently served a separate summons and complaint on each of the three defendants at their principal places of business. HVCC and the Board moved to dismiss the complaint against them because they were not served with a notice of claim. The only real question in this case is whether, as a condition precedent to commencing a tort action against a community college, a notice of claim must be served upon the college or its board of trustees. The answer is "no". By its express terms, GML 50-i applies only to certain municipal entities. Community colleges are not included in the statute's list. Similarly, GML 50-e requires that a notice of claim be served as a condition precedent to a tort action "against a public corporation, as defined in the general construction law". Colleges do not fall within the definition of a "public corporation" (*see,* General Construction Law § 66[1]). The plain language of the statutes establishes that a notice of claim need not be served on a community college prior to commencement of an action. Additionally, the Legislature has expressly stated that GML 50-e and 50-i apply to actions only against a community college of the City of New York (*see,* Education Law § 6224). If the General Municipal Law provisions applied to all community colleges by their own terms, the Legislature would not have needed to separately provide that they apply to city colleges. A notice of claim must be served upon the local sponsor, however, if that local sponsor would otherwise be entitled to a notice of claim (*see* Education Law 6308[3], [6]). Because plaintiff served a notice of claim on the County but was not required to serve one on HVCC or the Board, defendants' motion was denied.

VI TOLLING ISSUES

Heslin v. County of Greene, 14 N.Y.3d 67, 923 N.E.2d 1111, 896 N.Y.S.2d 723. In this case, the Court of Appeals decided that the special infancy toll of CPLR 208, applicable in wrongful death actions involving sole infant distributees under Hernandez v. New York City Health & Hosps. Corp., 78 N.Y.2d 687, 578 N.Y.S.2d 510, 585 N.E.2d 822 (1991), is not available for conscious pain and suffering claims. The notice of claim with regard to the conscious pain and suffering claim was here untimely because it was not filed within 90 days after the claim arose. Plaintiff tried to latch onto CPLR 208 due to the infancy of decedent's sole distributes - her sisters – but here the Court, on public policy grounds, limited the *Hernandez* rule to wrongful death claims. Court explained that, in wrongful death cases, where no personal representative was otherwise available, it was reasonable to look to the distributee's infancy status because the wrongful death

claim belonged to the distributee alone, and would compensate him for damages that he directly sustained as a result of family member's death. In effect, the *Hernandez* rule treats the distributee as the plaintiff under the tolling statute because, for all intents and purposes, the claim was his own. Not so in conscious pain and suffering claims. A conscious pain and suffering claim is designed to compensate the decedent for injuries suffered and is personal to the deceased.

Greco v. Incorporated Village of Freeport, 66 A.D.3d 836, 886 N.Y.S.2d 615 (2nd Dep't 2009). Plaintiffs' contention that the defendant's negligent operation of the power plant amounted to a continuous wrong so as to toll the limitations period for a negligence claim was without merit. Plaintiffs' trespass and nuisance causes of action were time-barred to the extent that they were based upon acts alleged to have occurred more than one year and 90 days prior to the commencement of the action.

Adam H. v. County of Orange, 66 A.D.3d 739, 887 N.Y.S.2d 605 (2nd Dep't 2009). Mother sued county and its social services department to recover damages for injuries sustained when her four infant children were sexually abused while in foster care. Motion to late-serve denied as to mother's derivative claim since mother did not move for leave to late-serve until more than a year and ninety days after the last alleged incident of sexual abuse. Since the plaintiff mother was not an infant, she was not entitled to a tolling of the applicable limitations period pursuant to CPLR 208 with respect to her derivative cause of action.

VII POLICE AND FIREFIGHER CLAIMS

A. GML 205-A AND 205-E

General Rule: In order "[t]o make out a claim under section 205-e or 205-a, a plaintiff must [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [police officer] was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm'" (*Williams v. City of New York*, 2 NY3d 352, 363 [2004], quoting *Giuffrida v. Citibank Corp.*, 100 NY2d 72, 79 [2003]). As for the "causation" element, there must be a "reasonable connection between the statutory or regulatory violation and the claimed injury" (*Giuffrida v. Citibank Corp.,* 100 N.Y.2d 72, 81 [2003][internal citations omitted]). Under General Obligations Law § 11-106, "a police

officer can assert a common-law tort claim against the general public" for "work injuries that occur in the line of duty.

Estrella v. City of New York, 25 Misc.3d 1207, 901 N.Y.S.2d 899, (Kings Co. Sup. Ct. 2009). The Court addressed, among other issues, the issue of whether suit under GML § 205-a was barred by Workers' Comp law. Court said the action was not barred because the New York City Fire Department was among the class of persons covered by GML § 205-a and could therefore maintain a complaint against the City of New York. The Court based its ruling on *Lo Tempio v. City of Buffalo*, 6 AD3d 1197 (4th Dept.2004) which held that a civilian employee of the Buffalo Fire Department was among the class of persons covered by GML § 205-a.

Ferriolo v. City of New York, 72 A.D.3d 490 (1st Dep't 2010). Police officer brought action against city, among others, to recover damages for injuries resulting when a fellow police officer accidentally discharged a semiautomatic weapon in the precinct locker room in the process of moving his gun from his locker to a storage locker for inventory purposes. Inasmuch as plaintiff's fellow police officer was moving his weapon to a different location as part of his police duties, plaintiff's exposure to the risk of injury was occasioned by the performance of police duties by his fellow officer. Had plaintiff not been about to commence his tour of duty as a police officer, he would not have been in the precinct locker room changing into his uniform, and he would not have been injured by the discharge of the officer's weapon. Thus, plaintiff's common-law negligence claim is barred by the "firefighter rule" (GOL 11-106). Plaintiff's GOL 205-e case was also dismissed because, although it was predicated upon alleged violations of the Penal Law and the Labor Law, no criminal charges were brought against the fellow officer, and plaintiff failed to come forward with compelling evidence that the fellow officer's conduct was criminally negligent or criminally reckless so as to overcome the presumption that the Penal Law had not been violated. Nor was plaintiff's injury the type of workplace injury contemplated by Labor Law § 27-a.

Bermudez v. City of New York, 66 A.D.3d 724, 887 N.Y.S.2d 221 (2nd Dep't 2009). Passenger, a city police detective, brought action against driver, who was also a police detective, and the city, under GOL § 205-e predicated on an alleged Vehicle & Traffic Law violation. Upon SJ motion, Court found issue of material fact as to whether driver, a police detective, committed traffic violation by failing to stop at stop sign (plaintiff said he did not stop, driver said he did).

B. GOL 11-106(1) CLAIMS

Alcalde v. Riley, 73 A.D.3d 1101 (2nd Dept 2010). As to the firefighter plaintiff's GOL 11-106(1) claim, a showing of actual or constructive notice of the particular defect on the premises causing injury is necessary. Here, plaintiff raised a triable issue of fact in this regard through his expert, who testified that a blocked interior staircase at the subject premises constituted a safety hazard that increased the likelihood of harm to the plaintiff. Since defendant resided in the house around the time of the fire, there was a triable issue of fact as to whether she had actual or constructive notice of the blocked staircase which allegedly contributed to the plaintiff's injuries.

Wadler v. City of New York, 14 N.Y.3d 192, 925 N.E.2d 875, 899 N.Y.S.2d 73. Court held that the "firefighter rule," which bars common-law negligence recovery by firefighters and police officers for injuries that result from risks associated with their employment, required dismissal of this case, in which a police officer was injured by the negligent operation of an anti-terrorist security device. More specifically, the parking lot of the New York City Police Headquarters in Manhattan was protected by an unusual kind of gate, designed to thwart car bombs and similar forms of terrorism. The gate was a concrete barrier that could be retracted into the ground to allow entry to the lot. If it was necessary to stop an entering vehicle (i.e., terrorists) the gate could be raised, automatically and quickly, with enough force to lift a car off the ground. In this case, the gate apparently worked as it was designed to do, but was accidentally engaged. The driver of the car in question was not a terrorist, but plaintiff, the commanding officer of the Police Commissioner's liaison unit, who was arriving at his place of work. Plaintiff sued the City and the Police Department for negligence. Court held that the cause of the injury to plaintiff was a risk "associated with the particular dangers inherent" in police work, and therefore barred by the firefighter's rule. An act taken in furtherance of a specific police function-entry into a protected parking lot, which only plaintiff's police credentials allowed him to enter, exposed plaintiff to the risk of this injury. Although plaintiff emphasized that at the time of his injury he was not "on duty", whether he was on duty or not was not dispositive; police officers often, by the nature of their jobs, face significant risks even when they are not technically at work.

C. GOL 11-106(1) AND GML 205-E COMBINED

Connery v. County of Albany, 898 N.Y.S.2d 298 (3rd Dep't 2010). Albany City police investigator and his wife and children brought action to recover of injuries he sustained when he was shot by sheriff's department investigator who was trying to shoot and kill an 80-pound vicious dog that had attacked plaintiff while he was tackling a fleeing suspect. There are two issues here: **(1) GOL 11-106(1):** On summary judgment motion, defendants contended that plaintiffs' negligence claim was barred by "the firefighter's rule" because it was an "in the line of duty" injury. Under the firefighter's rule, police officers may now seek recovery and damages for on-duty injuries

caused by the negligence of *any* person or entity *other than* that police officer's employer or co-employee. The issue thus turned on whether plaintiff's (an employee of the Albany Police Department) relationship with the County Sheriff's Department constituted an employment relationship for the purposes of GOL 11-106(1) so as to bar recovery for plaintiff's injuries. Here, although plaintiff was an employee of the City of Albany, on the day in question the City and County were clearly working together, and even in the absence of a formal task force, plaintiff was clearly assisting the Sheriff's Department, and thus was a co-employee, and thus his negligence case was barred by the firefighter's rule. Court says that a contrary conclusion would create an atmosphere inducing fear of exposure to liability claims that would inhibit municipalities from working together for purposes of law enforcement and other activities for the protection of the public safety, in violation of the strong public policy in favor of such collaboration. **(2) GML § 205-e:** Plaintiff premised this claim on an alleged violation of Agricultural and Markets Law§ 121(2), which requires that a police officer who witnesses a dog attack, or threaten to attack a person, make a complaint to a municipal judge or justice. The Court held that this statute does not impose a "clear legal duty" on defendants to refrain from taking other immediate action that they deem appropriate under the circumstances prior to reporting a dog attack. Further, plaintiff failed to raise a triable issue of fact as to whether defendants' alleged violation contributed to plaintiffs' injuries.

Fernandez v. City of New York, 27 Misc.3d 1207 (New York Co. Sup. Ct. 2010). A desk drawer fell on plaintiff's knee at her place of employment. She was New York City police officer. She sued under both **GOL 11-106(1)** and **GML § 205-e**. As for the **GML § 205-e claim**, plaintiff predicated her case on Labor Law § 27-a. the Public Employee Safety and Health Act (PESHA, the New York State equivalent of OSHA), which mandates that every employer shall provide its employees "a place of employment which [is] free from recognized hazards that are causing or are likely to cause ... serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees ...". Courts held that Labor Law § 27-a was a proper predicate and rejected the argument that it was too general a provision. But although plaintiff had a proper statutory predicate for her GML § 205-e claim, her claim was nevertheless insufficient as a matter of law because she could not establish notice. The First Department has held that notice of the statutory or regulatory violation is a prerequisite for recovery under GML § 205-e where the claim is for unsafe premises. *See* *Lusenskas v. Axelrod*, 183 A.D.2d 244, 248-49, 592 N.Y.S.2d 685 (1st Dept 1992). As for the **GOL 11-106(1) claim,** although a police officer's common-law negligence claim is barred by the "firefighter's rule" when his injuries occurred because of his duties, such a claim is not barred if those duties "merely furnished the occasion for the accident but did not heighten the risk of injury." Here, the Court noted that plaintiff was not injured while chasing a suspect or engaging in any other work specific to her duties as a police officer. She was injured while at her desk at her office. Plaintiff's duties as a police officer did not heighten the risk to her of being injured by a falling

desk drawer, and thus this claim normally be allowed to proceed, except that plaintiff here failed to raise a triable issue of fact as to whether defendants had notice of any defect with the drawer.

VIII EMERGENCY AND HIGHWAY MAINTENANCE VEHICLES --QUALIFIED IMMUNITY

General Rule: Pursuant to V&T Law § 1104, the driver (and the municipal employer) of an authorized emergency vehicle (e.g., police cars, ambulances), when involved in an emergency operation, may not be held liable for harm caused except where he/she acted with "reckless disregard" for the safety of others. V&T Law § 1103(b) extends the same protection to a governmental "operator of a motor vehicle or other equipment . . . actually engaged in work on a highway" (e.g., snow plows, pavers).

A. V&T LAW 1104(E)

1. Plaintiff Can't Use V&T Law 1104(E) As A Shield Against Comparative Negligence.

Ayers v. O'Brien, 13 N.Y.3d 456, 923 N.E.2d 578, 896 N.Y.S.2d 295. Police officer brought personal injury action against motorist, alleging motorist's negligence caused her to collide with officer's vehicle as he was making a U-turn with emergency lights activated to pursue a speeding vehicle. Following discovery, plaintiff moved to dismiss defendants' comparative fault defense, arguing that the liability standard for drivers of authorized emergency vehicles under Vehicle and Traffic Law § 1104(e) is "reckless disregard," and that he had not acted recklessly. The Appellate Division held the defense was valid, and the Court of Appeals now affirms, holding that the reckless disregard standard of liability does not apply in determining the culpable conduct of the plaintiff-officer.

2, What Is An "Emergency Operation"

Morrissey v. City of New York, 25 Misc.3d 1242 (Kings Co. Sup. Ct. 2009). Cop pursued a motorcyclist wearing an unauthorized helmet in violation of Department of Transportation safety regulations, and in so doing, made a u-turn and activating the lights and sirens of the vehicle, hit a truck, and injured his fellow (passenger) officer. Plaintiff argued that pursuing a motorcyclist in possible violation of a helmet law does not constitute a real emergency even though it "technically" fits the definition of emergency under VTL § 114-b. The Court found that the officer was engaged in an "emergency operation" as he was pursuing a "violator of the law" and that there was no issue of fact as to recklessness. The Court noted that the officer's subjective state of mind regarding whether the police call was urgent was immaterial. Furthermore, mere violations of the rules of the road do not rise to the level of recklessness. Nor is an officer reckless when exceeding the speed limit during an emergency. Further, plaintiff's common-law negligence claim was barred by the "firefighters rule" since it was undisputed that the plaintiff was a police officer engaged in a police activity-chasing a motorcyclist for a helmet violation.

3. Sirens And Lights Sometimes Required For Raising Reckless Disregard Defense

Christopher v. Coach Leasing, Inc., 66 A.D.3d 1522, 888 N.Y.S.2d 338 (4th Dep't 2009). Passenger of bus operated by an employee of the New York State Department of Correctional Services (DOCS) brought personal injury action against bus owner. Court rejected defendant's contention that the "reckless disregard standard" set forth in V&T 1104(e) applied. Because the bus was a "[c]orrection vehicle" (§ 109-a) rather than a "police vehicle" (§ 132-a), the bus was exempt from traffic regulations governing directions of movement and was subject to the reckless disregard standard of liability only if it satisfied the siren and light requirements set forth in section 1104(c). Here, the evidence presented at trial established that the bus did not satisfy those requirements.

4. What Constitutes "Reckless Disregard"?

Green v. State, 71 A.D.3d 1310, 897 N.Y.S.2d 536 (3rd Dep't 2010). Claimant was injured when the car he was operating struck a trooper's car which was attempting to make a U-turn o pursue a tractor trailer in violation of V&T Law. Following a bench trial on liability, the Court of Claims found the trooper and claimant each 50% liable for the collision. The court held that the Trooper was not entitled to qualified immunity under the Vehicle and Traffic Law because, although he was involved in an emergency operation at the time of the accident, his conduct was reckless. Appellate Court disagreed with Court of Claims that trooper's conduct was reckless. Court noted that the "reckless standard demands more than a showing of a lack of due care under the

circumstances ... It requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with a conscious indifference to the outcome". With respect to his conduct immediately prior to the accident, the trooper had testified that after he stopped in the breakdown lane, he activated his left turn signal and looked over his shoulder and out the front window several times to ensure that traffic had stopped in both directions. He observed that the northbound traffic had stopped, and that a car approaching from the rear-claimant's car-appeared to have stopped about 20 yards behind him. He then pulled out approximately a foot and a half, until his left front wheel was just over the fog line, and stopped. At that time, he looked over his shoulder again. Feeling comfortable that claimant's car was stopped, he started to execute the U-turn. His vehicle got halfway across the road before it was struck in the side by claimant's car. Given the evidence of precautions taken by the trooper before he attempted his U-turn, Court found that he did not act with "conscious indifference" to the consequences of his actions, but rather he acted under the mistaken belief that claimant's car had come to a complete stop, which constituted a momentary lapse in judgment not rising to the level of "reckless disregard for the safety of others".

