MICHAELS & SMOLAK
TRIAL LAWYERS

MUNICIPAL LIABILITY

PRECEDENTS & STATUTES 2009

Michael G. Bersani, Esq.
Michaels & Smolak, P.C.
71 South Street
Auburn, New York 13021
(315) 253-3293

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

McLean v. City of New York, 12 N.Y.3d 194, 878 N.Y.S.2d 238 (2009). Mother of infant who was injured while at city-registered family day care home brought negligence action against city. The New York City Administration for Children's Services (ACS) had received two complaints about the day care home, asserting that a child's hand had been dipped into a bowl of hot oatmeal, and that a child had been left alone for an hour and a half in a nearby store. ACS investigated the complaints and found both of them to be "indicated" - i.e., substantiated. There was no evidence that the home was later inspected and found to be in compliance, so the day-care mother should not have been permitted to renew her registration when it expired. But the Department of Health did permit her to renew. The reasons for this were not entirely clear. The record did not show whether ACS reported the two complaints about the home to OCFS (a State agency)- but that question was academic, because, amazingly, DOH (a City agency) did not make a practice of checking with OCFS before renewing registrations. It was debatable whether the City or the State was to blame for this failure; DOH, a city agency, said it complied with regulations of DSS, a state agency, which did not expressly require a search for complaints prior to renewal of a registration. In considering the City's motion for summary judgment, the Court assumed that DOH (i.e., the City) was at fault. The Court noted that an agency of government is not 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". Here, plaintiff did not show a special relationship giving rise to a special duty, and thus could not recover against the City. Plaintiff claimed that Social Services Law 390, which governs the licensing and registration of child day care providers, created a statutory duty for the benefit of a class of which she and her daughter were members; and also that the City voluntarily assumed a duty that she justifiably relied on the City to perform. The Court rejected both arguments. Recognizing a private right of action under Social Security Law 390 would be inconsistent with the legislative scheme. As for whether a "special relationship" was formed between plaintiff and the City, there were no "promises or actions" by which the City assumed a duty to do something on her or plaintiff's daughter's behalf. The only "direct contact" between the City and plaintiff was a routine telephone conversation in which an ACS employee agreed to send a list of registered providers and answered questions about what registration meant. Plaintiff also argued that no special relationship was needed, because the acts and omissions on which she relies were ministerial rather than discretionary. The Court disagreed. The Court cleared apparently contradictor language in some of its prior holdings (the *Tango, Lauer, Pelaez and Kovit* cases*)* to clarify the rule that "discretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is found". Although the acts for which plaintiff sued were ministerial, she nevertheless was required to prove a special relationship.

Butler v. City of Gloversville, 2009 WL 1851002 (Court of Appeals 2009). Infant-Plaintiff fell off a playground slide on property owned and maintained by defendants. It

was undisputed that at other playgrounds operated by defendants, protective ground cover, such as pea stone, had been installed around playground equipment to lessen injuries, as recommended in the U.S. Consumer Product Safety Commission's (CPSC) Handbook for Public Playground Safety and the American Society for Testing and Materials' (ASTM) Standard Consumer Safety Performance Specification for Playground Equipment for Public Use. On review of summary judgment motion, the Appellate Division had held that there was an issue of fact regarding defendants' duty to install ground cover but that defendants' expert established that the lack of an adequate ground cover was not the proximate cause of plaintiff's injuries. The case was thus dismissed. Two Justices dissented, however, finding that the conflicting expert opinions presented questions of fact that precluded summary judgment. The Court of Appeals held that defendants failed to meet their initial burden. Defendants' expert calculated that plaintiff generated 480 foot-pounds of energy when she landed on the ground. Relying on prior research tests in which he used rubber mats, defendants' expert stated that protective surfaces were not sufficiently energy-absorbent to have prevented plaintiff's fractures. Despite the fact that the CPSC and ASTM guidelines were based on the use of various ground covers in addition to rubber mats, the expert opined that plaintiff would have been injured even if the other types of recommended ground covers had been installed. He did not, however, provide a scientific or mathematical foundation to substantiate this assertion, nor did he address the shock-absorbing capacity of pea stone, the ground cover used by defendants at their other playgrounds. Summary judgment was therefore not warranted since defendants failed to sufficiently demonstrate that their alleged negligence was not a proximate cause of plaintiff's injuries.

D'Onofrio v. City of New York, 11 N.Y.3d 581, 873 N.Y.S.2d 251 (2008). Court of Appeals addressed two pedestrian trip and fall cases here. Both sets of Plaintiffs asserted that the big apple maps had given the "written notice" that the law requires. The notice issue was submitted to the jury in both cases, and both juries found the notice adequate. In the first case, *D'Onofrio*, however, Supreme Court held the notice insufficient as a matter of law, and set aside the verdict and granted judgment in the City's favor, which ruling was affirmed by the Appellate Division. In the second case, *Shaperonovitch*, Supreme Court denied the City's post-trial motion to set aside the verdict, and entered judgment in plaintiffs' favor; this judgment, too, was affirmed by the Appellate Division. The Court of Appeals affirmed in *D'Onofrio* and reversed in *Shaperonovitch.* The Big Apple map symbol used in *D'Onofrio* was a straight line, indicating "[r]aised or uneven portion of sidewalk." There was no evidence, however, from which the jury could have found that such a defect caused Mr. D'Onofrio's injury. He testified that, as he was walking over a grating, both his feet became caught almost simultaneously, causing him to fall forward. He said that he felt the grating move, and that he observed broken cement in the area; he attributed his fall to "the movement of the grating, plus the broken cement, the combination of the two." There was no evidence that Mr. D'Onofrio walked across a raised or uneven portion of a sidewalk, even on the assumption that the grating was part of the sidewalk (a disputed issue). A photograph of the area where he fell did not show any surface irregularity or elevation. Since the defect shown on the Big Apple Map was not the one on which the claim in *D'Onofrio* was based, the lower court in that case correctly set aside the verdict and entered judgment in the City's favor. The problem in

Shaperonovitch was the reverse of that in *D'Onofrio:* the nature of the defect that caused the accident was clear, but the symbol on the Big Apple Map was not. Ms. Shaperonovitch testified that she tripped over an "elevation on the sidewalk." No unadorned straight line, the symbol for a raised portion of the sidewalk, appeared on the Big Apple Map at the relevant location. The *Shaperonovitch* plaintiffs relied on a a line with a diamond at one end and a mark at the other. No symbol resembling this appeared in the legend to the map. A Big Apple employee, called to testify by the City, acknowledged that Big Apple "did not notify the city of any raise" in the location where Ms. Shaperonovitch fell. Plaintiffs in *Shaperonovitch* argued that the symbol on the map was "ambiguous" and that its interpretation was for the jury. The Court disagreed; a rational jury could not find that the mark on the Map conveyed any information at all. Because the map did not give the City notice of the defect, the City was entitled to judgment as a matter of law.

Gorman v. Town of Huntington, 12 N.Y.3d 275, 879 N.Y.S.2d 379 (2009). Pedestrian claimed that an uneven piece of the Town's sidewalk in front of a local church caused her to trip and fall. Four months prior to plaintiff's fall, the church's pastor had written to the Town's Department of Engineering Services, the Department responsible for the Town's sidewalks, complaining that the sidewalk needed repair. The Town had a prior written notice law in effect to State Town Law § 65-a (2) - which provides in relevant part that a civil action may not be maintained against the Town for personal injuries "sustained by reason of any ... sidewalk ... operated or maintained by the town ... being defective ... unless written notice of the specific location and nature of such defective ... condition by a person with first-hand knowledge was actually given to the Town Clerk or the Town Superintendent of Highways in accordance with § 174-5" (Huntington Town Code § 174-3[A]). Section 174-5 of the Town Code clearly stated that service of the notice on a person other than the Town Clerk or Highway Superintendent "shall invalidate the notice" (Huntington Town Code § 174-5). The Town Clerk is required to "keep an indexed record ... of all written notices received" (Huntington Town Code § 174-4; *see* Town Law § 65-a [4]). Following joinder of issue, the Town sought summary judgment on the ground that it had not received prior written notice of the defect as required by § 174-3 of its ordinance and § 65-a of the Town Law. In support of its motion, the Town submitted affidavits from Town Clerk and Highway Superintendent representatives that no such notice was located in their records. Concluding that the Town had delegated its statutorily-imposed duty of keeping records pertaining to complaints of sidewalk defects from its Town Clerk and Superintendent of Highways to its Department of Engineering Services, both Supreme Court and the Appellate Division held that the Town had waived strict compliance with its prior written notice law and granted plaintiff summary judgment dismissing the Town's affirmative defenses asserting a lack of proper prior written notice under the statute. The Appellate Division then certified to the Court of Appeals the question of whether its opinion and order was properly made. Court of Appeals held that they were not! "A written request to any municipal agent other than a statutory designee that a defect be repaired is not valid, nor can a verbal or telephonic communication to a municipal body that is reduced to writing satisfy a prior written notice requirement." Here, it was undisputed that neither the Town Clerk nor Highway Superintendent received prior written notice of the defective sidewalk. Because the

Department of Engineering Services was not a statutory designee, notice to that department was insufficient for purposes of notice under Town Law § 65-a and § 174-3 of the Town's local code. The Department of Engineering Services's practice of recording complaints and repairs did not warrant a departure from the precedent strictly construing prior-written notice provisions. As the entity charged with repairing Town sidewalks, it was to be expected that the Department would keep a record of needed repairs and complaints, but it could not be inferred from that conduct that the Town was attempting to circumvent its own prior written notice provision. The Court also rejected the Appellate Division's holding that the Town was estopped from relying on its prior written notice provision. Even assuming that estoppel could serve as a third exception to the prior written notice rule (in addition to the municipality creating the defect and special use) there was no evidence that these plaintiffs relied on the correspondence sent by the pastor to the Department of Engineering Services or on any alleged assurances by that Department that it would repair the condition.

II THE NOTICE OF CLAIM

A. Does Small Claims Court Have Jurisdiction to Grant Leave to Late-Serve a Notice of Claim?

Shane v. City of New York, 21 Misc.3d 1128, 875 N.Y.S.2d 823, (N.Y.City Civ.Ct. 2008). Plaintiff commenced this Small Claims action against the City for property damage caused to his car by a New York City Department of Sanitation truck. Upon defendant's motion for summary judgment, plaintiff conceded that he had served the notice of claim ninety two days after the claim arose, and hence two days beyond the 90 day limit. He made an oral application before this court to file a late notice of claim and contended that such a request was reasonable since he was only 2 days late in filing the notice of claim. The Court, however, *sua sponte*, considered the issue of whether small claims court had jurisdiction to rule upon plaintiff's application to file a late notice of claim. GML § 50-e(7) provides that all application regarding leave to serve a late notice "shall be made to the supreme court or to the county court." The Court noted that the purpose of the Small Claims Court is "to do substantial justice between the parties according to the rules of substantive law" and that the court "shall not be bound by rules of statutory provisions or rules of practice, procedure, pleading or evidence." The Court determined that it could entertain an application to file a late notice of claim, and taking into consideration the more relaxed standards present in the Small Claims Court, this Court granted claimant's application to file a late notice of claim.

B. What Kinds of Claims Require a Notice of Claim?

General rule: Only need a notice of claim torts where money damages claimed, but never for Federal Claims.

Rist v. Town of Cortlandt, 56 A.D.3d 451, 866 N.Y.S.2d 762 (2nd Dep't 2008). Although the plaintiffs pleaded two causes of action to recover damages as sounding in trespass and nuisance, Court held that these claims actually sounded in negligence, which required the

service of a notice of claim. The gist of the complaint was that the Town failed to properly maintain the curb, roads, and catch basins near their property, thereby causing damage to it. However, the causes of action seeking equitable relief by way of an injunction did not require a notice of claim and therefore those causes of action survived the motion to dismiss.

Finke v. City of Glen Cove, 55 A.D.3d 785, 866 N.Y.S.2d 317 (2nd Dep't 2008). The plaintiff's breach of implied contract and breach of license causes of action were not subject to the notice of claim requirements, and thus would have survived the motion to dismiss for failure to include them in the notice of claim, except that those claims had no merit, and thus were dismissed on summary judgment.

Swinton v. City of New York, 61 A.D.3d 557, 877 N.Y.S.2d 68 (1st Dep't 2009). Since a notice of claim is not required to assert a claim for federal civil rights violations, the court properly denied the request for permission to serve a late notice of claim (NOTE: You do need a notice of claim if suing a municipality for money damages under State civil rights laws, e.g., Human Rights Law violations).

Black v. City of New York, 21 Misc.3d 1121, 873 N.Y.S.2d 509 (Kings Co. Sup. Ct. 2008). Several claims thrown out for failure by plaintiff to serve a notice of claim on the City, but Federal § 1983 claim survived as the notice of claim requirements of GML § 50-e do not apply to federal civil rights claims.

Weisel v. City of New York, 2009 WL 2208332 (Kings Co. Sup. Ct. 2009). To the extent that plaintiff asserted State Law or City Law discrimination claims in his wrongful termination case, such claims could not be maintained because plaintiff failed to comply with the notice of claim requirement of Education Law § 3813(1). "There is no question that employment discrimination is included within the umbrella of [Education Law] § 3813". While plaintiff had filed administrative complaints, but they were not substitutes for a notice of claim.

C. Notice of Claim Served by family of Deceased without Letters of Administration Is a Nullity as to the Claim Brought by Deceased's Estate.

Billman v. City of Port Jervis, 23 Misc.3d 1127, 2009 WL 1392606 (Orange Co. Sup. Ct. 2009). Fifteen-year-old plaintiff died from injuries sustained from a fall through a skylight on the roof of the High School. The notice of claim was served in the name of his parents individually, neither of which yet had letters of administration (the mother would get them later), rather than as representatives of his estate of the child. The issue was whether this constituted proper service of a notice of claim on behalf of an estate of the child. The Court answers the question in the negative. Neither parent had legal standing or the authority to act, make a claim for, or sue on behalf of the deceased child. The Court concluded that the failure of the estate to have served through a legally authorized estate representative any notice of claim on its own behalf or properly in conjunction with that of another, or to have sought by way of motion or cross-motion leave to file a late notice of claim, left the Court no choice but to dismiss this action to the

extent that it was brought on behalf of the child's estate. However, the parents' claim for loss of services of the child survived.

D. Notice of Claim Requirements under Education Law § 3813 Less Formal Than under GML.

Cummings v. Board of Educ. of Sharon Springs Cent. School Dist., 60 A.D.3d 1138, 874 N.Y.S.2d 614 (3rd Dep't 2009). Bus driver received a letter informing her that she was placed on administrative leave because of a complaint regarding "certain off duty conduct" and was later terminated on the basis that. Shortly thereafter counsel for plaintiff sent a certified letter notifying defendant that plaintiff intended to bring a proceeding contesting her termination as being, among other things, without "just cause." She then commenced an Article 78 proceeding challenging her termination and seeking reinstatement of her employment. Defendant moved to dismiss the petition on various grounds, including allegations that plaintiff failed to timely serve upon defendant a verified notice of claim. Court agreed with plaintiff that the letter sent by her counsel to defendant satisfied the notice of claim requirement set forth in Education Law § 3813. Substantial compliance with the notice requirement of Education Law § 3813 has been held to be sufficient, even in the absence of verification as set forth in the statute, so long as the purported notice "contain[s] a sufficient degree of descriptive detail and was adequately served upon the defendant". Here, the letter sent by plaintiff's counsel to defendant recites, among other things, the details of the claim, the reasons she was disputing her termination and her intent to pursue litigation in the event the matter was not resolved in her favor. That was sufficient.

E. Whom to Serve the Notice of Claim Upon?

Santandrea v. Board of Trustees of Hudson Valley Community College, 881 N.Y.S.2d 889, 2009 WL 1975624 (Rensselaer Co. Sup. Ct. 2009). Defendants (HVCC and the County) contended they were not properly served with the notice of claim. Plaintiff served the County Attorney, who defendant alleged was not authorized to accept service for the College. Plaintiff argued that service upon the County attorney effected service upon the County as a named party and upon the County as the local sponsor of HVCC. Plaintiff contended that the notice of claim was not required to be served upon the Board of Trustees of HVCC. The Court concluded that the applicable statutes did not expressly require service upon the Board of Trustees. Court distinguished other cases that seemed to imply that a notice of claim must be served directly on the Board of Trustees of a community college. Defendants' motion for summary judgment thus denied.

F. Sufficiency of the Notice of Claim

1. New Factual Allegations Not Set Forth in Notice of Claim.

Gladys Parker-Cherry v. New York City Housing Authority, 62 A.D.3d 845, 878 N.Y.S.2d 790 (2nd Dep't 2009). Plaintiff's notice of claim alleged that she was walking down the stairs between the fourth and third floors of the defendant's building, when she

was caused to fall after stepping upon a broken, uneven, cracked, and unrepaired step. Three months later, she testified at her 50-h hearing, that she slipped on a clear liquid on a step somewhere between the fifth and fourth floors. However, in her complaint, filed nine months after the hearing, the plaintiff again alleged that she fell on a broken step located between the fourth and third floors. In her opposition to the defendant's motion to dismiss the complaint, the plaintiff failed to resolve the contradiction, and failed to offer an affidavit or any other evidence to demonstrate exactly where or how she fell. Defendant's motion to dismiss the complaint granted.

Charleston v. Incorporated Village of Cedarhurst, 62 A.D.3d 845, 878 N.Y.S.2d 790 (2nd Dep't 2009). The original notice of claim in this case, involving an allegedly defective sidewalk condition, misidentified the actual location where the claim arose and, therefore, was inadequate to meet the statutory requirements applicable to notices of claim (*see* GML § 50-e [2]). Specifically, the original notice of claim misidentified the situs of the incident as 6 Cedarhurst Avenue, rather than the correct address, 78 Cedarhurst Avenue. Furthermore, the photographs provided to the plaintiff's claim representative one month after service of the notice of claim failed to clarify the location of the incident. Moreover, the subsequent complaint, amended complaint, bill of particulars, and even a supplemental bill of particulars served 11 months after the incident repeated the same mistake. "Given the transitory nature of sidewalk defects, defendant was prejudiced by not being able to conduct a prompt and accurate investigation while the facts surrounding the incident were still fresh". In addition, the plaintiff's 14-month delay in seeking leave to serve an amended notice of claim deprived the defendant of an opportunity to conduct a meaningful investigation. Accordingly, leave to amend the notice of claim was denied and case dismissed.

2. New Theory of Liability not Set Forth in Notice of Claim

Bermudez v. New York City Bd. of Educ., 2009 WL 1810201 (Kings Co. Sup. Ct. 2009). While attending his sixth grade gym class, student fell when another student bumped him while he was trying to kick the ball during an unsupervised game of line soccer. The notice of claim alleged negligent supervision. After a successful trial for plaintiff, defendant sought to dismiss on the grounds, inter alia, that the notice of claim did not provide adequate notice of his negligent supervision claim. Court held that while the specific facts underlying the manner in which the claim arose were not set forth, there was no requirement for "literal nicety or exactness", and thus the Court upheld the verdict.

Heckel v. City of New York, 60 A.D.3d 812, 875 N.Y.S.2d 217 (2nd Dep't 2009). Plaintiff served the City with a notice of claim, in which he alleged that the City was negligent in, among other things, requiring sanitation workers to place cardboard and paper recyclables into the smaller compartment, an "inherently dangerous practice", which he alleged injured him. Subsequently, the plaintiff commenced an action alleging the same. However, in a bill of particulars served approximately 17 months after the accident, the plaintiff claimed, for the first time, that the City also was negligent in failing to properly

train and supervise employees with respect to placing cardboard and paper recyclables into the smaller compartment. The Court held that, as a matter of law, the City was not liable for its decision to place the cardboard and paper recyclables into smaller compartments, and that the plaintiff could not rely the evidence of negligent training and supervision since this theory of liability was not advanced in the notice of claim.

Brown v. City of New York, 56 A.D.3d 304, 867 N.Y.S.2d 408 (1st Dep't 2008). Pedestrian brought action against City stemming from slip-and-fall in pothole while attempting to board bus. The notice of claim was served within 90 days of the incident, but did not specifically allege failure to provide a safe place to board the bus. The Court held that the notice of claim, in combination with plaintiff's 50-h testimony, provided defendant with sufficient notice of the nature of the claim and the manner in which it arose, as well as the fact that plaintiff might assert a claim for failure to provide a safe place to board the bus. To the extent there was any defect in plaintiff's notice of claim, defendant could not claim to have been prejudiced thereby, as it did not undertake any meaningful investigation into plaintiff's claims until some 18 months after service of a supplemental bill of particulars, which defendant conceded gave express notice of the theory of liability advanced by plaintiff at trial.

Finke v. City of Glen Cove, 55 A.D.3d 785, 866 N.Y.S.2d 317 (2nd Dep't 2008). Plaintiff served a notice of claim upon the defendant alleging that the City consented to a tenancy at will permitting him to store his equipment on its property, and that the City was obligated to give him 30 days notice of termination before removing the equipment. In the lawsuit, however, he alleged additional causes of action sounding in breach of implied contract, breach of license, negligence, and conversion. Court noted that a notice of claim is a condition precedent to bringing a tort claim against a municipality, and that the some of the new allegations sounded in tort. Court has held that the newly alleged torts not claimed in the notice of claim could not be interposed because the addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiffs' claims. Those newly alleged causes of action would "substantively alter" the plaintiff's original claim and were not within the purview of GML § 50-e(6), which permits the court, in its discretion, to correct, supply, or disregard a mistake, omission, irregularity, or defect in a notice of claim. The plaintiff's breach of implied contract and breach of license causes of action, however, were not subject to the notice of claim requirements, and thus would have survived the motion to dismiss, except that they had no merit.

Torres v. City of New York, 21 Misc.3d 1109, 873 N.Y.S.2d 238 (Bronx Co. Sup. Ct. 2008). Because the injured construction worker's notice of claim against the City did not specifically refer to the sections of the Labor Law (200, 240 and 241) nor to the Industrial Code, the City argued that the Labor Law causes of action set forth in the complaint should be dismissed. The City also argued that the wife's loss of consortium claim should be dismissed since the notice of claim did not name her or indicate a loss of consortium claim. Both husband and wife, however, had testified at a 50-h hearing, which apprised defendant that both were making a claim. The Court ruled for plaintiff, denying the motion to dismiss, holding that "a theory of liability related to or implied by

what is clearly stated in the notice of claim should be permitted to proceed; particularly when as here, plaintiff's Labor Law claims can only prevail if the facts as set forth in the Notice of Claim and asserted in plaintiffs' complaint support the legal conclusion required to sustain an action which is premised on violations of Labor Law §§ 200, 240(1), and 241(6)." The test of the notice's sufficiency is whether it includes information sufficient to enable the city to investigate the claim. Here, the notice of claim identified in precise detail the type of work plaintiff was performing when the accident occurred; the location where he was working when the accident happened; what he was doing when the injury occurred; the name of his employer; the contract which his employer entered into; the nature of the work which his employer contracted to perform; the absence of the safety equipment which led to his injury; the existing conditions present under which plaintiff was required to perform his tasks which he was compelled to perform. Further, both plaintiff and his wife testified at the 50-h hearing. Thus, the Court allowed the both the main claim and the loss of consortium claim.

G. When Does 90-Day Clock Start Ticking?

1. Toll for Continuing Torts

Donas v. City of New York, 62 A.D.3d 504, 878 N.Y.S.2d 360 (1st Dep't 2009). Plaintiff's claim accrued when he was told he would never be promoted, yet plaintiff failed to serve defendants with a notice of claim within 90 days thereafter, nor did he seek leave to serve late. In a proposed amended complaint, plaintiff alleged ongoing retaliatory acts. However, absent any details of new discrete acts in the 90 days preceding his later-served notice of claim, rather than the effects of past acts, plaintiff's allegations were insufficient to establish a continuing violation claim.

2. Toll for Malicious Prosecution until Dismissal of Criminal Charges

Bush v. City of New York, 2009 WL 1332535 (Kings Co. Sup. Ct. 2009). Within ninety (90) days of the dismissal of the criminal charges, plaintiff filed a timely Notice of Claim against the City for the claim of malicious prosecution. However, the notice of claim was untimely as to the claims of false arrest, false imprisonment, negligent hiring and retention and infliction of emotional distress, as the 90-day time clock as to those claims started ticking on the date of the alleged false imprisonment. The failure to serve the notice of claim as to those claims within ninety (90) days of their accrual made the notice of claim a nullity as to those claims.

3. Right of Sepulture Claims

Melfi v. Mount Sinai Hosp., 64 A.D.3d 26, 877 N.Y.S.2d 300, (1st Dep't 2009). In this right of sepulcher case, defendant negligently disposed of the deceased's body by sending it to mortuary school (for student practice) without the permission of, or notifying, the next-of-kin. The body eventually ended up buried in potter's field. The next-of-kin did not find out about it until long after defendant had sent the body to the mortuary school. Defendant argued that the time for serving the notice of claim began to run from the day

it sent the body to the mortuary school, which was thus the day of the alleged tortious interference with the plaintiff's right to immediate possession of the body. The Court rejected this argument on the grounds that it fails to recognize the essential nature of the right of sepulcher, a unique cause of action among the torts recognized at common law. The right of sepulcher is less a quasi-property right and more the legal right of the surviving next of kin to find "solace and comfort" in the ritual of burial. Consequently, the cause of action did not accrue until interference with the right directly impacts on the "solace and comfort" of the next of kin, that is, until interference began causeing mental anguish for the next of kin, which did not happen until the next-of-kin became aware of what had happened to the body. The Court held that in order for the right of sepulcher claim to accrue 1) there must be interference with the next of kin's immediate possession of decedent's body *and* 2) the interference has caused mental anguish, which is generally presumed. Interference can arise either by unauthorized autopsy or by disposing of the remains inadvertently or, as in this case, by failure to notify next of kin of the death. As to a notice of claim, the 90-day clock starts to run upon the accrual of the claim, that is, the moment a wrong becomes actionable. In this case, the next-of-kin's claim accrued upon the painful realization that the body had been mutilated and buried in a mass grave of unclaimed bodies.

H. Those Weird "Public Authorities" and "Hybrid" Public Corporations

Gibson v. Roswell Park Cancer Institute Corp., 21 Misc.3d 638, 864 N.Y.S.2d 742 (Ct. Cl. 2008). Complex procedural case involving "hybrid" public entity, Roswell Park Cancer Institute, which must be sued in the Court of Claims but under GML procedural requirements (i.e., notice of claim, 1-year-90-day sol, etc.). One of the questions was whether claimant could move to late-serve a notice of claim after the one-year-90-days had passed. Under the Court of Claims Act section 10(8), a motion to file a Claim late can be considered by the Court if it is "made upon motion before an action asserting a like claim against a citizen of the state would be barred under the provisions of article two of the civil practice law and rules", i.e., for negligence claims, 3 years. But the SOL against Roswell Park was the one set forth in the GML, i.e., 1 year and 90 days. Court attempted to reconcile the Court of Claims Act with the GML requirement and, in the end, denied the application to late-serve.

Stampf v. Metropolitan Transp. Authority, 57 A.D. 3d 222, 868 N.Y.S.2d 641 (1st Dep't 2008). The action against the LIRR was timely commenced, and there was no requirement that a notice of claim be served upon LIRR, a subsidiary of the MTA, and the detailed letter sent to the LIRR by plaintiff's former attorney constituted the requisite demand on the LIRR (*see* Public Authorities Law § 1276[1]), and tolled the one-year statute of limitations, giving plaintiff up to one year and 30 days after her claim accrued to serve her complaint against it. However, plaintiff's motion to serve a late notice of claim with respect to her claims, except that for malicious prosecution, on the MTA was untimely. The MTA is a distinct legal entity from the LIRR for the purposes of suit (Public Authorities Law § 1266 [5]) and the service of her demand letter on the LIRR was ineffective to toll either the time to commence her action or the time within which to move to serve a late notice of claim on the MTA. Regarding the claim for malicious

prosecution, since that cause of action did not arise until there was a favorable termination of the criminal charges against plaintiff, the motion was timely.