Greenawalt v. Village of Cambridge, 67 A.D.3d 1158, 888 N.Y.S.2d 295 (3rd Dep't 2009). Plaintiff motorcyclist lead police on a high-speed chase, left the roadway, and crashed. He alleged that the officers that pursued him acted with reckless disregard for the safety of others and, thus, they should be held liable for his injuries. At issue was whether the officers' conduct in commencing and continuing pursuit of the motorcycle rose to the level of "reckless disregard for the safety of others" and whether such conduct was a proximate cause of plaintiff's injuries. Court concluded that plaintiff failed to allege facts that could support a finding that the conduct of the officers who pursued his motorcycle was a proximate cause of his accident and, therefore, summary judgment was properly granted. Plaintiff had commenced traveling at a high rate of speed immediately upon being sighted by police. The police did not begin pursuit until police witnessed plaintiff traveling at an excessive rate of speed, ignoring a traffic signal and carrying a passenger who appeared to want to get off the motorcycle. Thereafter, plaintiff successfully passed a roadblock and continued traveling at a high rate of speed for over 10 minutes. Court found that, as a matter of law, plaintiff's operation of his motorcycle, not the manner in which defendant's officers conducted their pursuit, was the proximate cause of the accident.

5. According To Fourth Department, There Are Only "Four Categories" Of "Privileged Conduct" Which Can Trigger "Reckless Disregard" Standard.

Kabir v. County of Monroe, 68 A.D.3d 1628, 892 N.Y.S.2d 714 (4th Dep't 2009). Driver of

vehicle rear-ended by a Deputy Sheriff contended that the Deputy was not entitled to qualified immunity under section 1104(e) because he was not operating a "police vehicle" within the meaning of section 1104(c) and was not engaged in an "emergency operation" within the meaning of Vehicle and Traffic Law §§ 114-b and 1104(a) at the time of the collision. The accident occurred when the Deputy received a dispatch to respond to a burglary and looked down at his mobile data terminal to ascertain the location of the burglarized premises. When he looked back up two to three seconds later, he observed that traffic was moving very slowly through the intersection that he was approaching. The Deputy immediately applied his brakes, but he was unable to avoid a rear-end collision with plaintiff's vehicle. Court held that, even assuming that the Deputy was involved in an emergency operation at the time of the collision, the "reckless disregard" standard of liability contained in section 1104(e) was not applicable to this action because the Deputy's conduct did not fall within any of the four categories of privileged activity set forth in section 1104(b). Vehicle and Traffic Law § 1104(a) provides that the driver of an authorized emergency vehicle involved in an emergency operation "may exercise the privileges set forth in this section, but subject to the conditions herein stated." The statute then goes on to enumerate those privileges in subdivision (b), specifically that the emergency driver may (1) stop, stand or park regardless of the provisions of the Vehicle and Traffic Law; (2) proceed past a steady or flashing red light or stop sign after slowing down to ensure the safe operation of the vehicle; (3) exceed the maximum speed limits so long as he or she does not endanger life or property; and (4) disregard regulations concerning directions of movements or turning. Subdivision (e) of the statute, which exempts the driver of an authorized emergency vehicle from liability for ordinary negligence relating to his or her operation of that vehicle, specifically relates back to subdivision (b). Thus, subdivision (e) states that " [t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his [or her] reckless disregard for the safety of others". The "foregoing provisions" referred to in the statute are the four categories of privileged activity set forth in section 1104(b). Therefore, in accordance with a plain reading of Vehicle and Traffic Law § 1104, the driver of an emergency vehicle who is engaged in an emergency operation may operate his or her vehicle in violation of the provisions of the Vehicle and Traffic Law so long as his or her conduct falls within one of the four categories of privileged conduct listed in subdivision (b), with two conditions. Despite the fact that the driver is privileged from having to comply with the Vehicle and Traffic Law in the four situations set forth above, he or she (1) nevertheless must operate the vehicle with due regard for the safety of others, and (2) nevertheless is liable for any injuries or consequences caused by his or her reckless disregard for the safety of others when operating the vehicle. In effect, the statute exempts a driver whose operation of an emergency vehicle falls within the four categories of subdivision (b) from the consequences of his of her ordinary negligence, rendering him or her liable only for conduct constituting the higher standard of reckless disregard for the safety of others. Even assuming that the Deputy in this case was involved in an emergency operation at the time of the accident, Court concluded that his conduct did not fall within any of the four categories of privileged conduct set forth in subdivision (b). The Deputy was merely

traveling in a normal stream of traffic, driving well within the speed limit and in the proper lane of the roadway. Thus, the "reckless disregard" standard of subsection (e) was never triggered. The two-member dissent (hint – this case will be decided by the Court of Appeals) faulted this analysis of Vehicle and Traffic Law § 1104 with respect to this case on several grounds, including that it was unsupported by a plain reading of the statute.

B. V&T LAW 1103(B) --- "ACTUALLY ENGAGED ON A HIGHWAY"

Lobello v. Town of Brookhaven, 66 A.D.3d 646, 887 N.Y.S.2d 161 (2nd Dep't 2009). Plaintiff was injured when his vehicle struck a dump truck owned by the defendant Town Highway Dept. The driver of the dump truck, an employee of the defendant Town, had been called earlier that evening to spread salt and sand on the road near the entrance to school. While performing this task, the driver had to make several passes over an icy condition. After he made approximately 12 U-turns without incident, he was in the process of making another U-turn when the plaintiff's vehicle struck the dump truck. Court held that the dump truck operated was "actually engaged in work on a highway" pursuant to Vehicle and Traffic Law § 1103(b) and thus the reckless disregard standard applied. Plaintiff failed to raise a triable issue of fact as to whether the dump truck was being operated in reckless disregard, and thus sj to defendant granted.

Catanzaro v. Town of Lewiston, 73 A.D.3d 1449, 900 N.Y.S.2d 815 (4th Dep't 2010). Snowplow truck driven by Town employee struck plaintiff. The snowplow truck was stopped at an intersection and plaintiff's vehicle slid out of control toward the intersection. Court concluded that defendants met their initial burden of establishing that the snowplow truck was "actually engaged" in work on a highway and that they did not act with "reckless disregard for the safety of others". Plaintiff was unable to meet his burden in opposition.

IX GOVERNMENTAL IMMUNITY

A. ABSOLUTE IMMUNITY

Mertens v. State, 73 A.D.3d 1376, 901 N.Y.S.2d 744 (3rd Dep't 2010). Parolee who had violated conditions of his parole, and whose parole had been revoked for third time, filed suit against Commissioner of Corrections. Claimant contended that the Commissioner made egregious factual errors and that the Commissioner's determination regarding his parole was not supported by the record. This case was dismissed because determining an appropriate time assessment for

a parole violation involves the exercise of discretion of a quasi-judicial nature and, accordingly, is protected by absolute immunity. Allegations of improper motives and even malicious wrongdoing are insufficient to circumvent absolute immunity do not provide a ground for liability.

B. PROPRIETARY (NO IMMUNITY) V GOVERNMENTAL (IMMUNITY) ROLE

General Rule: A municipal entity can be held liable even without a "special relationship" in their role as property owners or lessees just as an ordinary private citizen, including where, as property owner, the municipal entity fails to provide adequate security. In determining whether the negligent acts qualify as a "governmental activity" deserving of immunity (absent a "special relationship), or a "proprietary act" subjecting the public entity to tort liability (just as a "private citizen" would be), [it] is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which the act or failure to act occurred which governs liability" (*Miller v. State of New York*, 62 N.Y.2d 511 at 513, 478 N.Y.S2d 829, *quoting*, *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d at 182, 448 N.Y.S.2d 141). As the Court of Appeals explained in *Miller v. State of New York, supra,* a governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions. "This begins with the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, for example, the repair of steps or the maintenance of doors in an apartment building. The spectrum extends gradually out to more complex measures of safety and security for a greater area and populace, whereupon the actions increasingly, and at a certain point only, involve governmental functions, for example, the maintenance of general police and fire protection. Consequently, any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the State's alleged negligent action falls into, either a proprietary or governmental category".

Ruiz ex rel. Serrano v. City of New York, 27 Misc.3d 443, 894 N.Y.S.2d 862 (New York Co. Sup. Ct. 2010). Infant-plaintiff got beaten up by a group of kids on a City playground and alleged the City failed in its proprietary duty to properly manage, maintain and supervise the playground. City's first line of defense was that it was acting in its governmental capacity (police protection), and thus was immune absent a "special relationship, and there was none. Court held that City was acting in its governmental capacity and not its proprietary capacity. Here, the duty at issue was "security against physical attacks by third parties" and the determination whether to provide any type of park supervisors or police protection is exactly the discretionary type of resource-allocating function that is a governmental function and for which the municipality should thereby be protected from liability absent a special relationship with the plaintiff. "The cases cited by plaintiff to the contrary, in which a municipality was held liable for injury at a public park based on a finding that it was exercising its proprietary and not governmental function, are all more

than fifty years old and have been effectively, if not explicitly, overruled by *Bonner* and its progeny".

Doe v. City of New York, 67 A.D.3d 854, 890 N.Y.S.2d 548 (2nd Dep't 2009). Pedestrian, who was attacked and raped by a group of homeless men, brought action against municipal transit authority and railroad, alleging that they were negligent in failing to maintain their stations in reasonably safe condition. The defendants MTA and LIRR were aware of homeless individuals residing on their property and thus together created a social service outreach program, which was designed to assist homeless individuals in obtaining housing, but some refused to go to other shelter. The gravamen of the plaintiff's complaint against the MTA/LIRR is that they failed to remove the homeless encampment and homeless individuals from their property, and failed to consider the safety problems associated with the homeless outreach program. Court dismissed complaint, holding that the act or omission complained of lied at the governmental function end of the proprietary/governmental spectrum, and the MTA/LIRR made a policy decision to address the issue of homelessness by employing a social outreach program, rather than by forcibly removing homeless individuals from their property, which was a discretionary governmental decision for which there can be no liability.

C. MCLEAN'S CONFUSING LEGACY: DISCRETIONARY = GOVERNMENT ALWAYS IMMUNE. MINISTERIAL = NEED TO SHOW "SPECIAL RELATIONSHIP" TO DEFEAT IMMUNITY DEFENSE.

General Rules: A municipality (or other government agency) is immune for official action involving the exercise of *discretion* (even if a special relationship is shown) but not for ministerial action (if a special relationship is shown) (*see, McLean v. City of New York*, N.E.2d, 12 N.Y.3d 194, 2009 WL 813026 (N.Y.) (2009); *Tango v. Tulevech,* 61 N.Y.2d 34, 40 [1983]; *Litchhult v. Reiss,* 183 A.D.2d 1067, 1068 [1992], *lv denied* 81 N.Y.2d 737 [1992]). The general rule for distinguishing the two types of government acts is this: "Discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*id.* at 41). Rules for establishing a "special relationship: A special relationship may arise in three ways: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Pelaez v. Seide,* 2 N.Y.3d 186, 199-200, 778 N.Y.S.2d 111, 810

N.E.2d 393 [2004]; *see Garrett v. Holiday Inns,* 58 N.Y.2d 253, 261-262, 460 N.Y.S.2d 774, 447 N.E.2d 717 [1983]; *Cooper v. State of New York,* 13 A.D.3d 867, 868, 786 N.Y.S.2d 628 [2004]). As for the second (most common way) of showing a "special relationship", underlined above, plaintiff has the heavy burden of establishing the existence of a special relationship by proving all of the following elements: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking (*see Cuffy v. City of New York,* 69 N.Y.2d at 260, 513 N.Y.S.2d 372, 505 N.E.2d 937; *Thompson v. Town of Brookhaven,* 34 A.D.3d at 449, 825 N.Y.S.2d 83; *Clarke v. City of New York,* 18 A.D.3d 796, 796, 796 N.Y.S.2d 689).

D. COURT OF APPEALS CASE: *DINARDO V. CITY OF NEW YORK*

Dinardo v. City of New York, 13 N.Y.3d 872, 921 N.E.2d 585, 893 N.Y.S.2d 818 (2009). Special education teacher at a city public school brought action against the city and city board of education for negligence for injuries allegedly sustained when she tried to restrain one student from attacking another student. The student had been verbally and physically aggressive for several months, and plaintiff had repeatedly expressed concerns to her supervisors about her safety in the classroom. The school's supervisor of special education and the principal had both told her that "things were being worked on, things were happening" and urged her to "hang in there because something was being done" to have the student removed. Plaintiff alleged that, with these statements, defendants undertook an affirmative duty to take action with respect to the removal of the student, and that she justifiably relied upon those assurances (i.e., that plaintiff had a "special relationship" with defendants so that defendants were not shielded by governmental immunity). Following a jury verdict in plaintiff's favor, the Board of Education moved to set aside the verdict, Supreme Court denied the motion, and the Appellate Division affirmed the trial court's judgment, but over the dissent of two Justices. The Board of Education argued to the Court of Appeals that the conduct alleged to have constituted a promise to act was a discretionary government action, which cannot be a basis for liability, even if plaintiff establishes a "special relationship, under the recent Court of Appeals *McLean* case. Court of Appeals refused to reach that issue, but rather assumed, *arguendo,* that the school officials' actions in this case were ministerial, and thus that plaintiff could prevail if she established a special relationship. The Court then held there was no rational process by which a jury could have found a "special relationship" between plaintiff and defendant. "The vaguely worded statements by plaintiff's supervisor and principal that 'something' was being done to have the student removed, without any indication of when, or if, such relief would come, do not, as a matter of law, constitute an

action that would lull a plaintiff into a false sense of security or otherwise generate justifiable reliance". Judgment reversed. Judge Lippman, concurring, disagreed with the majority's conclusion that a rational jury could not have found that a special relationship existed between plaintiff and defendant Board, finding it was a jury question, and expressed his disagreement with the *McLean* rule. Whether the municipality's act is characterized as ministerial or discretionary should not be, and never has been, determinative in special duty cases. Unfortunately, Judge Lippman said, under the rule announced in *McLean,* a plaintiff will never be able to recover for the failure to provide adequate police protection, even when the police voluntarily and affirmatively promised to act on that specific plaintiff's behalf and he or she justifiably relied on that promise to his or her detriment, because such actions are always discretionary. The rule in *McLean,* which clearly extends beyond police protection and applies to all discretionary governmental actions, allows public officials to unjustifiably hide behind the shield of discretionary immunity even when their actions have induced a plaintiff to change his or her behavior in the face of a known threat.

E. MCLEAN AND DINARDO ANALYSIS

Signature Health Center, LLC v. State, 902 N.Y.S.2d 89 (N.Y. Ct. Cl. 2010). Great discussion of the new McLean rule, and how it has changed the municipal liability landscape and created confusion in the courts. **This case is a must read for anyone dealing with governmental immunity issues.** In this case, a Medicaid provider sued the State to recover consequential damages resulting from delay by New York State Department of Health (DOH) in posting provider's revised Medicaid reimbursement rates. Court noted that, prior to McLean and Dinardo, it was the understanding of many courts that there was a very narrow exception to the general rule of non-liability for discretionary governmental acts: situations in which the injured party had a "special relationship" with the government, one giving rise to a "special duty" owed by the government to the injured party, where the injury resulted from a violation of the special duty. Also, prior to McLean and Dinardo, and in contrast to the extensive protection given discretionary governmental actions, it was generally considered that ministerial governmental duties were no longer protected by any vestige of sovereign immunity, and, consequently, that liability could be imposed under the same common law principles applicable to private citizens or corporations. That is to say, recovery could be had if the injured party succeeded in establishing the following: "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof". Proof that a government official was negligent in his or her performance of a ministerial duty was not sufficient to warrant the imposition of liability. The Court further notes numerous decisions issued prior to McLean and Dinardo in which courts held that, upon proper proof, a party could recover for injury caused by negligence in performing ministerial governmental duties without the necessity

of finding either a special duty or a statutory private right of action. In summary, prior to 2009 when McLean and Dinardo were issued, most New York Courts understood the law of governmental immunity to be as follows: 1) judicial and quasi-judicial actions were protected by absolute immunity; 2) discretionary actions that were not judicial or quasi-judicial could lead to liability only where the action was taken in bad faith or without reasonable basis, or where the government had assumed a special duty owed to the injured party; and 3) ministerial governmental actions subjected the government to the same principles of liability applicable to private individuals and corporations. In McLean, the Court of Appeals made it clear that this understanding of the law outlined above was incorrect. Court summarizes the new McLean rule as follows: "The State's waiver of sovereign immunity now applies only to the following: 1) proprietary activities, 2) discretionary, non-judicial actions taken in bad faith or without reasonable basis, and 3) ministerial actions where there is a special duty owed by the government to the injured party (which may include statutory private rights of action relating to ministerial duties). Court further notes that, while "the lower courts are struggling with McLean 's statement that discretionary governmental actions 'may never be a basis for liability'", there appears to be no dispute regarding its statement of the current law relevant to ministerial governmental actions. On the facts of the case before it, the Court found the State's actions discretionary, but that there was a "special relationship" between plaintiffs and the State by virtue of PHL § 2807, which gave Medicaid providers a private right of action. Summary judgment granted to plaintiffs.