I. 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."

1. Date and Address Corrections

Charleston v. Incorporated Village of Cedarhurst, 62 A.D.3d 641, 878 N.Y.S.2d 407 (2nd Dep't 2009). The original notice of claim in this case, involving an allegedly defective sidewalk condition, misidentified the actual location where the claim arose and, therefore, was inadequate to meet the statutory requirements applicable to notices of claim (*see* GML § 50-e [2]). Specifically, the original notice of claim misidentified the situs of the incident as 6 Cedarhurst Avenue, rather than the correct address, 78 Cedarhurst Avenue. Furthermore, the photographs provided to the plaintiff's claim representative one month after service of the notice of claim failed to clarify the location of the incident. Moreover, the subsequent complaint, amended complaint, bill of particulars, and even a supplemental bill of particulars served 11 months after the incident repeated the same mistake. "Given the transitory nature of sidewalk defects, defendant was prejudiced by not being able to conduct a prompt and accurate investigation while the facts surrounding the incident were still fresh". In addition, the plaintiff's 14-month delay in seeking leave to serve an amended notice of claim deprived the defendant of an opportunity to conduct a meaningful investigation. Accordingly, leave to amend the notice of claim denied and case dismissed.

Ritchie v. Felix Associates, 60 A.D.3d 402, 873 N.Y.S.2d 628 (1st Dep't 2009). Plaintiff tripped and fell as he stepped off an improperly constructed sidewalk curb. Plaintiff moved for leave to amend the notice of claim, complaint and all subsequent pleadings to correct the date of the accident from March 15, 2005 to March 2, 2005. The City cross-moved for summary judgment dismissing the complaint based on plaintiffs' failure to satisfy the requirements of GML § 50-e(2). The court granted plaintiffs' motion to amend (GML 50-e[6]) the notice of claim. Although three years had passed between the date of the accident and the motion, the record did not demonstrate any lack of good faith on plaintiffs' part. Furthermore, given that discovery had not yet commenced, defendants fail to demonstrate any actual prejudice, nor was there any apparent prejudice to them given the non-transitory nature of the defect.

Candelario v. MTA Bus Co., 21 Misc.3d 1148, 875 N.Y.S.2d 819, (Bronx Co. Sup. Ct. 2008). Plaintiff, who was a passenger in a bus injured by the driver's negligence, moved for leave to amend her Notice of Claim pursuant to GML § 50-e(6). Plaintiff claimed that due to inadvertence, she misrepresented the date of the instant accident and should be allowed to correct the same. Plaintiff also sought an Order pursuant to CPLR § 3025(b)

granting her leave to amend her complaint to reflect the actual date of occurrence and to plead compliance with Public Authorities Law § 1276 (1). Defendants cross-move for summary judgment. The Court granted plaintiff's motion. The notice of claim and complaint stated that the date of the accident was on January 21, 2007, but in fact it was on February 21, 2007. Plaintiff submitted a denial of claim form wherein MBC listed the date of the accident herein as February 21, 2007. Plaintiff's motion seeking leave to amend her Notice of Claim was granted. Defendant's only opposition to the application was a conclusory allegation of prejudice, defendant failed to particularize the actual prejudice alleged, and the documents submitted by plaintiff belies any claim of prejudice.

Ming v. City of New York, 54 A.D.3d 1011, 865 N.Y.S.2d 256 (2nd Dep't 2008). Motorist brought action against city, seeking to recover damages for personal injuries arising out of incident in which his car struck an access port that was higher than the roadway, which had been milled in preparation for repaving. The notice of claim failed to correctly identify the accident location, however, the issue was whether to grant plaintiff's motion pursuant to GML § 50-e(6) to amend it. The defendants did not claim that the plaintiff's mistaken identification in his notice of claim was made in bad faith, and the record did not support either the defendants' contention that they would be prejudiced by the proposed amendment or a presumption of the existence of prejudice. Motion thus granted.

2. Theory or Cause-of-Action Amendments

Ramos v. New York City Transit Authority, 60 A.D.3d 517, 876 N.Y.S.2d 13 (1st Dep't 2009). The 66 year-old plaintiff, confined to a wheelchair, was traveling on an M11 bus when the bus driver negligently placed her in the wheelchair lift. She claimed that her wheelchair rolled off the lift, and that she was thrown to the ground, face first, thereby sustaining serious injuries. She and her husband timely served a notice of claim describing the accident and detailing the injuries at that point in time. She later died, and letters of administration were granted to her husband, who later filed a verified summons and complaint setting forth causes of action for wrongful death, conscious pain and suffering, and loss of services. Defendant moved to dismiss the wrongful death cause of action, alleging that claimant had failed to meet the notice of claim requirements, since the notice of claim did not allege wrongful death (his wife had not yet died then). Claimant cross-moved to amend the original notice of claim to add a claim for wrongful death arising out of the same circumstances set forth in the original notice of claim. He argued, among other things, that it was permissible under GML 50-e (6) to amend an existing and timely filed notice of claim to add a claim for wrongful death arising out of the circumstances enumerated in the original notice of claim. Court held that the summons and complaint served within 90 days of plaintiff's appointment as the decedent's administrator were not a substitute for the notice of claim for wrongful death. The Court had previously ruled that a plaintiff may amend a notice of claim to include derivative claims predicated on the same facts already included in the original notice of claim (*see, Sciolto v. New York City Tr. Auth.,* 288 A.D.2d 144, 734 N.Y.S.2d 9 [2001]). Similarly, the Fourth Department had already held that a plaintiff may add a claim for wrongful death pursuant to GML 50-e (6) (*Matter of Scheel v. City of Syracuse,* 97

A.D.2d 978, 468 N.Y.S.2d 786 [1983]). This Court agreed with the Fourth Department, holding that "because the wrongful death claim simply adds an item of damages that must be proven by the aggrieved party, plaintiff should be granted leave to amend the notice of claim pursuant to GML 50-e (6)". Furthermore, allowing an amendment to the original notice of claim in order to add a claim for wrongful death does not cause defendant any prejudice (GML 50-e [6]). The facts giving rise to the wrongful death claim were identical to that series of events which formed the basis for the original claim for personal injuries. Thus, the delay in asserting the wrongful death claim could not possibly have prejudiced defendant in maintaining its defense on the merits.

Boakye-Yiadom v. Roosevelt Union Free School Dist., 57 A.D.3d 928, 869 N.Y.S.2d 802 (2nd Dep't 2008). A bus owned and operated by the defendant allegedly collided with a vehicle owned and operated by the plaintiff, who soon thereafter served a notice of claim to recover damages for injury to property. Plaintiff then commenced an action against the defendant, seeking only to recover damages for personal injuries allegedly sustained by her infant passenger (with no mention of the property loss claim). Defendant later moved to dismiss the complaint for failure to serve a notice of claim and the plaintiffs cross-moved pursuant to GML § 50-e(6) for leave to amend the notice of claim to assert a claim to recover damages for the child's alleged injuries. The plaintiffs never sought leave to amend the complaint to add a cause of action to recover damages for injury to property. The Court granted defendant's motion to dismiss the complaint and denied the plaintiffs' cross motion for leave to amend the notice of claim. The amendment sought by the plaintiffs would substantively alter the nature of the claim by improperly adding a completely new claim on behalf of a different person (the infant), and thus it was beyond the purview of GML§ 50-e(6).

Finke v. City of Glen Cove, 55 A.D.3d 785, 866 N.Y.S.2d 317 (2nd Dep't 2008). Plaintiff served a notice of claim upon City alleging City consented to a tenancy-a-will permitting him to store his equipment on its property, and that the City was obligated to give him 30 days notice of termination before removing the equipment. In the lawsuit, however, he alleged additional causes of action sounding in breach of implied contract, breach of license, negligence, and conversion. Court noted that a notice of claim is a condition precedent to bringing a tort claim against a municipality, and that the some of the new allegations sounded in tort. Court has held that the newly alleged torts not claimed in the notice of claim could not be interposed because the addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiffs' claims. Those newly alleged causes of action would "substantively alter" the plaintiff's original claim and were not within the purview of GML § 50-e(6), which permits the court, in its discretion, to correct, supply, or disregard a mistake, omission, irregularity, or defect in a notice of claim. The plaintiff's breach of implied contract and breach of license causes of action, however, were not subject to the notice of claim requirements, and thus would have survived the motion to dismiss, except that they had no merit.

J. Late Service of the Notice of Claim (without Leave): A Nullity

Gelish v. Dix Hills Water Dist., 58 A.D.3d 841, 872 N.Y.S.2d 486 (2nd Dep't 2009). Landowner sued water district and town after she fell into improperly covered water meter well. Plaintiff had served her notice of claim (without leave to late-serve) less than one month after the expiration of the 90-day period. Although the service of the notice of claim itself was a nullity because it was done without leave to late-serve, defendants nevertheless received from it actual notice of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day period. Given the minimal delay in serving the notice of claim and the lack of substantial prejudice to the defendants, leave to late-serve nunc pro tunc was granted.

Singleton v. City of New York, 55 A.D.3d 447, 865 N.Y.S.2d 600 (1st Dep't 2008). Dismissal of the complaint was warranted, since plaintiff's notice of claim was served after 90-day period expired, and thus was a nullity, and plaintiff failed to move for leave to serve a late notice of claim, or to have the previous one deemed served nunc pro tunc, within the statute of limitations of one year and 90 days after the claim arose. Defendants were not required to raise the late filing as an affirmative defense, nor were they estopped from seeking dismissal of the complaint on this ground.

K. Application for Permission to Serve Late 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. Need Affidavit from Someone with Knowledge

Monfort v. Rockville Centre Union Free School Dist., 56 A.D.3d 480, 866 N.Y.S.2d 775 (2nd Dep't 2008). The infant plaintiff was running "laps around the track" during the course of a girls' varsity lacrosse team practice at the High School, when she was "blind-sided by a flying discus" thrown by a member of the boys' lacrosse team. She alleged a theory of inadequate supervision. Her motion to late-serve was denied. The Court noted that the infant failed to submit her own affidavit or other verified pleading, despite the fact that she would presumably have been able to offer information with respect to exactly when her coach, or some other employee of the high school or of the District, first became aware of the injury to her nose caused by the discus. Rather, she submitted only her attorney's affirmation, in which the attorney made merely conclusory allegations to the effect that the District had been on notice of the incident "since it occurred." Moreover, the application was not supported by any other testimonial or documentary evidence establishing that the District obtained notice of the essential facts of the claim within 90 days of the accident or a reasonable time thereafter.

2. Are the Merits of the Claim to be Considered?

Swinton v. City of New York, 61 A.D.3d 557, 877 N.Y.S.2d 68 (1st Dep't 2009). Plaintiff inmate moved to late-serve a notice of claim. To the extent the subject notice of claim alleged false arrest and imprisonment and malicious prosecution, these claims had no merit in light of plaintiff's conviction of assault in the third degree, which was upheld by the Court of Appeals. "A conviction which survives appeal is conclusive evidence of probable cause" and the finding of probable cause was fatal to each of plaintiff's causes of action. Plaintiff's negligence claim, which was based on personal injuries allegedly suffered when he was arrested, was fatally defective because there is no cause of action for false arrest or false imprisonment sounding in negligence. Also, since a notice of claim is not required to assert a claim for federal civil rights violations, the court properly denied the request for permission to serve a late notice of claim.

3. Actual Knowledge "within a Reasonable Time" after Expiration of the 90-day Limit" (the most important factor)

a. *Who Must Have "Actual Knowledge?"*

In the Matter of Shane Riccio, etc., et al., appellants, v Town of Eastchester, 2009 WL 2449179 (2nd Dep't 2009). Motion to late-serve on behalf of infant injured on Town park slide denied where plaintiff failed to establish that the Town had actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. Under established case law, knowledge of the Town's Police Department of the injury could not be imputed to the Town itself. Furthermore, the Police Department call report, the injury report filled out by an employee of the Park, and a subsequent memorandum of the General Manager of the Park, failed to establish any connection between the accident and any alleged negligence of the Town.

Black v. City of New York, 21 Misc.3d 1121, 873 N.Y.S.2d 509, (Kings Co. Sup. Ct. 2008). In this case, upon plaintiff's application to late-serve a notice of claim, the Court considered the question of whether the filing of a complaint by plaintiff with the Civilian Complaint Review Board (plaintiff claimed he was falsely arrested and assaulted by the police) gave actual notice of the essential facts constituting the claim to the City. Court first noted that knowledge of the incident could not be imputed to the City through the police officers by virtue of the fact that they were directly involved with the claim of false arrest and assault. "Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim." Plaintiff had filed, however, a complaint with the CCRB eight (8) days after his arrest, which was later found by the CCRB to be "substantiated". The City argued that it could not have acquired the essential facts of the case through the CCRB, as the CCRB is not an extension of the New York City Police Department. Court held that under the plain language of the pertinent statute, the Board was an independent body comprised of members of the public who did not hold public office or employment. There was thus no basis to impute the facts and knowledge obtained by an independent City agency to the City. Accordingly, the application to serve a late Notice of Claim was denied. The Court noted that this decision did not affect plaintiff's possible federal § 1983 claim as the notice of claim requirements of GML § 50-e do not apply to federal civil rights claims asserted pursuant to 42 USC § 1983.

b. *Knowledge Gained First-Hand.*

Smith v. Baldwin Union Free School Dist, 63 A.D.3d 1078, 881 N.Y.S.2d 488 (2nd Dep't 2009). The alleged presence of a janitor at the time and place of the incident did not establish that the district acquired actual timely knowledge of the essential facts of the claim, and it was not shown that the district would not be substantially prejudiced in maintaining its defense on the merits as a result of the delay.

Schwindt v. County of Essex, 60 A.D.3d 1248, 876 N.Y.S.2d 191 (3rd Dep't 2009). Plaintiff allegedly fell from the roof of a firehouse and moved for leave to file a late notice of claim against defendants. At the time of the accident, certain employees and/or representatives of the defendants, including the fire department's chief, paramedic and director/ambulance driver, as well as a custodian for the fire district - were at the fire house, responded to the call for assistance, and either observed, treated or assisted in stabilizing plaintiff and arranging for his transport to a local hospital. The record demonstrated that defendants possessed more than a generalized awareness that plaintiff had been injured and, indeed, "acquired actual notice of the essential facts of the claim shortly after the accident through [their representatives] sufficient to allow [them] to undertake the necessary investigation to defend a potential claim". Further, regarding prejudice, the transitory nature of an accident scene, standing alone, did not prevent physical inspection or demonstrate substantial prejudice and defendants' conclusory assertion that the mere passage of time has impaired their ability to adequately investigate plaintiff's claim was unpersuasive.

Grant v. Nassau County Indus. Development Agency, 60 A.D.3d 946, 875 N.Y.S.2d 556 (2nd Dep't 2009). Even if the plaintiff immediately reported the incident to the foreman of the general contractor on the construction site owned by the defendant and the foreman investigated the scene, this was insufficient to provide the defendant with actual knowledge of the essential facts constituting the claim. Defendant would be prejudiced by the 10-month delay between the time the claim arose and the time the plaintiff commenced this proceeding for leave to serve a late notice of claim.

Formisano v. Eastchester Union Free School Dist., 59 A.D.3d 543, 873 N.Y.S.2d 162 (2nd Dep't 2009). 12-year old student (through is mother) moved to late-serve a notice of claim, nearly six years after sustaining a fractured nose. The proposed notice of claim asserted that, after the light went off at the school dance, some students began to engage in "moshing", knocking plaintiff to the floor where he was violently kicked in the face. The ambulance incident report stated only that the plaintiff said at the time that, "while attending a dance at school he was laying on floor doing a dance maneuver and got kicked." The defendant knew at the time that plaintiff had broken his nose, but plaintiff could not show defendant was aware of the facts constituting the claim (i.e., what was plaintiff claiming that defendant did wrong?) within 90 days or within a reasonable time thereafter. Also, plaintiff failed to show a reasonable excuse for the six year delay.

Bailey v. City of New York Housing Authority, 55 A.D.3d 443, 866 N.Y.S.2d 155 (1st Dep't 2008). Mother of tenant who was shot and killed at housing complex applied for leave to file a late notice of claim against city housing authority based on its negligence in providing proper security at housing complex. Plaintiff failed to establish that defendant had actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter or to demonstrate that defendant was not prejudiced by the delay. That there was media coverage of the shooting did not establish that defendant knew about the incident or anticipated a claim of negligence. Moreover, plaintiff failed to identify any documents from the police investigation or criminal proceedings that would assist defendant in investigating a claim of negligence. In the absence of such notice, the seven-month delay in filing the application compromised defendant's ability to identify witnesses and collect their testimony based upon fresh recollections.

Dewey v. Town of Colonie, 54 A.D.3d 1142, 863 N.Y.S.2d 849 (3rd Dep't 2008). Pedestrian brought application for leave to file a late notice of claim against Town arising out of an injury to his right knee when he slipped and fell while walking in a pedestrian lane. The Town had notice of the essential facts underlying the claim given that, among other things, the Town's Police Department was present at the scene and assisted plaintiff after he fell. The Police Department prepared an accident report setting forth details concerning the incident. Further, FOIL requests seeking various documents had been made to the Police Department and the Town Attorney. (Note: Generally, knowledge of the essential facts of the claim by police will not be imputed to the municipality unless other factors, such as here, show that the municipality had knowledge).

c. *Knowledge Gained from Hospital Records, Police Reports, Accident Reports and Other Records*

1. Police and Criminal Reports

Bush v. City of New York, 2009 WL 1332535 (Kings Co. Sup. Ct. 2009). 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. To hold that the existence of such a report relieves a claimant of the necessity of complying with the statutory requirements of GML 50-e would effectively vitiate the protections afforded public corporations by such statutory provisions**.** The court in a prior case, *Caselli*, found that where actual knowledge is imputed to a police department, because of the existence of police reports or the involvement of an officer, that other factors need to be present for the court to consider whether the City had actual knowledge of the essential facts of the claim within the ninety (90) day period or a reasonable time thereafter through its police officers. Here, the Court did not find that there were any other factors present. Accordingly, the application to serve a late notice of claim was denied in its entirety.

Gobardhan v. City of New York, 64 A.D.3d 705, 882 N.Y.S.2d 692 (2nd Dep't 2009). The City of New York did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. Contrary to the plaintiff's contention, the mere filing of a police accident report with the New York City Department of Transportation did not constitute notice of the claim to the City. In addition, plaintiff failed to show that the delay in commencing this proceeding for more than 10 months after the accident would not substantially prejudice the City in maintaining its defense on the merits. Moreover, the only excuse proffered by the petitioners for attempting to serve an unauthorized late notice of claim five months after the expiration of the 90-day statutory period was law office failure, which is not an acceptable excuse.

Furr v. City of New York, 22 Misc.3d 1120, 880 N.Y.S.2d 872 (Kings Co. Sup. Ct. 2009). Plaintiff moved pursuant to GML § 50-e for an order granting him leave to file a late Notice of Claim against the City arising out of his claims of false arrest by City police officers. The proposed Notice of Claim described the nature of the claims for personal injuries as a result of the false arrest, malicious prosecution, negligent hiring and retention, negligent supervision, and violations of 42 USC § 1983. He filed an order to show cause seeking leave to file a late Notice of Claim about ten 10 months after the cause of action accrued and about seven (7) months after the ninety (90) day statutory period expired. Plaintiff asserted that the police officer's knowledge of the incident should be imputed to the City, and that a criminal investigation conducted relating to plaintiff's arrest gave the City actual notice. The rule previously established in the Second Department is that "Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim". Where actual knowledge is imputed to a police department, because of the existence of police reports or the involvement of an officers, that other factors need to be present for the Court to grant the relief requested pursuant to

GML § 50-e. The Court examined the proffered documents to see if they provided the City with the essential facts upon which the theory or theories of the claim were based and additionally to see if the plaintiff could demonstrate that there was "other factors" present. The Court found that the arrest records and the criminal disposition paperwork did not contain any facts which would have put the City on notice of the claims of false arrest, negligent hiring and retention, negligent supervision, as there were no facts which would relate to the theories of these claims contained within the those records. The Court noted that this decision did not effect plaintiff's possible federal § 1983 claim as the Notice of Claim requirements of GML § 50-e do not apply to federal civil rights claims asserted pursuant to 42 USC § 1983.

Catuosco v. City of New York, 62 A.D.3d 995, 880 N.Y.S.2d 142 (2nd Dep't 2009). The original line-of-duty injury report, aided report, and witness statement prepared immediately after his accident, were insufficient to provide the City of New York with actual notice of the essential facts underlying his claim. These reports merely indicated that plaintiff was injured when he attempted grab a handrail to prevent himself from falling down the stairs, and made no reference to the alleged presence of sand on the stairs tracked in from the outdoors, or poor lighting conditions. What satisfies the statute is knowledge of the facts that underlie the legal theories on which liability is predicated, not simply knowledge of the accident itself. Furthermore, although the amended line-of-duty report and witness statement did note that the plaintiff slipped on a sandy surface and that the stairwell was poorly lit, these amendments were not filed until more than nine months after the accident. Thus, the City of New York was not aprised of these facts within 90 days after the accident or within a reasonable time thereafter. Also, plaintiff had no reasonable excuse for the delay and the City was prejudiced by its inability to investigate the claim in a timely manner. Motion to dismiss granted.

Figueroa v. City of New York, 22 Misc.3d 1111, 880 N.Y.S.2d 223 (Kings Co. Sup. Ct. 2009). Court considered whether City had actual knowledge of the essential facts constituting the claim within 90 days or shortly after plaintiff's alleged false arrest, false imprisonment, defamation, and negligent hiring, training and supervision. Court noted that, in order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated, but need not have specific notice of the theory or theories themselves. The Court was unable to find any information recorded within the criminal record itself which would provide the City with facts that underlied the theories of negligence or intentional tort, but the records of the IAB report filed by the defendant against the arresting officers, which was made within the ninety (90) day GML § 50-e period, contained the facts which underlied the legal theories on which the claims were based. Therefore, plaintiff demonstrated that the City acquired actual knowledge within the ninety (90) day GML § 50-e period of the essential facts of the claims for false arrest, false imprisonment, defamation, and negligent hiring, training and supervision. Lastly, as to whether the City would be prejudiced by the eleven (11) month delay in service of the late Notice of Claim, the Court noted that "proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by such a delay". Motion to late-serve granted.

Munro v. Ossining Union Free School Dist., 55 A.D.3d 697, 866 N.Y.S.2d 687 (2nd Dep't 2008). School district employee brought claims against school district under state human rights laws to recover damages for alleged employment discrimination on the basis of race and sex. A claimant seeking to commence an action for violations of the Human Rights Law must serve a timely notice of claim on the public corporation on the district within three months after accrual of the claim. Compliance with this requirement is a condition precedent to suit and must be pleaded in the complaint. Here plaintiff argued that the District had actual knowledge of the essential facts constituting her claim because she allegedly reported various incidents. In her cross motion and supporting documents, however, the plaintiff offered no details about the substance of her alleged reports that would permit a record-based conclusion that the District was put on notice of the essential facts underlying her current claims under the Human Rights Law. Additionally, the plaintiff offered no excuse at all for failing to serve a timely notice of claim. Motion to late-serve denied.

2. School Accident Reports

Petersen v. Susquehanna Valley Cent. School Dist., 57 A.D.3d 1332, 870 N.Y.S.2d 155 (3rd Dep't 2008). Infant plaintiff was injured when another student pulled her chair out from under her while she was eating lunch in the cafeteria. Plaintiff's mother contacted the school nurse to explain what happened and an accident report was completed. Plaintiff moved to serve a late notice of claim alleging that her injuries were the result of defendant's negligent supervision of the students in the cafeteria. Although the accident report established defendant's knowledge that plaintiff was injured when "[she] was in lunch and another student pulled her chair out from [under] her," defendant was not made aware of plaintiff's claim that the injuries resulted from its negligent supervision of the students in the cafeteria until the application to late-serve the notice of claim. Plaintiff thus failed to establish that defendant had actual knowledge of the essential facts constituting the claim.

Troy v. Town of Hyde Park, 63 A.D.3d 913, 882 N.Y.S.2d 159 (2nd Dep't 2009). While the school nurse employed prepared an accident report at the time of the incident or shortly thereafter, that report, which merely indicated that the infant plaintiff was injured when she tripped and fell down a set of stairs, did not establish that the defendant had actual knowledge of the essential facts underlying the plaintiffs' claim that the defendant failed, inter alia, to repair a leak and to clean or mop the stairs. Moreover, the plaintiffs failed to establish that the nine-month delay after the expiration of the 90-day statutory period would not substantially prejudice the defendant in maintaining a defense on the merits. Since the plaintiffs failed to comply with a condition precedent to the commencement of the action, defendant's motion to dismiss granted.

In the Matter of Marshal R. Korman v. Bellmore Public Schools, 62 A.D.3d 882, 879 N.Y.S.2d 194 (2nd Dep't 2009). Plaintiff injured his right shoulder when he fell from the steps in the school auditorium while attending a school play. While plaintiff's letter to the school's principal one day after the accident indicated that he fell from the top of the

auditorium steps, it failed to apprise the school of his injury or of his contention that the steps were negligently installed or repaired. Leave to later-serve denied.

Leeds v. Port Washington Union Free School Dist., 55 A.D.3d 734, 865 N.Y.S.2d 349 (2nd Dep't 2008). Defendant's employee witnessed the infant plaintiff's accident, which occurred on a sanctioned school field trip, and prepared a student incident report within 24 hours of the accident. In addition, the school's principal reviewed the student incident report within two days of the accident, and, due to the injuries sustained by the infant plaintiff, the principal provided the plaintiffs with a medical claim form within four days of the accident. The absence of a reasonable excuse for the delay did not bar the court from granting leave to serve a late notice of claim, since here, there was actual notice and an absence of prejudice.

Jantzen v. Half Hollow Hills Cent. School Dist. No. 5, 56 A.D.3d 474, 866 N.Y.S.2d 768 (2nd Dep't 2008). Student injured during wrestling scrimmage petitioned for leave to serve late notice of negligence claim upon school district. In support of his petition, the plaintiff submitted his mother's affidavit, which alleged that she provided " detailed information concerning what had transpired" to the school nurse within a week after the plaintiff was injured during a wrestling scrimmage. This statement was insufficient to establish that the defendant acquired, within 90 days or a reasonable time after the accident, actual knowledge of the essential facts constituting the present claim that the defendant was negligent in supervising or positioning the members of the wrestling team during the scrimmage.

3. Hospital Reports

Ali v. New York City Health & Hospitals Corp., 61 A.D.3d 860, 877 N.Y.S.2d 221 (2nd Dep't 2009). Permission to late-serve the notice of claim denied where, although the defendant hospital was in possession of the infant's medical records, those records did not establish that the hospital had actual knowledge of the essential facts constituting the claim. Further, plaintiff failed to satisfactorily explain a nine-year delay in seeking to serve a late notice of claim. The delay was not directly attributable to the plaintiff's infancy. Moreover, the plaintiff failed to meet his burden of establishing that the hospital was not been prejudiced in maintaining its defenses on the merits given the lengthy and unexcused delay in seeking to serve the late notice of claim.

Rowe v. Nassau Health Care Corp., 57 A.D.3d 961, 871 N.Y.S.2d 330 (2nd Dep't 2008). Although the defendant was in possession of the pertinent medical records, that alone was insufficient to establish notice of the specific claim. "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 plaintiff".

Gonzalez v. City of New York, 60 A.D.3d 1058, 876 N.Y.S.2d 139 (2nd Dep't 2009). The Record did not support plaintiff's contention that defendant Hospital acquired actual knowledge of the facts constituting the claim within 90 days after accrual of the claim or a reasonable time thereafter by virtue of its possession of the medical records pertaining

to the delivery of the plaintiff's child or the child's subsequent care at the hospital. There was no indication in hospital's records to support the claims of the plaintiff and her expert that the child suffered from hypotonia, hip dysplasia, or other impairment, either at the time of her birth or at any time during her follow-up visits, the last of which occurred four months after her birth. Furthermore, there was nothing in the hospital's records to suggest that the hospital had knowledge of the plaintiff's claim that it failed to diagnose and treat these conditions.

Perez v. N.Y.C. Health and Hospitals Corp., 22 Misc.3d 1123, 2009 WL 385547 (Bronx Co. Sup. Ct. 2009). In this medical malpractice action based on allegations of negligent prenatal labor and delivery care which allegedly caused permanent injury to the infant-Plaintiff, plaintiff's motion for leave to late-serve denied where a review of the records did not reveal a causal link between actions taken by staff members and injury to the infant. Further, defendant was prejudiced by the delay. The physician who delivered the infant had not been in the employ of the hospital since soon after the birth, and was not under defendant's control. Plaintiff's delay prevented defendant from investigating the claim while the facts were fresh.

d. Actual Knowledge gained from previously served late Notice of Claim without Leave

Gelish v. Dix Hills Water Dist., 58 A.D.3d 841, 872 N.Y.S.2d 486 (2nd Dep't 2009). Landowner sued water district and town after she fell into improperly covered water meter well. Plaintiff had served her notice of claim (without leave to serve late) less than one month after the expiration of the 90-day period. Although the service of the notice of claim itself was a nullity because it was done without leave to late-serve, defendants nevertheless received from it actual notice of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day period. Given the minimal delay in serving the notice of claim and the lack of substantial prejudice to the defendants, leave to late-serve nunc pro tunc was granted.

Godwin v. Town of Huntington, 56 A.D.3d 671, 867 N.Y.S.2d 543 (2nd Dep't 2008). The notice of claim served (without leave) upon the Town 99 days after the collision of plaintiff's vehicle with one owned and operated by the Town, did not give the Town actual knowledge that plaintiff was claiming negligent operation of the Town vehicle. The proposed notice of claim asserted that the Town was negligent in the design, maintenance, and traffic control of an intersection. It was not until the complaint was served, 11 months later, that the Town had any notice that the claim was premised on the alleged negligent operation of the Town vehicle. Moreover, the police accident report, which was received by the Town, did not provide actual knowledge of the claim, but rather noted that the accident occurred when the vehicle operated by plaintiff crossed the center line of the roadway, on wet pavement, and skidded into the Town vehicle. A municipality must have notice or knowledge of the specific claim; general knowledge that an accident occurred is insufficient. On these facts, plaintiff's belated motion to late-serve the notice of claim was denied.

4. Excuses, Excuses (Reasonable or Not) for Delay in Serving Notice of Claim

a. Unaware of the severity of the injury

Jantzen v. Half Hollow Hills Cent. School Dist. No. 5, 56 A.D.3d 474, 866 N.Y.S.2d 768 (2nd Dep't 2008). Student injured during wrestling scrimmage petitioned for leave to serve late notice of negligence claim upon school district. Even if the Court were to excuse plaintiff's initial delay of one year and eight months in serving the notice of claim based upon his assertions that he was unaware of the severity of his left elbow injury, plaintiff offered no valid excuse for the additional delay of one year and five months that ensued before commencing a proceeding for leave to serve a late notice of claim. Plaintiff also failed to demonstrate other key factors for allowing late-service of claim.

b. Unaware of Defendant's Liability

Dewey v. Town of Colonie, 54 A.D.3d 1142, 863 N.Y.S.2d 849 (3rd Dep't 2008). Pedestrian brought application for leave to file a late notice of claim against Town arising out of an injury to his right knee when he slipped and fell while walking in a pedestrian lane. The Town had notice of the essential facts underlying the claim given that, among other things, the Town's Police Department was present at the scene and assisted plaintiff after he fell. The Police Department prepared an accident report setting forth details concerning the incident. As for an excuse for the delay, plaintiff claimed he was unaware of defendant's potential liability until he had the chance to review the materials that defendants provided to him in connection with a FOIL request. Shortly thereafter, he moved for permission to late-serve the notice of claim.

c. Law Office Failure

Smith v. Baldwin Union Free School Dist, 63 A.D.3d 1078, 881 N.Y.S.2d 488 (2nd Dep't 2009). Court held that student should not have been granted leave to serve a late notice of claim in a tort action against a school district. The delay in serving the notice was the result of law office failure, which was not a sufficient excuse. Plaintiff also failed to demonstrate other key factors for allowing late-service of claim.

d. *Ignorance of law*

Bush v. City of New York, 2009 WL 1332535 (Kings Co. Sup. Ct. 2009). Plaintiff's inmate moved to late-serve a notice of claim but failed to present a reasonable excuse for its failure to file a timely Notice of Claim. Ignorance of the requirement to file a Notice of Claim does not serve as a valid excuse. Nor was it a proper excuse that he was "preoccupied by his criminal case" since case law establishes that even imprisonment does not excuse the delay. Plaintiff also failed to show other key "factors" favoring granting leave to late-serve.

Grant v. Nassau County Indus. Development Agency, 60 A.D.3d 946, 875 N.Y.S.2d 556 (2nd Dep't 2009). Plaintiff's assertion that he was unaware of the notice of claim requirement was not a reasonable excuse for his initial delay in serving a notice of claim upon the defendant. Plaintiff's also failed to proffer any excuse for the 2 1/2-month delay between the time that he retained counsel and the time he made his first application for leave to serve a late notice of claim against the wrong governmental agency. Plaintiff also failed to show other key factors for granting leave to late-serve.

Troy v. Town of Hyde Park, 63 A.D.3d 913, 882 N.Y.S.2d 159 (2nd Dep't 2009). In their initial motion papers, the plaintiffs did not proffer any excuse for their failure to serve a timely notice of claim upon the defendant. The excuse they ultimately did proffer, which was improperly raised for the first time in a reply affirmation, was that they were not familiar with the statutory requirement, a contention that does not constitute a reasonable excuse. Plaintiff also failed to show other key factors for granting leave to late-serve.

e. *Infancy*

Rowe v. Nassau Health Care Corp., 57 A.D.3d 961, 871 N.Y.S.2d 330 (2nd Dep't 2008). Although infancy will automatically toll the applicable one year and 90-day statute of limitations for commencing an action against a municipality, the factor of infancy alone does not compel the granting of a motion for leave to serve a late notice of claim. In this case, the plaintiff served a notice of claim upon the defendants approximately four years and four months after the alleged medical malpractice. The delay in serving the notice of claim and, thereafter, in moving to deem the notice of claim timely served, was not the product of the plaintiff's infancy. In addition, there was no reasonable excuse for the delay and defendant had no actual notice of the claim within the requisite 90-day period, or within a reasonable time thereafter. Although the defendant was in possession of the pertinent medical records, that alone was insufficient to establish notice of the specific claim of negligence.

Ali v. New York City Health & Hospitals Corp., 61 A.D.3d 860, 877 N.Y.S.2d 221 (2nd Dep't 2009). Plaintiff failed to satisfactorily explain a nine-year delay in seeking to serve a late notice of claim. The delay as not directly attributable to the infant plaintiff's infancy. Moreover, the plaintiff failed to meet his burden of establishing that the hospital had not been prejudiced in maintaining its defenses on the merits given the lengthy and unexcused delay in seeking to serve the late notice of claim. Plaintiff also failed to show the other key factors.

Gonzalez v. City of New York, 60 A.D.3d 1058, 876 N.Y.S.2d 139 (2nd Dep't 2009). Infant plaintiff in med mal case failed to provide a reasonable excuse for her delay in seeking leave to serve a late notice of claim. The delay in consulting with counsel could not be attributed to the child's infancy or the need to provide the child with extraordinary care. Plaintiff also failed to prove other key factors for permission to late-serve.

Perez v. N.Y.C. Health and Hospitals Corp., 22 Misc.3d 1123, 2009 WL 385547 (Bronx Sup. Ct. 2009). Instead of seeking leave of the court to deem the late Notice of Claim

timely, Med mal plaintiff, an infant, commenced an action by filing a summons and complaint almost one and a half years after med mal event. Plaintiff's counsel then sought leave, almost seven years after first filing a late Notice of Claim, and just one month before the statute of limitations would expire, to file a late notice of claim. Court denied the motion in part because of plaintiff's failure to prove an excuse for the delay. Although Plaintiff claimed that the delay in bringing the application was due to infancy, counsel had enough information to file a medical malpractice action with the certificate of merit much earlier.

f. *Oops, Wrong Entity . . .*

Kobernik v. City of New York, 61 A.D.3d 483, 877 N.Y.S.2d 46 (1st Dep't 2009). Passenger brought action against city when a tree on the side of a road uprooted and fell on the van in which he was a passenger. Plaintiff's original error in serving notice of claim on the towns of Carmel and Putnam County was excused as it was based on a reasonable belief that one or the other owned this roadway within the territorial jurisdiction of both, and plaintiff's subsequent delay in serving the true owner, the City of New York, was also excusable where he promptly moved to serve a late notice of claim against the City once advised by Putnam County that the site was owned by the City. The transient nature of the condition refuted the City's claim of prejudice by the late notice.

Ruffino v. City of New York, 57 A.D.3d 550, 868 N.Y.S.2d 739 (2nd Dep't 2008). Plaintiff was injured when she tripped and fell over wooden board on boardwalk. She timely served a notice of claim on the NY City Transit Authority, and timely sued it too, but the Transit Authority commenced a third-party action against the City alleging that the City owned, operated, maintained, managed, and controlled the area of the boardwalk where the plaintiff fell, and later, apprised the plaintiff that the City had jurisdiction over the area where she fell. Plaintiff then moved for leave to serve a late notice of claim upon the City. The Court noted that an error in serving the wrong governmental entity with a notice of claim may be excused if remedied promptly after discovery of the mistake. Furthermore, plaintiff demonstrated that the delay in serving the notice of claim did not substantially prejudice the City in maintaining its defense on the merits. The City repaired the subject piece of planking less than one month after the accident. Thus, due to its own actions, it would not have been able to investigate the site of this transitory defect any more effectively even if it been timely served 90 days after the incident. Further, plaintiff had taken photographs of the defect on the day of the accident and returned to inspect and photograph the location approximately one month after the accident.

Burgess v. County of Suffolk, 56 A.D.3d 769, 868 N.Y.S.2d 250 (2nd Dep't 2008). Plaintiff motorcyclist's application for leave to serve a late notice of claim against the Town was denied where the Town did not have any knowledge of the claim until plaintiff brought the proceeding six months after his motorcycle accident. Plaintiff's proffered excuse for the delay, his mistaken belief that the location of the highway where the accident occurred was within the jurisdiction of the County of Suffolk and the Village of Farmingdale rather than the Town of Suffolk, was unacceptable due to the unexplained

additional 3 1/2-month period of time which elapsed between the discovery of his error and the commencement of this proceeding. Further, the Town was prejudiced by the delay due to the passage of time and the possible changed conditions of the accident site.

Mayayev v. Metropolitan Transp. Authority Bus, 23 Misc.3d 1137, 2009 WL 1619913 (Queens Co. Sup. Ct. 2009). Plaintiff was injured when the driver of the Q38 bus in which he was a passenger made a sudden and violent maneuver, causing him to fall. MTABC moved to dismiss because the action was not commenced within a year and 30 days of plaintiff's accident, the applicable statute of limitations for an action brought against a public authority (*see*, Public Authorities Law § 1276[2]). Plaintiff acknowledged that the action was untimely, but argued, in his cross motion, that defendant should be equitably estopped from asserting such defense because he was misled in an earlier timely action brought against incorrect defendants, the Metropolitan Transportation Authority and the New York City Transit Authority. The Court agreed with plaintiff. A MTABC attorney advised plaintiff's counsel by letter that a hearing date would be provided and urged him to provide records in order to get a "prompt disposition" of the claim. Court was outraged at this behavior, writing that "*under these circumstances, for the defendant to move to dismiss, after it lulled plaintiff to believe that the claim would be processed in the ordinary course of business and then to pull a surprise of a dismissal after the expiration of the Statute of Limitations should offend the basic sensibilities of any fair-minded person. For a governmental agency to behave in such a duplicitous manner, premised on the writing of one of its attorneys, makes the misconduct all the more unfathomable and reprehensible."* Accordingly, defendant's motion to dismiss the complaint was denied in all respects and plaintiff's cross motion to strike the defendant's limitations defense was granted.

g. *Fear of Retaliation*

Formisano v. Eastchester Union Free School Dist., 59 A.D.3d 543, 873 N.Y.S.2d 162 (2nd Dep't 2009). Student moved to late-serve a notice of claim. The principal excuse offered for the late filing was a fear, the source of which was unspecified, of some possible retaliation against the plaintiff by the school authorities and teachers should a claim be filed. The Court deemed this excuse unreasonable and unrelated to the plaintiff's infancy.

III THE 50-H HEARING

Angel Vargas, et al., respondents, v. City of Yonkers, appellant., 2009 WL 2448565 (2nd Dep't 2009). Generally, 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, dismissal of the complaint is not warranted where the hearing has been postponed indefinitely beyond the 90-day period and the municipality does not reschedule the hearing. Here, after the defendant served the plaintiffs with a demand for a hearing, the plaintiffs' attorney adjourned the scheduled hearing date and no new hearing date was selected. Since the hearing had been indefinitely postponed and the defendant

did not serve a subsequent demand, the plaintiffs' failure to appear for a hearing did not warrant dismissal of the complaint.

October v. Town of Greenburgh, 55 A.D.3d 704, 865 N.Y.S.2d 646 (2nd Dep't 2008). Here, the defendant granted plaintiff's first request for an adjournment of the hearing and the hearing was rescheduled to a date more than 90 days after service upon them of the demand. Prior to the second scheduled hearing date, the parties agreed to postpone the hearing without setting another date. Since defendant failed in its obligation to reschedule the hearing for the earliest possible date available, the plaintiffs' failure to appear for a hearing did not warrant the dismissal of the complaint.

Kemp v. County of Suffolk, 61 A.D.3d 937, 878 N.Y.S.2d 135 (2nd Dep't 2009). Plaintiff had invoked his Fifth Amendment privilege against self-incrimination at the hearing pursuant to GML 50-h. Court held that plaintiff, and not the County defendants, was obligated to reschedule a continuation of the 50-h hearing after the criminal proceeding terminated two years later. Since that did not happen, defendants' motion for summary judgment dismissing the complaint based on the plaintiff's failure to comply with GML 50-h was granted.

Steenbuck v. Sklarow, 63 A.D.3d 823, 880 N.Y.S.2d 359 (2nd Dept 2009). Plaintiff alleged County was negligent in the construction and maintenance of the roadway and in failing to install adequate traffic control devices at an intersection. The County served a demand for a 50-h hearing. The examination was adjourned indefinitely at the request of the plaintiff's counsel. Several months later, the County served a demand for an examination of the plaintiff's parents. The plaintiff did not appear for an examination, however, the plaintiff's parents did. Subsequently, the plaintiff's counsel forwarded to the County a letter from the plaintiff's treating physician describing the plaintiff's injuries and explaining why he was unable to testify. The plaintiff, by his parents as guardians of his person and property, then commenced an action against the driver of the automobile and the County to recover damages for personal injuries. Defendant's motion for summary judgment for failure of plaintiff to comply with the condition precedent of submitting to a 50-h hearing was denied. The failure to submit to a 50-h examination may be excused in exceptional circumstances, such as extreme physical or psychological incapacity. Under the circumstances of this case, given the nature and extent of the plaintiff's injuries as documented by his treating physician and testified to by his father, the appointment of the plaintiff's parents as his guardians pursuant to Mental Hygiene Law article 81, and the appearance of the plaintiff's parents at a hearing pursuant to General Municipal Law § 50-h, the plaintiff's failure to appear for such a hearing did not warrant dismissal of the complaint.

IV MUNICIPAL LIABILITY FOR DEFECTS IN ROADWAYS, SIDEWALKS, ETC.

A. The Prior Written Notice Requirement

1. Prior Written Notice Generally

DiLeo v. Town/Village of Harrison, 55 A.D.3d 867, 866 N.Y.S.2d 742 (2nd Dep't 2008). The plaintiff fell over an allegedly defective storm drain at an intersection in the Town/Village of Harrison. The plaintiff claimed that there was also an inoperable streetlight at that location. The evidence submitted by the defendant established, prima facie, that the defendant did not receive prior written notice of the allegedly defective storm drain and/or the surrounding pavement. The evidence submitted by the plaintiff in opposition failed to raise an issue of fact as to whether the defendant received such prior written notice or whether an exception to the prior written notice requirement applied. Further, the Town did not have a duty to provide street lighting for the area where the plaintiff allegedly fell. Defendant was granted summary judgment.

Delaney v. Town of Islip, 63 A.D.3d 658, 880 N.Y.S.2d 190 (2nd Dep't 2009). The Town of Islip, enacted an ordinance which provides, in relevant part, that no civil action shall be maintained against it for injuries sustained by reason of a street defect unless prior written notice of such condition was actually given to the Town Clerk or the Commissioner of Public Works, and the Town failed to repair it within a reasonable time thereafter. The Town's ordinance, however, did not set forth any requirements for the specificity of the notice of a street defect. Court found that, since prior notice laws are in derogation of common law and must be strictly construed, notice would be deemed sufficient if it brought the particular condition which allegedly caused the subject accident to the attention of the authorities designated to receive notice. There was prior letter of complaint describing defective conditions on South Ocean Avenue, and requesting that the roadway be repaved. Whether the notice provided by this letter encompassed the particular condition which allegedly caused the subject accident was an issue of fact which should await resolution at trial, and thus defendant's motion for summary judgment was denied.

Alexander v. City of New York, 59 A.D.3d 650, 874 N.Y.S.2d 220, (2nd Dep't 2009). Plaintiff stepped into a hole on the street while alighting from a New York City bus. Due to the presence of illegally parked cars, the bus driver had been prevented from pulling into the bus stop at the corner of Broadway and Gates Avenue in Brooklyn. The City had received a document, generated by its Department of Transportation, indicating that a pothole existed on Broadway between Gates Avenue and Linden Street. At the first trial, a jury determined that the City had prior written notice of the roadway defect and was negligent, but also found that the defendant's negligence was not a proximate cause of the plaintiff's injuries. The Court reversed and ordered a new trial, finding that because "[t]he issues of negligence and proximate cause [were] inextricably intertwined," it was "logically impossible" for the jury "to find negligence without also finding proximate cause". Following a retrial, the jury again determined that the City had prior written notice of the roadway defect. It further found the City, the bus driver (who testified at the second trial but was not a party to the lawsuit), and the plaintiff to be negligent, and assigned fault percentages of 90%, 8%, and 2%, respectively. At the close of the evidence, the Supreme Court denied the City's motion to dismiss the complaint on the ground that the prior written notice of the defect lacked specificity. Appellate Division affirmed since there was sufficient evidence from which the jury could deduce that the defendant had written notice of the roadway defect four months before the accident.

Eisenberg v. Village of Cedarhurst, 21 Misc.3d 1122, 873 N.Y.S.2d 511 (Nassau Co. Sup. Ct. 2008). The underlying negligence action was commenced after plaintiff tripped and fell as a result of broken and cracked pavement located on the sidewalk area of a driveway. Since it was unclear who had jurisdiction over the area (the Village or the County), plaintiff sued both. Both argued on summary judgment that they did not have jurisdiction over the area. And both got out of the case. The Village and County both successfully argued that they did not receive prior written notice of the alleged defect through the testimony of their clerks, who swore that they were not in possession of any records regarding this location and did not perform any work at this location. In opposition, plaintiffs failed to raise a triable issue of fact.

Sachs v. County of Nassau, 60 A.D.3d 1032, 876 N.Y.S.2d 454, (2nd Dep't 2009). The decedent's wheelchair hit a raised portion of a sidewalk. The sidewalk abutted a road owned by the County of Nassau and was adjacent to property owned by the defendant property owner. The property owner moved for summary judgment. The Town of Oyster Bay Code § 205-2 imposed tort liability on each owner and occupant of any house or other building in the Town for failing to make or negligently making a repair or performing maintenance on abutting sidewalks. Since the Town Code specifically obligated the owner to maintain the sidewalk and imposed liability for a breach of that duty, the defendant property owner failed to establish her entitlement to judgment as a matter of law. The County, which also moved for summary judgment, established its entitlement to judgment as a matter of law by proffering deposition testimony by a County employee and an affidavit by another employee that they did not find any record of prior written notice, and plaintiffs failed to raise a triable issue of fact in this regard. Summary judgment to County granted.

2. Is Prior Written Notice Needed Where Municipality Leases, But Does not "Own", the Property?

Dick v. Town of Wappinger, 63 A.D.3d 661, 880 N.Y.S.2d 180 (2nd Dep't 2009). Issue of first impression. Pedestrian slip-and-fall accident at entrance to state police barracks. The entrance to the barracks was situated upon property owned by the defendant Town and leased to the New York State Police pursuant to a written lease. The Town was identified in the lease as the "LANDLORD." The building was not occupied or utilized by the Town for town government employees and contained no town offices or departments. The Town received rental payments from the New York State Police pursuant to the written lease. The Town moved for summary judgment dismissing the complaint on the ground that it did not receive prior written notice of the defect. Court held that a municipality that leases out property and acts as a landlord functions in a *proprietary* capacity and is, therefore, subject to the same principles of tort law as a private landlord. Thus, even if the entrance was a "sidewalk", the plaintiffs were not required to establish prior written notice to the Town. The dissent disagreed, finding that the leasing of the property was a "red herring". It noted that the Court of Appeals had repeatedly held that "the purpose of a prior written notice provision is to place a municipality on notice that there is a defective condition on *publicly owned property* which, if left unattended, could

result in Injury". The rule has nothing to do with governmental v. proprietary roles. The majority's determination would, in effect, create a third exception to the prior written notice rule. (The other two are affirmatively causing the defect and special use.) Dissent's bottom line: "In the absence of any legal precedent directly on point, expressly excepting prior written notice requirements based upon the ground relied upon by the plaintiffs and embraced by the majority, I would not obviate the prior written notice requirement."

3. Prior Written Notice Must Be WRITTEN

Rile v. City of Syracuse, 56 A.D.3d 1270, 867 N.Y.S.2d 823 (4th Dep't 2008). Although plaintiff contended that defendant was aware of the allegedly defective condition on sidewalk because actual notice had been provided through defendant's telephone hotline, "alleged actual notice of the defect does not obviate the necessity for prior written notice".

4. Problems with Big Apple Map Notice

Reyes v. City of New York, 63 A.D.3d 615, 882 N.Y.S.2d 64 (1st Dep't 2009). Here, plaintiff testified that a broken curb caused her foot to slip into a hole abutting the curb, where she fell and broke her ankle and wrist. The Big Apple Map showed an extended portion of broken or misaligned curb, as indicated by two "x's" connected by a straight line. The testimony at trial established that the defect, as depicted in the photographs in evidence, corresponded to the broken curb as marked on the map, that such defects would be noted on the Big Apple Map as a "curb defect" because the curb was broken and misaligned, and that a curb defect "also encompassed whatever happens at that particular location." Such evidence provided a sufficient basis for the jury to conclude that defendant had prior written notice of the defect.

D'Onofrio v. City of New York, 11 N.Y.3d 581, 873 N.Y.S.2d 251 (2008). Court of Appeals addressed two pedestrian trip and fall cases here. Both sets of Plaintiffs asserted that the big apple maps had given the "written notice" that the law requires. The notice issue was submitted to the jury in both cases, and both juries found the notice adequate. In the first case, *D'Onofrio*, however, Supreme Court held the notice insufficient as a matter of law, and set aside the verdict and granted judgment in the City's favor, which ruling was affirmed by the Appellate Division. In the second case, *Shaperonovitch*, Supreme Court denied the City's post-trial motion to set aside the verdict, and entered judgment in plaintiffs' favor; this judgment, too, was affirmed by the Appellate Division. The Court of Appeals affirmed in *D'Onofrio* and reversed in *Shaperonovitch.* The Big Apple map symbol used in *D'Onofrio* was a straight line, indicating "[r]aised or uneven portion of sidewalk." There was no evidence, however, from which the jury could have found that such a defect caused Mr. D'Onofrio's injury. He testified that, as he was walking over a grating, both his feet became caught almost simultaneously, causing him to fall forward. He said that he felt the grating move, and that he observed broken cement in the area; he attributed his fall to "the movement of the grating, plus the broken cement, the combination of the two." There was no evidence that Mr. D'Onofrio walked across a

raised or uneven portion of a sidewalk, even on the assumption that the grating was part of the sidewalk (a disputed issue). A photograph of the area where he fell did not show any surface irregularity or elevation. Since the defect shown on the Big Apple Map was not the one on which the claim in *D'Onofrio* was based, the lower court in that case correctly set aside the verdict and entered judgment in the City's favor. The problem in *Shaperonovitch* was the reverse of that in *D'Onofrio:* the nature of the defect that caused the accident was clear, but the symbol on the Big Apple Map was not. Ms. Shaperonovitch testified that she tripped over an "elevation on the sidewalk." No unadorned straight line, the symbol for a raised portion of the sidewalk, appeared on the Big Apple Map at the relevant location. The *Shaperonovitch* plaintiffs relied on a a line with a diamond at one end and a mark at the other. No symbol resembling this appeared in the legend to the map. A Big Apple employee, called to testify by the City, acknowledged that Big Apple "did not notify the city of any raise" in the location where Ms. Shaperonovitch fell. Plaintiffs in *Shaperonovitch* argued that the symbol on the map was "ambiguous" and that its interpretation was for the jury. The Court disagreed; a rational jury could not find that the mark on the Map conveyed any information at all. Because the map did not give the City notice of the defect, the City was entitled to judgment as a matter of law.

5. Written Notice Requirement Limited to Streets, Highways, Bridges, Culverts, Sidewalks and Crosswalks

Peters v. City of White Plains, 58 A.D.3d 824, 872 N.Y.S.2d 502 (2nd Dep't 2009). The plaintiff slipped and fell on a ramp in a public parking garage leased and maintained by the defendant City. Court held that a public parking garage, like a parking lot, falls within the definition of a highway and is one of the areas in which the General Municipal Law permits a local government to require notice of defective conditions. The City did not have prior written notice of the defects alleged by the plaintiffs, and thus summary judgment awarded to defendant.

Bright v. Village of Great Neck Estates, 54 A.D.3d 704, 863 N.Y.S.2d 752 (2nd Dept 2008). The plaintiffs allegedly sustained personal injuries when the limb of a tree fell onto the motor vehicle in which they were traveling, in the defendant Village of Great Neck Estates. Plaintiff alleged the County was negligent in failing to remove a dead and/or diseased tree. County moved for summary judgment on the grounds, inter alia, that it had no prior written notice of the defect. Court noted, however, that the written notice statutes apply to "actual physical defects in the surface of a street, highway [or] bridge" etc., but not to trees. Furthermore, the County failed to establish a prima facie case that it lacked actual and constructive notice of the alleged hazard in this case.

6. Who Must Give, and Receive, Prior Written Notice?

McCarthy v. City of White Plains, 54 A.D.3d 828, 863 N.Y.S.2d 500 (2nd Dep't 2008). Plaintiff tripped and fell as a result of missing brickwork surrounding a tree. The City established its entitlement to judgment as a matter of law by proffering the deposition testimony of a municipal code enforcement officer, in which he stated that he had

searched the City's prior written notice logbook and had found no records indicating that the City had received prior written notice of the alleged defective sidewalk condition. Contrary to the plaintiff's contention, an internal document entitled “Notice of Defect” generated by the City's Department of Public Works and referred for repair to the City's Highway Department did not constitute prior written notice so as to satisfy the statutory requirement of the Code provision Moreover, even though the Department of Public Works generated the notice in response to a telephonic complaint. A telephonic complaint reduced to writing does not satisfy the requirement of prior written notice. Moreover, to the extent that the plaintiff contended that the City had actual notice of the alleged sidewalk defect due to the existence of the 2004 telephonic notice, actual notice did not obviate the need to comply with the prior written notice statute.

Gorman v. Town of Huntington, 12 N.Y.3d 275, 879 N.Y.S.2d 379 (2009). Pedestrian claimed that an uneven piece of the Town's sidewalk in front of a local church caused her to trip and fall. Four months prior to plaintiff's fall, the church's pastor had written to the Town's Department of Engineering Services, the Department responsible for the Town's sidewalks, complaining that the sidewalk needed repair. The Town had a prior written notice law in effect to State Town Law § 65-a (2) - which provides in relevant part that a civil action may not be maintained against the Town for personal injuries “sustained by reason of any ... sidewalk ... operated or maintained by the town ... being defective ... unless written notice of the specific location and nature of such defective ... condition by a person with first-hand knowledge was actually given to the Town Clerk or the Town Superintendent of Highways in accordance with § 174-5” (Huntington Town Code § 174-3[A]). Section 174-5 of the Town Code clearly stated that service of the notice on a person other than the Town Clerk or Highway Superintendent “shall invalidate the notice” (Huntington Town Code § 174-5). The Town Clerk is required to “keep an indexed record ... of all written notices received” (Huntington Town Code § 174-4; *see* Town Law § 65-a [4]). Following joinder of issue, the Town sought summary judgment on the ground that it had not received prior written notice of the defect as required by § 174-3 of its ordinance and § 65-a of the Town Law. In support of its motion, the Town submitted affidavits from Town Clerk and Highway Superintendent representatives that no such notice was located in their records. Concluding that the Town had delegated its statutorily-imposed duty of keeping records pertaining to complaints of sidewalk defects from its Town Clerk and Superintendent of Highways to its Department of Engineering Services, both Supreme Court and the Appellate Division held that the Town had waived strict compliance with its prior written notice law and granted plaintiff summary judgment dismissing the Town's affirmative defenses asserting a lack of proper prior written notice under the statute. The Appellate Division then certified to the Court of Appeals the question of whether its opinion and order was properly made. Court of Appeals held that they were not! “A written request to any municipal agent other than a statutory designee that a defect be repaired is not valid, nor can a verbal or telephonic communication to a municipal body that is reduced to writing satisfy a prior written notice requirement.” Here, it was undisputed that neither the Town Clerk nor Highway Superintendent received prior written notice of the defective sidewalk. Because the Department of Engineering Services was not a statutory designee, notice to that department was insufficient for purposes of notice under Town Law § 65-a and § 174-3

of the Town's local code. The Department of Engineering Services's practice of recording complaints and repairs did not warrant a departure from the precedent strictly construing prior-written notice provisions. As the entity charged with repairing Town sidewalks, it was to be expected that the Department would keep a record of needed repairs and complaints, but it could not be inferred from that conduct that the Town was attempting to circumvent its own prior written notice provision. The Court also rejected the Appellate Division's holding that the Town was estopped from relying on its prior written notice provision. Even assuming that estoppel could serve as a third exception to the prior written notice rule (in addition to the municipality creating the defect and special use) there was no evidence that these plaintiffs relied on the correspondence sent by the pastor to the Department of Engineering Services or on any alleged assurances by that Department that it would repair the condition.