F. NO SPECIAL RELATIONSHIP FOUND

Brinkerhoff v. County of St. Lawrence, 70 A.D.3d 1272, 897 N.Y.S.2d 269 (3rd Dep't 2010). A motorist went wild and killed, by gunshot, plaintiffs' decedent. The killer had been on probation for a petit larceny conviction and was under the supervision of defendant St. Lawrence County Department of Probation during the 20-month period immediately prior to the shooting. While on probation and prior to the shooting, the killer was arrested and charged with purchasing alcohol for three underage friends, but was not cited by the Probation Department for violating the terms of his probation. Two months later, the Probation Department obtained a warrant for his arrest for a probation violation after he was found to have alcohol and marihuana in his dormitory room, but failed to forward the warrant for execution to a law enforcement agency or enter it into the Division of Probation and Correctional Alternatives Registrant System computer database as required by state probation division regulations. Plaintiff claimed that, had defendants properly supervised the killer's probation and processed the warrant for his arrest, he would not have been at large and the shooting that resulted in plaintiff's decedent's death would not have occurred. In deciding defendants' summary judgment motion, the Court first noted that even if defendants failed to comply with the Probation Department's own regulations in the processing of the motorist's arrest warrant or in the manner in which it supervised his probation,

it may not, as a governmental agency, be held "liable for the negligent performance of a governmental function unless there existed 'a special duty to the injured person, in contrast to a general duty owed to the public' " at large (*citing,* the recent Ct of Appeals *McLean* case). Here, plaintiff failed to allege or prove any of four "factors" of a "special relationship" with the Probation Department. Summary judgment to defendants granted.

Valdez v. City of New York, 74 A.D.3d 76, 901 N.Y.S.2d 166 (1st Dep't 2010). Plaintiff, who renewed an order of ex-protection against her boyfriend, testified that the ex-boyfriend called her and threatened to kill her. She decided to leave her apartment but, on her way to her grandmother's house, she called the police precinct, where an officer told her: "don't worry, don't worry, we're going to arrest him, go to your home and don't worry anymore" according to her. The plaintiff then returned to her apartment with her children. The plaintiff explained that she thought the arrest was going to be "immediately" because the cop "told me to go back immediately to my house." When plaintiff opened her apartment door to take out the garbage 24 hours later, she *believed* the police would have already acted on their promise to arrest the ex, but instead she was shot several times by her ex who was waiting for her in the hallway. The plaintiff asserted a "special relationship", and the Court examined this contention in the light of the recent Court of Appeals rulings, *McLean v. City of New York,* specifically focusing on the element of justifiable reliance, an element which the Court found lacking. In *McLean,* the Court held that a special duty exception to governmental immunity applies only to ministerial actions, and not discretionary ones, and further, in *Dinardo,* Chief Judge Lippman, in concurrence, observed that since provision of police protection is necessarily discretionary in nature, then under the rule announced in *McLean,* the special duty exception is essentially eliminated, and a plaintiff will never be able to recover for a failure to provide adequate police protection. However, here Court harmonizes these Court of Appeals rulings, finding that the Court did not intend to "eliminate" the special duty exception, but rather meant to allow for a "subset of police action or nonaction that can provide a basis for liability". A governmental agency's liability for negligent performance depends in the first instance on whether a special relationship existed with the injured person. "It is inconceivable . . . that the Court intended to eliminate the special duty exception upon which liability in police cases can be found without explicitly reversing the position it appears to solidly reiterate by citing *Cuffy* at length in the decision". In this case, the Court did not need to reach the issue of whether the action was discretionary or ministerial since the plaintiff ultimately failed to establish the element of justifiable reliance for a special duty exception (the other three elements were all present). The only evidence of "justifiable reliance", which fell far short, was that, when plaintiff opened her apartment door she *believed* the police had acted on their promise to arrest the assailant immediately. Reliance based on a mere "belief" is not justifiable. The case was factually indistinguishable from *Cuffy.* In that case, the Court of Appeals determined that a verbal assurance, without more, did not constitute a sufficient basis for the plaintiff's justifiable reliance There, the plaintiff sought police protection for himself and his family because of a tenant's abusive conduct. He told the police that, unless

he was given police protection, he was going to leave his apartment. The police told the plaintiff that he should not worry and that the police would do something about the situation "first thing in the morning." The police did not act on the promise and the plaintiff's wife and son suffered injuries in an altercation with the tenant on the following evening. The Court determined that the plaintiff's reliance on the police officer's promise was not justified because by midday the family had not seen any police activity outside its home, and the plaintiff was aware that the police had done nothing to restrain the tenant. In other words, whatever reliance Cuffy may have legitimately placed on the police officer's promise was not valid once it was no longer "first thing in the morning." Similarly, in this case, even if some justifiable reliance could be found on the plaintiff's behalf, it was certainly no longer valid by the end of the first day when the plaintiff had not received the expected phone call about Perez's "immediate" arrest.

Lesperance v. County of St. Lawrence, 25 Misc.3d 1244 (St. Lawrence Co. Sup. Ct, 2009). Plaintiff suffered horrific personal injuries at the hands of an assailant who invited him to his apartment for a party. While under the influence of alcohol and drugs, the assailant detained plaintiff and brutally and savagely attacked him, causing permanent and serious injuries. Plaintiff sued the assailant as well as the County Defendants for negligent control, supervision and reporting of probation violations since the assailant was on probation with the St. Lawrence County Probation Department at the time of the attack. It was alleged that these deficiencies proximately caused or contributed to the attack. The Court cited extensively to *McLean v. City of New York*, 12 NY3d 194 (2009), and, assumed, for the sake of argument, that the facts of this case involved "ministerial acts" (since under *McLean,* discretionary acts may never be a basis for liability). The issue then was whether the County owed a special duty to plaintiff, as opposed to a general duty owed to the public. Court held that plaintiff failed to demonstrate a special relationship between himself and the County Defendants, its departments or agents as a result of the violation of statutory duty enacted to benefit a particular class of persons; the voluntary assumption of duty creating justifiable reliance; or, the municipal entities assuming positive direction and control in the face of a known, blatant and dangerous safety condition. Court here has a **great discussion of the Court of Appeals' recent decisions in *McLean v. City of New York*, 12 NY3d 194 (2009), and *DiNardo v. City of New York*, --- NY3d ----, 2009 WL 4250125 (2009).**

Lewis v. State, 68 A.D.3d 1513, 892 N.Y.S.2d 583 (3rd Dep't 2009). Claimant, a patient of a physician who improperly reused syringes, brought action against State alleging negligence in connection with the notification process undertaken by the Department of Health (DOH) to alert patients of physician to the possibility that they may have contracted a blood-borne disease as a result of reuse of syringes. The Court of Appeals had recently clarified the application of governmental immunity, confirming that "government action, if discretionary, may not be a basis

for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (McLean v. City of New York, 12 N.Y.3d 194, 203, 878 N.Y.S.2d 238, 905 N.E.2d 1167 [2009]). Here claimant argued that allegations of a special duty were unnecessary, but her position was untenable in light of the Court of Appeals' decision in McLean. Here there was no evidence of a special relationship between claimant and the State actors. Even if claimant had properly alleged a special duty, DOH's conduct still would not have given rise to liability because "the setting of priorities and the allocation of agency resources are inherently exercises of discretion" and DOH made affirmative decisions regarding the scope and timing of notifications.

Funt v. Human Resources Admin of the City of New York, 68 A.D.3d 490, 890 N.Y.S.2d 55 (1st Dept 2009). Dismissal of pro se action alleging negligent failure to provide assistance to avert eviction because the Human Resources Administration was not a proper party and the notice of claim was not served within ninety days after plaintiff's claim arose. But Court also noted that, even if timely service of the notice of claim and commencement of the action been timely made on the proper party, dismissal would have been warranted as plaintiff failed to establish the existence of "a special relationship between himself and the agency so that the City could be held liable for the discretionary acts of its employee" (NOTE: Under *McLean,* if the actions are *discretionary* there can be no liability, even if there is a special relationship!).

Here, in support of its motion, the NYCTA demonstrated that it had no special relationship with the plaintiff, thereby establishing its prima facie entitlement to judgment as a matter of law. In opposition, the plaintiff failed to raise a triable issue of fact as to whether an NYCTA employee observed a passenger injuring him on NYCTA property and failed to summon emergency assistance in a timely manner from a position of safety, and whether such failure was a proximate cause of his injuries sufficient to bring his claim within an exception to the special relationship.

Brown v. City of New York, 73 A.D.3d 1113, 902 N.Y.S.2d 594 (2nd Dep't 2010). Plaintiff alleged that city failed to provide adequate police protection, resulting in confrontation in which plaintiff's neighbor stabbed her in the eye. City established its prima facie entitlement to judgment dismissing the complaint by demonstrating there was no special relationship. First, there was no affirmative undertaking by the City to provide the plaintiff with police protection. The assurances by the City were, at best, vague and ambiguous. Essentially, these assurances amounted to general statements by a police office, such as "don't worry. I am going to take care of it." The plaintiff repeatedly was told to "call the police" if anything actually happened. Although police officers allegedly were stationed in the area, the plaintiff was never told by when the officers would be present or how long they would remain. Second, the plaintiff did not

justifiably rely upon any affirmative undertaking by the City. In this regard, plaintiff failed to show that she was lulled her into a false sense of security, induced her either to relax her own vigilance or forego other avenues of protection, and thereby placed her in a worse position than she would have been had the City never assumed the duty.

Zimmerman v. City of New York, 74 A.D.3d 439, 903 N.Y.S.2d 21 (1st Dep't 2010). School psychologist brought action against city and related defendants for personal injuries sustained during an altercation between two students. At trial, plaintiffs failed to allege or prove the existence of a special relationship that would establish an affirmative duty on defendants' part toward the injured party. There was no evidence that the Board of Education had undertaken any specific security measures for plaintiff's exclusive benefit beyond the general security for which it was responsible, or that she justifiably relied on any security measures or other assurances so as to lull her into a false sense of security or a belief that such measures were specifically intended for her exclusive benefit. Plaintiffs further failed to demonstrate direct contact with agents of the Board of Education regarding such security measures or the incident leading to her injuries that might have created such a special relationship. Nor did she demonstrate that any such contacts in general might have alerted the Board to the need for enhanced protection under the circumstances.

United Services Auto. Ass'n v. Wiley, --- N.Y.S.2d ----, 73 A.D.3d 1160, (2nd Dep't 2010).

These related actions arose from a fire that damaged three attached townhouses. During the course of the work, a fire apparently started when an open flame being used to solder copper gutters ignited a wood fascia board. The fire was extinguished by the Eastchester Fire District, which was sued along with other defendants, and which moved for summary judgment dismissing all complaints and cross claims insofar as asserted against it on the ground that it could not be held liable in the absence of a "special relationship" with an injured party. Court held that the Fire District demonstrated that it was entitled to summary judgment dismissing all complaints and cross claims insofar as asserted against it under the McLean rule, i.e., "Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general". Here, in the absence of a special relationship with an injured party, the Eastchester Fire District could not be held liable for the actions of its employees. The Eastchester Fire District demonstrated, prima facie, that such a relationship was lacking as to any injured party.

G. SPECIAL DUTY ESTABLISHED THROUGH "SPECIAL RELATIONSHIP" WITH INDIVIDUAL PLAINTIFF

Gotlin v. City of New York, 26 Misc.3d 514, 890 N.Y.S.2d 811 (Kings Co. Sup. Ct. 2009). This action arises out of the wrongful death of an infant while under the supervision of the New York City Administration for Children's Services (ACS). It is alleged plaintiff's decedent was killed by the companion of her mother, and that ACS, which was charged under a Brooklyn Family Court order with supervising the child's home, "had a mountain of evidence confirming that [the child's] mother repeatedly placed herself and her children in extremely dangerous domestic violence situations." In their motion, defendants contended, with respect to the adequacy of their court-ordered monitoring of the infant's household, that they were entitled to absolute immunity for any claim premised upon the quality of their investigation and supervision. Although ACS monitored the family pursuant to its obligations under the Social Services Law, defendants asserted that its obligations did not create a special relationship with respect to plaintiff so as to constitute a predicate for liability. In opposition to the cross motion, plaintiff maintained that a "special relationship" did exist since defendants' duty arose from a supervision order issued by the Family Court. Court held that plaintiff had shown a special relationship in that the Family Court's supervision order triggered specific, mandatory duties on the part of ACS, and its employees were aware of the potentially dangerous environment in which the infant lived, and that there was direct contact and reliance by the mother (someone other than the injured party may be sufficient to create a special relationship where the person making the contact was acting on behalf of his or her immediate family). In addressing the recent *McLean* Decision, Court held that the actions were ministerial, not discretionary, in that the Family Court order of supervision, ACS was <u>required</u> to perform specific duties to ensure the safety of the child. Since its actions were not discretionary, *McLean's* automatic immunity does not attach.

H. SPECIAL DUTY ESTABLISHED THROUGH STATUTE INTENDING PRIVATE RIGHT OF ACTION FOR PLAITNIFF'S CLASS

City of New York v. State, 27 Misc.3d 1207 (N.Y.Ct.Cl. 2009). In the filed claim the City of New York seeks damages arising from the State's allegedly negligent failure to properly program its welfare management system computers to recognize ineligibility determination codes transmitted by the federal government for Medicaid recipients entitled to Medicaid by virtue of eligibility for federal Supplemental Security Income [SSI]. Court held that plaintiff was arguably one of the

class for whose particular benefit the particular statute within a statutory scheme was enacted-in that Social Services Law § 368-a apportions the respective financial obligations between the federal, state and municipal-governments and the purpose of this individual section could conceivably be promoted by recognizing a private right of enforcement attaching to the localities, but implying a private right of action would not be consistent with the general legislative scheme broadly directed at providing needed services to citizens, and might embroil governmental entities in bottomless litigation. While it is arguable that the situation satisfies the first two prongs of the test, in order to satisfy the third prong to imply such a right of action, there must be "clear evidence" of the Legislature's willingness to expose the governmental entity to liability that it might otherwise not incur. Court found that a private right of action to enforce Social Services Law § 368-a was inconsistent with the overall legislative scheme of Title 11 and therefore cannot be fairly implied. Further, the acts or omissions of the State's employees were discretionary, and involved the exercise of judgment upon which reasonable minds might differ, and different results might obtain, and thus entitled to absolute immunity and thus, the agency could not be held liable under *McLean* and *Dinardo*.

I. DISCRETIONARY ACTS = IMMUNITY, REGARDLESS OF WHETHER THERE IS SPECIAL RELATIONSHIP

Petrosillo v. Town of Huntington, 73 A.D.3d 1146, 901 N.Y.S.2d 692 (2nd Dep't 2010). While helping town employees remove plastic garbage bags from metal garbage containers, a sharp object inside one garbage bag lacerated both his legs. Plaintiff sued the Town. The defendant demonstrated, prima facie, that the plaintiff's allegations concerning the alleged conduct of its employee in seeking his assistance in removing the garbage bags from the metal containers involved discretionary acts for which the defendant could not be held liable pursuant to McLean v. City of New York.

j. WHEN GOVERNMENT FAILS TO EXERCISE ITS DISCRETION, NO IMMUNITY

Metz v. State, 27 Misc.3d 1209 (N.Y.Ct.Cl. 2010). Claimants, the estates of several couples, sought damages for the alleged wrongful deaths and personal injuries arising from the tragic capsizing of a tour boat known as the Ethan Allen on Lake George, New York. Claimants moved to dismiss the affirmative defense of sovereign immunity asserted by defendant State of New York and defendants cross-moved for summary judgment. The Ethan Allen was built in 1964. A certificate of inspection, valid for three years, was issued by the United States Coast Guard in

1976 and provided that the maximum number of passengers allowed was 48. The vessel operated as a tour boat on Lake George starting 1979. Inspections of the vessel were performed on an annual basis by inspectors from the Marine Services Bureau (hereinafter MSB) within the New York State Office of Parks, Recreation and Historic Preservation (N.Y.SOPRHP). The first inspection by the MSB occurred in 1979 and approved a maximum of 48 passengers. Inspections of the Ethan Allen occurred annually thereafter, and every time it was again approved for 48 passengers. In 1989, however, the Ethan Allen had been modified when its canvas canopy was removed and replaced with a wooden canopy. The passenger capacity number of 48 remained unchanged, though. The Ethan Allen was carrying 47 passengers when the accident occurred, of which 27 died and nine were injured. An investigation by the National Safety Transportation Board determined that the vessel's stability was insufficient because it carried 48 persons where post-accident stability calculations demonstrated that it should have been permitted to carry only 14 persons". MSB representatives who inspected the Ethan Allen prior to the accident indicated that, although many safety features of the boat were closely inspected, the inspectors relied heavily on the capacity number listed on the previous year's certificate of inspection in order to state the passenger capacity. Testimony from the inspectors also suggests that while the inspectors followed a checklist and understood that certain tasks were mandatory, the inspectors possessed the authority to make their own determinations if the inspections revealed a concern, and to take further steps to ensure the passenger capacity number was appropriate, including performing a stability test. The Court first found that it was not clear from the record whether the inspections were "proprietary" or "governmental" in nature (immunity would only apply if it is the latter). Claimants argued that the inspection and registration of vessels was akin to the inspection of motor vehicles performed by private entities, and therefore, that defendant has acted in a proprietary capacity. But Claimants had not offered any proof to establish that inspections by MSB representatives "displaced or supplemented a traditionally private enterprise or were engaged in the type of activity usually performed by private enterprises", and thus there remained a question of fact in this regard. But even if it were governmental, the analysis would then have to be conducted as to whether the actions were discretionary or ministerial. The Court pointed out that in the recent case of *McLean v. City of New York,* in which the Court of Appeals rejected the possibility that a discretionary act could ever generate liability for a governmental entity, stating that "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general". Although not acknowledged in the opinion, the McLean decision appears to be a departure from precedent governing the immunity historically accorded discretionary and ministerial acts. Prior to McLean, discretionary acts, including the providing of police and fire protection or ambulance services, were ordinarily immune from liability, even where the conduct was negligent, except in a relatively narrow category of cases where a special duty or special relationship existed between the aggrieved party and the public official. Conversely, in instances where it was alleged that a ministerial act was negligently performed, the governmental entity could be subject to liability (see Lauer v. City of New York, supra at 99, 711 N.Y.S.2d 112, 733 N.E.2d 184; Tango v.

Tulevech, supra at 40-41, 471 N.Y.S.2d 73, 459 N.E.2d 182), without the need to establish a specific special duty or special relationship of the type described in McLean. The Court here noted, however, that McLean did not address or impact cases where a government actor is entrusted with discretionary authority, but fails to exercise any discretion in carrying out that authority. The Court of Appeals had previously held that, even though an action may be characterized as discretionary, there must be some showing that discretion was actually exercised before immunity may attach (see, Haddock v. City of New York). Here, the Court looked at the functions and duties of the inspectors, which involved many tasks ranging from examining the hull, the propelling and auxiliary machinery, the electrical apparatus and the vessel's equipment to fixing the number of passengers the vessel can safely carry, and found triable issues of fact exist as to whether the inspections constituted ministerial or discretionary acts. While the inspectors were required by statute to perform certain tasks, the inspectors also appeared to retain the authority to make reasoned judgments and require that additional measures be taken to ensure the safety of the vessel. In addition, the Court concluded that, even if the inspections constituted discretionary conduct, there existed issues of fact as to whether the inspectors exercised the discretion inherent in the position, such as determining whether stability tests or further measures should have been taken to assess the passenger capacity of the Ethan Allen. The inspectors' testimony indicated that they relied almost exclusively on the passenger capacity number from the previous year's inspection when fixing the capacity number for the current season. If the inspectors chose not to exercise any discretion when in fact they had such discretion, the action cannot be cloaked in immunity (see, Haddock v. City of New York, supra). In sum, there were questions of fact for trial on all issues regarding immunity.

k. "DISCRETIONARY" V. "MINISTERIAL"

Leasure v. 1221-1225 Realty, LLC, 25 Misc.3d 1226 (Kings Co.Sup. Ct. 2009). There were three alleged acts or omissions by the City regarding the Leasure family: (1) the approval of the family's eligibility for emergency housing at a fair hearing (two months before the infant's birth); (2) the referral of the family, once the City found it to be eligible, to one of the City's independent contractors (here, City Homes) for transitional placement; and (3) the City's alleged failure or refusal, when the infant was five-seven months old, to permit the family to have an air conditioner in the apartment. The first act was inherently discretionary, and the court did not need to determine whether the second act or the third act (or rather omission) were discretionary or ministerial because, even if these acts/omissions were ministerial, the City would be held liable only if there existed "a special duty to the injured person, in contrast to a general duty owed to the public" and here the City did not voluntarily assume a duty that could have generated the parents' justifiable reliance because, according to their deposition testimony, neither parent had notified the City regarding the absence of air conditioning in the apartment. And although a special relationship may be formed when a municipality assumes positive

direction and control in the face of a known, blatant, and dangerous safety violation, there was no evidence that the City assumed any direction or control over the apartment, nor that the absence of air conditioning in the apartment was an egregious safety violation.

Velazquez v. New York City Health and Hosp. Corp., 65 A.D.3d 981, 886 N.Y.S.2d 129 (1st Dep't 2009). Plaintiff, a home attendant, was injured as her client was carried down a stairway by two emergency medical services (EMS) workers employed by the municipal defendants. The EMS workers were responding to the 911 call plaintiff placed when her client, a severely disabled 85-year-old woman, suffered a seizure. Plaintiff testified that the EMS workers said that they were at the end of a long shift, and one of them appeared to be drowsy, the client was quite heavy, and plaintiff suggested that the EMS workers call for help moving the client down the stairs. Instead, they decided to do it themselves, while plaintiff helped. They were carrying the client down the stairs, began to drop the wheel chair, and plaintiff tried to prevent this by pitching in. She ended up underneath the wheel chair, injured. After a jury trial, defendant moved for a directed verdict on the grounds of the doctrine of governmental immunity in that the employees' decision to not call for help in moving the client was discretionary. Court held that the doctrine does not insulate municipal defendant from liability for the negligence of their employees in carrying an ill person down a stairway, as such an act is plainly ministerial in nature, not discretionary. Further, no "special relationship" was needed between the injured plaintiff and the municipal EMS workers. The assumption of a duty of care toward plaintiff's client by the EMS workers (when they undertook to carry her down the stairs) gave rise to a duty of care to plaintiff when she sought to rescue the client from the peril in which the latter was allegedly placed by the alleged negligence of the EMS workers.

Hussein v. City of New York, 25 Misc.3d 1221, 901 N.Y.S.2d 907 (Richmond Co. Sup. Ct. 2009). Retaining wall collapsed after City had issued building permits for it (in tidal wetlands), then inspected and approved it, and issued certificates of occupancy. Plaintiff homeowners sued, but the Court, applying the *McLean* rule, noted that issuing a building permit, certificates of occupancy, etc., is discretionary in nature, and doing so renders the municipality immune from tort liability, regardless of negligence or even malice. In any event, even if the duties in question were ministerial in nature, the plaintiffs' papers were devoid of any evidence of affirmative conduct on the part of the City defendants which may have induced plaintiffs' purported justifiable reliance upon its actions and/or given rise to a special relationship.

Miniero v. City of New York, 65 A.D.3d 861, 885 N.Y.S.2d 45 (1st Dep't 2009). Members of city police department brought consolidated actions against city and manufacturer of noise protection devices supplied to city and used by officers during firearms training, seeking to recover for hearing loss and related injuries allegedly sustained as a result of their exposure to sound of gunfire at department firing ranges and lack of adequate protective devices. Case against City

dismissed because selection of protective equipment was a discretionary function, and thus governmental immunity applied.

Johnson v. City of New York, 65 A.D.3d 476, 884 N.Y.S.2d 44 (1st Dep't 2009). Bystanders, who were shot during a daylight exchange of gunfire between police officers and a robbery suspect, brought negligence action against city. Court noted that, as a general rule, a municipal defendant is immune from liability for conduct involving the exercise of discretion and reasoned judgment. However, the judgment error rule does not immunize municipal defendants when an innocent bystander is injured by the action of a police officer "in an altercation involving a violation of established police guidelines governing the use of deadly physical force by police officers". That's because following the guidelines is "ministerial" not discretionary. But in this case, plaintiff failed to show that any police guidelines were violated. There is no evidence that innocent persons were unnecessarily endangered, because nothing indicated that at the time the robbery suspect opened fire there were any bystanders, including the plaintiffs, in view. To the contrary, the uncontradicted testimony of the police officers was that they saw no bystanders as they sought to protect themselves and their fellow officers by returning fire. The police took appropriate measures to protect themselves, as well as the public, which was clearly endangered by the actions of this fleeing felon. Furthermore, in view of the absence of proof that there were any bystanders in view, the report of the plaintiffs' expert suggesting that there were questions of fact as to whether police guidelines were violated was rejected. Two dissenters said the case presented a question of fact as to whether plaintiffs' injuries were brought about by a departure from acceptable police practice.

X BUS AND SUBWAY LIABILITY

A. "UNUSUAL OR VIOLENT" MOVEMENTS OF BUS

Tallant v. Grey Line New York Tours, Inc., 67 A.D.3d 497, 889 N.Y.S.2d 562 (1st Dep't 2009). Passenger, who was allegedly injured when driver of double-decker tour bus stopped abruptly, filed suit against tour bus company. As passenger was talking to the guide, defendant driver slammed on the brakes and the bus, which had been moving about five miles per hour, stopped abruptly. The driver testified that the bus was stopped at a red light at Madison Avenue and 52nd Street, and when the light turned green, he proceeded at five miles per hour, approximately two or three feet, when a cab "jumped in front of" him. According to the driver, he applied the brakes with "medium" pressure. Defendants invoked the emergency doctrine. In opposition to this SJ motion, plaintiffs failed to adduce any evidence that the driver might have created the emergency

or could have avoided a collision with the cab by taking some action other than applying his brakes. Nor did plaintiffs demonstrate that the stop was "unusual or violent", and different from the jerks and lurches normally associated with urban bus travel.

B. ASSAULTS ON BUS

Frazier v. Manhattan and Bronx Surface Transit Operating Authority, 75 A.D.3d 619 (2nd Dep't 2010). The infant plaintiff boarded a bus operated by the defendant New York City Transit Authority (hereinafter NYCTA) in Brooklyn and was involved in a fight with another passenger who shot him after they got off the bus. Generally, the New York City Transit Authority owes no duty to protect a person on its premises from assault by a third person, absent facts establishing a special relationship between [the NYCTA] and the person assaulted.

C. DUTY TO PROVIDE SAFE PLACE TO ALIGHT AND BOARD

Davila v. New York City Transit Authority, 66 A.D.3d 952, 888 N.Y.S.2d 138 (2nd Dep't 2009). Summary judgment granted to City Transit Authority where passenger who, after alighting from the bus, tripped and fell on a gas cap, sued city transit authority and the installer of the cap. Plaintiff sued wrong entity. The City of New York, not the NYCTA, is responsible for the maintenance of bus stops within the City of New York, including the roads, curbs, and sidewalks attendant thereto. Moreover, the testimony adduced by the plaintiff at the hearing conducted pursuant to 50-h hearing demonstrated that he was provided with a safe place to alight

D. SUBWAY PROPERTY DEFECT

Bonzon v. City of New York, 25 Misc.3d 1237 (New York Co. Ct. 2009). Plaintiff tripped on a single step separating the sidewalk from the stairway leading to the subway platform. The step was as low as four inches above the ground on the left side, and as high as nine inches above the ground at the spot where plaintiff fell. Although defendants conceded they had a duty to maintain the area in a reasonably safe condition, they argued that could not be held liable because they were compliant with Transit Authority guidelines, and municipal entities are afforded qualified immunity as to their policy decisions where a governmental planning body has passed judgment on the same question of risk as would ordinarily be placed in the "inexpert" hands of the jury.

(*Weiss v. Foote,* 7 N.Y.S.2d 579). Court held defendants were not entitled to immunity because they failed to cite to any provision, in Transit Authority guidelines or otherwise, with which it purported to comply. Further, plaintiff's expert witness determined that the area was in violation of the guidelines, raising as issue of fact as to defendants' liability.

XI MALICIOUS PROSECTION, FALSE ARREST, EXCESSIVE FORCE

Young v. City of New York, 898 N.Y.S.2d 33 (1st Dep't 2010). Plaintiff's landlord called the police to report that plaintiff, who had previously been evicted from her apartment, had re-entered it without permission. Police Officers responded, and after the landlord showed them an eviction letter from the marshal and unlocked the apartment with a key, the officers entered unannounced and, finding plaintiff in bed, and arrested her for criminal trespass. Arrestee brought action against city and police officers alleging false imprisonment, malicious prosecution, negligence, and violation of federal civil rights. All claims, except the excessive force, negligence and federal civil rights claims, were dismissed since the police had probable cause, which constituted a complete defense. The jury found that one of the officers had used excessive force and had been negligent during the arrest, and that the excessive force and negligence were substantial factors in causing plaintiff's injury to her wrists. The failure to issue a DAT was not a violation of plaintiff's civil rights.

LoFaso v. City of New York, 66 A.D.3d 425, 886 N.Y.S.2d 385 (1st Dep't 2009). Tenant of a housing development involved in a physical altercation with an off-duty police officer, and tenant's wife, brought action against development's owner, and its security division and officers, alleging that the off-duty officer was the aggressor, and that the development's owner and its security officers failed to investigate the incident and importuned the police to arrest tenant. The claims for false arrest and malicious prosecution lacked merit as probable cause existed to arrest and prosecute plaintiff. Such probable cause was shown by the criminal complaint that was sworn out by the arresting police officer based on a statement to the arresting officer that plaintiff had punched the off-duty officer in the jaw causing a serious physical injury that required hospital admission.

XII PRIOR WRITTEN NOTICE RULE

A. SNOW AND ICE CASES

Groninger v. Village of Mamaroneck, 67 A.D.3d 733, 888 N.Y.S.2d 205 (2nd Dep't 2009). Plaintiff slipped and fell on patch of ice in municipal parking lot. The Village demonstrated its

prima facie entitlement to judgment as a matter of law by submitting proof that there was no prior written notice of the existence of the icy condition. Contrary to the plaintiff's contention, the prior written notice requirements of Village Law § 6-628 and CPLR 9804 were applicable to a municipal parking lot. As for the failure to remove all the snow or ice from a parking lot is not an affirmative act of negligence, allegation that the Village affirmatively created the hazard, plaintiff failed to adduce any evidence that the patch of ice was created as an immediate consequence of an affirmative act of negligence by the Village. The opinion offered by the plaintiff's expert was speculative.

Wohlars v. Town of Islip, 71 A.D.3d 1007, 898 N.Y.S.2d 59 (2nd Dep't 2010). Plaintiff and fell on ice or snow on a sidewalk located in defendant's parking lot. He testified at his 50-h that it had snowed the day before the incident. However, he did not recall how long it snowed, how much snow fell, or when it stopped snowing. There also was no evidence of any prior snowfall in the weeks immediately preceding the day of the incident. The Town established its prima facie entitlement to judgment as a matter of law by submitting the affidavit of a public works project supervisor stating that his search of the Town's records revealed no prior written notice of the alleged icy condition at the subject parking lot. Plaintiff failed to demonstrate that the allegedly icy condition was created by the Town's affirmative negligence nor was there any claim of special use. The plaintiff, having testified that there was no indication of snow and ice removal on the sidewalk where he fell, failed to present any evidence to substantiate the speculative assertions that the Town undertook snow abatement measures before his fall, and that such measures created or exacerbated the alleged icy condition.