7. Exceptions to Prior Written Notice Requirement

a. Affirmatively Created the Hazard

Levy v. Town of Huntington, 54 A.D.3d 732, 864 N.Y.S.2d 81 (2nd Dep't 2008). Pedestrian brought personal injury action against town based on alleged trip and fall in a sunken, depressed, and uneven sidewalk area." Town established its prima facie entitlement to judgment as a matter of law based upon the plaintiff's failure to comply with the prior written notice requirements of Town Law § 65-a. But plaintiff raised an issue of fact, through her engineer expert, as to the defendant created the defect through opening and subsequently repaving the roadway in question.

Santana v. City of New York, 56 A.D.3d 295, 868 N.Y.S.2d 13 (1st Dep't 2008). Plaintiff was injured when his bicycle struck a 3 1/2-inch high metal bollard sleeve protruding from a municipal park pathway without the 40-inch high bollard pole positioned in the sleeve. Contrary to defendant's contention, its motion to dismiss at trial was properly denied, because although defendant did not have prior written notice of the defective condition, evidence established affirmative negligence in that the missing bollard pole was regularly removed by defendant's employees to allow for maintenance vehicles to access areas of the park normally blocked by the bollards.

DiGregorio v. Fleet Bank of New York, NA, 60 A.D.3d 722, 875 N.Y.S.2d 204 (2nd Dep't 2009). Plaintiff tripped and fell over a defect in a sidewalk abutting the property of the bank defendants. There was a rectangular area in the sidewalk that consisted of red bricks, and the plaintiff alleged that she tripped and fell over one corner of the brick area that abutted the cemented portion of the sidewalk due to a height differential between the brick area and the cement area. Plaintiff sued the banks, and the Village. Village moved for summary judgment contending that it did not have prior written notice of the alleged defect. The banks moved for summary judgment contending that that as an abutting owner, they could not be held liable for a defect in a public sidewalk. The Court granted the Village's motion, since there was no prior written notice, and the "vague, conclusory, and speculative affidavit of the plaintiff's expert did not raise a triable issue of fact as to whether the alleged defect was created by the Village's alleged negligent repair work of a nearby area". The defendant-banks motions were granted, too, because liability for

defective conditions on public sidewalks is placed on the municipality and not the abutting occupant except where the occupant negligently constructed or repaired the sidewalk, otherwise caused the defective condition, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligated the occupant to maintain the sidewalk, none of which occurred here.

b. No Liability Where Defect was Affirmatively Created But Developed Over Time

Lastowski v. V.S. Virkler & Son, Inc., 64 A.D.3d 1159 (4th Dep't 2009). While driving a backhoe from one job site to another during a rainstorm, plaintiff passed the exit and entrance to a quarry abutting a road in defendant Town. The quarry was owned and operated by a private corporation and, beyond the quarry, the road descended steeply toward an intersection. After cresting the hill and beginning the descent, the backhoe began to fishtail and ultimately tipped over. Plaintiff alleged that the Town was negligent in its design, maintenance and repair of the road, and that it created the roadway condition that caused the accident. With respect to the motion of the Town, the Court concluded that the Town met its initial burden on its motion by establishing that it did not have prior written of the allegedly defective condition of the road. Plaintiff failed to meet his burden in opposition by showing that the defect was due to an affirmative act of negligence or that a special use resulted in a special benefit to the Town. The expert affidavit submitted by plaintiff, while faulting the adequacy of the subsurface installed on the road, acknowledged that it was the number and weight of trucks to and from the quarry over the course of time that resulted in the allegedly dangerous pavement condition that plaintiff encountered.

Boice v. City of Kingston, 60 A.D.3d 1140, 874 N.Y.S.2d 319 (3rd Dept 2009). Plaintiff tripped and fell when she stepped in a rut on a public street in the City of Kingston, Ulster County. Defendant moved for summary judgment on the grounds that it did not receive prior written notice of the alleged defect in the roadway in accordance with Kingston City Charter § C17-1. In opposition, plaintiffs argued that no prior written notice was required inasmuch as (1) defendant affirmatively created the hazardous condition and (2) defendant had actual or constructive knowledge of it. Argument number 2 was summarily rejected by the Court since neither constructive nor actual notice can substitute prior written notice. Plaintiff attempted to prove the affirmative creation of a defective condition by defendant in two ways. First, he asserted that defendant negligently constructed and designed the street upon which plaintiff fell. Specifically, plaintiffs proffered the report and affidavit of their engineer, who opined that the absence of a drainage system and installation of an asphalt curb caused water to accumulate on the roadway, thereby degrading its surface. However, in the absence of evidence that the purported improper drainage of the roadway resulted in an immediate defective or hazardous condition, as opposed to one that evolved over a period of time, plaintiff failed to raise an issue of fact in this regard. Plaintiff also contended that rather than repaving the entire road, defendant repeatedly patched it, thereby creating an uneven and dangerous surface. Yet, plaintiffs presented no evidence of who last patched this section of the roadway before the accident, when any such work may have been carried

out, or the condition of the road's surface immediately after any such patching. As such, summary judgment granted to defendant.

Halitzer v. Village of Great Neck Plaza, Inc., 63 A.D.3d 882, 881 N.Y.S.2d 474 (2nd Dep't 2009). Pedestrian brought action against village when she tripped and fell when she struck her toe on a brick paver that was raised three-quarters of an inch to one inch above the others. The raised brick paver abutted a tree pit box. There was evidence that both the brick paver walkway and the tree pit box had been installed by the defendant Village. However, there was no evidence that the Village received written notice of the alleged defective condition. At the conclusion of the trial, the jury rendered a verdict in favor of the Village against the plaintiffs. The jury found that no affirmative act of the Village caused the subject brick paver located at the tree pit to be raised above the others. The plaintiffs moved pursuant to set aside the verdict, the court denied the motion, and Appellate Division affirmed. While there was evidence that the Village installed the brick paver walkway and the tree pit boxes located in the subject walkway approximately 15 years prior to this accident, the plaintiffs were unable to demonstrate that a dangerous condition existed immediately after the completion of its installation, that the dangerous condition was caused by a repair allegedly performed by the Village, or that the Village enjoyed a special use over the subject portion of the brick paver walkway.

Pluchino v. Village of Walden, 63 A.D.3d 897, 880 N.Y.S.2d 545 (2nd Dep't 2009). Sewage backup flooding caused extensive damage to plaintiffs' property. The Village moved for summary judgment dismissing the complaint based upon the plaintiffs' failure to comply with the Village's prior written notice law. The Village demonstrated its prima facie entitlement to judgment by proof that the plaintiffs failed to furnish prior written notice of a sewer defect which allegedly was a substantial factor in causing the flooding. However, in opposition thereto, the plaintiffs raised a triable issue of fact as to whether this defect was affirmatively created by the Village. Under the circumstances of this case, there was also a question of fact as to whether the Village's actions immediately resulted in the existence of a dangerous condition rather than resulting from the passage of time. Summary judgment to defendant denied. (QUERY: Why did not plaintiff argue, or Court address, that this a "sewer defect" and thus not a defect that requires a prior written notice, i.e., not a "highway, bridge, culverts, sidewalks or crosswalk").

San Marco v. Village/Town of Mount Kisco, 57 A.D.3d 874, 871 N.Y.S.2d 236 (2nd Dep't 2008). Pedestrian brought action against village after she slipped and fell on accumulation of black ice on surface of public parking lot owned and maintained by village while exiting her vehicle. Defendant moved for summary judgment on the ground that it had no prior written notice. The plaintiff opposed, arguing that the affirmative negligence exception was applicable since the defendant created the black ice hazard through its negligent snow removal procedures by piling snow in an area adjacent to parking meters, rather than removing the snow. The plaintiffs alleged that the temperature fluctuations for the week before the accident resulted in the snow melting and refreezing, creating a dangerous condition. Court ruled that even assuming that the defendant's creation of snow piles adjacent to parking meters was negligent, the plaintiffs failed to raise a triable issue of fact as to the applicability of the affirmative negligence exception.

According to the deposition testimony of a foreman from the defendant's Highway Department, prior to the plaintiff's accident, the Highway Department last plowed the parking lot on a week before the accident. According to the report of the plaintiffs' meteorological expert, melting and refreezing could not have begun until four days later. Such facts did "not rise to immediate creation, as it was environmental factors of time and temperature fluctuations that caused the allegedly hazardous condition.

Boice v. City of Kingston, 56 A.D.3d 599, 868 N.Y.S.2d 229 (3rd Dep't 2009). Plaintiff tripped and fell when she stepped in a rut on a public street. Since there was no prior written notice, plaintiff attempted to prove the affirmative creation of a defective condition in two ways. First, she asserted that defendant negligently constructed and designed the street upon which plaintiff fell. Specifically, plaintiff proffered the report and affidavit of an engineer, who opined that the absence of a drainage system and installation of an asphalt curb caused water to accumulate on the roadway, thereby degrading its surface. But the record was devoid of any evidence that defendant constructed or designed the road. Moreover, although plaintiff's engineer opined that the pooling of water caused by the lack of drainage and asphalt curb "hastened the rate of deterioration of the pavement" and caused it to crack "over time," the affirmative negligence exception is "limited to work by the [municipality] that immediately results in the existence of a dangerous condition". Next, plaintiff contended that rather than repaving the entire road, defendant repeatedly patched it, thereby creating an uneven and dangerous surface. Yet, plaintiffs "presented no evidence of who last patched this section of the roadway before the accident, when any such work may have been carried out, or the condition of the road's surface ... immediately after any such patching". More importantly, there was no evidence that any such patchwork repairs caused plaintiff to trip and fall. In fact, plaintiffs' engineer specifically noted that the rut on which plaintiff stepped was not part of the patching process. Thus, summary judgment granted to defendant.

Diaz v. City of New York, 56 A.D.3d 599, 868 N.Y.S.2d 229 (2nd Dep't 2008). The plaintiff tripped and fell over a pothole abutting a manhole cover. At the close of the plaintiff's case, the defendant moved pursuant to CPLR 4401 for judgment as a matter of law, and the Supreme Court denied the motion, but Appellate Division reversed. Plaintiff did not allege that the City received prior written notice of the defect (Administrative Code of City of N.Y. § 7-201), or that the special use exception to the prior written notice requirement applied. Rather, he alleged that the City affirmatively created the defect. However, a witness for the plaintiff testified that the street where the accident occurred had been repaved two or three years before the accident, and the pothole had developed several months after that work was performed. There can be no liability for affirmative acts of negligence where the alleged defect occurs "over time".

Richmond v. City of Long Beach, 21 Misc.3d 1113, 873 N.Y.S.2d 515 (Nassau Co. Sup. Ct. 2008). Plaintiff tripped and fell in a City parking lot which had been renovated by the City and included a concrete strip which bordered the north and south side of the parking lot, which were covered by brick pavers and contained tree pits approximately five feet by five feet which were several feet apart. Trees were planted in the tree pits, which were

filled with soil and mulch by the City. Plaintiff fell while walking through the parking lot "as he was exiting the 4th tree pit on an irregular, uneven, and broken walkway". He claimed that the tree pit surface was pitted and was covered with spongy mulch; that the bricks around the pit were uneven and not level with the adjacent mulch; that there was three-inch difference between the mulch and the surface of the bricks. He claimed that when he stepped down with his right foot, he sunk down in the mulch, three to five inches, which caused him to lose his balance, and when he attempted to step back onto the surrounding brickwork, he tripped and fell. The plaintiff argued that the alleged defect was not readily observable and that "the decomposing spongy mulch" in the tree pit was caused by the City's negligent maintenance and design. But plaintiff submitted no expert affidavit setting forth the nature and cause of the defect and the City's culpability. Plaintiff's unsubstantiated allegations that the City created the defect, made in the affirmation of an attorney who had no personal knowledge of the facts, was insufficient to defeat the City's motion for summary judgment. The Court's view of photographs led it to conclude that the tree pits along the curb in the parking lot did not constitute a dangerous condition that would lead a prudent landowner to anticipate trip and fall accidents but, rather, were too trivial to be actionable. Although the creation argument is an exception to the prior written notice rule, there was no evidence that the alleged difference in height between the mulch and the surrounding brickwork, caused by decomposing or pitted mulch, was affirmatively created by the City rather than the result of natural settlement of the mulch in relation to the brick work over time.

Desposito v. City of New York, 55 A.D.3d 659, 866 N.Y.S.2d 248 (2nd Dep't 2008). The evidence at trial was sufficient to deny the City's motion pursuant to CPLR 4404(a) on the issue of whether the defendant affirmatively created the roadway defect or worsened the condition by doing work that immediately resulted in the existence of a dangerous condition that would preclude it from relying on it prior written notice law.

Hirasawa v. City of Long Beach, 57 A.D.3d 846, 870 N.Y.S.2d 96 (2nd Dep't 2008). The plaintiff tripped over a metal plate protruding from a median located on Grand Boulevard in the defendant City of Long Beach. The concrete curb, which had been constructed around the median approximately 18 months before the accident, was missing from the area around the metal plate upon which the plaintiff allegedly fell. Thereafter, the plaintiff sued the City and contractor. The City established its entitlement to judgment as a matter of law by submitting evidence that it had no prior written notice of the allegedly defective condition which caused the plaintiff's fall. In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact as to her contention that the City created the alleged defect through an affirmative act of negligence. Although the City had supervised the contractor's work, the plaintiff failed to submit evidence that the defective condition existed immediately upon the completion of the repair work.

c. Special Use Exception

Schleif v. City of New York, 60 A.D.3d 926, 875 N.Y.S.2d 259 (2nd Dep't 2009). The plaintiff fell after he stepped into a depression in the asphalt abutting a manhole cover and then caught his foot on the edge of the manhole cover. The depression and manhole

were located in the middle of a municipal parking lot owned and maintained by the City. Plaintiff's theory as to liability was that the special use exception to the prior written notice rule. Upon the jury verdict, the City moved pursuant to CPLR 4404(a) to set aside the verdict. Plaintiff presented no proof as to the alleged special use of the manhole, let alone what special benefit the City derived from it. Accordingly, as the plaintiff failed to meet his burden of showing that he was entitled to avail himself of the special use exception, the Appellate Division held that City's motion should have been granted.

Ivanov v. City of New York, 21 Misc.3d 1148, 875 N.Y.S.2d 820 (New York Co. Sup. Ct. 2008). Plaintiff slipped and fell due to the presence of ice and snow on the sidewalk near the entrance to the A-Train subway station on the northwest corner of Broadway and 169th Street in New York City. Plaintiff named the City as a defendant based on its ownership and control of the sidewalk; the MTA and the Transit Authority were individually named as defendants based on each entity's control of the New York City subway system and their "special use" of the area of the sidewalk where plaintiff fell. MTA/TA's moved for summary judgment on the grounds that the accident did not take place on property under their control. Opponents to the motion argued that sidewalk was under the MTA/TA's control because it was within the "special use" portion of the MTA/TA's property., i.e., the accident occurred on a portion of the sidewalk which was being specially used by the MTA/TA for its entrance to the A-train. Court found an issue of fact.

d. Highway Law § 139(2) – No Prior Written Notice Necessary for Defects in County Highways

Moxey v. County of Westchester, 63 A.D.3d 1124, 883 N.Y.S.2d 80 (2nd Dep't 2009). The plaintiff allegedly sustained personal injuries when she drove her car over a large tree limb which had fallen onto the northbound roadway of the Bronx River Parkway. After the plaintiff commenced the action, the defendant moved for summary judgment dismissing the complaint on the ground that it lacked prior written notice or constructive notice of the roadway obstruction. Section 780.01 of the Laws of Westchester County required prior written notice of a defect before a civil action may be maintained against the County for injuries sustained as a result of a defect on a public street or highway. Here, the affidavits of the defendant's employees established prima facie that the defendant did not have prior written notice of the downed tree limb..The evidence which the plaintiff submitted in opposition failed to raise a triable issue of fact. However, Highway Law § 139(2) allows for tort recovery for dangerous highway conditions even in the absence of prior written notice where "such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence." The deposition testimony of a road foreman, which the defendant submitted in support of its motion, indicated that, on an ordinary day, in the course of his patrols, he would drive past the subject location three or four times, over a seven hour period, and that he did not recall observing any downed tree limbs, when he did so, on the day of the accident. This evidence established, prima facie, that the defendant did not have constructive notice of the downed tree limb. In opposition, the plaintiff again failed to raise a triable issue of fact. Accordingly, summary judgment granted to defendant.

Friedland v. County of Warren, 61 A.D.3d 1138, 876 N.Y.S.2d 757 (3rd Dep't 2009). Motorist brought action against county and town when his car slid off county road, allegedly due to dangerous and hazardous conditions resulting from accumulation of snow and ice. The County of defendant owned the road where the accident occurred but had contracted with defendant Town for snow and ice removal, salting and sanding. Defendants each moved for summary judgment dismissing the complaint, which motions were granted. Court found that, pursuant to the prior written notice statutes applicable to defendants, a cause of action based upon negligent snow and ice removal was precluded unless the municipality received prior written notice of the dangerous condition. Here, defendants presented affidavits that no prior written notice had been received. (Query: What about County Highway Law 139[2]?!).

B. Abutting Owner Liable: Only If "Affirmatively Created" the Hazard or Had a "Special Use" of the Sidewalk, etc.

Schwartz v. City of New York, 2009 WL 2382988 (Kings Co. Sup. Ct. 2009). The Court found triable issues of fact as to whether the cracked area where plaintiff fell on was caused by the use of the driveway by the abutting landowners, as plaintiff fell very close to the part of the driveway that was damaged. Even if he did not fall directly on the driveway, the weight of traffic on the driveway could have been a concurrent cause of the defect in the sidewalk. The defendants thus fail to meet their burden of establishing that their special use of the sidewalk did not contribute to the allegedly defective condition.

McGee v. Denson, 21 Misc.3d 1135, 875 N.Y.S.2d 821 (Queens Co. Sup. Ct. 2008). This is a pre-Administrative Code 7-210 case. The law in NYC at the time was that a landowner could not be liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner's premises unless the landowner created the defective condition or caused the defect to occur because of some special use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon him. Here, plaintiff contended that a tenant in the building, a Church, made a special use of use of the sidewalk. Plaintiff claimed she had tripped over "a raised sidewalk door and lock on the public sidewalk". The pastor of the defendant Church testified at the examination before trial that the Church did not have any keys for the lock on the exterior metal doors (two other tenants in the building did), could not open the doors from the interior, and did not use the vault to gain entrance to the basement of the church. The exterior metal doors were the sole and exclusive means of access to the basement area from the sidewalk for the three stores who rented other areas in the building. The Church had its own separate internal access to the basement through the interior of the church, the Church had no occasion or need to use the exterior metal doors to access the basement. The keys to the exterior vault door lock were kept by both the grocery store and the candy store, and if the Church needed to use the metal doors to get into the basement from the exterior of the building he had to get the key from either the candy store or the grocery store. The only occasion that the Church had a need to open the exterior metal doors was at a time when he was cleaning out the basement. The Court held that the exterior metal doors and lock did not confer a

benefit on the Church, as there was no evidence in the record to show that the Church used, or had a need to use the metal doors and lock for access to the basement. The mere fact the metal doors and lock were adjacent to the Church's leasehold was not a special use that might impose maintenance and repair obligations with respect to the metal doors and lock. Plaintiff presented no evidence to show that the Church made special use of the metal doors. Defendant's motion for summary judgment granted.

C. Liability under New City Sidewalk Law (§ 7-210 of the NYC Administrative Code)

1. Commercial Abutting Property Owner Liability

James v. Blackmon, 58 A.D.3d 808, 872 N.Y.S.2d 179 (2nd Dep't 2009). Plaintiff tripped and fell in a public sidewalk in front of a commercial building owned by the defendant landowner. On her motion for summary judgment, the defendant failed to provide any evidence showing that she properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injuries. Although the defendant argued that she was an out-of-possession landlord, under these circumstances, this did not constitute a defense. Thus, the defendant failed to demonstrate her prima facie entitlement to judgment as a matter of law.

Okowsky v. Cord Meyer Development, LLC, 22 Misc.3d 1122, 2009 WL 383359 (Queens Co. Sup. Ct. 2009). Plaintiff slipped and fell on a public sidewalk. Focusing on different portions of plaintiff's deposition testimony, defendants maintained that plaintiff was not able to say where she fell, while plaintiff maintained that she pointed out exactly where she fell, and what caused her to fall. Court held that, while plaintiff's testimony might serve as fodder for cross-examination at trial, it was hardly dispositive on the issue of whether plaintiff knew where she fell, or what caused her to fall. Also, defendant's motion papers left unresolved triable issues of fact as to whether they created the alleged dangerous condition, or alternatively, whether they had actual or constructive notice of its existence. The court also found a question of fact as to whether the defect upon which plaintiff tripped and fell was of such a trivial nature that it could not give rise to legal liability on the part of defendants.

De Garcia v. Empire Fasteners, Inc., 57 A.D.3d 710, 871 N.Y.S.2d 217 (2nd Dep't 2008). In support of its motion for summary judgment dismissing the complaint, the commercial defendant submitted photographs establishing that its property did not abut the portion of the sidewalk which contained the alleged defect that the plaintiff identified at her deposition as the location of her fall. Said defendant thus established that it did not have a duty to maintain the portion of the sidewalk where the plaintiff fell in a reasonably safe condition, and that it was therefore entitled to summary judgment dismissing the complaint insofar as asserted against it (*see* Administrative Code of City of N.Y. § 7-210). The plaintiff failed to raise a triable issue of fact in opposition to Empire's showing, and accordingly, summary judgment granted to defendant.

Morris v. City of New York, 21 Misc.3d 758, 865 N.Y.S.2d 495 (Kings Co. Sup. Ct. 2008). Pedestrian filed negligence suit, pursuant to Sidewalk Law, seeking to recover from city and Dormitory Authority of New York State (DANYS) for trip and fall in hole on sidewalk in front of dormitory on college campus. Dormitory authority moved for summary judgment. There was an issue of first impression, since no previous cases have addressed the application of the Sidewalk Law to DASNY. In a previous case, the Appellate Division, First Department likened the relationship between Columbia University and DASNY as "more akin to that of mortgagor and mortgagee rather than that of traditional owner and tenant" because DASNY held title only until the loan on dormitory facilities constructed by DASNY was repaid. The court noted that in other cases courts had declined to apply to DASNY an owner's statutory obligation to maintain its building in good repair because the "lease is not a standard leasing agreement, but rather a part of an extensive financing arrangement". In the instant case, plaintiffs did not controvert DASNY's prima facie case of entitlement to summary judgment by proffering any evidence that DASNY retained significant control over the premises that would subject it to liability. The lease and financing agreement between the parties, as well as the Education Law and the Public Authorities Law, collectively placed the responsibility for maintenance of the premises on CUNY and the responsibility for funding construction of CUNY structures on DASNY. DASNY did not undertake any repairs in this case for which it could be held liable, as it has in other cases and the mere reservation of the right to re-enter where all significant control and maintenance of the premises had been placed on CUNY was not a sufficient retention of control to subject DASNY to liability. Therefore, DASNY's motion for summary judgment was granted**.**

2. Prior Written Notice to City under the New Sidewalk Law

Ramos v. City of New York, 55 A.D.3d 896, 866 N.Y.S.2d 737 (2nd Dep't 2008). The plaintiff fell when her foot got caught in a hole in a street adjacent to a catch basin. The City submitted evidence sufficient to establish its entitlement to judgment as a matter of law pursuant to Administrative Code § 7-201(c)(2). While there was a written acknowledgment of the defect from the City, the accident occurred within the 15-day grace period provided by Administrative Code § 7-201(c)(2) for the City to repair or remove the defect. In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact. There was evidence that the New York City Department of Environmental Protection had received notice by telephone that the catch basin in question was clogged, and the catch basin was inspected and appeared "to be good." However, that evidence did not give rise to a triable issue of fact since it did not constitute a written acknowledgment of the defect in question, nor was it circumstantial evidence of prior written notice pursuant to Administrative Code § 7-201(c)(2).

3 Are Curbs, Ramps, Tree Wells, etc., Part of the "Sidewalk" under the New Sidewalk Law?

Santiago v. City of New York, 2009 WL 1018808 (Richmond Co. Sup. Ct. 2009). Plaintiff was playing "catch" with a football and his two boys when he tripped and fell in a depression near a park bench. The City moved for summary judgment for failure to

plead compliance with the prior written notice requirement of Section 7-201(c)(2) of the Administrative Code of the City of New York. The City argued that the area in question was a "sidewalk" for purposes of the Administrative Code § 7-201(c)(1)(b), which is defined as including "a boardwalk, underpass, pedestrian walk or path, step and stairway". In opposition, plaintiff contended that the paved area of a "park" is "categorically different" from a "sidewalk", as defined by Administrative Code § 7-201(c)(1)(b). In proffering this argument plaintiff likened this case to other tort actions involving (1) a defective paddleball court (*Walker v. Town of Hempstead*, 84 N.Y.2d 360); (2) a recreational playing field (*Zumbo v. Town of Farmington*, 60 A.D.2d 350); and (3) a tree well (*Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517). In the first two cases, it was held that prior written notice was *not* a condition precedent to municipal liability, and in the last case, it was held that a tree well did not constitute a part of the sidewalk for purposes of Section 7-210 of the Administrative Code. The Court held that the photographs which he submitted revealed that the area where he fell "functionally fills the same purpose as a pedestrian walk or path", both of which fall within the definition of "sidewalk" under Administrative Code § 7-201(c)(1)(b). The paved area meandered along the waterfront, narrowing during much of its length to take on all of the physical characteristics of a sidewalk. It was also lined with benches, upon which a pedestrian might rest and enjoy a view of the Manhattan skyline. Thus, summary judgment was granted to defendant.

Rodrigues v. Brazal South Holdings, LLC, 22 Misc.3d 1115, 2009 WL 212582 (Queens Co. Sup. Ct. 2009). Plaintiff tripped and fell on a sidewalk in Queens after the heel of her shoe stepped into a hole, and the front portion of her foot came into contact with a metal bar. The defendant landowner asserted, on his summary judgment motion, that the hole plaintiff stepped into was part of the curbstone, not the sidewalk and that, under section 7-210 of the Administrative Code of the City of New York ("Administrative Code"), the curbstone is the responsibility of the City of New York and not the abutting landowner. Plaintiff countered that the curbstone was the edge of the sidewalk for which the abutting landowner is responsible. The issue was thus whether the curbstone was part of the sidewalk, which would make it the responsibility of the defendant. The Court noted that, although the word "sidewalk" was not defined in section 7-210 of the Administrative Code, section 7-201(c)(1)(b) states that a sidewalk "shall include a boardwalk, underpass, pedestrian walk or path, step or stairway." No mention is made of a "curbstone." Moreover, Section 7-201(c)(1)(a) of the Administrative Code provides, in pertinent part, that "[t]he term street' shall include the curbstone ...". Further, Administrative Code § 19-101(d) defines "sidewalk", for purposes of Title 19, as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, *but not including the curb*, intended for the use of pedestrians." The Court also noted that the Court of Appeals, in *Vucetovic v. Epsom Downs, Inc.* (10 NY3d 517 [2008]), had discussed the applicability of Administrative Code § 7-210 to tree wells, which was somewhat analogous to the case at bar. Defendant's motion for summary judgment granted.