Reiser v. Incorporated Village of Rockville Centre, 70 A.D.3d 796, 894 N.Y.S.2d 151 (2nd Dep't 2010). Plaintiff slipped and fell on a patch of ice in a parking lot owned and operated by the defendant. Defendant moved for SJ on grounds it had no prior written notice of the icy conditions. The Deputy Superintendent of Public Works, in his affidavit, did not unequivocally testify that the Village had no prior written notice of the subject icy condition, and he did not testify that he had conducted any search to determine whether such notice had indeed been received by the proper statutory designee. Under these circumstances, the Deputy Superintendent's testimony was insufficient to satisfy the Village's prima facie burden of showing that it had no prior written of the subject icy condition. Thus, motion for SJ denied.

Stallone v. Long Island Rail Road, 69 A.D.3d 705, 894 N.Y.S.2d 65 (2nd Dep't 2010). One morning, approximately 12 hours after the end of a major snowstorm, the plaintiff slipped and fell on an accumulation of snow or ice in a parking lot at the Lindenhurst station of the defendant Long Island Rail Road (LIRR). The parking lot was owned by the LIRR and operated and maintained by the defendant Incorporated Village of Lindenhurst. The plaintiff sued both, and the Village moved for sj claiming plaintiff failed to establish prior written notice as required under the Code of the Incorporated Village of Lindenhurst. There was no prior written notice,

and plaintiff failed to prove the Village affirmatively created the hazard. There was no proof that plowing efforts immediately resulted in a dangerous condition or exacerbated a previously existing dangerous condition. The opinion offered by the plaintiff's expert was addressed, in effect, to the deficiencies in the Village's efforts to remove the snow, rather than to its affirmative creation or exacerbation of a dangerous condition.

B. SNOW AND ICE CASES

Pipero v. New York City Transit Authority, 69 A.D.3d 493, 894 N.Y.S.2d 39 (1st Dep't 2010). Defendant made a prima facie showing that plaintiff fell during a storm in progress by submitting certified weather records showing that snow began the day before plaintiff's accident and, while the intensity decreased, continued through the end of the day of plaintiff's fall But plaintiff's testimony and defendant's own records raised issues of fact as to whether defendant gratuitously and negligently performed snow and ice removal operations and as to whether its failure to place sand or salt on the stairs created or exacerbated a dangerous condition.

Verleni v. City of Jamestown, 66 A.D.3d 1359, 886 N.Y.S.2d 289 (4th Dep't 2009). Pedestrian brought personal injury action after he allegedly slipped and fell on sidewalk. In support of defendants' motion, defendants submitted the deposition testimony of defendant-abutting landowner in which he stated that there was "a light snowfall" and "a dusting of snow on the sidewalk" at the time of plaintiff's fall. That testimony and other submissions of defendants in support of their motion for SJ were insufficient to satisfy their burden of proving a storm in progress defense.

Gleeson v. New York City Transit Authority, 74 A.D.3d 616, 905 N.Y.S.2d 26 (1st Dep't 2010). Defendant met its prima facie burden of establishing its entitlement to summary judgment with evidence that there was a storm in progress at the time of the accident. In opposition, plaintiff failed to raise an issue of fact. It was undisputed that it had snowed on the date of the accident. While there was conflicting testimony with respect to whether it was snowing at the specific time of plaintiff's accident, plaintiff offered no evidence as to the elapsed time between cessation of the storm and his accident. Accordingly, he did not raise an issue of fact as to whether defendant had a reasonable time to remove the snow. Although the record showed that defendant's employee was in the process of removing snow and ice and salting the steps when the accident occurred, there was simply no evidence that by removing the snow and applying salt, defendant exacerbated the condition.

C. PRIOR WRITTEN NOTICE REQUIRED FOR DEFECTS ONLY ON "STREETS, HIGHWAYS, BRIDGES, CULVERTS, SIDEWALKS AND CROSSWALKS."

Blanc v. City of Kingston, 68 A.D.3d 1525, 892 N.Y.S.2d 589 (3rd Dep't 2009). Property owners brought action against city to recover for damage sustained when sewer main collapsed, alleging that city was negligent in repair and maintenance of sewer line. Plaintiffs alleged defendant was negligent in its maintenance and repair of the sewer line. Defendant moved for summary judgment dismissing the complaints because it was not provided with prior written notice of any defect as required by Kingston City Charter § C17-1. Unlike the local laws involved in cases cited by plaintiffs, the plain language of Kingston City Charter § C17-1 was not limited to "streets, sidewalks and similar areas", but required prior written notice of defects or dangerous conditions in an expanded list of publicly-owned properties, specifically including any "sewer." Because no party challenged the local law as contrary to or in violation of state legislation, we will not address whether a municipality may lawfully require prior written notice of a defect that is subsurface and not visible, as opposed to limiting notice statutes to observable surface defects. But since there was prior written notice, the Court declined to address the alternative arguments concerning exceptions to the written notice requirement.

Mullen v. Town of Hempstead, 66 A.D.3d 745, 886 N.Y.S.2d 355 (2nd Dep't 2009). Contrary to the plaintiff's contention, the defendant, Town of Hempstead, was not prohibited by GML 50-e(4) from requiring prior written notice of defects in a paved bike path over which the public has a general right of passage, which is the functional equivalent of a sidewalk or highway. Accordingly, since it was undisputed that the Town did not have prior written notice, case dismissed.

Groninger v. Village of Mamaroneck, 67 A.D.3d 733, 888 N.Y.S.2d 205 (2nd Dep't 2009). Plaintiff slipped and fell on patch of ice in municipal parking lot. Contrary to the plaintiff's contention, the prior written notice requirements of Village Law § 6-628 and CPLR 9804 are applicable to a municipal parking lot, which is deemed a "highway". While the plaintiff's contention in this regard, premised on Walker v. Town of Hempstead, 84 N.Y.2d 360, is not without some logical appeal, Court was not persuaded that a departure from the long-standing precedents in this area was warranted. Since there was no prior written notice, nor evidence that Village affirmatively created hazard, SJ granted to defendant. The failure to remove all the snow or ice from a parking lot is not an affirmative act of negligence. The plaintiff failed to adduce any evidence that the patch of ice was created as an immediate consequence of an affirmative act of negligence by the Village. The opinion offered by the plaintiff's expert was, at best, speculative, and was insufficient to raise a triable issue.

[Babenzien v. Town of Fenton](), 67 A.D.3d 1236, 889 N.Y.S.2d 295 (3rd Dep't 2009). Motorcyclist crossing railroad tracks was caught in the throat by a wire hanging low across the roadway and thrown from his motorcycle into a ditch. He sued the Town which owned and maintained the road that crossed tracks, and also sued the railroads which owned and maintained tracks, wire that motorcyclist struck, and pole from which wire was suspended. Town moved for SJ based on no prior written notice of the dangerous condition, and the burden shifted to plaintiff to establish a factual issue as to the existence of an exception to the notice requirement. Plaintiff argued, however, that the Town employees had created the hazard. But the Town employees testified without contradiction that they had nothing to do with it. Thus, SJ granted to defendant Town. NOTE: How can the prior written notice requirement apply when the defect at issue, a wire strung between two poles over a roadway, was not a defect in a street, highway, bridge, culverts, sidewalk or crosswalk? The defect was not in the roadway, but suspended above it. I think plaintiff's attorney may have overlooked that argument.

D. REPAIR ORDERS OR REPORTS DO NOT CONSTITUTE "PRIOR WRITTEN NOTICE"

Kempton v. City of New York, 26 Misc.3d 1204 (Richmond Co. Sup. Ct. 2009). Plaintiff tripped and fell due to pothole in road on Staten Island. The City moved for summary judgment on lack of prior written notice. It showed records that the pothole had last been repaired two years before the accident. Plaintiff's expert opined that repair work was never done on the subject pothole and that it remained in that condition at the time of plaintiff's accident, and that the City had actual notice of the defect from a repair order that was never carried out. "Contrary to plaintiffs' contention, repair orders or reports, reflecting only that pothole repairs had been made to the subject area more than a year before the accident, are insufficient to constitute prior written notice of the defect". Summary judgment grated to defendant.

E. TELEPHONIC COMPLAINTS AND INTERNAL WRITTEN REPORTS DO NOT CONSTITUTE "PRIOR WRITTEN NOTICE".

Kiszenik v. Town of Huntington, 70 A.D.3d 1007, 895 N.Y.S.2d 208 (2nd Dep't 2010). With regard to the issue of notice, the plaintiff's reliance on a telephonic complaint about the alleged condition which the defendant reduced to writing was misplaced, since such a complaint is not the equivalent of prior written notice of the condition. Similarly, the "time and material reports"

maintained by the defendant as part of its internal records do not satisfy the prior written notice requirement. Likewise, the prior written notice requirement was not satisfied by a purported letter which the plaintiff vaguely testified at his deposition that he might have sent to the defendant's disability office, rather than to the Town Clerk or the Town Superintendent of Highways, as is required by the applicable code provision.

F. ALMOST NOTHING CONSTITUTES “PRIOR WRITTEN NOTICE”!

Kiszenik v. Town of Huntington, 70 A.D.3d 1007, 895 N.Y.S.2d 208 (2nd Dep’t 2010). Defendant submitted affidavits of its employees demonstrating that it did not receive prior written notice of the roadway defect upon which the plaintiff allegedly fell. Plaintiff’s reliance on a telephonic complaint about the alleged condition which the defendant reduced to writing was misplaced, since such a complaint is not the equivalent of prior written of the condition. Similarly, the “time and material reports” maintained by the defendant as part of its internal records do not satisfy the prior written notice requirement. Nor was prior written notice established by a purported letter which the plaintiff vaguely testified at his deposition that he might have sent to the defendant's disability office, rather than to the Town Clerk or the Town Superintendent of Highways, as is required by the applicable code provision. Plaintiff also failed to show defendant affirmatively created the dangerous condition, since the plaintiff made no showing that any of the defendant's internal work records pertained to the defective condition upon which he allegedly fell, and the plaintiff's own testimony at his 50-h hearing and deposition negated any suggestion that the defendant repaired the subject area of the roadway. Additionally, the plaintiff failed to come forward with any evidence that any repair by the defendant was negligently performed and that this immediately caused a defective condition. Rather, plaintiff's own testimony established that the defect arose gradually and worsened over time.

G. SHIFTING BURDENS OF PROOF

Westbrook v. Village of Endicott, 67 A.D.3d 1319, 889 N.Y.S.2d 317 (3rd Dep't 2009). Plaintiff tripped over a pothole while crossing a street maintained by defendant. Defendant moved to dismiss the complaint and/or for summary judgment and argued, among other things, that it had not received prior written notice of the pothole. Defendant's village clerk submitted an affidavit unequivocally stating that no such notice was given, shifting the burden to plaintiff to raise a material question of fact as to the applicability of an exception to the prior written notice requirement. Plaintiff failed to meet this burden.

H. "BIG APPLE MAP" NOTICE

Ortiz v. City of New York, 67 A.D.3d 21, 884 N.Y.S.2d 417 (1st Dep't 2009). The Big Apple map on which plaintiff relied for showing prior written notice did not constitute such notice because the "awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident". In other words, markings showing a crack on the sidewalk do not give notice of a hole at the end of that crack. The markings on a Big Apple map must give notice of the particular defect alleged to have caused the injury. There were issues of fact, however, as to whether the City caused or created the hole. There was evidence the City repaved the street and either buried the curb or simply failed to install one, which created a 1 1/2-to-2-inch vertical drop from the ramp to the street.

I. SPECIAL USE

De La Reguera v. City of Mount Vernon, 74 A.D.3d 1127, 904 N.Y.S.2d 108 (2nd Dep't 2010). Plaintiff was injured when she tripped on a pothole in the "permit only" area of a parking lot owned by the defendant. The plaintiff possessed a City-issued permit allowing her to park in the "permit only" parking spaces within the parking lot, for which she paid a fee. The City established its prima facia entitlement to judgment as a matter of law by presenting evidence that it had not received prior written notice of the defect. In opposition, the plaintiff failed to raise a triable issue of fact as to the applicability of the "special use" exception by failing to make a showing of any nexus between the alleged "special use" of issuing parking permits and the alleged pothole which caused her injury

Ghin v. City of New York, 904 N.Y.S.2d 905 (1st Dep't 2010). City had no prior written notice of the sidewalk condition. Although plaintiff claimed inadequate lighting, the notice of claim failed to give notice of the theory that theory. Although the notice of claim stated that plaintiff tripped on a raised metal plate, it did not allege, nor did plaintiff present any proof at trial, that the City derived any special benefit from the metal plate

J. DEMINIMUS DEFECTS IN SIDEWALKS

Johnson v. New York City Housing Authority, 26 Misc.3d 1235 (New York Co. Sup. Ct. 2010). Plaintiff tripped and fell on a crack between two sidewalk flags. The whole front of her toes had entered into the crack, one side of which was higher than the other, causing her to fall. Denying that the sidewalk defect was trivial (as defendant contended in its SJ motion), plaintiff offered

the affidavit of an engineer who, based on his examination of plaintiff's photographs and the sidewalk, concluded that the defect constituted a tripping hazard, as the vertical grade differential between the two sidewalk flags was approximately one inch. Court recited *Trincere* for the proposition that whether a defect is trivial does not depend solely on its dimensions. Rather, "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury." Thus, sidewalk defects measuring one-inch have been found to be not trivial, and here there was a question of fact. Defendant offered only the inadmissible statements of its employees as proof that the sidewalk defect on which plaintiff tripped was trivial. Even if defendant had met its burden, plaintiff's engineer's report created a question of fact. Further, plaintiff's description of how her toes entered the crack, moreover, warranted an inference that it constituted a tripping hazard, as it was wide enough and deep enough to trap her shod toes.

DeLeon v. New York City Housing Authority, 65 A.D.3d 930 (1st Dep't 2009). *Two-tenths-inch* height differential between the surface of the bathroom floor covered by tiles and the surface of the floor where tiles were missing was *de minimis*.

K. SECTION 7-210 OF THE ADMINISTRATIVE CODE OF THE NYC

1. What Is Part Of The "Sidewalk" Within Meaning Of 7-210?

Ortiz v. City of New York, 67 A.D.3d 21, 884 N.Y.S.2d 417 (1st Dep't 2009). Pedestrian brought action against city and property owner, seeking to recover damages for injuries she allegedly sustained when she tripped on hole in pedestrian ramp connected to sidewalk adjacent to a building. Owner and city moved for summary judgment. At issue was whether a corner pedestrian ramp leading down a sidewalk onto the street is part of the "sidewalk" for purposes of Administrative Code of the City of New York § 7-210, which imposes tort liability on property owners who fail to maintain City-owned sidewalks in a reasonably safe condition. Court held that § 7-210 does not impose tort liability on abutting property owners for defects on pedestrian ramps. The City of New York is responsible for maintaining the pedestrian ramps. The City's Highway Rules regarding "Sidewalk, Curb and Roadway Work" mandate the specific construction requirements of sidewalk "flags" (34 RCNY § 2-09[f][4][vii]) and "Pedestrian ramps" (§ 2-09[f][4] [xiv]), clearly indicating that the City views the two as separate and distinct items. Further, contrary to plaintiff's assertions, the City did not receive prior written notice of the hole that allegedly caused plaintiff to trip. The Big Apple map on which plaintiff relied did not constitute such notice because the "awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident". In other words, markings showing a crack on the sidewalk do not give notice of a hole at the end of that crack. The markings on a Big Apple map must give notice of the particular defect alleged to have caused the injury. There were issues of fact, however, as to whether the City caused or created

the hole. There was evidence the City repaved the street and either buried the curb or simply failed to install one, which created a 1 1/2-to-2-inch vertical drop from the ramp to the street.

Lanhan v. City of New York, 69 A.D.3d 678, 893 N.Y.S.2d 183 (2nd Dep't 2010). Plaintiff stepped into a hole in a curb and/or a sidewalk, abutting the business property of the commercial defendant. The plaintiff alleged, in his notice of claim and bill of particulars, that the defective condition which caused his fall was located on a "sidewalk/curb." Commercial defendant moved for summary judgment on the ground that the defect was on the curb, and not on the sidewalk. Commercial defendant failed, in its SJ motion, to demonstrate that the defect which allegedly caused the plaintiff's fall was located exclusively on the curb, rather than on the sidewalk abutting his property. Reference to the plaintiff's deposition testimony in which he occasionally used the word "curb" to describe where he fell could not serve to negate his testimony that the location was the "sidewalk/curb."

Calise v. Millennium Partners, 26 Misc.3d 1222 (New York Co. Sup. Ct. 2010). Plaintiff was caused to trip and fall by a piece of metal protruding from the public sidewalk abutting the premises known as 155 West 66th Street. The defect was originally a sign post, installed by the City, bearing a "No Parking" or "No Standing" sign and designating the area as a hotel loading and unloading zone. For at least three years preceding plaintiff's accident, neither the abutting landowner or the tenant had done any work on the sidewalk in front of the premises. It appeared from the evidence that some three years ago Consolidated Edison had removed the sign when it was doing some work in the area. Defendants moved for SJ, and Court noted that Administrative Code § 7-210 does not shift liability for sign posts installed by and maintained by the City of New York to abutting land owners. Plaintiff contended that the abutting owner and tenant derived a "special use" from the sign in that it originally bore a sign restricting traffic in the area for the benefit of the abutting land owner(s) and guests. Court said it Plaintiff "knows of no case, in which an abutting land owner has been held liable for the dangerous condition of an item installed and maintained by the City of New York, under the theory of special use". Here, the sign was installed by the City of New York and exclusive responsibility for maintaining or removing the sign appears to lie with the City of New York Department of Transportation, pursuant to New York City Charter § 2903(a)(2). It is the City of New York, not the abutting owner or tenant, who has the responsibility for regulating parking and traffic. That some benefit may have flowed to the abutting owner or tenant is not the determinative factor. There must be control over the installed object. Thus, SJ granted to defendants.

Marino v. Parish of Trinity Church, 67 A.D.3d 500, 888 N.Y.S.2d 49 (1st Dep't 2009). Pedestrian tripped and fell on a metal protrusion located on the sidewalk either right in front of or just near a driveway that led to landowner's loading dock. Under the law in effect at the time of the accident, which predated Administrative Code of the City of N.Y. § 7-210, liability on an abutting landowner could only be liable where he negligently constructed or repaired the

sidewalk, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligated the owner to maintain the sidewalk and provided that a breach of that duty would result in liability. Here, the abutting owner was entitled to summary judgment because there was no evidence of any of this.

Grier v. 35-63 Realty, Inc., 70 A.D.3d 772, 895 N.Y.S.2d 149 (2nd Dep't 2010). Trip and fall victim sued the owner of the premises abutting the sidewalk upon which she fell, seeking to recover damages for personal injuries. Plaintiff claimed to have tripped while walking over an unpaved patch of ground and onto a concrete slab of the adjoining sidewalk flag. The plaintiff testified at her deposition that the unpaved patch was on the same general level as the sidewalk, but that her right foot became caught on the concrete slab of the adjoining sidewalk flag since the edge of the slab was slightly higher than the unpaved patch. The plaintiff sued the commercial owner of the premises abutting the sidewalk, which then commenced a third-party action against the City of New York and its own commercial tenant, which leased the store located at the corner of the first floor of its building. A representative of the Forestry Division of the New York City Department of Parks and Recreation for the borough of Queens testified, at an examination before trial, that the area where the plaintiff fell was actually a tree well, which had once contained a tree. The representative testified that the tree had been removed more than four years prior to the subject accident, and that its stump was removed approximately nine months after the removal of the tree. Upon defendant's motion for summary judgment, Court noted that, although Administrative Code of the City of New York § 7-210 shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner, a tree well is not part of the "sidewalk" for purposes of that section of Administrative Code of the City of New York. Moreover, the plaintiff did not refute the commercial defendant's contention that it did not create the defective condition, did not negligently repair it, and did not cause the condition to occur through its special use of the tree well. Thus summary judgment granted to defendant.

Antenozzi v. Village of Spencerport, 26 Misc.3d 650, 889 N.Y.S.2d 433 (Monroe Co. Sup. Ct, 2009). The Village submitted evidence that there had been no prior written notice of the alleged broken tree well grate located in the City's sidewalk. Plaintiff opposed the summary judgment motion by arguing that, in accordance with Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517, 860 N.Y.S.2d 429, 890 N.E.2d 191 (2008), the tree well and adjacent material surrounding the tree well is not considered a part of the "sidewalk" or "street" within the meaning of New York State Village Law § 6-628 and Local Law § 110-12. Plaintiff concluded that because the tree well grate is not part of the sidewalk, no written notice under the statutes is required in order to maintain this action. Plaintiff submits that summary judgment must be denied. Court agreed that tree well was not part of the "sidewalk" for purposes of section 7-210 of the Administrative Code of the City of New York. The Court in *Vucetovic* acknowledged that the case presented a close

question concerning the issue of transferring liability to abutting landowners (*Id.* at 522, 860 N.Y.S.2d 429, 890 N.E.2d 191). Recognizing that the case presents a "close question," the Court concludes that "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" (*Id.* at 521, 860 N.Y.S.2d 429, 890 N.E.2d 191). But Court concluded that the *Vucetovic* decision was not controlling here. The Court in *Vucetovic* was clear that its decision and determination that a tree well was not part of the sidewalk was specifically for the purposes of section 7-210 of the Administrative Code of the City of New York on the issue of transferring liability to adjoining property owners. The issue of transferring liability from the municipality to an adjoining property owner is not applicable here. The definition of a "sidewalk" provided by the State Legislature is in the Vehicle and Traffic Law as "[t]hat portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians" (Vehicle and Traffic Law § 144). Under this definition the tree well grating would be part of the sidewalk, as it is located in the defined area and intended for the use of pedestrians to walk over when near a tree. Summary judgment granted to Village.

Fuller v. PSS/WSF Housing Co., L.P.,70 A.D.3d 415, 893 N.Y.S.2d 547 (1st Dep't 2010). Pedestrian who tripped in the dirt area of a tree well cut out of a public sidewalk and fell into the tree brought personal injury action against abutting landowner, who established its entitlement to summary judgment by submitting, inter alia, plaintiff's deposition testimony that, while jogging to catch a bus, he looked over his left shoulder to see the bus, at which point he tripped in the dirt area of the tree well. Plaintiff was aware of the presence of the tree before he started jogging. In opposition, plaintiff failed to raise a triable issue of fact as to whether defendants' adjacent construction fence, which, in accordance with the permit issued by the City was five feet from the curb of the sidewalk, constituted a hazard, or had any role in the accident. The Court held that the tree area was not part of the sidewalk for purposes of tort liability under Administrative Code of City of N.Y. § 7-210. Even assuming that defendant's use of the fence constituted a "special use," plaintiff did not present any evidence showing that anything other than his own inattention was the proximate cause of his accident, or that the presence of the fence had an impact upon his actions

Fusco v. City of New York, 71 A.D.3d 1083 (2nd Dep't 2010). Pedestrian tripped and fell on an elevated sidewalk which was raised by a nearby tree root emanating from an adjacent tree well. Court noted that, for purposes of the Administrative Code, "a tree well is not part of the 'sidewalk' and consequently section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells. Here, the defendants (the City and the abutting property owner) each failed to demonstrate the absence of any triable issues of fact as to whether the plaintiff tripped and fell over a defective sidewalk, or a tree well, or a combination of the two. Further, the Court declined to reach the City's contention, raised for the first time on appeal, that it did not receive prior written notice of any alleged defect at the site of the plaintiff's accident as required by Administrative Code of the City of New York § 7-210(c)(2).

Storper v. Kobe Club, --- N.Y.S.2d ----, 2010 WL 3119496 (1st Dep't 2010). At issue was whether a sidewalk metal grating owned by the MTA was part of the "sidewalk" for purposes of Administrative Code of the City of New York § 7-210, which requires owners of real property to maintain abutting sidewalks in a reasonably safe condition. Plaintiff's testimony established that she tripped and fell on a raised and broken portion of the public sidewalk surrounding the vault cover owned by the MTA. The vault was adjacent to the premises owned by defendants. Court held that this was not part of the "sidewalk", relying in large part on the Rules of City of New York Department of Transportation 34 RCNY 2-07, which imposes the duty of maintenance and repair of a sidewalk grate on the owner of the grate, which in this case was the MTA. There was no doubt that the defective area of the sidewalk where plaintiff fell was inside the 12-inch zone that the MTA was required to repair pursuant to 34 RCNY 2-07.

Hurley v. Related Management Co., 74 A.D.3d 648 (1st Dep't 2010). Plaintiff's testimony established that she fell as a result of an alleged slippery condition of a sidewalk grate and it was undisputed that defendant Consolidated Edison Company of New York, rather than the abutting landowner, owned the grate and vault it covers. At issue was whether sidewalk metal grating was part of the "sidewalk" for purposes of Administrative Code of the City of New York § 7-210, which requires owners of real property to maintain abutting sidewalks in a reasonably safe condition. Although sidewalk grates are generally intended for the use of pedestrians, sections 19-152 and 16-123, the provisions whose language section 7-210 tracks, contemplate the installation, maintenance, repair and clearing of sidewalks or sidewalk flags. New York City Department of Transportation Highway Rule 34 (RCNY § 2-07), which governs the maintenance and repair of sidewalk grates, places maintenance and repair responsibilities on the owners of covers or gratings. Therefore, we find that § 7-210 of the Administrative Code of the City of New York does not impose liability upon an abutting property owner for failure to maintain a sidewalk grate in a reasonably safe condition.

Germain v. City of New York, 66 A.D.3d 640, 886 N.Y.S.2d 501 (2nd Dep't 2009). Jury verdict set aside where plaintiff failed to establish that the City had prior written notice of the roadway defect (*see* Administrative Code of the City of New York § 7-201[c][2]). Plaintiff also failed to establish that the abutting property owner was subject to liability under the relevant provision of the Administrative Code of the City of New York. The alleged accident did not occur on a "sidewalk" for purposes of section 7-210 of the Administrative Code of the City of New York, which imposes tort liability on certain property owners who fail to maintain city-owned sidewalks in a reasonably safe condition.

Smith v. 125th Street Gateway Ventures, LLC, 903 N.Y.S.2d 231 (1st Dep't 2010). Case dismissed against abutting landowners because City sign or signpost was not part of the "sidewalk" for purposes of section 7-210 of the Administrative Code.

2. Whether Abutting Owner Had Notice Of The Defect

Martinez v. Khaimov, 74 A.D.3d 1031 (2nd Dep't 2010). The plaintiff slipped and fell on a mound of snow located on the public sidewalk adjacent to an eight-unit apartment building in Brooklyn owned by the defendants. The defendants did not live in the building. To prevail on their summary judgment motion, the defendants were required to demonstrate that they neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. Here, defendants failed to do so. Although defendant testified at his deposition that he inspected the building two or three times a week, he failed to provide any testimony as to when he last inspected the subject sidewalk prior to the accident or what it looked like when he last inspected it.

3. Who Is The Abutting Landowner?

Gabriele v. Edgewater Park Owners Co-op. Corp., Inc., 67 A.D.3d 484, 891 N.Y.S.2d 319 (1st Dep't 2009). Plaintiff parked her vehicle and was forced by construction work on the sidewalk to walk onto the roadway where she was injured when she stepped into a pothole located one foot from the curb. Plaintiff argued that the street was defective because of the pothole, and the sidewalk was defective because of the obstruction. Plaintiff thus sued both the abutting landowner and the City. The defendant abutting owner argued that it was a large, cooperative development consisting of 675 unattached, single-family homes, any thus liability rests solely with the shareholder whose unit abutted the obstructed portion of the sidewalk. But this argument failed because the defendant did not proffer its declaration or by-laws. Concerning the City, the complaint was properly dismissed in the absence of evidence rebutting the City's prima facie showing that it did not have notice of or create the pothole in question (Administrative Code § 7-210[c][ii]). Permits issued by the City in the months prior to plaintiff's accident for water meter work in units close to the unit immediately abutting the obstructed area of the sidewalk did not indicate that the City was aware of the pothole in question so as to constitute a 'written acknowledgment' within the meaning of the Pothole Law, and the issuance of the work permits was insufficient to satisfy the prior written notice requirement of the statute.

4. Residential Use Exception

Dejesus v. City of New York, 24 Misc.3d 1249, 899 N.Y.S.2d 58 (Kings Co.Sup. Ct. 2009). Plaintiff tripped and fell on a defective condition of the sidewalk area in front of the premises located at 123 Nevins Street, Brooklyn, New York. Court here discusses a series of recent Second Department cases where the concept of "actual use" of premises has emerged as an element in the definition of the exemption authorized in Administration Code § 7-210; that is, whether the dwelling is a one-, two- or three-family residential dwelling, in whole or part owner occupied. Upon the facts here, summary judgment was denied based on an issue of fact regarding "actual use".

Schwartz v. City of New York, 74 A.D.3d 945, 903 N.Y.S.2d 93 (2nd Dep't 2010). Defendants abutting landowners established their prima facie entitlement to judgment by demonstrating that the certificate of occupancy for the subject property permitted three families to reside there, and that the property was owner-occupied and used exclusively for residential purposes. Thus, the appellants established, prima facie, that the property was exempt from liability imposed pursuant to Administrative Code of City of New York § 7-210(b).

Dimitratos v. City of New York, 25 Misc.3d 1224 (New York Co. Sup. Ct. 2009). The City failed to submit sufficient proof, in evidentiary form, to establish that the Seventh Avenue South property was not owner-occupied residential property with three or fewer units. The City submitted only an affirmation of an attorney employed by DOF who was responsible for responding to Freedom of Information Law requests, who affirmed, based on a review of information from the Real Property Assessment Division ("RPAD") database, that the property located at 48-52 Seventh Avenue South was classified as "Building Class 09 (Office Buildings), and not as a one-two- or three-family solely residential property." However, the witness did not amend a printout from the RPAD to his affirmation, nor did the City submit any other documentation in admissible form to substantiate the witness's statement. The owner's testimony showed that the property's actual use was counter to its tax classification, and that she used it as a home office when she was in New York. A jury could find that the property was "used exclusively for residential purposes." There was an issue of fact as to whether the property was used as a one family residentially occupied property for purposes of application of Administrative Code § 7-210.

Braun v. Weissman, 68 A.D.3d 797, 890 N.Y.S.2d 615 (2nd Dep't 2009). Plaintiff slipped and fell on ice on a sidewalk abutting the defendants' property. But since the defendants and their children lived in the premises, a one-family house, the premises were exempt from liability imposed pursuant to Administrative Code of the City of New York § 7-210(b) for negligent failure to remove snow and ice from the sidewalk. Nevertheless, the defendants, as movants, failed to establish that their snow removal work did not create the alleged icy condition. A triable issue of fact existed as to whether the ice upon which the injured plaintiff slipped was formed when snow piles created by the defendants' snow removal efforts melted and refroze.

Coogan v. City of New York, 73 A.D.3d 613, 900 N.Y.S.2d 645 (1st Dep't 2010). Dismissal of the complaint was justified in light of the exemption afforded to "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (New York City Administrative Code § 7-210[b]). In support of his motion, defendant submitted a personal affidavit that he had neither used the premises for a "home office" nor claimed any part thereof as an income tax deduction. Assuming, without deciding, that he might occasionally use his laptop computer for research, such use was merely incidental to his residential use of the property.

Gordy v. City of New York, 67 A.D.3d 523, 887 N.Y.S.2d 847 (1st Dep't 2009). Defendant established entitlement to judgment by submitting evidence that the property that abutted the sidewalk where the accident occurred was a two-family dwelling owned by a corporate entity, and thus was not owner-occupied (Administrative Code of City of N.Y. § 7-210).

5. Tenant Liability Where Lease Is "Comprehensive And Exclusive" As To Duty To Maintain Sidewalk

Abramson v. Eden Farm, Inc., 70 A.D.3d 514, 894 N.Y.S.2d 429 (1st Dep't 2010). Pedestrian brought negligence action against tenant after she tripped over a cracked portion of public sidewalk abutting tenant's store. In support of its motion for summary judgment, tenant demonstrated that it did not create the alleged defect through any special use of the sidewalk or otherwise and that it was not a landowner and therefore was not subject to a statutory obligation to maintain the sidewalk in "reasonably safe condition" pursuant to Admin Code of City o N.Y. 7-210. However, while tenant relied on provisions of its lease which required it to clean the sidewalk and make non-structural repairs to the premises, it entirely failed to address another provision which required it, at its own expense, to "make all repairs and replacements to the sidewalks and curbs adjacent" to the premises, or the legal issue of whether the lease was so "comprehensive and exclusive" as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk. Thus, defendant did not demonstrate an absence of a duty of care owing to the plaintiff pedestrian.