Takebe v. New York City Housing Authority, 22 Misc.3d 1120, 880 N.Y.S.2d 876 (New York Co. Sup. Ct. 2009). The issue here was whether the spot where plaintiff slipped part

of the sidewalk or the curb. The issue was critical because 7-210 of the Administrative Code of the City of N.Y. largely shifted responsibility for pedestrian injuries caused by defective sidewalks from the City of New York to adjoining property owners. Since the new law went into effect, courts, citing the narrow language of section 7-210, have excluded from its reach certain "sidewalk" components that might traditionally have been thought of as being part and parcel of a city sidewalk. Last year, the Court of Appeals in *Vucetonic v. Epsom Downs, Inc.*, 10 N.Y.3d 517, 860 N.Y.S.2d 429, 890 N.E.2d 191 (2008), held that tree wells were not part of the sidewalk for purposes of liability. Similarly, in *Irizarry v. Rose Bloch 107 Univ. Place Partnership*, 12 Misc.3d 733, 819 N.Y.S.2d 398 (Sup Ct, Kings County 2006) summary judgment was granted to the adjoining building owner dismissing the complaint where the plaintiff acknowledged that she fell on the curb rather than on the sidewalk itself. Relying on *Vucetovic* and *Irizarry*, defendant, the New York Housing Authority, here moved for summary judgment in that the area where plaintiff fell was "clearly" the curb, an area for which it has no responsibility under the Administrative Code. Plaintiff, on the other hand, asserted that defendant's liability was well established since it was "clear" that the offending crack was situated on the sidewalk. The Court noted that the issue of whether the curb is part of the sidewalk is a difficult issue. In some places there are real curbstones, in others there are defined concrete curbs separate and distinct from the sidewalk pavement. On many streets, there is nothing but a rusted metal edge between the sidewalk and the roadway, or there is only the barest trace of a concrete border differing almost imperceptibly from the sidewalk pavement in color or composition. And then all too often the sidewalk just seems to end at the street without any line of demarcation whatsoever. Because in this case the curb was not readily identifiable, at least to this court's eye, it held that there remained an issue of fact as to whether the place where plaintiff sustained her injury is the sidewalk or the curb.

Rooney v. Sterling Mets, L.P., 63 A.D.3d 1027, 881 N.Y.S.2d 171 (2nd Dep't 2009). Pedestrian walking on the paved area located immediately outside of Shea Stadium toward an adjacent parking lot tripped and fell when he stepped on a broken portion of the curb of the paved area. Defendants established on summary judgment motion that it no prior written notice of the alleged defective curb condition as required by Administrative Code of the City of New York § 7-201(c)(2). In opposition, the plaintiffs failed to raise a triable issue of fact (NOTE: THERE WAS NO DISCUSSION ABOUT WHETHER THE "CURB" WAS PART OF THE "SIDEWALK" UNDER THE NEW SIDEWALK LAW).

Rodriguez v. Sequoia Property Management Corp., 878 N.Y.S.2d 606, 2009 WL 1272055 (Queens Co. Sup. Ct. 2009). Pedestrian brought negligence action against owners of land abutting sidewalk after she fell in the area of a pedestrian ramp. Landowners filed third-party complaint against city. Landowners and city moved for summary judgment. A director of the pedestrian ramp unit for the New York City Department of Transportation testified that (1) pedestrian ramps and sidewalk units are distinct constructions; and (2) the ramp at the subject location was constructed by the City prior to plaintiff's accident. This testimony established that the curb-cut pedestrian ramp was not constructed by, on behalf of, or for the benefit of the landowner-defendant.

It further demonstrated that a "pedestrian ramp" is not a part of a "sidewalk" and thus, it does not fall within the ambit of § 7-210. Moreover, plaintiff alleged that her accident occurred not because of a failure to maintain or repair a defect in the sidewalk, but rather because of an alleged improperly designed pedestrian ramp; to wit: the steepness of its slope. Section 7-210 applies to maintenance work to be performed by abutting landowners, not to the features of the sidewalk themselves. Court found that a close reading of the statute, coupled with the circumstances discussed above, revealed that plaintiff's accident did not shift liability to the landowner. This was true in light of the principle that "legislative enactments in derogation of common law, and especially those creating liability where none previously existed," will be strictly construed. "In the instant case, there is no issue of the property owner's failure to maintain the sidewalk and there is no allegation that the sidewalk was broken or otherwise in a state of disrepair.... Rather, the groove that plaintiff alleges caused her to fall was part of the design of the ramp and was created by the contractor who made the ramp on behalf of the City. Therefore, § 7-210 does not apply to the facts of this case."

Smirnova v. City of New York, 64 A.D.3d 641, 882 N.Y.S.2d 513 (2nd Dep 't 2009). Plaintiff tripped and fell when she caught her foot on the edge of a plywood board covering a subway grate in the sidewalk adjacent to property owned by defendant abutting landowner. It was undisputed that, prior to the accident, employees of the defendant New York City Transit Authority (NYCTA) had installed plywood boards over the subway grate. The abutting landowner moved for summary judgment on the ground, inter alia, it had no duty to maintain the plywood boards installed over the sidewalk. Motion granted. Although the New Sidewalk Law shifted responsibility for the sidewalk to the abutting landowner, the plywood boards affixed to the sidewalk by NYCTA were not part of the "sidewalk" for purposes of liability under Administrative Code § 7-210.

Satram v. City of New York, 2009 WL 2426007 (Kings Co. Sup. Ct. 2009). Plaintiff alleged that while walking on the sidewalk in front of 354 Grant Avenue in Brooklyn, N.Y. that she tripped and fell due to a "cracked, uneven, raised, depressed, missing and/or deteriorated" sidewalk. There was evidence that tree roots from a City-planted tree had caused the problem in the sidewalk. Plaintiff thus sued the City as well as the abutting landowners. The City moved for summary judgment relying on the New Sidewalk Law. The issue before the Court was whether the existence of a tree whose roots push up the sidewalk is in itself a basis for liability on the part of the City as opposed to the abutting property owner. Court held that the clear unambiguous language of the New Sidewalk Law combined with the expressed purpose of the law as set forth in the legislative history established that the City Council intended to shift liability for sidewalk accidents away from the City to the abutting landowner, even where a City tree caused the sidewalk to be pushed up. Instead, the owners of the property abutting the defective sidewalk are responsible for remedying the condition caused by the tree roots and are liable for damages that may occur because of the defect.

4 Exemption Where Abutting Building Used "Exclusively for Residential Purposes".

Story v. City of New York, 24 Misc.3d 325, 876 N.Y.S.2d 838 (Kings Co. Sup. Ct. 2009). Pedestrian was injured as a result of a trip and fall accident on a sidewalk in Brooklyn. The owners of the abutting property moved for summary judgment. Plaintiff and the co-defendant City of New York opposed the motion asserting that there was a fact issue as to whether the property was used "exclusively for residential purposes" as there was a sign attached to the property that read, "Richard Lowinger Attorney at Law and Equinox Company". In opposition to the summary judgment motion, neither plaintiff nor the City offers any evidence to dispute the property owner's and his son's sworn testimony that his son used to, but no longer, practiced law at the property. The sole basis of their opposition was the sign and OCA filings, which listed that address as a law office. Court held that the OCA filing together with the sign did not establish a nonresidential use of the property. The legislative purpose of the New Sidewalk Law was to shift liability away from the City to commercial property owners, but the exemption was intended to shield the small private home owner from liability. Where, as here, the property was used as a mail drop at most for the homeowner's son's law practice, the Court found that the exemption applied.

Bi Chan Lin v. Po Ying Yam, 62 A.D.3d 740, 879 N.Y.S.2d 172 (2nd Dep't 2009). Plaintiff allegedly slipped and fell on ice on a sidewalk abutting the defendants' property. The defendants and their children lived in the premises. Thus, they were exempt from the liability imposed pursuant to New York City Administrative Code § 7-210(b) for failure to remove snow and ice from the sidewalk. In response to the defendants' demonstration of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact as to whether the defendants made the condition more hazardous than if they had done nothing. Evidence that melting snow on the defendants' property on the sides of the defendants' driveway might have run off onto the sidewalk did not indicate that the defendants made the naturally-occurring conditions more hazardous.

D. Primary Assumption of Risk Doctrine does not Apply to Bicyclists Confronting defects on Municipal Roadways.

Cotty v. Town of Southampton, 880 N.Y.S.2d 656 (2nd Dept 2009). Plaintiff was injured while riding a bicycle on a paved public roadway. The issue was whether the plaintiff was engaged in an activity that subjected her to the doctrine of "primary assumption of risk". Plaintiff was a member of a bicycle club which engaged in long-distance rides. The plaintiff testified at a deposition that the road "was not perfectly smooth," and contained potholes, but that she had previously ridden on the subject road approximately 20 to 30 times, as recently as two to four weeks before the accident, and was aware of construction activity on various portions of the road. The road had no shoulder, and the plaintiff was riding approximately one to two feet from the edge of the road, and approximately 1 to 1 1/2 wheel lengths behind another bicyclist at a maximum speed of 17 to 18 miles per hour. The bicyclists in the front of the line began a "hopping" maneuver with their bicycles to avoid a "lip" in the road. The cyclist in front of plaintiff unsuccessfully attempted the hopping maneuver, and fell in the plaintiff's path. Seeking to avoid him, the plaintiff swerved and slid into the road where she collided with an oncoming car, sustaining injuries. The plaintiff sued, among others, the Town of

Southampton. All defendants moved for summary judgment on the grounds of primary assumption of the risk. The Court denied the motion, holding that it was not sufficient for a defendant to show that the plaintiff was engaged in some form of leisure activity at the time of the accident. If such a showing were sufficient, the doctrine of primary assumption of risk could be applied to individuals who, for example, are out for a sightseeing drive in an automobile or on a motorcycle, or are jogging, walking, or inline roller skating for exercise, and would absolve municipalities, landowners, drivers, and other potential defendants of all liability for negligently creating risks that might be considered inherent in such leisure activities. Such a broad application of the doctrine of primary assumption of risk would be completely disconnected from the rationale for its existence. The doctrine is not designed to relieve a municipality of its duty to maintain its roadways in a safe condition, and such a result does not become justifiable merely because the roadway in question happens to be in use by a person operating a bicycle, as opposed to some other means of transportation The Court noted that, in prior decisions involving injuries sustained by bicycle riders, it had concluded that the doctrine of primary assumption of risk applied in some situations, but not in others. For example, in one case, plaintiff was thrown from a mountain bike, which he was riding on an unpaved dirt and rock path in a park, when the bike struck an exposed tree root. This Court held that the plaintiff's action was barred by the doctrine of primary assumption of risk, reasoning that "[a]n exposed tree root is a reasonably foreseeable hazard of the sport of biking on unpaved trails, and one that would be readily observable". By contrast, in other cases it had held that plaintiffs who had been riding their bicycles on paved pathways in public parks cannot be said as a matter of law to have assumed risk of being injured as a result of a defective condition on a paved pathway merely because they participated in the activity of bicycling. The Court concluded that "these decisions recognize that riding a bicycle on a paved public roadway normally does not constitute a sporting activity for purposes of applying the primary assumption of risk doctrine. By contrast, mountain biking, and other forms of off-road bicycle riding, can more readily be classified as sporting activity". The Court recognized that the distinction between using a bicycle to engage in a sporting activity and using a bicycle for some other purpose will sometimes be elusive. It is important to draw that line, however, because "extensive and unrestricted application of the doctrine of primary assumption of risk to tort cases generally represents a throwback to the former doctrine of contributory negligence, wherein a plaintiff's own negligence barred recovery from the defendant". Court thus denied defendants' motion, finding that they failed to make a prima facie showing that the primary assumption of risk doctrine was applicable. Moreover, the defendants failed to establish as a matter of law that the unbarricaded lip created by the road construction was not a "unique and dangerous condition over and above the usual dangers that are inherent".

Caraballo v. City of Yonkers, 54 A.D.3d 796, 865 N.Y.S.2d 229 (2nd Dep't 2008). Twelve-year-old bicyclist was injured when the "home made" bicycle he was riding came into contact with a pothole abutting a manhole cover on a street in the City of Yonkers. Although the plaintiff was an experienced bicyclist and was aware of the pothole, which was in a street located near his residence, he failed to observe it on this particular occasion when he was traveling to his friend's house. Court held that the City failed to establish its prima facie entitlement to summary judgment. Contrary to the City's

contention, the infant plaintiff could not be said, as a matter of law, to have assumed the risk of being injured by a defective condition of a pothole on a public street, merely because he was participating in the activity of recreational noncompetitive bicycling and using the bicycle as a means of transportation.

V. GOVERNMENTAL IMMUNITY

General Rule: 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).

A. Discretionary v. Ministerial Acts

Tomasso v. Finkelstein, 24 Misc.3d 1223, 2009 WL 2184355 (Nassau Co. Sup. Ct. 2009). Doctor exposed patients to the Hepatitis C Virus by utilizing contaminated and/or unsterile syringes and medications in administering epidural injections for the treatment of back pain. Plaintiff sued the Doctor, but also the County and the New York City Department of Health, alleging negligence in failing to timely and properly investigate the Doctor and in failing to timely notify plaintiffs of the possibility that plaintiff had been exposed to the Hepatitis C. The County and NCDOH moved for summary judgment contending that there was no basis for imposing liability on the County for a negligent investigation because, under the New York Public Health Law, the NCDOH has qualified immunity when, in its discretion, it makes decisions on how to conduct the reporting and control of disease. Counsel contended that, since the decisions of the NCDOH entailed the exercise of judgment, the County was entitled to immunity for those discretionary acts which promote the governmental function of the agency. Furthermore, since the acts were not ministerial in nature, no negligence could be imposed. Furthermore, defendants contended that plaintiff could not show a special relationship with the County. Relying on the recent Court of Appeals case of *Mclean v. City of New York*, 12 NY3d 194, 878 N.Y.S.2d 238, 905 N.E.2d 1167 (2009), Court found that, since the government's actions here were discretionary, they could not be the basis for liability at all. Only ministerial actions may give rise to liability, and only then if they violate a special duty owed to the plaintiff, apart from any duty to the public in general. Here, even if the actions were ministerial, which they were not, no special relationship was formed.

Heckel v. City of New York, 60 A.D.3d 812, 875 N.Y.S.2d 217 (2nd Dep't 2009). Plaintiff sued the City claiming that the City was negligent in, among other things, requiring sanitation workers to place cardboard and paper recyclables into the smaller compartment, an "inherently dangerous practice", which he alleged injured him. The City demonstrated its prima facie entitlement to summary judgment by establishing that it

could not be subjected to tort liability for its decision to require sanitation workers to place cardboard and paper recyclables into the smaller compartment, as that decision constituted a discretionary act involving the exercise of reasoned judgment. In this regard, the City submitted evidence showing that the decision was made by a Sanitation Department district superintendent, who, based on certain information he gathered and his experience, determined that the larger compartment was more appropriately used for metal, glass, and plastic recyclables, which could include large items such as refrigerators

B. "Special Relationship" Needed to Overcome Immunity Defense

GENERAL RULES: In the absence of some "special relationship" creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to take actions in its governmental capacity (*O'Connor v. City of New York,* 58 N.Y.2d 184, 192, 460 N.Y.S.2d 485, 447 N.E.2d 33 [1983]; *see Sanchez v. Village of Liberty*, 42 N.Y.2d 876, 877-878, 397 N.Y.S.2d 782, 366 N.E.2d 870 [1977];*Newhook v. Hallock,* 215 A.D.2d 804, 805, 626 N.Y.S.2d 300 [1995]). 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).

1. New Court of Appeals Pronouncement

McLean v. City of New York, 12 N.Y.3d 194, 878 N.Y.S.2d 238 (2009). Mother of infant who was injured while at city-registered family day care home brought negligence action against city. The New York City Administration for Children's Services (ACS) had received two complaints about the day care home, asserting that a child's hand had been dipped into a bowl of hot oatmeal, and that a child had been left alone for an hour and a half in a nearby store. ACS investigated the complaints and found both of them to be "indicated" - i.e., substantiated. There was no evidence that the home was later inspected and found to be in compliance, so the day-care mother should not have been permitted to renew her registration when it expired. But the Department of Health did permit her to renew. The reasons for this were not entirely clear. The record did not show whether

ACS reported the two complaints about the home to OCFS (a State agency)- but that question was academic, because, amazingly, DOH (a City agency) did not make a practice of checking with OCFS before renewing registrations. It was debatable whether the City or the State was to blame for this failure; DOH, a city agency, said it complied with regulations of DSS, a state agency, which did not expressly require a search for complaints prior to renewal of a registration. In considering the City's motion for summary judgment, the Court assumed that DOH (i.e., the City) was at fault. The Court noted that an agency of government is not 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". Here, plaintiff did not show a special relationship giving rise to a special duty, and thus could not recover against the City. Plaintiff claimed that Social Services Law 390, which governs the licensing and registration of child day care providers, created a statutory duty for the benefit of a class of which she and her daughter were members; and also that the City voluntarily assumed a duty that she justifiably relied on the City to perform. The Court rejected both arguments. Recognizing a private right of action under Social Security Law 390 would be inconsistent with the legislative scheme. As for whether a "special relationship" was formed between plaintiff and the City, there were no "promises or actions" by which the City assumed a duty to do something on her or plaintiff's daughter's behalf. The only "direct contact" between the City and plaintiff was a routine telephone conversation in which an ACS employee agreed to send a list of registered providers and answered questions about what registration meant. Plaintiff also argued that no special relationship was needed, because the acts and omissions on which she relies were ministerial rather than discretionary. The Court disagreed. The Court cleared apparently contradictor language in some of its prior holdings (the *Tango, Lauer, Pelaez and Kovit* cases*)* to clarify the rule that "discretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is found". Although the acts for which plaintiff sued were ministerial, she nevertheless was required to prove a special relationship.

2. Qualified Governmental Immunity in Claims against Social Workers, Foster Care Agencies, etc.

Martinez v. City of New York, 24 Misc.3d 1223, 2009 WL 2170273 (Kings Co. Sup. Ct. 2009). The infant plaintiff was attending a city-registered daycare center operated by a not-for-profit. While there, the plaintiffs testified that his teacher picked him up by the arm and then "threw" him down into a chair. Plaintiffs sued the City of New York and The Department of Social Services/ Human Resources Administration for Children Services as well as the private not-for-profit. The claim against the City was for negligence in referring the infant to the daycare center. Court looked to the recent Court of Appeals *McLean* case, and found that no special relationship existed and ruled in favor of the defendant City.

Alex LL. v. Department of Social Services of Albany County, 60 A.D.3d 199, 872 N.Y.S.2d 569 (3rd Dep't 2009). Father brought civil rights action against Department of Social Services (DSS) and its caseworker and supervisor, alleging defendants imposed

frivolous and irrelevant requirements in order for father to obtain custody of his child. Court found that the County and DSS were entitled to summary judgment on plaintiff's 42 USC § 1983 claims because their actions were not "pursuant to official municipal policy of some nature caused a constitutional tort" (*Monell v. New York City Dept. of Social Servs.*, 436 U.S. at 691, 98 S.Ct. 2018;). Further, the case workers were entitled to absolute immunity for their role in initiating and prosecuting the placement and termination of parental rights proceedings. "Agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts". These case workers requested continued placement of the child with DSS, and petitioned for termination of plaintiff's parental rights. Their responsibility in this arena was similar to the function of a criminal prosecutor. They were also entitled to absolute immunity with respect to their role in requiring plaintiff to complete a substance abuse evaluation and psychological assessment in accordance a Family Court order. Agency officials are absolutely immune for actions taken to carry out facially valid court orders. But they were entitled only to *qualified* immunity with respect to their conduct in (1) requiring plaintiff to obtain evaluations and participate in preventive service programs, (2) making evidentiary submissions and recommendations to Family Court, and (3) limiting plaintiff's visitation with the child. Qualified immunity protects government officials from liability for damages when performing discretionary duties "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"". Although "a parent has 'a right to the care and custody of a child, superior to that of all others, unless he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood', the law also obliged DSS to make diligent efforts to encourage and strengthen the parental relationship and assist the parent in planning for the future of the child in foster care, in an ultimate effort to reunite the child with his or her family. Here it was objectively reasonable for the case workers to believe that their conduct was lawful under the circumstances they confronted.

Brown v. City of New York, 22 Misc.3d 893, 870 N.Y.S.2d 217 (New York Co. Sup. Ct. 2008). Adoptive mother brought action on behalf of her minor child against city children's services agency and foster care services agency, alleging defendants were negligent in returning child to her birth mother, in failing to finalize adoption of child, and in failing to properly investigate reports of abuse to child. Plaintiff sought damages for severe injuries caused by her natural mother after being permanently discharged by HDWC into her mother's custody at the age of six. Both HDWC and the City claimed their employees had immunity from suit, both under Social Services Law ("SSL") § 419 and the common law for discretionary acts of public officials. Plaintiff countered that neither agency could claim statutory immunity under SSL § 419 because their activities were not within the class of activities the statute was meant to immunize, that is the investigation of child abuse and removal of abused children to protective custody. Plaintiff also argued that defendants were not immunized because defendant agencies undertook a special duty to plaintiff and breached that duty, their case workers were grossly negligent and failed to do non-discretionary investigative work. The Court entertained only the City's motion, because HDWC's motion for summary judgment was brought more than 120 days after the filing of the note of issue. The Court held that the

City had failed to establish its entitlement to statutory immunity under SSL § 419 with respect to: (1) acts, omissions and decisions in returning custody of plaintiff and her older sister to their mother; and (2) acts, omissions and decisions in failing to maintain and execute the permanency goal of adoption for plaintiff and her sister. Immunity pursuant to § 419 extends to all acts undertaken by persons providing child protective services under § 424, which covers the "duties of the child protective service concerning reports of abuse or maltreatment." The underlying policy for immunizing persons engaged in child protective services under § 424 is to encourage the reporting of child abuse situations, and thereby afford children greater protection. The decision not to terminate parental rights and finalize the adoption of plaintiff and her sister and instead to return them to their mother, had nothing to do with investigating child abuse reports or removing a child from the parents. Accordingly, § 419 did not apply to these claims. Section 419 did, however, apply to the City's investigation of child abuse complaints against plaintiff's mother. Regardless, there were issues of material fact regarding whether the City's case workers committed gross negligence or willful misconduct in their handling or mishandling of plaintiff's case, which would override the claim of statutory immunity. The City also failed to establish common law immunity for its welfare workers because it failed to show that they were engaged in discretionary, as opposed to ministerial acts.

3. The "Assumption of an Affirmative Duty" and "Justifiable Reliance" Elements

Davis v. New York City Transit Authority, 63 A.D.3d 990, 882 N.Y.S.2d 207 (2nd Dep't 2009). Plaintiff commenced this action after her son was stabbed while riding on a subway train on the way home from school. The plaintiff claimed that the defendants City of New York and its two police officers were negligent in failing to provide police protection. According to the student's testimony at a hearing pursuant to GML § 50-h, he and a crowd comprised of students and nonstudents had congregated outside his high school. After police officers told the crowd to "clear the way," the student and his friends went to the subway station and boarded a train; two police officers later boarded the same subway car. Other members of the crowd entered the adjacent subway car. The officers stayed on the train for two stops and, before exiting the subway car, they told the student and his friends not to go into the adjacent subway car. A few minutes later, the assailant and his friends entered the students' subway car and an altercation took place, which resulted in the student receiving a stab wound to his chest. The City defendants moved for summary judgment on the grounds that there was no special relationship between them and the student which would give rise to a duty of police protection. Court held that the police officer's statement to the student that he should not go into the adjacent car of the train was not an assumption of an affirmative duty to protect him and that the student's testimony also failed to show that he justifiably relied on the police officers' protection, as the officers left the train before the assailant entered his subway car. Summary judgment to defendant granted.

Alava v. City of New York, 54 A.D.3d 565, 863 N.Y.S.2d 653 (1st Dep't 2008). Employee of private contractor who was assaulted by third party whom she was registering for city

shelter services brought suit against city to recover for her injuries. The issue on appeal was whether the municipal defendants owed plaintiff a special duty of protection. The Court held that defendants were entitled to summary judgment because plaintiff failed to raise a triable issue of fact that they assumed a special duty to protect her, or that she justifiably relied on defendants' alleged affirmative undertaking to provide her with protection. Specifically, plaintiff did not demonstrate that she communicated any information to defendants prior to the attack concerning her assailant or inadequate security, or that defendants ever made a direct promise to her on which she relied. Plaintiff inferred justifiable reliance solely from the usual security defendants provided. Plaintiff testified that while there was always one, and sometimes two or three, officers at a table outside the intake office where she worked, none were outside when the incident occurred. She also testified that the officers would go on rounds. But she did not testify that officers were ever in the intake office with her. Thus, given that plaintiff was aware that no guard was present and that the guards would rove, she could not show reliance.

Hightower v. City of New York, 21 Misc.3d 1122, 873 N.Y.S.2d 512 (Richmond Co. Sup. Ct. 2008). Mother called 911 to report a house fire and realized that her son was still inside the house. Upon their prompt arrival, New York City Firefighters found him on the third floor, unresponsive. He was not breathing and had no pulse. Plaintiff claimed negligence on the part of the Fire Department's Basic Life Support Unit (EMTs) and St. Vincent's Advanced Life Support Unit in their unsuccessful attempts to revive him. In moving to dismiss, the City alleged immunity because (1) they did not owe the victim any special duty; (2) nothing done by the municipal defendants worsened the decedent child's condition; and (3) any negligence on the part of the City could not be shown to be a proximate cause of decedent's death. Plaintiff failed to show that the City affirmatively assumed a duty to render care to the decedent. Plaintiff's expert opined that "EMS personnel present at the emergency scene did not follow the proper procedure pertaining to a cardiorespiratory emergency", and that the foregoing was a significant factor in contributing to decedent's death. The Court noted that municipalities are generally immune from tort liability for the negligent performance of discretionary acts, *i.e.*, those which require the use of reasoned judgment, and that a municipality may not be held liable for injuries resulting from the failure to provide adequate police or fire protection. Court held that, contrary to plaintiff's conclusory allegations of detrimental reliance, the papers presently before the Court were devoid of any evidence of same. Rather, the deposition testimony of both the firefighters who initiated resuscitative efforts and the members of the Basic Life Support Unit which took their place until St. Vincent's Advanced Life Support Unit arrived, as well as that of the decedent's mother, demonstrated that the actions attributed to the City did not cause plaintiff to forego any other avenues of rescue. Moreover, the evidence failed to indicate that the reliance, if any, placed on the intermediate resuscitative efforts of the Basic Life Support Unit placed the deceased at a disadvantage. The care rendered was undeniably brief, and quickly superceded by the efforts of the Advanced Life Support Unit from St. Vincent's. The Court acknowledged that even when no duty is owed, a duty once undertaken must be exercised with due care. Court stated in conclusion that "in the absence of a special relationship, no liability may attach to the discretionary, albeit negligent, acts of a municipal employee" (Note that this case was decided before the Ct of Appeals case of

McLean v. City of New York, supra, and appears to ignore the rule set forth there that **"**Discretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is found".)

4. "Direct Contact" Requirement

Ramos v. Charles, 23 Misc.3d 1136, 2009 WL 1608724 (Kings Co. Sup. Ct. 2009). Plaintiff was seriously injured while he was walking on a sidewalk when a car jumped the sidewalk and struck him. He sued the driver/owner for negligence, and sued the City as well, alleging that an unidentified police officer directed a 17-year-old, unlicensed passenger of the car, who was seated in the car waiting for his mother to return, to move the car as it was illegally double-parked. The complaint further alleged that the 17-year-old advised the police officer that he did not have a license. The City now moved for summary judgment arguing that it could not be held liable for the negligent performance of discretionary acts of its employees, unless a special relationship had been established between the plaintiff and the City, thereby creating a special duty. The City relied on *Kovit v. Estate of Hallums,* 4 NY3d 499 (2005), which involved the direction by a police officer to a "hysterical" person to move her car forward. Instead, the driver put her car in reverse crushing plaintiff's legs. The Court dismissed that action on summary judgment as there was no "special duty" formed. The Court held *Kovit* controlling. Not only was there a lack of a special relationship between plaintiff and the police officer, there was no material communication or relationship at all. The only communication was with the co-defendant 17-year old driver.