Cucinotta v. City of New York, 68 A.D.3d 682, 892 N.Y.S.2d 352 (1st Dep't 2009). Pedestrian tripped and fell on an allegedly structurally defective sidewalk abutting the premises located at 162 West 21st Street, New York. The lease required tenant to make all "nonstructural repairs to the sidewalks". Tenant moved for summary judgment on the grounds that the defendant was structural. Court held that it established that the lease did not shift responsibility for the structurally defective concrete slab on the sidewalk from owner to tenant, and that the defect in the sidewalk was not due to any negligence on the part of the tenant.

6. Law Authorizing City to Pay, At Its Discretion, pedestrians injured on sidewalk, does not create a right of action.

Rodriguez v. City of New York, 70 A.D.3d 450, 895 N.Y.S.2d 358 (1st Dep't 2010). Pedestrian tripped and fell accident on sidewalk. The City established prima facie that it did not own the real property abutting the sidewalk on which plaintiff fell and that the property was a vacant lot, and that therefore, pursuant to Administrative Code of City of N.Y. § 7-210(c) was not liable for plaintiff's injuries. In opposition, plaintiff failed to raise any issues of fact. Plaintiff's reliance on Administrative Code § 7-212 was unavailing. Section 7-212, which authorizes the comptroller to make payments, at his discretion and under certain conditions, to an individual injured because of a defective sidewalk, does not create a right of action against the City.

7. City's Liability

Kempton v. City of New York, 26 Misc.3d 1204 (Richmond Co. Sup. Ct. 2009). Staten Island trip and fall on sidewalk in which City alleged plaintiff failed to prove compliance with the prior written notice requirement in accordance with section 7-201(c) of the Administrative Code of the City of New York, and failed to demonstrate that the alleged defect was caused and/or created by any affirmative negligence on the part of the City. In opposition, plaintiff submitted an expert affidavit by a professional engineer who opined that repair work which had been ordered by written repair order was never done on the subject pothole and that it remained in that condition at the time of plaintiff's accident. Court noted that Administrative Code § 7-201(c) limits the City's duty of care over, e.g., municipal streets, by imposing liability only for such defects or hazardous conditions that its officials have been actually notified exist at a specified location. Contrary to plaintiffs' contention, repair orders or reports, reflecting only that pothole repairs had been made to the subject area more than a year before the accident, are insufficient to constitute prior written notice of the defect. The expert affidavit of the plaintiff's engineer was of little evidentiary value, as it was both speculative and conclusory in nature. SJ granted to defendant.

L. HIGHWAY LAW 139(2) – NO PRIOR WRITTEN NOTICE NEEDED

Napolitano v. Suffolk County Dept. of Public Works, 65 A.D.3d 676, 884 N.Y.S.2d 484 (2nd Dep't 2009). Motorcyclist brought action against county Department of Public Works and other defendants after he rode over a pothole in roadway, causing him to fall to ground and be injured.

The defendants moved for SJ, contending that they did not have prior written notice of the alleged defect, as required under Suffolk County Charter § C8-2A. Under Highway Law 139(2) provides that constructive notice of a highway defect, except in the case of snow and ice, is an exception to any such prior written notice requirement for county highways. Here, while defendants established their entitlement to SJ on the issue of prior written notice by submitting evidence that they had no prior written notice of the roadway defect that allegedly caused the accident, they failed to submit any admissible evidence on the issue of whether or not they had constructive notice of the alleged defect. Accordingly, they failed to meet their burden of showing their entitlement to SJ.

Loughren v. County of Ulster, --- N.Y.S.2d ----, 75 A.D.3d 976, 2010 WL 2853096 (3rd Dep't 2010). Plaintiff alleged County was negligent in maintaining a portion of the County's road where he fell after stepping in a hole that was located on the shoulder of the roadway. Defendant moved for summary judgment dismissing the complaint based on lack of prior written notice, but plaintiff argued that defendant had constructive notice that a hole existed in the shoulder of the highway pursuant to Highway Law 139(2) and, as such, service of written notice of the defect was not required. Even though the local County law purported to require prior written notice of a defect, the New York State Highway Law trumped it. The plaintiff submitted a photograph which he claimed showed the defect existed for a significant period of time so that the County should have and repaired it before the accident occurred. In response, defendant submitted deposition testimony of a Highway Department official who stated that he had inspected the roadway where the fall is alleged to have occurred each week for the entire year immediately prior to plaintiff's accident and never saw the hole as depicted in the photograph or any other defect in that area of the accident. In addition, plaintiff did not established that the photograph accurately reflected the condition or the configuration of the hole as it existed at the time of his accident or when, in fact, the photograph was actually taken. Summary judgment granted to defendant.

Shapiro v. County of Nassau, 26 Misc.3d 1238 (Nassau Co. Sup. Ct. 2010). Plaintiff trip and fall as a result of a cracked and depressed portion of a sidewalk abutting a County highway (Grand Boulevard) in Baldwin, New York. The plaintiff alleged that the dangerous and defective condition, a depressed portion of the sidewalk, had dirt, debris and grass growing on the cracked edges which indicated that it existed for a sufficient period of time to allow vegetation to grow on it. Defendant moved for sj based on lack of prior written notice, as required under Nassau County Admin Code. In opposition, defendant relied on *Phillips v. County of Nassau, 50 AD3d 755,* to support plaintiff's contention that the Nassau County Administrative Code § 12-4.0(e) should be construed in accord with Highway Law § 139(2) which allows for constructive notice of defects in County highways. That latter statute requires prior written notice *unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same*

should have been discovered and remedied in the existence of reasonable care and diligence. Here, the plaintiff contended that the County had constructive notice of the depressed and cracked portion of the sidewalk that caused plaintiff to fall which existed for a sufficient period of time to put the County on notice. The only problem with plaintiff's argument was that Highway Law § 139(2) makes no express reference to "sidewalks" and therefore, Nassau County Administrative Code § 12-4.0(e) governs.

XIII **ROADWAY DESIGN AND MAINTENANCE LIABILITY**

General Rule: Municipalities have a "qualified immunity from liability for highway planning decisions" (*Green v. County of Niagara,* 184 A.D.2d 1044, 584 N.Y.S.2d 362; *see, Friedman v. State of New York,* 67 N.Y.2d 271, 283, 502 N.Y.S.2d 669). In order to hold a municipality liable with respect to the planning and design of its streets, the plaintiff must show that a street plan was evolved without adequate study or lacked a reasonable basis (*see, Gutelle v. City of New York,* 55 N.Y.2d 794, 795, 447 N.Y.S.2d 422; *Weiss v. Fote,* 7 N.Y.2d 579, 200 N.Y.S.2d 409[1960). "Courts should not be permitted to review determinations of governmental planning bodies under the guise of allowing them to be challenged in negligence suits; something more than a mere choice between conflicting opinions of experts is required before the State or one of its subdivisions may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public"(*Weiss v. Fote, supra,* at 588, 200 N.Y.S.2d 409). **M**unicipality is not required to upgrade highways that complied with design standards when they were built merely because the standards were subsequently upgrade unless the roadway has a history of accidents or when the roadway undergoes significant repairs or reconstruction.

A. NEGLIGENCE OF DRIVER CAN SEVERE PROXIMATE CAUSE FOR NEGLIGENT DESIGN

Feeney v. Holeman, 73 A.D.3d 848, 900 N.Y.S.2d 451 (2nd Dep't 2010). Plaintiff-passenger alleged that the defendants Town of Brookhaven and County of Suffolk were negligent in the design and maintenance of the roadway where the accident occurred. Court held that, even assuming that either the Town or the County were negligent, they each established their prima facie entitlement to judgment by demonstrating that their conduct was not a proximate cause of the accident. Rather, the conduct of another plaintiff's driver, who admitted to talking on her cell phone while driving, and who proceeded into the intersection against the red light, severed any connection between the alleged negligence of the County or the Town and the happening of the accident. Furthermore, since said driver was familiar with the roadway and the subject intersection, the absence of additional warning signs or a strobe light could not be proximate causes of the accident.

B. PROPER JURY INSTRUCTIONS IN NEGLIGENT ROAD DESIGN CASE

Lifson v. City of Syracuse, 72 A.D.3d 1523, 900 N.Y.S.2d 568 (4th Dep't 2010). The Court rejected the contention of the City that the court erred in failing to instruct the jury that it had qualified immunity with respect to the original traffic plan. Although the court did not use the words "qualified immunity," it properly advised the jury of the limited issue before it. The City failed to preserve for the Court's review its contention that the court erred in failing to instruct the jury that the City had a continuing duty to monitor the traffic situation at the intersection only when it was made aware of a dangerous traffic condition. In any event, there was in fact a citizen complaint concerning the traffic situation at that intersection made in 1993. Dissent would have reversed because it agreed with plaintiff that Supreme Court erred in giving an emergency instruction with respect to the assertion of the motorist that he failed to observe decedent because he was blinded by sun glare. The emergency instruction is appropriate "where the evidence supports a finding that the party requesting the charge was confronted by a sudden and unexpected circumstance that leaves little or no time for thought, deliberation or consideration. Defendant testified that he had previously looked to the left, i.e., to the west, and the accident was at 4:00 p.m. The glare of the sun in the late afternoon is not an emergency situation.

C. BATTLE OF EXPERTS REGARDING NEGLIGENT DESIGN

Ferguson ex rel. Ferguson v. Sheahan. 71 A.D.3d 1207, 896 N.Y.S.2d 245 (3rd Dep't 2010). Negligent maintenance of roadway case. While apparently driving within the legal speed limit-at approximately 25 to 30 miles per hour in an unposted 55-mile-per-hour zone, the driver failed to notice a curve warning sign advising a speed limit of 10 miles per hour. Upon encountering the sharp curve, the vehicle failed to turn and instead skidded on the wet road, crossing the southbound lane and proceeding directly off the roadway. The Bronco went over an earthen berm and tumbled to the bottom of a deep gorge. All passengers were injured. The Town moved for summary judgment arguing that the road was posted with warning signs, that the berm offered a barrier to prevent vehicles from entering the gorge and that, in any event, the driver's negligence was the sole proximate cause of the accident. Plaintiff's expert opined that the guide rail was not long enough to adequately protect motorists from the gorge and that the vehicle's speed was not unexpected, given the unposted speed zone and the suddenness of the curve. He also disagreed with the Town's expert's opinion that the earthen berm was an effective barrier, noting that the sloped side of the berm became a ramp that effectively vaulted the Bronco into the gorge. Court found question of fact.

Tineo v. Gibbs, 27 Misc.3d 1226, 2010 WL 2044506 (Richmond Co. Sup. Ct. 2010). Court found that, even assuming *arguendo* that the City has met its *prima facie* burden of proof in support of its summary judgment motion, the analysis contained within the expert affidavit proffered by plaintiff was sufficient to create a triable issue of fact as to whether the City's failure to install a traffic control device at the subject intersection was the product of inadequate study or lacked a reasonable basis, and was a substantial cause of plaintiff's injury. In addition, a triable issue of fact existed as to whether liability could be imposed upon the City, even if found negligent, based upon plaintiff's familiarity with the location where the accident occurred (proximate cause issue).

D. BUDGETARY DEFENSE TO ROAD REPAIR DOES NOT EXCUSE FAILURE TO TEMPORARILY CORRECT DEFECTS.

Shon v. State, --- N.Y.S.2d ----, 75 A.D.3d 1035, 2010 WL 2943543 (3rd Dep't 2010). While driving on a State road, plaintiff encountered a “dip” and cracks in the highway, lost control of his car, and veered into the on-coming lane, where she collided head-on with a State Police vehicle. She alleged negligent maintenance of the Road. Court of Claims determined that, while defendant's delay in formulating and implementing a plan to eliminate the underlying cause of the pavement problem was a legitimate ordering of priorities based upon funding limitations, defendant was negligent in failing to maintain the roadway in a safe condition by making temporary repairs to the defects in the pavement's surface pending the permanent repairs, and its failure to take measures to temporarily correct the defects was a proximate cause of the accident. In concluding that claimant was partially at fault, the court credited testimony that she exceeded the actual and advisory speed limit when the accident occurred, operated her vehicle in a fatigued condition and failed to heed to warning signs alerting drivers to the dip and curve in the roadway.

XIV CLAIMS BY INMATES -- Jailers Must Have Actual or Constructive Notice of the Risk of Assault Upon Inmate

Vasquez v. State, 68 A.D.3d 1275, 890 N.Y.S.2d 184 (3rd Dep't 2009). Claimant-inmate was assaulted by three other inmates in a bathroom located within the recreation yard of a medium security facility. He claimed State failed to provide adequate supervision and protection from the inmate assault. Case properly dismissed since testimony at trial indicated neither actual nor constructive notice of the risk of assault upon claimant. There was no evidence that claimant's assailants were prone to perpetuating such an assault or posed a threat to claimant, and claimant himself testified that he had no previous encounters with his assailants, had no reason to believe that he would be the subject of an attack and at no time requested protective custody out of fear

for his safety. While it was established that an inmate had been assaulted in the same recreation yard bathroom nearly four years earlier, this single incident was insufficient to establish that defendant should have known of a threat of a future assault. There was no evidence that the correction officers were inattentive or that the location of their posts was inadequate or deficient, and liability cannot be predicated on the mere fact that the officer could not see claimant at the time of the attack. Furthermore, although the bathroom had no windows, cameras, loudspeakers or alarm systems, defendant's duty to prisoners does not mandate unremitting surveillance in all circumstances, claimant produced no evidence of any statute, regulation, rule or policy that mandated that the interior of the recreation yard bathroom be subjected to personal or electronic surveillance. Claimant's reliance on a regulation applicable to county jails requiring responsible staff to maintain an "uninterrupted ability to communicate orally with and respond to each prisoner" and an ability to "immediately respond to emergency situations", while not irrelevant to a foreseeability analysis, did not compel a different result. Regarding the negligent design claim, the testimony of plaintiff's expert that the recreation yard bathroom was deficiently designed due to the absence of a window was directly contradicted by defendant's expert, and both agreed that the bathroom design did not violate any applicable codes, regulations or policies of defendant.

XV SCHOOL LIABILITY

A. GENERAL DUTY TO SUPERVISE STUDENTS TO AVOID INJURY

Armellino v. Thomase, 72 A.D.3d 849, 899 N.Y.S.2d 339 (2nd Dep't 2010). Student injured when he was pushed down by another pupil at recess sued school district to recover damages for personal injuries. The defendant school failed to meet its prima facie burden of showing that its failure to supervise was not the proximate cause of the infant plaintiff's injuries. The infant plaintiff testified that he and his classmates began throwing pieces of asphalt from the track at each other, and although this activity was prohibited by school regulations, the teacher or teachers assigned to supervise recess failed to notice or halt the activity. The incident escalated, and the infant plaintiff eventually sustained a broken leg that resulted in several surgeries.

Ferraro v. North Babylon Union Free School Dist., 69 A.D.3d 559, 892 N.Y.S.2d 507 (2nd Dep't 2010). Student, who suffers disabilities, claimed negligent supervision caused him to catch one of his fingers in hinge of heavy self-closing door at school while attending special education program. Plaintiff claimed he should not have been permitted to operate the door without

supervision or assistance. Court held that although school met its prima facie burden of showing that it adequately supervised the infant plaintiff, in opposition the plaintiffs raised a triable issue of fact. The infant plaintiff's serious developmental delays and other disabilities documented in his IEP raised a triable issue of fact as to whether BOCES was negligent in permitting him to operate a heavy, self-closing door without supervision or assistance

B. SPORTS INJURIES

1. Assumption Or Risk For Voluntary Sports Participation

McGrath v. Shenendehowa Cent. School Dist.,--- N.Y.S.2d ----, 2010 WL 3168077 (3rd Dep't 2010). Girl varsity lacrosse player sustained injuries during a regulation game while performing a "roll dodge" maneuver. Her foot slid into the ground and "caught" as her body continued to pivot, causing severe damage to her knee. She alleged defendant created the dangerous condition by using a sandy or soft material to fill ruts on the field. Plaintiff claimed that she was injured when her foot became caught in a "sink hole-that is, her foot sank into a deep rut, the depth of which was concealed by a sandy soil, but which appeared to be a typical ungrassy, hard patch of ground." In other words, a hidden danger that was not part of the risks she assumed in agreeing to play lacrosse. Court found questions of fact as to whether the assumption of risk doctrine was applicable. Dissent took issue with "plaintiff's self-serving affidavit, wherein she states that she was unaware of the material used to fill the ruts that she observed on the field".