5. Requirement that Municipality Know that Failure to Act Puts Plaintiff at Risk

Sciortino v. Leo, 60 A.D.3d 1470, 876 N.Y.S.2d 308 (4th Dep't 2009). Plaintiff alleged that the County of Oneida and its Department of Emergency Services and Sheriff's Department were negligent in failing to protect decedent from an assault in response to decedent's telephone call to the Sheriff's Department. The County defendants established that they had no special relationship with decedent, and plaintiff failed to raise an issue of fact to defeat the motion. The key element of "special relationship" lacking here was "knowledge on the part of a municipality's agents that inaction could lead to harm" i.e., notice of palpable danger, as where it is so obvious that a layman would ascertain it without inquiry, or where a person unambiguously communicated the danger to the municipality's agent. The evidence submitted by the County defendants established that decedent did not mention any immediate danger in his telephone call, and plaintiff failed to submit any evidence from which it might be inferred that the telephone operator at the Sheriff's Department should have known that such a danger existed. Further, there was no "justifiable reliance" by the decedent on the municipality's affirmative undertaking of a duty to act on his behalf, i.e., that "defendant[s]' conduct lulled [decedent] into a false sense of security, induced him to relax his own vigilance or forego other viable avenues of protection. Defendant granted summary judgment.

Euell v. Incorporated Village of Hempstead, 57 A.D.3d 837, 871 N.Y.S.2d 224 (2nd Dep't 2008). Plaintiff was exhibiting abnormal signs of behavior, including, but not limited to,

hallucinations and delusions. The plaintiff's mother called the police to the plaintiff's home in Hempstead, and informed the police that the plaintiff suffered from a mental illness and that he ingested an entire bottle of pills. The police tried to restrain the plaintiff by administering electroshock with a taser three times. However, they were unsuccessful and the plaintiff escaped to his bedroom where he set the room on fire. He was subsequently indicted for arson. Plaintiff sued the Village of Hempstead alleging, inter alia, that the police officers had assumed a special duty toward him and were liable for the injuries he sustained from the fire. The plaintiff did not rely on any promise of protection from the police. Moreover, there was no basis for the police to have realized that their failure to move more expeditiously or violently to detain the plaintiff could lead to the harm that occurred. Although there was direct contact between the police and the plaintiff, it was not of a kind that meaningfully alerted them to his intent to set fire to his room. Village's motion to dismiss the complaint thus granted.

6. All Four Elements Present

Alvarado v. City of New York, 874 N.Y.S.2d 96 (1st Dep't 2009). Here is one of the rare cases where plaintiff was able to prove a "special relationship" with the government agency. While acting as an interpreter for defendant police department during the course of an investigation into a complaint of domestic violence, plaintiff was assaulted by a knife-wielding individual who was involved in a dispute with his girlfriend. Plaintiff alleged that the injuries she sustained during the attack were the result of the failure of the police to protect her from a man who was known to be violent and dangerous. The record showed that plaintiff was not simply a member of the public at large, but was a translator whose services had been requested by defendant police department to aid officers in the investigation of a complaint of domestic violence. Under these circumstances, the police department assumed an affirmative duty to avoid placing plaintiff in a dangerous position and at the mercy of a person the officers suspected was capable of violence. It also could be said, as a matter of law, that the police were unaware that inaction on their part might cause harm to someone in the suspect's vicinity. Furthermore, there was direct contact between plaintiff and the police, and as someone who was summoned by the police to a possible crime scene, plaintiff had a right to expect that she would receive protection from the individual suspected of domestic violence, thereby satisfying the element of justifiable reliance on the municipality's affirmative undertaking.

7. None of Elements Present

Molina v. Conklin, 57 A.D.3d 860, 871 N.Y.S.2d 230, 240 Ed. Law Rep. 852 (2nd Dep't 2008). Plaintiff was a seventh-grade student who stayed after school to participate in soccer practice, after which she walked home. Upon arriving home and realizing that she had forgotten her soccer uniform at school, she rode her bicycle back to school to get it. Outside the school, the injured plaintiff was struck by a car. She and her mother sued, inter alia, the School District, alleging that it released her into a potentially hazardous situation that posed a foreseeable harm. The District established its right to summary judgment on the grounds that it owned no duty to plaintiff as she was not on school

property or under its physical control at the time of the accident. The plaintiff also sued the Town on the theory that it failed to provide crossing guards, but plaintiff failed to show any of the elements of "special relationship" with the Town needed to impose liability on it for discretionary governmental activities.

Lopez v. Beltre, 59 A.D.3d 683, 873 N.Y.S.2d 726 (2nd Dep't 2009). The infant plaintiff was crossing the street after school when he was struck by a vehicle. The intersection was governed by traffic light signals, and the defendant Village stationed a crossing guard there. Plaintiff sued the negligent driver, but also the Village. Village moved for summary judgment, contending there was no "special relationship, and that its crossing guard was not negligent and that driver's negligence was the sole proximate cause of the accident. Motion denied because the Village assumed a special relationship with the infant plaintiff and there were issues of fact regarding whether the Village's duty was breached, i.e., regarding the respective locations at the time of the accident of the infant plaintiff, the approaching car, and the Village's crossing guard, in addition to what the crossing guard did or did not see and do.

Gandler v. City of New York, 57 A.D.3d 324, 869 N.Y.S.2d 76, (1st Dep't 2008). Homeowner brought action against city after she hired unlicensed home improvement contractor who allegedly performed unprofessional renovation work, alleging that city breached an affirmative duty to protect her from the contractor's deceptive practices. Plaintiff alleged that the municipal defendants assumed and breached an affirmative duty to protect consumers like herself from building contractors' deceptive practices, pursuant to statutes governing the home improvement business (New York City Administrative Code § 20-385, *et seq.*). The Department of Buildings (DOB) issued a work permit to the contractor, who was unlicensed to perform home improvement renovations; on his application for the work permit, had entered a fraudulent license number. The municipal defendants moved for summary dismissal, arguing that plaintiff failed to raise an issue of fact as to whether a special relationship existed between herself and the City in connection with its issuance of the permit to the contractor. The Court held that the City's implementation of procedures for issuing permits did not constitute an assumption of an affirmative duty to protect homeowners like plaintiff from unscrupulous home improvement contractors. Moreover, there was no evidence of "direct contact" between the DOB's agents and plaintiff. In any event, plaintiff did not show that using an agent to act on her behalf satisfied the "direct contact" requirement of the "special relationship." Additionally, there was no showing of "justifiable reliance", since there was no evidence that plaintiff knew about the Administrative Code's licensing requirements, or that she relied upon the DOB's authority to enforce the relevant consumer protection laws. Further, the statutes at issue did not expressly authorize a private right of action, and such right cannot be implied from their language. The intent of the legislative scheme governing the home improvement business was to regulate contractors and enable homeowners to hold them accountable for their misconduct. The scheme was not intended to afford homeowners a right of action against the City for improperly enforcing the relevant statutes.

Kadymir v. New York City Transit Authority, 55 A.D.3d 549, 865 N.Y.S.2d 269 (2nd Dep't 2008). Plaintiff brought personal injury action against city transit authority, alleging negligence related to slip-and-fall after plaintiff disembarked train pursuant to authority's direction during evacuation of subway train as a result of electrical blackout. Court held that any alleged injuries she sustained actually arose from the NYCTA's discretionary decision to evacuate passengers from the subway train directly onto the track bed. As such, the majority held, it was not the NYCTA's maintenance of the track bed that was at issue, but its decision to evacuate the plaintiff onto the track bed. As such, plaintiff needed to show a "special relationship". (Note: This is *contra* to the new Court of Appeals case, *McLean v. City of New York*, discussed *supra*, which held that **"**Discretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is found". Once the Court here determined the decision was "discretionary", the analysis should have gone no further). The Court went on to the "special relationship" analysis, and found that the plaintiff had failed to show the four elements of: 1) an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of a 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) that party's justifiable reliance on the municipality's affirmative undertaking". Plaintiff failed to establish the second element, as she did not show that the NYCTA had actual or constructive knowledge that she specifically required assistance in traversing the track bed such that the NYCTA's employees had knowledge that their inaction could lead to harm. The Court thus declined to address the remaining elements. The dissent, however, believed that the majority was wrong to entertain the defense of "governmental immunity" at all. The question was, according to the dissent, whether the NYCTA, as a common carrier, breached its duty to the plaintiff to provide her with a safe place and pathway to disembark. The dissent found that the case did not call into play any issues concerning governmental immunity, the special relationship analysis, or discretionary acts by NYCTA personnel. The NYCTA and plaintiff were in a passenger-common carrier relationship, and thus a duty of care existed *ab initio* as a matter of law and it was wholly unnecessary and inappropriate to engage in the "special relationship" analysis. There were simply triable issues of fact regarding the NYCTA's alleged negligence.

8. Special Duty Emanating from a Statute

Nicholson v. State, 872 N.Y.S.2d 846, 241 Ed. Law Rep. 299 (Ct. Cl. 2008). Claimant brought action against State alleging that he was caused to suffer electric shock punishment while a student at a Massachusetts private residential school for children with mental or emotional disabilities due to State's negligence in failing to properly investigate and/or regulate the school while keeping the school on a list of approved out-of-state residential educational facilities. New York Education Law 4402(2)(b)(2) provides that if an appropriate public program is not available to implement a student's IEP, the board of education of the local school district may attempt placement of the student in an in-state or out-of-state private school. The New York State Education Department (SED) maintains a list of approved private in-state and out-of-state residential educational

facilities pursuant to 8 NYCRR 200.7. Upon defendant's motion for summary judgment, the issue was whether defendant was engaged in a governmental function with respect to the activities referred to in the claim. The Court held that the oversight and regulation of the educational system in the State of New York, together with the determination of its policies, is a "governmental" and "fully public function". Defendant was thus acting in a governmental capacity when it placed private school for children on its list of approved private schools, when it kept it on its approved list after monitoring and inspecting it and when it allegedly failed to enforce certain laws and regulations. The affidavits provided by the State indicated that defendant exercised reasoned judgment and discretion in listing, and thereafter maintaining, the school on its list of approved out-of-state facilities. As for the allegations about the failure to follow certain regulations, claimant failed to demonstrate the existence of a special relationship between the defendant and the claimant. The duty here was owed to the public at large, rather than to any specific person, and absent a special relationship, there could be no liability. Claimants alleged that a statutory special relationship was formed by Education Law 4403, but the Court found that the Statute did not create a special relationship as it did not authorize a private cause of action. The State was thus granted summary judgment.

C. Governmental v. Proprietary Functions

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".

Kadymir v. New York City Transit Authority, 55 A.D.3d 549, 865 N.Y.S.2d 269 (2nd Dep't 2008). Plaintiff brought personal injury action against city transit authority, alleging negligence related to slip-and-fall after plaintiff disembarked train pursuant to

authority's direction during evacuation of subway train as a result of electrical blackout. Where, as here, the public entity serves a dual proprietary and governmental role, the analysis of government immunity involves determining where along the spectrum of proprietary and governmental functions the defendant's alleged negligence falls. Here, the plaintiff's alleged injury arose when the subway train, as a result of a massive regional blackout, lost all power and after 40 minutes, the NYCTA, apparently in conjunction with the NYPD, decided to evacuate the subway train by directing passengers, including the plaintiff, to disembark directly onto the track bed and walk to the next station. The plaintiff does not and cannot fault the NYCTA for the subway train stopping. Thus, any alleged injuries she sustained actually arose from the NYCTA's discretionary decision to evacuate passengers from the subway train directly onto the track bed, not from its proprietary function in maintaining a track bed for passenger egress. As such, the majority held, it was not the NYCTA's maintenance of the track bed that was at issue, but its decision to evacuate the plaintiff onto the track bed. As such, plaintiff needed to show a "special relationship" with the municipal defendant, which she failed to show. The dissent, however, believed that the majority was wrong to entertain the defense of "governmental immunity" at all. The police officers who were at the scene were members of the New York City Police Department - a legal entity distinct and wholly separate from the NYCTA. While the New York City Police Department might enjoy immunity for its allocation of police resources and the absence or presence of police officers at the scene, the New York City Police Department is not a common carrier and the City of New York was not a defendant. Thus, any analogy to or reliance upon those cases involving the allocation of police resources or providing police protection was, according to the dissent, wholly misplaced if applied to the NYCTA as a common carrier. The question was, according to the dissent, whether the NYCTA, as a common carrier, breached its duty to the plaintiff to provide her with a safe place and pathway to disembark. The dissent found that the case did not call into play any issues concerning governmental immunity, the special relationship analysis, or discretionary acts by NYCTA personnel. The NYCTA and plaintiff were in a passenger-common carrier relationship, and thus a duty of care existed *ab initio* as a matter of law and it was wholly unnecessary and inappropriate to engage in the "special relationship" analysis. There were simply triable issues of fact regarding the NYCTA's alleged negligence.

Connolly v. Simon, 2009 WL 1815171 (Queens Co. Sup. Ct. 2009). Plaintiff sued the City (as well as the dog owner) when he was attacked by a dog while walking on a public sidewalk outside of Maurice Park, a City-owned park in the borough of Queens. The dog was unleashed in Maurice Park at a time beyond the permissible hours fixed by City regulations for dogs to be unleashed in the park and ran out of the park onto the sidewalk where the attack occurred. The City's motion was premised solely on its contention that it could not be held liable in a matter involving a governmental function because it did not owe a special duty to plaintiff upon which the injured plaintiff relied to his detriment. Plaintiff did not dispute the City's showing that no special relationship existed, but attempted to defeat the motion on other grounds, specifically, by asserting that the operation of a park by a municipality is not a governmental function and that, therefore, they need not plead or prove a special relationship between the injured plaintiff and the City in order to recover. Plaintiff contended that the City was negligent in the operation

of the park and was liable for failing to enforce its own rules and regulations regarding unleashed dogs. (Also, it was argued that an affirmative act of a city employee, who was allegedly playing with the unleashed dog just before it ran out into the sidewalk, caused the accident, but the court dismissed this argument as "speculative" since it could not be proven that the employee caused the dog to run out). The issue was, foremost, whether the City was acting in its governmental or proprietary capacity. The Court held that the City acted both in a proprietary capacity as the owner of the park, and in a governmental capacity, by undertaking to provide for the protection and safety of the general public. Whether the City could be held liable to plaintiff was thus dependent upon the specific act or omission by the City out of which plaintiff's injury arose, and the capacity in which the City's conduct occurred. The Court found that the City's promulgation and enforcement of the regulations prohibiting unleashed dogs in City parks except in designated parks or designated areas of a park between the hours of 9:00 P.M. and 9:00 A.M. fell within the category of a governmental function. By promulgating and enforcing these regulations intended for the protection of the general public, the City did not assume a special relationship with the injured plaintiff that carried with it a special duty to protect him from the prohibited activity. The Court thus granted in part defendant's motion for summary judgment. In all other respects, the motion was denied. The City did not address its potential liability for negligence in the performance of a proprietary function as the owner of the park and did not made a prima facie showing that it did not breach its duty to maintain the park in a reasonably safe condition by failing to prevent an allegedly ultrahazardous activity of which it had knowledge.

Kadymir v. New York City Transit Authority, 55 A.D.3d 549, 865 N.Y.S.2d 269 (2nd Dept 2008). A 72-year old plaintiff used her MetroCard at the Kings Highway station owned and operated by the defendant, New York City Transit Authority (NYCTA) and boarded a Brighton Beach-bound express "Q" subway train. The NYCTA is a common carrier that exercises both proprietary and governmental functions. The train's movement, air conditioning, and lights simultaneously shut down as a result of a blackout originating in Ohio that enveloped eight states and eastern Canada and affected millions of people. The train did not move, everything was turned off, and no announcements were made for approximately 40 minutes. At that time, NYCTA personnel directed all of the passengers to the first car of the train so they could disembark and walk to the Sheepshead Bay station, which was the nearest station. The plaintiff complied with the directive, and NYCTA personnel then instructed the plaintiff to walk along the track bed to the Sheepshead Bay station. The plaintiff alleged that after taking 8 or 10 steps along the track bed, which was littered with debris and an oily substance, she slipped on the oily substance and fell, sustaining injuries. The plaintiff thereafter sued NYCTA, asserting a single cause of action to recover damages for negligence. NYCTA argued, inter alia, that it owed no duty to the plaintiff and that, in any event, it was immune from liability for injuries that may have resulted from its employees' discretionary determination to evacuate the train by directing passengers to walk along the track bed to the Sheepshead Bay station. Summary judgment granted to defendant. Court noted that government immunity arises "when the conduct complained of 'involves the exercise of professional judgment,' even if the judgment was poor". Where, as here, the public entity serves a dual proprietary and governmental role, the analysis involves determining where along

the spectrum of proprietary and governmental functions the defendant's alleged negligence falls into. To determine where along the continuum the alleged negligence lies, it is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred. Here, the plaintiff does not and cannot fault the NYCTA for the subway train stopping due to a blackout, and although the plaintiff alleged that the NYCTA's alleged negligent maintenance of the track bed caused her injuries, any alleged injuries she sustained actually arose from the NYCTA's discretionary decision to evacuate passengers from the subway train directly onto the track bed, not from its proprietary function in maintaining a track bed for passenger egress. Since government immunity applied, plaintiff had to show the existence of a special relationship with the public entity in order to get around the immunity. (NOTE: *This case was decided before the Ct of Appeals McLean case, discussed supra, in which it held that once the Court determines there was the government actions were discretionary, even a special relationship will not save plaintiff's case.*) Plaintiff failed to establish the second element, as she did not show that the NYCTA had actual or constructive knowledge that she specifically required assistance in traversing the track bed such that the NYCTA's employees had knowledge that their inaction could lead to harm The dissent would have ruled for plaintiff, finding that plaintiff had a theory of liability based purely on the agency's proprietary capacity as landowner of the track. Thus, plaintiff had no need to show a special relationship.

D. Negligent Roadway Design Cases

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.

1. Prior Written Notice Rule Does Not Apply to Negligent Roadway Design

Madden ex rel. Madden v. Town of Greene, 64 A.D.3d 1117, 883 N.Y.S.2d 392 (3rd Dep't, 2009). Injured motorist sued municipality claiming it negligently failed to install,

maintain, and repair sufficient guardrail that would have prevented motorist's vehicle from leaving the road. The Town moved for summary judgment dismissing the complaint, inter alia, on the ground that it had not received prior written notice of any defective highway condition. A Local Law of the Town of Greene provided required prior written notice for highway defects. It was undisputed that no notice was given. Court held that the Town's alleged negligent failure to design and install a sufficient guardrail was not subject to dismissal on prior written notice grounds because they related to highway planning decisions that are not within the purview of this requirement.

2. Whether the Roadway Design "Evolved without Adequate Study or Lacked Reasonable Basis"

Guan v. State, 55 A.D.3d 782, 866 N.Y.S.2d 697 (2nd Dep't 2008). Plaintiff brought action against the State to recover damages for wrongful death after plaintiff's decedent was killed when his car veered off the parkway and struck a tree. Court of Claim Trial was had. Although there were no witnesses to the accident, responding police officers and accident reconstruction experts opined at trial that the decedent's car hydroplaned and then slid sideways into the tree after traveling through a puddle that was 161 feet long, 15 feet wide, and 8 inches deep, stretching the entire width of the eastbound left lane of traffic. The claimant argued, inter alia, that the State of New York was required to expand the "clear zone" at the accident site to 30 feet in order to comply with modern highway design standards established after the parkway's initial construction. A clear zone is an area without fixed objects that is adjacent to a highway and intended to provide safe passage and a recovery area for vehicles that veer off the roadway. The State conducted an extensive assessment of the parkway system including, inter alia, lane widths, grades, ditch selections, curbs, shoulders, medians, and recovery areas before establishment of 30-foot clear zones for new or major reconstruction of existing parkways and 20-foot clear zones for rehabilitation and minor upgrading. In adopting the policy, the State recognized that expanding the clear zone to 30 feet on existing parkways could result in the wholesale removal of bordering trees, the preservation of which was important to the design of the original parkways. Upon reviewing, among other things, accident records and the input of interested citizens, the State weighed the risks in maintaining a 20-foot clear zone with the benefits of roadside trees in adopting the policy. Under these circumstances, it could not be said that the State's policy of maintaining a 20-foot clear zone on the parkways "evolved without adequate study or lacked reasonable basis".

3. Whether Roadway Design Failed to Comply with Acceptable Standards at the Time of Construction

Popolizio v. County of Schenectady, 62 A.D.3d 1181, 879 N.Y.S.2d 616 (3rd Dept 2009). On a snowy night, plaintiff was driving on defendant's road when he lost control of his car on a very steep downgrade and, unable to negotiate the sharp curve at the bottom of the hill, slid across the road and plunged head-on into a ditch. The ditch was 12-feet wide, more than four-feet deep, V-shaped, and had steep sloping sides. The car angled downward when it entered the ditch and, as a result, when the front end struck the opposite slope, plaintiff's head hit the windshield frame above the airbag. Plaintiff sued

the defendant alleging it was negligent in its design and maintenance of the road. A jury rendered a verdict for plaintiff. On post-trial motion and the appeal, defendant argued, inter alia, that the verdict was not supported by legally sufficient evidence and was against the weight of the evidence. Verdict was sustained. Plaintiff's highway and engineering experts had presented proof that the design of the ditch deviated significantly from accepted standards for highway design. Further, they opined that, given its location alongside a right-angle curve at the foot of a very steep slope, the ditch was dangerous and should have been eliminated, modified to render it traversable, or protected by a guide rail.

Toyos v. City of New York, 54 A.D.3d 628, 864 N.Y.S.2d 417 (1st Dept 2008). In a prior appeal in this action, the Court concluded that the evidence supported "the jury's finding that plaintiffs sustained their injuries in a collision caused in part by the City's negligent failure to provide turnouts or other places of refuge for disabled cars on the Harlem River Drive." Following the retrial on the issue of liability, the jury apportioned 20% of the fault for the accident to the City, and the City then contended, in part, that plaintiffs failed to establish, prima facie, any liability on its part for their injuries. However, the evidence introduced during the retrial was essentially the same as that presented at the first trial, so the Court rejected that argument.

4. Municipality Required to Upgrade to Modern Safety Standards Where It is Made Aware of Dangerous Condition by History of Accidents.

Bresciani v. County of Dutchess, 62 A.D.3d 639, 878 N.Y.S.2d 410 (2nd Dept 2009). Plaintiff's decedent was killed in the Town of LaGrange when her car went off the road and crashed into a tree. The police accident report listed the roadway surface condition as "Wet," and noted "Pavement Slippery." Her estate sued Dutchess County on the theory, inter alia, that defendant failed to appropriately investigate and remedy a known dangerous condition on the county road and performed negligent repair and maintenance on it. The County moved for summary judgment on its qualified immunity defense, claiming that its deliberative decision-making process because a capital improvement project encompassing the county road in question was in the planning stages at the time of the accident. The motion was denied. The County's submissions failed to establish as a matter of law that, once it was made aware that the subject roadway became dangerously slippery as water accumulated on it in wet weather, the County undertook an adequate study to determine what, if any, remedial measures were necessary, or that it did not unjustifiably delay in implementing such measures.

Guan v. State, 55 A.D.3d 782, 866 N.Y.S.2d 697 (2nd Dep't 2008). Where plaintiff alleged negligence in the placement of trees near the roadway, State was not on constructive notice of a dangerous condition as the evidence produced at trial indicated that the daily traffic volume at the site of the accident was roughly 65,000 to 70,000 vehicles per day, and there were only 11 collisions with trees within the vicinity of the accident site from the years 1991 to 2000.

5. What Constitutes "Significant Repairs or Reconstruction" Requiring Municipality to Upgrade to More Modern, Stricter Safety Standards?

Madden ex rel. Madden v. Town of Greene, 64 A.D.3d 1117, 883 N.Y.S.2d 392 (3rd Dep't, 2009). Motorist filed negligence action against driver and owner of dump truck and against municipality alleging that negligent operation of dump truck precipitated accident by forcing motorist to take evasive action and that municipality had negligently failed to install, maintain, and repair sufficient guardrail that would have prevented motorist's vehicle from leaving the road. The fact that the guardrail in place at the time of the accident did not comply with current design standards was undisputed. The Town's policy was to gradually upgrade culverts and roadways as repairs became necessary and as finances permitted. The Town contended that it had no duty to upgrade the guardrail because no previous accidents had occurred there and the roadway had no history of significant repair. In this regard, however, the Court found the record deficient. No evidence was provided as to when the culvert and guardrail where the accident occurred were constructed or what standards were in effect at that time. Questions of fact therefore existed as to whether the road complied with applicable engineering standards when it was built. Further, the Town did not establish its entitlement to qualified immunity as a matter of law for its highway planning decisions with regard to the original design and placement of the guardrail because it did not show that these determinations resulted from a deliberate decision-making process. Further, as to the road's history of significant repairs, one of the Town's experts stated that a "major" repaving of the highway took place in 1996". Merely overlaying a highway with new pavement, as opposed to "ripping it out and rebuilding it or reconfiguring it," does not, however, constitute significant repair or reconstruction for the purpose of requiring a municipality to upgrade a roadway to comply with current design standards. Whether the work performed in 1996 on this roadway was sufficiently extensive to constitute significant repair or reconstruction obligating the Town to upgrade the culvert and guardrail could not be determined on this record because no evidence of the nature and extent of the work was provided. Summary Judgment to Town denied.

Hay v. State, 60 A.D.3d 1190, 875 N.Y.S.2d 313 (3rd Dep't 2009). Motorist, who was injured after colliding with a roadside tree stump, brought action against the State alleging the State was negligent in failing to remove the stump and provide a 30-foot clear zone along the side of the roadway. The crux of the issue was whether defendant's 1991 project constituted a reconstruction of State Route 82. While a municipality is under a duty to construct and maintain its highways in a reasonably safe condition, it need not comply with design standards adopted after the construction of a highway unless it undertakes "significant repair or reconstruction" that would allow compliance with the new standards. Nor was there any requirement that a municipality undertake such reconstruction to provide an opportunity to comply with new safety standards. To support her argument that the 1991 project was a "significant repair or reconstruction", claimant proffered the testimony of a professional engineer who opined that defendant's work constituted reconstruction, primarily because the title page of the record plans bore the title "Reconstruction on Routes 82 and 22." Additionally, claimant's engineer pointed to the fact that the plans called for rehabilitation on the shoulder of the road and adjacent

ditches. However, the upper right hand corner of that same title page described the type of construction as "Asphalt Concrete Resurfacing." In addition, defendant introduced the testimony of employees from both the State and County Departments of Transportation who stated unequivocally that the project was one of repaving and not reconstruction. To support this contention, the employees explained that the only work that had been done was to overlay the existing roadway, rather than ripping it out and rebuilding it or reconfiguring it, and the area outside the shoulders had not been changed at all. Court held that defendant's project to repave the road did not give rise to an obligation to comply with modern safety standards inasmuch as there was no significant repair, modernization or correction of the road itself.

Guan v. State, 55 A.D.3d 782, 866 N.Y.S.2d 697 (2nd Dep't 2008). Plaintiff brought action against the State to recover damages for wrongful death after plaintiff's decedent was killed when his car veered off the parkway and struck a tree. Court held that State was entitled to qualified immunity and was not required to comply with the modern highway design standards established after the construction of the parkway. Replacement of the median, the repaving of the road surface, and the improvements made to the drainage system did not materially alter the roadway itself and did not constitute significant repair or reconstruction such that compliance with modern highway design standards was required.