Brown v. City of New York, 69 A.D.3d 893, 895 N.Y.S.2d 442 (2nd Dep't 2010). The plaintiff was injured while playing touch football at a public field owned by the defendant when he dove for the football at the sideline and his knee struck a cement strip which ran alongside the field approximately five feet outside of the sideline. The plaintiff had played at the field previously and was aware of the presence of the cement strip, which was open and obvious. Indeed, he testified at his deposition that the cement was there for the purpose of holding down the artificial turf surface of the field. Summary judgment granted to defendant because plaintiff assumed the risk of injury by voluntarily participating in the football game despite his knowledge that doing so could bring him into contact with the open and obvious cement strip in the out-of-bounds area of the field. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendant unreasonably increased the risk associated with the activity of playing football on the subject field. In this regard, the expert affidavit submitted by the plaintiff failed to identify the violation of any specific safety standard which was applicable to the field. Accordingly, the expert's affidavit was speculative and conclusory.

Farrell v. Hochhauser, 65 A.D.3d 663, 884 N.Y.S.2d 261 (2nd Dep't 2009). High school wrestler sued school district, alleging that he contacted herpes simplex I while participating in wrestling match. High school wrestler's alleged contracting of herpes simplex I while participating in wrestling match, if proven, could not be basis for liability on part of school district, where district informed wrestler of specific risk of contracting herpes, not just risk of contracting skin diseases in general through wrestling, when, inter alia, coach distributed to wrestlers and their parents packet of information including article stating that herpes was among skin diseases most commonly seen in wrestling. Case dismissed on assumption of risk ground because, contrary to the plaintiff's contention, the School District informed plaintiff and his parents of the specific risk of contracting herpes, not just the risk of contracting skin diseases in general through wrestling.

Ballou v. Ravena-Coeymans-Selkirk School Dist., 898 N.Y.S.2d 358 (3rd Dep't 2010). Plaintiff was in ninth grade when, in the course of trying out for the varsity basketball cheerleading team, she was injured while attempting to perform a stunt known as a "prep cradle twist" in which she would be lifted and thrown up in the air by two cheerleaders, would then drop her left shoulder back, make a 360 degree spin, and land in the crossed arms of the four cheerleaders. However, plaintiff mistakenly dropped her right shoulder (instead of the left) and was propelled forward instead of backward, causing her to land partially off the mat that was positioned underneath the stunt group and to strike her head on the hard gymnasium floor. She was an experienced cheerleader and had successfully performed the prep cradle twist approximately 10 to 20 times in the past. Plaintiff's case was based largely on inadequate supervision. Although defendant met its threshold burden of establishing its entitlement to judgment by offering proof of plaintiff's experience as a cheerleader, together with the testimony of the coach that the appropriate safety precautions and level of supervision were followed, Plaintiff's expert raised a question of fact. Said expert opined that there was inadequate supervision of plaintiff's performance of the stunt, that the performance of a prep cradle twist was in contravention of the applicable cheerleading guidelines, that the atmosphere in the gymnasium was dangerous relative to the performance of stunts because of the visual and auditory distractions created by all of the activities occurring simultaneously, that the coaches should not have attempted to monitor two stunt groups the at the same time, and that spotters should have been required. Summary judgment denied.

Trupia v. Lake George Central School Dist., 14 N.Y.3d 392, 927 N.E.2d 547, 901 N.Y.S.2d 127 (N.Y. 2010). While attending a summer program administered by defendants on their premises, the infant plaintiff rode and ultimately fell from a banister, seriously injuring himself. Plaintiff alleged that the infant plaintiff had been left wholly unsupervised even though he was not yet 12 years old. Defendant moved to amend the Answer to allege assumption of the risk but the lower Court and the Third Department had denied said motion because, under First and Third Department case law, the assumption of risk doctrine is not applicable in general negligence

actions, but rather only against liability arising from risks inhering in athletic and recreational activities. (Under second and Fourth Department case law, a broader use of the doctrine had been allowed). The Court of Appeals here traces the history of the primary assumption of the risk doctrine, and found that it is somewhat troublesome that this doctrine has survived the comparative negligence doctrine adopted in New York in 1975. "The doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation." The Court reasoned that, "in the end, its retention is most persuasively justified . . . simply for its utility in "facilitat[ing] free and vigorous participation in athletic activities" because "athletic and recreative activities possess enormous social value. The Court noted that the Court of Appeals had never "applied the doctrine outside of this limited context and it is clear that its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative" negligence. Here, Court held that defendant did not advance a "suitably compelling policy justification" to permit an assertion of assumption of risk in a non-sports or recreational activity. The injury-producing activity here at issue was mere "horseplay," not a sport or recreational activity whose social value merits protection. The Court also implied that the doctrine should not generally be applied in school settings. "Allowing the defense here would have particularly unfortunate consequences [because] little would remain of an educational institution's obligation adequately to supervise the children in its charge if school children could generally be deemed to have consented in advance to risks of their misconduct".

2. No Assumption Of Risk For Physical Education Or Required Gym Classes, But Liability Turns On Whether Supervision Was Adequate

Odekirk v. Bellmore-Merrick Cent. School Dist., 70 A.D.3d 910, 895 N.Y.S.2d 184 (2nd Dep't 2010). The infant plaintiff was injured while playing a game of floor hockey during his physical education class. According to the plaintiff, he was struck on his left hand by the blade of an opposing player's hockey stick. The incident occurred accidently and without warning despite the opposing player having "swung as he was supposed to." Since no amount of supervision would have prevented the sudden injury, defendant met its prima facie burden of demonstrating that the alleged inadequate supervision was not a proximate cause of the injuries suffered. In opposition, the plaintiffs failed to raise a triable issue of fact as to causation. The plaintiffs' theory that the defendant failed to sufficiently instruct its students was improperly asserted for the first time in opposition to the defendant's motion for summary judgment. Summary judgment granted.

Spaulding v. Chenango Valley Cent. School Dist., 68 A.D.3d 1227, 890 N.Y.S.2d 162 (3rd Dep't 2009). Infant student was injured when he was struck on his right shin by a "hockey ball" in a game of floor hockey during gym class. It was undisputed that a floor hockey game was in

progress, supervised by the gym teacher, and that another student was aiming for the goal when his shot accidently hit the infant plaintiff. Defendant's summary judgment motion was granted because the event was "a spontaneous and unintentional accident" and "no amount of supervision, however intense" could have prevented the injury".

Paragas v. Comsewogue Union Free School Dist., 65 A.D.3d 1111, 885 N.Y.S.2d 128 (2nd Dep't 2009). The six-year old student-plaintiff was injured during gym class when he accidentally collided with another student during a game. Defendant made a prima facie showing of entitlement to summary judgment by establishing that it provided adequate supervision and, in any event, that any alleged inadequacy in the level of supervision was not a proximate cause of the accident. The defendant submitted evidence that, among other things, the 19 children in the infant plaintiff's gym class were playing an age-appropriate game under the supervision of a teacher with several years of experience, that the collision was inadvertent, and that more intense supervision would not have prevented the spontaneous and accidental collision of the two children. In opposition, the plaintiffs failed to raise a triable issue of fact as to whether the supervision was inadequate or whether more intense supervision might have prevented the accidental collision. Summary judgment to defendant.

C. DUTY TO PROVIDE SAFE CROSSING

Smith v. Sherwood, 68 A.D.3d 1785, 891 N.Y.S.2d 798 (4th Dep't 2009). 12-year-old student of private school transported to and from school on buses owned by defendant Central New York Regional Transportation Authority, also known as Centro, pursuant to a contract between Centro and defendant School District. The buses were not yellow school buses and were not equipped with the safety features required for school buses pursuant to Vehicle and Traffic Law § 375(20). On the date of the accident, defendant bus driver drove past the stop for plaintiff's son and dropped him off on the opposite side of the street. Upon exiting the bus, plaintiff's son walked in front of the bus and was struck by a vehicle while he was attempting to cross the street. Because Centro was acting on behalf of the School District in transporting students, Centro had a common-law duty to perform that service in a careful and prudent manner. A bus driver has a continuing duty "to exercise reasonable care to ensure that discharged students reach a position of safety before moving his or her vehicle," and that duty extends to discharged students who must cross to the opposite side of the street if the bus driver knows that they must do so. Here, there was evidence in the record that defendant bus driver knew that plaintiff's son had to cross the street after exiting the bus, without the benefit of the red flashing lights found on yellow school buses. Although Centro was not subject to the equipment requirements of Vehicle and Traffic Law § 375(20), the absence of that equipment increased the danger of discharging plaintiff's son on the wrong side of the street. "Because the presence of the bus necessarily created some hazard by obstructing the views of the child and the drivers of overtaking vehicles, the jury might well find that the Centro defendants assumed a duty to protect the child]against

the special danger which it had created". Therefore defendants' summary judgment motion denied. The School District got out on summary judgment, though, since a school cannot generally be held responsible for accidents that happen off school grounds, and the school had delegated its responsibility for transportation to Centro, and they therefore could not be held liable for injuries sustained by plaintiff's son after he boarded the Centro bus. Contrary to plaintiff's contention, the mere fact that the School District entered into a contract with Centro to provide transportation to its students on buses other than yellow school buses does not constitute a breach of duty to plaintiff. The two-member dissent disagreed with the majority that the driver of a city bus that is neither painted yellow nor equipped with the flashing lights and stop signs utilized by school buses has a duty to ensure that a student passenger has safely crossed the street. Centro's duty to plaintiff as a passenger terminated when he alighted safely on the curb.

D. STUDENT ON NON-STUDENT ATTACKS – NON-STUDENT MUST SHOW "SPECIAL RELATIONSHIP"

Rollins v. New York City Bd. of Educ., 68 A.D.3d 540, 889 N.Y.S.2d 456 (1st Dep't 2009). Plaintiff, a school safety officer, had to show a special relationship in order to state a claim for negligent failure to protect her from injury caused by a student. Since she raised neither that legal theory nor the factual predicate - an alleged oral promise and policy with the special education dean - in her notice of claim or her complaint, she could not assert that theory or the facts underlying it for the first time in opposition to the motion for summary judgment.

E. PREMISES LIABILITY IN SCHOOL SETTING

Musachio v. Smithtown Cent. School Dist., 68 A.D.3d 949, 892 N.Y.S.2d 123 (2nd Dep't 2009). Seventh grader allegedly slipped and fell during lunch period on an accumulation of water in the school cafeteria. The accident occurred when the plaintiff attempted to sit down on a seat in the cafeteria, which required him to first step over a bench. As he was doing so, he slipped on the water and fell to the floor. Defendant moved for SJ on the grounds that it did not create the hazard of have actual or constructive notice of it, but defendant's custodian failed to establish when the area where the accident occurred was last cleaned or inspected prior to the occurrence of the accident. Accordingly, there was an issue of fact regarding constructive notice, and SJ motion denied.

F. SEXUAL ASSAULT OR MOLESTATION ON SCHOOL GROUNDS – NOTICE OF PRIOR INCIDENTS REQUIRED

Brandy B. v. Eden Central School District, ___ N.Y.3d ___, 2010 WL 2301154 (2010). Five-year-old kindergartener's mother brought action against school district seeking to recover damages for injuries student sustained when she was sexually assaulted on school bus by an 11-year-old student. Court affirmed Appellate Division's granting of summary judgment to defendant on grounds that school district lacked specific knowledge or notice that 11-year-old student had previously engaged in sexually assaultive behavior. Court held that the alleged sexual assault against the kindergartener was an unforeseeable act that, without sufficiently specific knowledge or notice, that could not have been reasonably anticipated by the school district. Although the 11-year old had a troubled history, which included aggressive behavior and exposing himself and masturbating in public, his prior history did not include *any* sexually aggressive behavior. The dissent (Ciparick and Lippman) reasoned that the issue of whether the sexual assault was reasonably foreseeable should have gone to the jury. They found that the 11-year old's troubled history should be read in conjunction with the school's actual knowledge that he was frequently interacting closely with the plaintiff-kindergartner on the school bus and that the plaintiff-mother had written letters and made verbal requests to the bus driver that he separate the two because her kindergartener "seemed to be interacting [too much] with this [older] child". These communications between the mother and the driver, considered along with the 11-year old's troubled history, were enough, according to the dissent, to allow a reasonable jury to find that the school defendants had sufficient notice of a dangerous situation and could have anticipated the sexual assault.

Andrew T.B. v. Brewster Cent. School Dist., 67 A.D.3d 837, 889 N.Y.S.2d 240 (2nd Dep't 2009).

The kindergartener infant plaintiff, a kindergarten student, was sexually molested by two second- or third-grade students while seated towards the rear of the school bus on his way home from school. Defendants met their burden in support their summary judgment motion by submitting proof, including the deposition testimony of a school district employee, that the defendants had neither actual nor constructive notice of any prior similar conduct. In opposition, the plaintiffs failed to raise a triable issue of fact.

Shannea M. v. City of New York, 66 A.D.3d 667, 886 N.Y.S.2d 483 (2nd Dep't 2009).

Plaintiff, a special education student at a public middle school operated by the defendant City of New York, was raped in a bathroom at the school, and alleged that the City was negligent in

failing to provide adequate supervision. At trial, over the plaintiff's objection, the court instructed the jury that it could not find that the City was negligent unless the City had “actual or constructive notice of prior assaults in school bathrooms,” and that “constructive notice means the City of New York, in the use of reasonable care, should have known that prior assaults in school bathrooms occur, although, in fact, it had no knowledge of it.” The plaintiff argued that, under the circumstances of this case, no notice was required and that the jury charge was erroneous. Court held that the charge as delivered, even if erroneous, did not prejudice the plaintiff inasmuch as it was so general as to require merely that the City knew or should have known that assaults occurred in school bathrooms in general. An expert witness for the plaintiff had offered undisputed testimony that middle school bathrooms were “notorious” for incidents, including fights, and that many students avoided them. Moreover, the charge on notice did not relate to the central issue at trial, which was whether the incident had even occurred.

XVI COURT OF CLAIMS PROCEDURE

A. FEDERAL EXPRESS WON’T DO --- FOLLOW THE LITERAL SERVICE REQUIREMENTS FOR NOTICE OF INTENTION AND CLAIM ITSELF

Femminella v. State of New York, 71 A.D.3d 1319, 896 N.Y.S.2d 533 (3rd Dep't 2010).

Detainee served a notice of intention to file a claim, but did it wrong. Although serving a Notice of Intention to File a Claim extends the deadline for filing and serving a claim from 90 days to two years (*see* Court of Claims Act § 10[3]), a claimant suing defendant must satisfy the literal notice requirements of Court of Claims Act § 11, including the requirement that the notice of intention, just like the claim itself, must be served “either personally or by certified mail, return receipt requested”. Court rejected claimant’s assertion that Federal Express mode of delivery here strictly fulfilled the foregoing statutory criteria. Alternative mailings which do not equate to certified mail, return receipt requested, are inadequate and do not comply with Court of Claims Act § 11. Since the notice of intention was it did not serve to extend claimant's time for filing and serving his claim.

B. LEAVE TO FILE LATE CLAIM

Lerner v. State of New York, 72 A.D.3d 406, 897 N.Y.S.2d (1st Dep't 2010). Leave to file a late claim cannot be granted with respect to the false imprisonment claim, as it accrued more than one year before claimant moved for such leave (*see* CPLR 215[3]; Court of Claims Act § 10[6]). Regarding the claims that arguably were not time-barred, the court considered the relevant factors (Court of Claims Act § 10[6]), and denied the motion to late-file. The excuses for the delay in filing her claim, i.e., illness and inability to secure counsel, were insufficient, and the State did not have notice of the essential facts constituting the claim, even though it owned and maintained the facility where claimant was allegedly imprisoned and the fact that claimant's medical records might be at a State facility does not mean that the State had an opportunity to investigate the circumstances underlying her claim.