6. Where Roadway Itself Adequate, Objects Such as Trees and Shrubbery in Close Proximity Do not Create an Unreasonable Danger

Hay v. State, 60 A.D.3d 1190, 875 N.Y.S.2d 313 (3rd Dep't 2009). As to claimant's argument that defendant breached its duty to maintain the road in a reasonably safe condition because it had actual and constructive notice of the hazardous tree stump, the Court noted that where the paved portion of the roadway is adequate, objects such as trees and shrubbery in close proximity do not create an unreasonable danger where travel beyond the paved portion is neither contemplated nor foreseeable. A municipality's duty to maintain its highways extends to conditions beyond the travel lanes and shoulders only when a prior accident or other event would give notice of a specific dangerous condition. Here, there appeared to be no dispute that the roadway itself was more than adequate to permit safe passage. No prior complaints had been made about the roadside stump, nor had any prior accidents in the vicinity of the stump been reported. As such, Court found that defendant satisfied its duty since the road was "reasonably safe for drivers who obey the rules of the road"

Soto v. City of New York, 63 A.D.3d 1035, 883 N.Y.S.2d 72 (2nd Dept 2009). Plaintiff testified that he swerved from the southbound lane into the northbound lane to avoid an oncoming vehicle in his lane. In the process, the plaintiff lost control of his vehicle and collided with a tree located inside the park approximately 4 1/2 feet from the roadway. There were guardrails in the area, but at this particular location there were trees between the roadway and the guardrails, and therefore the guardrails would not prevent a vehicle leaving the roadway from colliding with those trees. After a jury trial, the defendant City of New York and the plaintiff were each found to be 50% at fault in the happening of the

accident. On appeal, Court found that plaintiff failed to establish, through proof of prior similar accidents, violations of mandatory safety standards, or any other evidence, that the placement of guardrails in this manner lacked any reasonable basis. Although the plaintiff's theory was that the guardrails, which were installed on the other side of the trees at issue from the roadway, were defectively installed because they did not prevent his car from colliding with a tree, the existence of a barrier located behind the tree line designed to prevent vehicular entry into the park did not, by itself, establish a duty on the part of the City to install guardrails between the curb and the tree line to prevent cars that left the roadway from colliding with the trees. The existence of trees within approximately 4 1/2 feet of the roadway curb did not give rise to a condition so inherently dangerous as to necessitate the erection of guardrails or the removal of the trees. The Court restated the rule that, "a municipality's duty to maintain its highways extends to conditions beyond the travel lanes and shoulders only when a prior accident or other event would give notice of a specific dangerous condition". The plaintiff presented no evidence concerning such a prior accident. Accordingly, complaint dismissed.

7. Laying Oil and Stone Does not Constitute a "Highway Design" Subject to Qualified Immunity

Kilmer v. Town of Porter, 61 A.D.3d 1341, 877 N.Y.S.2d 567 (4th Dept 2009). Motorist brought action against Town and road contractor seeking damages for injuries sustained when she lost control of vehicle she was operating on a road that had been resurfaced by contractor with oil and stone. According to plaintiffs, the road was in a dangerous condition because of the presence of excess loose stones and the absence of appropriate warning and traffic control signs. Court concluded that plaintiff "raised a triable issue of fact whether the Town created a dangerous condition by failing to remove loose stones" from the road in a timely manner following the oil and stone resurfacing. In addition, plaintiffs raised a triable issue of fact whether the Town was negligent in failing to post adequate signage to reduce the speed limit on the road in accordance with New York State Department of Transportation specifications. The contractor got out on summary judgment, however, by "demonstrating that [the road] was resurfaced in accordance with normal procedures and that the road was safe for traffic after the process was completed." In opposition, the plaintiffs made no effort to quantify the amount of loose [stones] and offered no expert testimony that the resurfacing was not performed properly"

8. Lack of Signage Cannot be a Proximate Cause of Accident Where Driver Knew of the Danger the Signs Would Have Warned Against

Dennis v. Vansteinburg, 63 A.D.3d 1620, 881 N.Y.S.2d 738 (4th Dept 2009). Infant-plaintiff was struck by a vehicle driven by a defendant-driver while attempting to cross a two-lane road maintained by defendant Village in order to reach a park. Plaintiff sued driver, but also the Village. According to plaintiff, the Village was negligent in, inter alia, failing to reduce the speed limit on the road, failing to warn drivers of the presence of children at play and failing to install a crosswalk in the area of the accident. Court granted summary judgment to Village because, even assuming, arguendo, that the Village breached its duty to maintain the road in a reasonably safe condition, the Village

established that any such breach was not a proximate cause of the accident. The Village submitted the deposition testimony of defendant driver in which he testified that he had lived in the area where the accident occurred for over 40 years and that, on numerous occasions prior to the accident, he had observed children cross the road to play in the park. Defendant further testified that he did not need signs on the road to alert him that there were children in the area. Inasmuch as defendant was "well acquainted" with the road, any negligence on the part of the Village could not be deemed a proximate cause of the accident.

VI CLAIMS AGAINST POLICE, JAILORS

A. Probable Cause Requirement in False Arrest and Malicious Prosecution Claims

Sital v. City of New York, 60 A.D.3d 465, 875 N.Y.S.2d 22 (1st Dep't 2009). Regarding plaintiff's false arrest cause of action, Court held that a rational jury could have found that there was no probable cause for plaintiff's arrest because the accusation from an identified citizen, which was the sole basis for the arrest, was not sufficiently reliable, given that the investigating officer had doubts about the witness's credibility. The identification of plaintiff was also arguably contradicted by physical evidence from the crime scene that was consistent with a conflicting statement of an independent eyewitness, and the jury heard testimony showing that the investigating officer recognized plaintiff based on a prior arrest, at which time he had referred to plaintiff as "an animal." Under these circumstances, a rational jury could have determined that the officer's failure to make further inquiry of potential eyewitnesses was unreasonable under the circumstances, and evidenced a lack of probable cause. Regarding the claim for malicious prosecution, there was a sufficient basis in the trial record for the jury to conclude that the presumption of probable cause created by the indictment was rebutted. The jury could have rationally concluded that the investigating officer, who did not alert the prosecutor to the statement by another witness, which was inconsistent with the statement given by the individual who accused plaintiff, and arguably implicated that individual in the shooting, failed to make a complete and full statement of facts to the District Attorney.

Warner v. City of New York, 57 A.D.3d 767, 870 N.Y.S.2d 82 (2nd Dep't 2008). Former prisoner, whose second degree murder conviction was vacated after he had served 15 years of his 21 year sentence, brought malicious prosecution action against city defendants. Contrary to the plaintiffs' contention, the defendants City of New York, New York City Police Department, and a police detective, none of whom appeared in the criminal action, were not deemed to have admitted that the plaintiff was wrongfully arrested, imprisoned, and prosecuted, by virtue of the fact that the Kings County DA joined in the plaintiff's CPL 440.10 motion, as the Kings County DA is a separate entity from the City defendants. Accordingly, any admissions by the Kings County DA in the criminal proceeding neither bind the City defendants nor judicially or collaterally estop the City defendants from opposing the complaint in the instant action. Since the plaintiffs failed to establish, prima facie, their entitlement to summary judgment on the

issue of liability, that branch of their motion was properly denied regardless of the sufficiency of the defendants' opposing papers.

B. Inmate Lack of Security Cases

Walton v. State, 22 Misc.3d 1134, 2008 WL 5727351 (N.Y.Ct.Cl.) (2008). The documentary evidence and the testimony at trial of all the witnesses established that State was well aware that there was a reasonably foreseeable and high risk of harm from other inmates to the claimant inmate (Elmira). Not only was claimant concerned for his own safety, which concern he thoroughly expressed to prison officials, but those same officials concurred in his assessment and believed that it was in claimant's best interests to be moved to another facility. Defendant nevertheless contended that, because it was not aware of the potential for risk to claimant coming specifically at the hands of a specific inmate, the attack was not foreseeable. This argument was held to be unavailing as a plaintiff is not required to show "the precise manner in which the harm occurred need not be foreseeable" so too need it not be foreseeable precisely who delivers the blow in order to establish liability. Defendant's response to the known and foreseeable risk of harm to claimant was clearly inadequate in that defendant placed claimant in a cell where he could not be directly seen from the officer's station, the requests from facility officials to Albany to expedite claimant's move to another prison were ignored for at least 41 days, and an inmate with a long-handled ice scraper with a heavy metal blade was allowed to "work" unsupervised outside claimant's cell. Thus, Court of Claims decided the case in claimant's favor.

C. Improper Sentencing Cases

Vazquez v. State, 23 Misc.3d 1101, 2009 WL 818704 N.Y.Ct.Cl. (2009). Claimant was sentenced to a determinate sentence of three and one-half years, concurrent, for the crimes of attempted burglary in the first degree and attempted robbery in the first degree. Although the sentencing court failed to impose the statutorily mandated five-year period of post-release supervision on the record at the time sentence was imposed (*see,* Penal Law § 70.00[6] and § 70.45[1]), a period of post-release supervision was administratively imposed by DOCS upon the claimant's release from prison. Thereafter, claimant was declared in violation of the terms of his post-release supervision on two occasions and imprisoned both times. Claimant's petition for a writ of habeas corpus was granted and it was ordered that the five-year term of post-release supervision be vacated and the claimant released from custody. In doing so, the Court relied, in part, on the Second Circuit Court of Appeals decision in *Earley v. Murray* (451 F3d 71 [2d Cir2006]), which held that the imposition of post-release supervision by DOCS was a nullity as "[t]he imposition of a sentence is a judicial act; only a judge can do it" (*Id.* at 76). (In addition, all four Departments are now in agreement that "a court's failure to impose a period of post release supervision at the time of sentence will not require post-release supervision as a component of the sentence"). *Matter of Garner v. New York State Dept. of Correctional Servs.* (10 NY3d 358 [2008]) and *People v. Sparber* (10 NY3d 457 [2008]) reaffirmed the principle that post-release supervision is a significant component of a sentence and must be imposed by the sentencing judge pursuant to CPL 380.20 and

380.40. While the Court in *Garner* did not foreclose the possibility of resentencing to correct the error (*Matter of Garner*, 10 NY3d at 363, n 4), the Court in *Sparber*, specifically held that "[t]he sole remedy for a procedural error such as this is to vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement" (*People v. Sparber*, 10 NY3d at 471). The Appellate Division, Third Department, recently stated in *Matter of State of New York v. Randy M.* (57 AD3d 1157 [2008]) that even where a defendant is resentenced so as to impose the statutorily mandated period of post-release supervision, "[t]he court's later resentencing of defendant did not operate retroactively to cure the illegal imposition of post-release supervision ... meaning defendant could not validly be punished for violating the terms of post-release supervision until after it was imposed by a court" (*Id.* at 1159, citing *People ex rel. Benton v. Warden, Adolescent Receiving Detention Ctr.*, 20 Misc.3d 516, 521 [2008];*see also Matter of Jackson v. Cuomo*, 20 Misc.3d 1115[A][2008]). *Benton (supra),* which was cited with approval by the Court in *Matter of State of New York v. Randy M. (supra),* specifically held that where a term of post-release supervision is a nullity because it was administratively. Nevertheless, the Court held that absent either an allegation or inference that the parole warrant or order directing the claimant's confinement for parole violations was invalid on its face or that the court lacked jurisdiction to issue the order, the confinement for the violation was privileged and "sufficient to protect officials who carried out its mandates" from liability for false imprisonment Moreover, since the determination to revoke the claimant's parole was made by the Parole Board, such determinations are judicial in nature and protected by the cloak of absolute immunity. To the extent the conduct complained of is that of DOCS in improperly imposing the term of post-release supervision the result is the same. The law is settled that when official conduct involves the exercise of discretion, a government officer is not liable for the injurious consequences of his or her actions even if resulting from tortious conduct or malice. Immunity attaches "for those governmental actions requiring expert judgment or the exercise of discretion". Here, claimant's confinement for parole violations occurred prior to the Court of Appeals decisions in *Garner* and *Sparber* in April 2008 and pursuant to what had been a longstanding practice by DOCS of implementing the statutorily mandated terms of post-release supervision. Importantly, at the time of the administrative application of post-release supervision in this case, the courts generally viewed post-release supervision as an "automatic" consequence of a conviction resulting in a determinate sentence. In summary, a claim for false imprisonment relating to a period of confinement for violating the conditions of an improperly imposed term of post-release supervision is meritless where, as here, there is no allegation or inference that the commitment papers were invalid on their face. In addition, DOCS is immune from liability for its discretionary application of the sentencing criteria.

Mickens v. State, 881 N.Y.S.2d 854, 2009 WL 1651478 N.Y.Ct.Cl. (2009). Claimant was one of many former prisoners who was required to serve a term of post-release supervision (PRS) that had been imposed by the Department of Correctional Services (DOCS) rather than by the court when he was sentenced following his criminal conviction. He commenced this action based on allegations of false imprisonment and violation of his civil rights and now moves for summary judgment in his favor on the issue of liability, on the principles of *res judicata,* relying on a Supreme Court decision

that held DOCS' action in imposing a term of PRS on claimant to be unlawful. Defendant opposed and cross-moved for summary judgment dismissing the claim on the ground that DOCS' action was privileged and could not give rise to civil liability because Penal Law § 70.45 required that claimant serve a period of PRS. A series of Court of Appeals decisions and, ultimately, an amendment to Penal Law § 70.45, resolved any question about when and by whom the mandatory PRS must be imposed. It can only be imposed by supreme court, not a parole board because a defendant has a statutory right to have that punishment imposed by the sentencing In two Court of Claims decisions, it had already been held that claims alleging false imprisonment in these situations must fail since "any confinement arising from an improperly imposed period of PRS is privileged [because] it was required by § 70.45(1) of the Penal Law". The immunity that is granted to certain governmental actions had also been cited as a reason for rejecting these claims. This Court, however, stated that it was "unable to view DOCS' actions as being either privileged or entitled to immunity from liability. DOCS simply did not have legal jurisdiction or lawful authority to impose any component of sentences on convicted criminals" and "if DOCS had no lawful authority to pronounce any portion of the sentence on these individuals, then its action in doing so cannot be considered privileged (*i.e.* as being carried out "pursuant to lawful authority" or "under color of law or regulation"). Because DOCS' imposition of the PRS term was considered neither privileged nor protected by immunity, liability on the part of the State was possible. However, in the view of this Court, there also had to be an allegation and ultimately proof that DOCS' action actually caused injury to claimant, caused confinement that was not otherwise privileged, before the elements of false imprisonment could be established. In this, the claimant failed. Proper action on the part of DOCS would have resulted in resentencing by a court, which would have been privileged. DOCS' imposition of a five year term of PRS on claimant was unlawful but that wrongful act was not the cause of any of the confinement he experienced while serving PRS.

Lapidus v. State, 57 A.D.3d 83, 866 N.Y.S.2d 711 (2nd Dep't 2008). Former prison inmate, who had served substantial portion of second-felony-offender sentence before being released, sued state, alleging that negligence of state-court clerks had resulted in her incorrect classification as second felony offender. The Court of Claims granted summary judgment for state on proximate causation grounds. In support of its cross motion for summary judgment, the State argued that the claim should be dismissed for a number of reasons, including government immunity and lack of a duty of care. The Court first noted that the doctrine of governmental immunity does not shield the State from liability for an employee's negligent performance of his or her ministerial duties. Here, the acts of negligence alleged to have resulted in claimant's erroneous adjudication as a second felony offender were committed by the part clerk, who incorrectly recorded both the jury verdict against him and the sentence imposed upon him on the line of the court file designated for him. Since the accurate recording of a verdict rendered by a jury and a sentence imposed by a court do not require the conscious exercise of discretion, these duties were ministerial in nature, and the State could not be shielded from liability for the negligent performance of them. Similarly, the sentence clerk, who later prepared a duplicate commitment order for the sentence, purportedly without consulting the court file, which would have revealed the error, was also performing a ministerial duty, for

which the State may not be immunized. With regard to the issue of duty, court employees have a duty to exercise due care in performing their ministerial duties. Defendant, however, alleged that, as a matter of law, claimant's failure to controvert her status as a second felony offender at his sentencing hearing was an intervening, superseding act which broke the causal chain between the alleged negligence of court employees and her imprisonment for an excessive period. The Court disagreed and instead found a question of fact on this issue. Claimant never would have been placed in the position of having to admit or deny that she was a predicate felon had not a court employee mistakenly recorded on her court file that she had been convicted of assault in the second degree and sentenced to a term of imprisonment for that crime. Thus, the conduct alleged to be an intervening act flowed from the original alleged negligence of the part clerk. Questions of fact existed as to whether claimant's failure to controvert her status as a second felony offender at her sentencing was either so improbable and unforeseeable as to constitute a superseding event breaking the causal connection between the alleged negligence of the court employees and her service of an excessive period of confinement, and/or rose to such a level of culpability as to replace the defendant's alleged negligence as the legal cause of the accident.

VII MUNICIPAL BUS AND SUBWAY LIABILITY

A. Subway Liability

Glover v. New York City Transit Authority, 60 A.D.3d 587, 876 N.Y.S.2d 40 (1st Dep't 2009). Passenger sued city transit authority for injuries to her leg sustained when she slipped into gap between subway platform and train and remained trapped until subway car was lifted by emergency equipment. Plaintiff claimed that defendant breached its duty of reasonable care, based on its own 1987 guidelines limiting the maximum tolerable gap between a subway car and a platform to six inches. However, Plaintiff failed to demonstrate at trial defendant's breach of a duty of reasonable care to remedy an unsafe condition. Her testimony that her leg went into the gap above the knee, and that the circumference of her thigh measured just above the knee was more than 16 inches, was insufficient to prove that the space between the train and the subway platform was greater than six inches. Plaintiff's civil engineering expert testified that based on his measurements four years after the accident, he concluded that the diameter of her leg above the knee was 6.68 inches. But these measurements did not establish the size of the gap at the time of the accident. Dissent would have ruled for plaintiff because the defendant "tacitly conceded that a gap greater than six inches would constitute a dangerous condition requiring remedial action under these circumstances" and because the "jury verdict has ample support in the record".

B. Unusual or Violent Movements of Bus

Grant v. New York City Transit Authority, 61 A.D.3d 422, 877 N.Y.S.2d 31 (1st Dep't 2009). Plaintiff was injured when the bus he was riding as a standee stopped suddenly, causing him to lose his footing. Plaintiff's proof was sufficient to raise a triable issue of fact as to whether defendant was negligent. Plaintiff estimated the bus's speed to be at

least 35 to 40 miles per hour immediately before deceleration. Plaintiff added that when the bus stopped, he was launched into the air even though he was holding the overhead grip. It was also plaintiff's testimony that the bus's sudden stop caused another standee to fall to his knee. Such testimony constituted "objective evidence that the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant".

Crane v. New York City Transit Authority, 60 A.D.3d 467, 874 N.Y.S.2d 112 (1st Dep't 2009). Plaintiff established a prima facie case of negligence with deposition testimony that the sudden stop caused a jerk or lurch that was unusual and violent. Defendants' opposition to summary judgment was insufficient to create a triable issue of fact. Their contention that the bus stopped suddenly because a passenger pushed on the rear door, possibly activating the bus's rear door interlock braking mechanism, was unsupported by evidence as to how the mechanism worked and as to whether it was functioning properly and was operated properly by the bus driver at the time and on the bus in question.

Rayford v. County of Westchester, 59 A.D.3d 508, 873 N.Y.S.2d 187 (2nd Dep't 2009). The plaintiff testified at her deposition that, as a result of a "jerking" movement of the bus, she fell from where she had been standing, next to the steps leading to the front door of the vehicle, and landed on the steps, with her legs partially hanging out of the opened front door. The Court found that the nature of the incident, in which the plaintiff, according to her deposition testimony, was merely caused to land on the steps next to where she had been standing, was not, in itself, sufficient to provide the objective support necessary to demonstrate that the movement of the bus was "unusual or violent" and of a "different class than the jerks and jolts commonly experienced in city bus travels". Summary judgment granted to defendant.

Cuadrado v. New York City Transit Authority, 2009 WL 2431946 (1st Dep't 2009). Through her own testimony at trial and that of a disinterested witness, plaintiff produced sufficient objective evidence to establish that the bus from which she fell made a movement that was "unusual and violent," that is, something more than the jolting and jerking incidental to the operation of a city bus. A concurring opinion found that it was by no means clear that the holding of *Urquhart v. New York City Tr. Auth.* (85 N.Y.2d 828 [1995]) applies when a bus is stopped and the doors are open. In this case, the concurring justice found there was evidence from which the jury could have found that the movement of the bus causing plaintiff to fall occurred after the doors had opened, in which case even an ordinary jerk and lurch (not necessarily an "unusual and violent" one) would be actionable.

C. Failure to Provide a Safe Place to Alight

General Rule: . A common carrier does have a duty to afford departing passengers a safe place and means to alight (*see e.g. Blye v. Manhattan & Bronx Surface Tr. Operating Auth.*, 124 A.D.2d 106, 511 N.Y.S.2d 612 [1987], *affd.* 72 N.Y.2d 888, 532 N.Y.S.2d 752

[1988]; *Miller v. Fernan*, 73 N.Y.2d 844, 537 N.Y.S.2d 123 [1988]; *Hickey v. Manhattan & Bronx Surface Tr. Operating Auth.*, 163 A.D.2d 262, 558 N.Y.S.2d 543 [1990]).

Sabella v. City of New York, 58 A.D.3d 712, 871 N.Y.S.2d 721 (2nd Dep't 2009). Plaintiff fractured ankle while disembarking from a bus operated by the defendant New York City Transit Authority (NYCTA). The plaintiff alleged defendant failed to provide her with a safe place to alight by not engaging the kneeling device, which lowers the steps on the bus. Defendant's driver testified at deposition that NYCTA policy required drivers to lower the bus if it was stopped more than six inches from the curb or if the disembarking passenger appears to be disabled, was a senior citizen, or had a baby stroller. Defendant submitted evidence showing that at the time of the subject accident, the bus was stopped no more than six inches from the curb. There was no evidence that the plaintiff was disabled, a senior citizen, or had a stroller, or that there was any defect in the sidewalk where plaintiff descended. Accordingly, the defendant established, prima facie, that they had no duty to lower the bus before the plaintiff disembarked and that they provided the plaintiff with a safe place to disembark. In opposition, the plaintiff failed to raise a triable issue of fact.

VIII COURT OF CLAIMS

A. Time for Service of Notice of Intention or Claim

Frederick v. State, 23 Misc.3d 1008, 874 N.Y.S.2d 762 (Ct. Cl. 2009). Former prisoner brought action against State alleging that the State violated his rights and falsely imprisoned him. State moved to dismiss based on failure to timely serve a notice of intention or a claim within 90 days of the event complained of. Court of Claims Act § 11(a)(i) provides, "[s]ervice by certified mail, return receipt requested, upon the attorney general shall not be complete *until the claim ... is received* in the office of the attorney general." Claimant served his Claim by certified mail on the 90th day, but the Attorney General's office received the Claim by certified mail, return receipt requested, 92 days after accrual. This was a nullity, never mind that that the Claim was postmarked on the 90th day after accrual. Court of Claims Act § 10 is more than a statute of limitations; it is a jurisdictional prerequisite to bringing and maintaining an action in this Court. Failure to timely comply with the statutory filing requirements of the Court of Claims Act constitutes a fatal jurisdictional defect requiring dismissal. The defect was timely and properly raised with particularity, by this pre-answer motion, in accordance with Court of Claims Act § 11 (c). The Court then addressed claimant's motion pursuant to Court of Claims Act § 10(6) to late-serve a Claim. Court of Claims Act § 10(6) sets forth six factors (similar to, but not the same as the GML factors) for deciding whether to grant such a motion, although other factors deemed relevant also may be taken into account. The Court went through the six factors, and found that defendant had early notice of the events, had an opportunity to investigate them, and was not prejudiced by the delay in filing a claim. Further, claimant had no other remedy. However, the delay was not excusable, and the claims appeared to lack of merit, which is perhaps the most important factor, so the Court denied the application for late claim relief.

B. Sufficient Specificity of Claim or Notice of Intention

IX NEGLIGENCE OF OPERATORS OF EMERGENCY VEHICLES AND VEHICLES ENGAGED IN HIGHWAY WORK

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 1104 (Emergency Vehicles)

1. What Constitutes "Reckless Disregard?"

Herod v. Mele, 62 A.D.3d 1269, 877 N.Y.S.2d 807 (4th Dept 2009). Vehicle in which plaintiff was a passenger collided with a deputy sheriff's car. Deputy sheriff was operating a police vehicle while responding to a dispatch call concerning a fight in progress, and was thus operating an authorized emergency vehicle while involved in an emergency operation (*see*, V&T Law §§ 101, 114-b), and thus that the reckless disregard standard of liability applied. The County defendants established as a matter of law that deputy sheriff's conduct did not rise to the level of reckless disregard for the safety of others. The fact that deputy was exceeding the posted speed limit at the time of the collision "certainly cannot alone constitute a predicate for liability, inasmuch as such conduct is expressly privileged under V&T Law § 1104 (b)(3)". Even assuming, arguendo, that the deputy was traveling on wet roads without having activated the lights and siren on his police vehicle and that he experienced a short-term reduction in visibility of the intersection where the collision occurred, Court concluded that those factors also did not rise to the level of reckless disregard for the safety of others. The deputy sheriff had the right-of-way at the intersection, and there was no evidence of any traffic at or near that intersection other than plaintiffs' vehicle.

Corallo v. Martino, 58 A.D.3d 792, 873 N.Y.S.2d 102 (2nd Dep't 2009). On summary judgment motion, defendant police officer failed to establish that, as a matter of law, he did not act in reckless disregard for the safety of others where he failed to establish that he slowed down his police vehicle prior to entering the intersection against a red light. V&T 1104(b)(2) provides that "the driver of an authorized emergency vehicle may ... proceed past a steady red signal ... but only after slowing down as may be necessary for safe operation"

Tutrani v. County of Suffolk, 64 A.D.3d 53, 878 N.Y.S.2d 412 (2nd Dep't 2009). Motorist whose vehicle was rear-ended brought action against driver of following vehicle and police officer who had abruptly decelerated vehicle in front of plaintiff's vehicle seconds before the accident, seeking to recover damages for personal injuries sustained in the accident. At the time of the accident, the officer was responding to a radio dispatch

concerning a disabled motorist on the service road nearby. At trial, the plaintiff testified that immediately before the accident, the officer abruptly moved into her lane, "cutting her off" and causing her to "jam" on her brakes to avoid colliding with his vehicle. The plaintiff stated that the officer did not signal his intention to change lanes or activate his overhead lights. The jury found that the officer had acted in "reckless disregard" for the safety of others and, accordingly, determined that the officer was 50% at fault in the happening of the accident. Court held that, contrary to the defendant's contention, the evidence was legally sufficient to support the jury verdict that the officer operated his police vehicle in reckless disregard for the safety of others. The credible evidence indicated that the officer came to a virtual stop extremely abruptly in front of the plaintiff's vehicle, in rush hour traffic, proceeding at 40 miles per hour, without any warning and just seconds before the collision. It could not be said that there was no rational process by which the jury could have found that the officer operated his vehicle in reckless disregard for the safety of others.

Flack v. State, 57 A.D.3d 1199, 870 N.Y.S.2d 500 (3rd Dep't 2008). Plaintiff sued State for MVA where state trooper, who was in pursuit of a speeding vehicle, fishtailed out of control while he was driving in excess of 80 miles per hour, and spun 180 degrees into the opposite lane of oncoming traffic, hitting the car in which claimant was a passenger. Following a bench trial, the Court of Claims dismissed the claim, after determining that defendant was entitled to qualified immunity pursuant to V&T Law § 1104, and that the trooper's conduct did not rise to the level of recklessness. Claimants appealed. Appellate Court agreed that the trooper was involved in an emergency operation at the time of the accident, thereby entitling defendant to qualified immunity, but it disagreed with the Court of Claims finding on the issue of recklessness; it found the trooper's conduct reckless. A finding that the trooper acted in reckless disregard of others requires a showing that he "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 [that he] has done so with conscious indifference to the outcome". The Court noted that, in reviewing the Court of Claims' determination in this regard, "this Court may 'independently consider the [relative] probative weight of the evidence and the inferences that may be drawn therefrom". It was undisputed that it was raining heavily at the time of the accident, other cars on the road were traveling well under the speed limit, the road contained S-curves and knolls, and the trooper knew that there recently had been other serious accidents caused by inappropriate speed in the area where this collision occurred. Additionally, while the trooper testified that the reason he was chasing the speeding vehicle-which was traveling at 73 miles per hour-was that it posed a risk to the public based on the above conditions, he nevertheless pursued that car at a speed of over 80 miles per hour, a speed at which he had never driven on that road even under ideal conditions and a speed which he admitted posed a significant risk to the public. This constituted reckless conduct.

Kabir v. County of Monroe, 21 Misc.3d 1107, 873 N.Y.S.2d 234 (Monroe Co. Sup. Ct. 2008). Road patrol deputy sheriff, on routine patrol, in a marked police vehicle, received a radio dispatch from a police dispatcher to respond to a stolen vehicle report. Traffic was moving slowing in front of him as he looked down at his dispatch signal and touched

the screen to view the "job card" to assist in locating the address in issue. When he looked back up after viewing the screen, traffic in front of him had slowed, he immediately applied his brakes, was unable to stop, and collided with the plaintiff's car. The accident occurred moments after the deputy had received and acknowledged the burglar alarm call, but before he had activated the emergency equipment, i.e., siren and flashing lights, on the police vehicle. It was a low-speed impact. Court granted summary judgment to defendant on, *inter alia*, the issue of whether his actions were reckless. There was no conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow and doing the act with a conscious indifference to the outcome.

Krulik v. County of Suffolk, 62 A.D.3d 669, 878 N.Y.S.2d 436 (2nd Dep't 2009). In opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law demonstrating that the defendant police officer was engaged in an emergency operation at the time of the subject collision (*see* Vehicle and Traffic Law § 114-b), and that the officer's conduct did not rise to the level of reckless disregard for the safety of the public, plaintiff created a triable issue of fact. Specifically, plaintiffs submitted the deposition testimony of two witnesses, which raised triable issues of fact as to whether the siren and emergency lights on the officer's vehicle were activated and whether that vehicle slowed down prior to entering the intersection at which the collision occurred.

Britt v. Bustamante, 55 A.D.3d 858, 866 N.Y.S.2d 740 (2nd Dep't 2008). There were triable issues of fact as to whether the police officer here acted in reckless disregard for the safety of others where, in contradiction to the officer's testimony, a witness stated that the "police car did not have its overhead emergency lights on, nor were the sirens activated" and where it was undisputed that officer did not stop for the stop sign at the intersection where his view was partially obstructed by hedges.

Nurse v. City of New York, 56 A.D.3d 442, 867 N.Y.S.2d 486 (2nd Dep't 2008). The officers both testified at their depositions that the pursuit ended when they lost sight of the vehicle prior to the accident and that, when they heard through a radio transmission that the stolen car was involved in an accident, it took them between 10 and 15 minutes to get to the accident scene. In opposition, the plaintiffs failed to raise a triable issue of fact. Defendant established its entitlement to judgment as a matter of law by demonstrating that the police officers involved in the pursuit of the stolen car did not act with reckless disregard for the safety of others. In any event, the proximate cause of the accident was the independent recklessness of the driver of the stolen car, and not the police officers' conduct in initiating the pursuit of it.

Ferrara v. Village of Chester, 57 A.D.3d 719, 869 N.Y.S.2d 600 (2nd Dep't 2008). Village and its police officers failed to meet their initial burden of establishing, prima facie, that the police officers responding to the emergency did not act in reckless disregard for the safety of others in commencing, conducting, or failing to terminate the high-speed pursuit of another vehicle driven by an individual suspected of violating his parole and driving with a suspended license, during which the subject accident occurred. There were issues of fact as to whether the pursuing officer or his supervisor should have

commenced the pursuit given the minor offenses the suspect was thought to have committed, or terminated the pursuit in light of the fact that it was conducted at high speeds on curving narrow roads, through a construction zone and into oncoming traffic, where the suspect vehicle may not have been using headlights.

Colletti v. Pereira, 61 A.D.3d 804, 876 N.Y.S.2d 716 (2nd Dep't 2009). Motorist brought action against volunteer emergency medical technician after technician rear-ended his vehicle while responding to emergency page. The medical technician was traveling on a winding mountain road, at or near the 55 miles-per-hour speed limit, with his emergency vehicle blue strobe light illuminated. Upon emerging from a curve, he saw the plaintiffs' vehicle. The technician pushed down on his brakes, but was unable to come to a complete stop. Court held that technician had established his prima facie entitlement to judgment as a matter of law. In opposition, the plaintiffs failed to raise a triable issue of fact as to whether the technician acted with "willful negligence or malfeasance."

Franco v. Rizzo, 61 A.D.3d 818, 877 N.Y.S.2d 415 (2nd Dept 2009). A Suffolk County Police Department vehicle collided at an intersection with plaintiffs' vehicle. Shortly before the collision, the officer at the wheel received a radio call of shots fired at a nearby residence. As the vehicle of officer approached the intersection, he faced a stop sign, and the cross street upon which plaintiffs' vehicle was traveling had the right of way. The officer was following two other police cars whose flashing lights were activated. The officer admittedly proceeded into the intersection without his flashing lights or siren activated and without stopping or applying his brakes. The officer testified at his deposition that he had turned his emergency lights off just seconds before reaching the intersection. Court denied plaintiff's motion for summary judgment, holding that the deposition testimony submitted on the motions did not eliminate all triable issues of fact, inter alia, as to whether the plaintiff-driver used reasonable care to avoid the collision.

2. Whether Officer Was Involved in an "Emergency Operation"

Krulik v. County of Suffolk, 62 A.D.3d 669, 878 N.Y.S.2d 436 (2nd Dep't. 2009). In opposition to defendant's motion that as a matter of law he did not act with "reckless disregard", plaintiffs submitted the deposition testimony of two witnesses which raised triable issues of fact as to whether the siren and emergency lights on the officer's vehicle were activated and whether that vehicle slowed down prior to entering the intersection at which the collision occurred. Defendant's motion for summary judgment thus denied.

Kabir v. County of Monroe, 21 Misc.3d 1107, 873 N.Y.S.2d 234 (Monroe Co. Sup. Ct. 2008). Road patrol deputy sheriff, on routine patrol, in a marked police vehicle, received a radio dispatch from a police dispatcher to respond to a stolen vehicle report. En route to the stolen vehicle call, he overheard on his police vehicle's radio that a fellow deputy sheriff was dispatched to a burglar alarm. The burglar alarm call was given a "priority one", the highest priority designation by the police dispatcher. The police dispatcher requested a backup unit for the burglar alarm call. The accident occurred moments after the deputy had received and acknowledged the burglar alarm call, but before he had activated the emergency equipment, i.e., siren and flashing lights, on the police vehicle.

Court granted summary judgment to defendant on, *inter alia*, a finding that the deputy sheriff was as a matter of law he was engaged in an "emergency operation" within the meaning of § 114-b of the V&T law.

Rusho v. State, 24 Misc.3d 752, 878 N.Y.S.2d 855 (N.Y.Ct.Cl.) (2009). Defendant parole officer was on an investigative mission, in an unmarked car with no emergency lights or siren, to locate a parole absconder and saw a vehicle that appeared to match the vehicle of the absconder and was in the process of turning to initiate pursuit. The Court held that the vehicle fell within the ambit of V&T 1104., i.e., that it was an "authorized emergency vehicle". V&T 132-a defines a "police vehicle" as a "vehicle owned by the state ... and operated by the ... law enforcement agency of such governmental unit". Thus a vehicle used by a state parole officer qualifies as such a "police vehicle". As for whether the officer was performing an "emergency operation", the Court held that, even though the internal documents indicated that the parole officer and his commanders did not see this as an "emergency", their categorization of it was not determinative. Instead, the Court looked to V&T 114-b, which defines "emergency operation". Said definition includes, "*pursuing an actual or suspected violator of the law"*. Since the officer was pursuing a parole absconder, he was engaged in an "emergency operation". The reckless standard thus applied. The Court held that the driver's failure to use the turn signal and to see plaintiff approaching were, as a matter of law, not "reckless", which involves "consciously or intentionally doing an act of unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow *and* the act is done with conscious indifference to its outcome". Summary judgment to defendant granted.

3. Can V&T 1104 Be Used As a Shield against a Comparative Negligence Defense? Split in the Departments.

Ayers v. O'Brien, 60 A.D.3d 27, 870 N.Y.S.2d 587 (3rd Dep't 2008). Plaintiff-deputy sheriff while on duty observed a vehicle, heading in the opposite direction, speeding on the highway. With the intent of making a U-turn to pursue the speeder, plaintiff pulled over to the right shoulder and activated his emergency lights. He then looked into his side view mirror and observed another vehicle (defendant's) coming from behind, but slowing down. He "assumed" that defendant had completely stopped and thus proceeded to initiate the U-turn. He was immediately struck by defendant's vehicle. He sued her, and she asserted an affirmative defense alleging that plaintiff's own culpable conduct caused or contributed to his damages such that any damage award must be proportionately diminished. Plaintiff moved to dismiss this defense pursuant to V&T 1104, in that he was engaged in the emergency operation of an authorized vehicle at the time of the accident, his own negligence could not be considered by the jury. Rather, he could only be held comparatively negligent if he acted in "reckless disregard for the safety of others." The motion court agreed with defendant, and found that as a matter of law he did not act with "reckless disregard", and thus dismissed the affirmative defense of comparative negligence. The Appellate Division reversed, and in so doing disagreed with both the Fourth Department and Second Department, which have taken a contrary position on this issue (*see McGloin v. Golbi*, 49 A.D.3d 610, 853 N.Y.S.2d 378 [2008]; *Sierk v. Frazon*,

32 A.D.3d 1153, 821 N.Y.S.2d 689 [2006]). Here, the Third Department reasoned that "applying the statute to an [emergency] operator's own claim for damages could result in potential financial windfalls to negligent operators of emergency vehicles and hold partially negligent bystanders responsible in a greater amount than otherwise permitted" and this "would be an unfair and unintended result of the statute."

B. V&T 1103(b) (Municipal Vehicles "Engaged in Work on Highway")

Small v. City of New York, 54 A.D.3d 747, 864 N.Y.S.2d 437 (2nd Dep't 2008). Since the municipal defendants were engaged in the removal of snow from a city bus stop with a front-end loader at the time of the accident, they could be found liable only if their conduct evinced a reckless disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, with a conscious indifference to the outcome pursuant to V&T 1103. The municipal defendants made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating that they complied with applicable work regulations and were not reckless in operating the front-end loader and in securing the work area, and the plaintiff failed to raise a triable issue of fact in response thereto. Even if the failure of the municipal defendants to utilize an additional guide person or other traffic warning devices at the worksite was reckless, it was not a proximate cause of the accident given the undisputed evidence of the grossly excessive speed of the plaintiff's decedents' vehicle, the highly intoxicated condition of its operator, and the failure of that operator to observe the large, brightly-colored front-end loader, which was illuminated by the streetlights along the roadway as well as by its own numerous lights and reflectors.

Hofmann v. Town of Ashford, 60 A.D.3d 1498, 876 N.Y.S.2d 588 (4th Dept 2009). Plaintiff sued the Town and the driver of its snow plow after the snowplow collided with her vehicle at an intersection. Defendants made a motion for summary judgment on the ground that the "reckless disregard" standard of care pursuant to V&T Law § 1103(b) applied, and they contended that they established as a matter of law that the snow plow operator's conduct was not reckless. The sole issue was whether the operator was "actually engaged in work on a highway" at the time of the collision and the Court concluded that he was not. Interpreting the Statute, the Court found that the inclusion of the language "actually engaged in work on a highway" indicates that the exemption applies only when such work is in fact being performed at the time of the accident. To conclude otherwise would render superfluous the phrase "actually engaged." Here, the record established that, at the time of the collision, the snowplow operator was not driving on part of his plow route but instead was traveling from one part of his route to another by way of a county road that he was not responsible for plowing. Further, the snowplow operator was driving with both blades of the snowplow raised, and was not sanding or salting the road. The exemption does not apply to a driver who is traveling from one work site to another, and it likewise did not apply here. Thus, the ordinary negligence standard of care applied. Two justices dissented (so this will likely go up!). In their view, the snowplow operator was operating the vehicle in the course of his duties, i.e., he had finished plowing one road on his route and was proceeding to the next road

assigned on his route, and thus there was an issue of fact whether he was "actually engaged in work on a highway."

X CLAIMS ON BEHALF OF FIREFIGHTERS AND POLICE OFFICER

A. Predicating GML 205-a or 205-e Claim on Violation of a Statute, Regulation, etc.

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.

B. Whether the Predicate Rule Constitutes a "Well Defined Body of Law"

Cusumano v. City of New York, 63 A.D.3d 5, 877 N.Y.S.2d 153 (2nd Dep't 2009). Plaintiff firefighter fell down a flight of stairs while attending Certified First Responder Defibrillator training in a building owned by the defendant City of New York. The plaintiff slipped on debris located at the top of the stairwell and could not grasp the handrail to prevent himself from falling. Plaintiffs predicated liability on violations by the defendant of Administrative Code of the City of New York § 27-375(f), which provided requirements for handrails located in interior stairs. The Court noted that GML 205-a does not require proof of "notice" as would be necessary to a claim in common-law negligence, i.e., actual or constructive notice of the particular defect on the premises causing injury". "The statute requires only that the circumstances surrounding the failure to comply indicate that the failure was a result of any neglect, omission, willful or culpable negligence[ ] on the defendant's part". Here, plaintiffs introduced sufficient evidence at trial for the jury to conclude rationally that the defendant violated Administrative Code §§ 27-127 and 27-128 by failing to maintain the stairwell in a safe condition based on the condition of the handrail. Dissent disagreed and found the regulatory sections either not applicable or not sufficiently indicative of a "well defined body of law".

Norman v. City of New York, 60 A.D.3d 830, 875 N.Y.S.2d 232 (2nd Dep't 2009). Police captain brought negligence action against city and job performance analysis corporation, seeking to recover damages for injuries sustained while performing physical fitness examination. Summary judgment granted to defendant because, although Labor Law § 27 (a) may serve as a proper predicate for a cause of action alleging a violation of GML 205-e, here the affidavit of the plaintiff's expert failed to raise a triable issue of fact as to

whether duct tape used to mark the gymnasium floor during the fitness examination constituted a recognized hazard.

Gover v. Mastic Beach Property Owners Ass'n, 57 A.D.3d 729, 869 N.Y.S.2d 593 (2008). The plaintiff-police officer was injured when a dock collapsed while he was standing on it during an investigation of a boat fire, but failed to establish a claim under GML 205-e. Plaintiff relied upon Brookhaven Town Code § 81-10, which set forth the standards for constructing residential docks and which was enacted after the dock had been erected. Thus, the plaintiffs failed to identify a specific safety standard that was violated by the defendants.

C. Whether Cop or Firefighter Was in "Scope of Performance of Duty" When Injured

Walters v. City of New York, 2009 WL 1395829 (New York Co. Sup. Ct. 2009). The plaintiff-firefighters were returning to their fire house after responding to an emergency call when they stopped to buy dinner. Not seeing a space large enough to park their fire truck without blocking a crosswalk, the firefighter-driver double parked in the eastern-most travel lane. There was a safety bulletin issued by FDNY prohibiting double parking of an FDNY vehicle in non-emergency situations, it was his practice. Because they were still on duty and could receive an emergency call at any time, one member of the team was required to remain with the truck to monitor for incoming calls and all the men were required to stay within close proximity of the truck and in radio contact with each other. A taxi driven struck the fire truck from the rear injuring two of the firefighters. They sued their fellow firefighters and the City under GML 205-a, premising it, inter alia, under Labor Law § 27-a. The City moved for summary judgment. The Court noted that there were no cases directly on point as to whether a firefighter who stops to purchase a meal, who is "in-service but out of quarters" and wearing firefighting gear, and who is limited as to how far from the vehicle he may go, is within the scope of performance of a duty for purposes of GML § 205-a. The Court here left it up to the jury, i.e., it found that a reasonable finder of fact could conclude that the firefighters were in the scope of performance of their duties as firefighters based on the broad language of the statute allowing firefighters to recover for injuries sustained "while in the discharge or performance at *any time or place* of *any duty imposed.*" The Court then addressed the City's second basis for seeking summary judgment: that Labor Law § 27-a cannot serve as a proper statutory predicate in this instance to support plaintiffs' GML § 205-a cause of action. Labor Law § 27-a requires a public sector employer to provide its employees with "a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees." Here the Court found that the mere fact that firefighters were injured while by the side of their parked FDNY rescue vehicle, as opposed to being at the actual scene of a rescue, did not mean that they were not within the confines of their "place of employment," as the term is used in Labor Law § 27-a. The Court drew guidance from the case of *Williams v. City of New York*, 2 NY3d 352, 364 (2004) where the Court of Appeals found that claims that generally arise from the risks "unique to police work or firefighting" are not a valid basis

for a Labor Law § 27-a violation. In the case at hand, the risk of being struck by a car while at the back of a double parked truck could not be deemed unique to firefighters. Therefore, in this case, Labor Law 27-a formed a valid predicate to a GML 205-a claim.

D. The "Relaxed" Causation Requirement

Brinkerhoff v. County of St. Lawrence, 24 Misc.3d 426, 875 N.Y.S.2d 877 (St. Lawrence Co. Sup. Ct. 2009). Plaintiff, widow of a New York State Trooper, commenced a civil action asserting causes of action as a result of her husband's work-related death. He was fatally shot while in the line-of-duty as his team was attempting to apprehend a fugitive who had violated his probation a number of times. The County Probation Department failed to abide by its own Probation Violation Policies, which required a timely arrest for violation of probation. The Court held that this did not satisfy even the "indirect" causation requirement of a GML 205-e cause of action. While it is true that delay of the arrest warrant may have permitted the fugitive to remain at large for several months, the delay was not a factor which indirectly produced this tragic result.

XI SCHOOL LIABILITY

A. Mistake of Suing City of NY Rather than NY City Bd of Education

Leacock v. City of New York, 61 A.D.3d 827, 877 N.Y.S.2d 420 (2nd Dep't 2009). City established its prima facie entitlement to judgment as a matter of law in this action arising from a slip-and-fall accident by showing that the accident occurred on public school premises, and that it did not operate, maintain, or control the public schools, which fall under "the exclusive care, custody and control of the [New York City] Board of Education, an entity separate and distinct from the City".

B. No Cause of Action for "Educational Malpractice" Exists

McGovern v. Nassau County Dept. of Social Services, 60 A.D.3d 1016, 876 N.Y.S.2d 141 (2nd Dep't 2009). Parent brought action against education board, alleging educational malpractice. The plaintiff alleged that the Board of Education ignored the concerns she expressed about her daughter's reading skills when the child was in elementary school, and inappropriately placed the child in a special education class when she reached middle school. The allegations sound in educational malpractice, which has not been recognized as a cause of action in this State because public policy precludes judicial interference with the professional judgment of educators and with educational policies and practices. Case dismissed.

C. Student on Teacher Assaults: ("Special Relationship" Generally Needed)

Dinardo v. New York City, 57 A.D.3d 373, 871 N.Y.S.2d 15 (1st Dep't 2008). Special education teacher brought action against city and Board of Education to recover damages for injuries allegedly sustained while protecting one student from attack by another student with history of aggressive and disruptive behavior. Appellate Court held that trial

court properly denied defendant's motion at the close of plaintiff's case for judgment as a matter of law. A jury could have rationally concluded that a special relationship existed between plaintiff and the Board, where the latter, in initiating a Type 3 referral to have the student who later attacked plaintiff transferred from her classroom to another program, assumed an affirmative duty to act on plaintiff's behalf; that the Board, through its agents, had knowledge that inaction could lead to harm; that there was direct contact between those agents and plaintiff; and that plaintiff justifiably relied on the Board's affirmative undertaking. Although no express promise was made to plaintiff by any agents of the Board, there is no requirement that the promise to protect be explicit. Plaintiff testified that her supervisor told her to "hang in there because something was being done to have [the student] placed or removed." The dissent disagreed, positing that plaintiff could not have been lulled into a false sense of security by being told something was being done and by the initiation of a Type 3 referral, especially since she knew it could take up to 60 days to process such a referral.

Zimmerman v. Board of Educ. of City of New York, 21 Misc.3d 1146, 880 N.Y.S.2d 228 (Bronx Co. Sup. Ct. 2008). Plaintiff was employed by defendant as a school counselor in a school for troubled kids. She was assisting another teacher with escorting a class of twelve (12) students from the school cafeteria to their classroom located on another floor in the school when a fight broke out between two students. One of the students left the cafeteria unattended to continue his fight with the student on the stairway, where plaintiff tried to break up the fight, and was injured. The issue was whether plaintiff had to show a "special relationship" with the school district in order to sue. Court noted that plaintiff was assigned to work in an atmosphere fraught with danger that manifestly was recognized by the State of New York when the Commission of Education promulgated rules establishing a ratio between a teacher and the number of emotionally disabled students that would compose a class size. Moreover, the Board in the case at bar, implicitly recognized the need to protect its teachers and employees such as plaintiff whose assigned tasks and responsibilities manifestly required the Board to hire security guards to protect its employees such as the plaintiff. The duty of the Board to provide adequate protection was intended to insure the safety of teachers and professional counselors such as plaintiff. The presence of a security guard in the cafeteria, the site of the initial physical engagement between the two students, one of whom was part of the twelve students assigned to Ms. Gibson clearly was a recognition by the Board that inaction could lead to harm to teachers and Zimmerman. However, no guard was present in the cafeteria where the fight started. Moreover, no evidence was offered by the Board explaining one of the fighting student's ability to move freely about the school without supervision. The jury found defendant negligent in failing to prevent the student from leaving the cafeteria and that defendant's negligence was a proximate cause of plaintiff Zimmerman's injury. The finding of negligence by the jury was consistent with the court's determination in *Meyers v. City of New York,* 230 A.D.2d 691, 646 N.Y.S.2d 685 (1st Dept.1996), *lv dismissed,* 89 N.Y.2d 1085, 681 N.E.2d 1306, 659 N.Y.S.2d 859 (1997) where a teacher was struck in her eye by a ball during an unsupervised recess. The Court in *Meyers* approved the finding that the Board of Education of the City of New York was negligent and the absence of proof of a special relationship "has no relevancy with respect to the Boards duty of [care] to its employees ." The Board here was

obviously aware of the need to have a plan in place at the school where emotionally disturbed children are placed that would provide adequate protection to students, their teachers and professionals such as plaintiff from physical altercations that could jeopardize their safety. Verdict upheld.

D. Negligent Supervision Claims (no "Special Relationship" needed)

1. Student on Student Assaults

MacNiven v. East Hampton Union Free School Dist., 62 A.D.3d 760, 878 N.Y.S.2d 449 (2nd Dep't. 2009). Student sued school district when a student, who was junior in high school and member of the winter track team, punched him in the face during physical altercation at practice involving other team members. In support of its motion for summary judgment, the school district submitted the infant plaintiff's deposition testimony that he "jumped in" to a fight between other team members which had commenced approximately 20 feet away from him and that he was punched in the face by a teammate after he kicked that teammate in the head. Such testimony established, prima facie, that the infant plaintiff was a voluntary participant in the fight, and thus, the alleged inadequacy of the school district's supervision could not be considered a cause of his injuries.

E.R. v. City of New York, 22 Misc.3d 1134, 2009 WL 654331 (Kings Co. Sup. Ct. 2009). Plaintiff was twelve years old student when she was sexually assaulted during school hours at school for the third time. The Board moved for summary judgment to dismiss the complaint arguing that the Board did not have notice that the incident would occur and that the school had provided reasonable security. The issue was whether knowledge by the Board of a prior act of sexual assault against the infant plaintiff by fellow students, although different ones, put the Board on notice which required the Board to take steps to insure that additional incidents did not occur. The Board argued that because different boys were involved in the prior accident, it was not on notice that an incident would occur. Plaintiff argued that the prior incident constituted notice and that triable issues of fact existed. Testimony from the principal of the school indicated that during class hours there would be a district guard and a school safety officer who were responsible for the school's common areas including the bathrooms. However, there was no specific procedure to check the bathrooms. During class hours, the district guard and monitor were supposed to walk and monitor the hallways. Court held that the rape was not unforeseeable as a matter of law. A rational jury hearing the trial testimony could have determined, as the jury in this case did, that the foreseeable result of the danger created by defendant's alleged lack of supervision was injury such as occurred here.

2. Vehicular, Pedestrian and Bus Accidents Blamed on School

Ravner v. Autun, 60 A.D.3d 1030, 876 N.Y.S.2d 453 (2nd Dep't 2009). Mother of a high school student who was killed when he was run over by a vehicle driven by a fellow pupil sued, inter alia, school district and a security service to recover damages for wrongful death. The accident happened in a student parking lot of the high school. The

school district established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not have sufficiently specific knowledge or notice of a particular danger at a particular time, so as to have reasonably anticipated the accident. Since the plaintiff failed to raise any issue of fact in opposition to that showing, the school district's motion for summary judgment was granted.

Lopez v. Beltre, 59 A.D.3d 683, 873 N.Y.S.2d 726 (2nd Dep't 2009). The infant plaintiff was crossing the street after school when he was struck by a vehicle owned and operated by a defendant attempting to make a left turn. The intersection was governed by traffic light signals, and the defendant Village had stationed a crossing guard at the intersection. The Village moved for summary judgment dismissing the complaint insofar as asserted against it, contending that its crossing guard was not negligent and that the negligent driver was the sole cause of the accident. Court held that the Village assumed a special relationship with the infant plaintiff, and that the plaintiffs raised triable issues of fact regarding the respective locations at the time of the accident of the infant plaintiff, the approaching car, and the Village's crossing guard, in addition to what the crossing guard did or did not see and do.

Davis v. Marzo, 55 A.D.3d 1404, 865 N.Y.S.2d 440 (4th Dep't 2008). Plaintiffs' decedents were killed in a motor vehicle accident. The decedents and the driver were all 17-year-old high-schoolers. They had left the school grounds for a lunch break and were en route to the school when the accident occurred. Pursuant to a newly instituted program at the school seniors who met certain academic standards were allowed to leave the school campus during their lunch periods with parental permission, and decedents and the driver had left the school campus pursuant to that program. Court granted School District's summary judgment motion. The contention of plaintiffs that decedents left the school campus without parental permission, even if true, would not subject the District to liability. Under the circumstances of this case, the District owed no duty either to decedents or to plaintiffs to prevent decedents from leaving the School campus in an automobile. Moreover, the record did not support plaintiffs' contentions that decedents were released into a dangerous situation. There was nothing in the record to indicate that the District had notice that the driver was an incompetent driver and the risk that he would be involved in an automobile accident was no greater than the risk incurred by the operation of an automobile by any average 17-year-old driver. There likewise is no support in the record for plaintiffs' contention that the District owed decedents or plaintiffs a special duty of care.

Cominsky v. City of Syracuse, 21 Misc.3d 1135, 875 N.Y.S.2d 819 (Onondaga Co. Sup. Ct. 2008). Infant plaintiff sued several defendants for injuries plaintiff sustained when struck by a car while crossing a street. She had disembarked from a bus and crossed the street behind the bus. As the bus pulled away from the curb, plaintiff attempted to run across the street. At the time of the accident, Cominsky was a sophomore in a private Catholic high school. The defendant School District had contracted with Centro, a private bus company, to transport students living in the city to schools such as this Catholic high school. The bus from which plaintiff disembarked was not used exclusively to transport pupils. The bus was "open to the public," although at the time of the accident

only students were on the bus. The Centro bus was not a yellow school bus, and it was not equipped with the safety features required for school buses pursuant to V&T law section 375. Plaintiffs sued for violation of that section of the V&T. Plaintiff also alleged violation of section 3635 of the Education Law (addressing school busing). The District moved for summary judgment claiming that plaintiff was out of the District's custody and control and the District did not release her into an affirmatively dangerous situation. The District maintained that plaintiff's injuries were caused by her decision to exit the bus before her designated bus stop, her failure to heed instructions she was given about bus safety, and her decision to run behind the bus into a busy street. Plaintiff argued that the District failed to provide adequate safety measures to transport plaintiff to and from school. She contended that the District was liable because it released her into a hazardous setting of its own making, contracted with Centro without justification, failed to transport her in a yellow school bus, and failed to establish safe bus stops. The Court granted defendant's motion for summary judgment, finding that section 3635 of the Education Law did not impose a duty on a school district to bus children, but only that, where busing is provided, it must be made available to all eligible children equally. The Court also relied on prior case law that held that "where a school district has engaged an independent contractor to provide busing, the school district cannot be held liable based on physical custody once the children board the contractor's bus" unless the school was "aware of an unreasonable risk posed by the conduct or nonfeasance of the bus company and failed to take steps to minimize the risk despite being in the best position to do so, liability may ensue". Here, plaintiff made no such showing. In fact, at the start of each school year, the District provided safety instructions for students to use when boarding and exiting Centro buses. These instructions included a warning that vehicles are not required to stop when a Centro bus is boarding or discharging passengers and directions to students to wait until the bus is at least one-half block away before attempting to cross the street. Plaintiff was in fact provided a safe place to alight from the bus. Plaintiff admitted that if she had stayed on the bus it would have looped around so she would not have had to cross the street. Instead, she opted to get off the bus early. Her decision to cut short her bus ride and her spontaneous decision to run across the street without waiting for the bus to move a sufficient distance to provide a clear path of vision for her and the drivers on the road superseded any alleged negligence of the District. The bus company, Centro, was also let out on summary judgment.

Molina v. Conklin, 57 A.D.3d 860, 871 N.Y.S.2d 230 (2nd Dep't 2008). Plaintiff was a seventh-grade student who stayed after school to participate in soccer practice, after which she walked home. Upon arriving home and realizing that she had forgotten her soccer uniform at school, she rode her bicycle back to school to get it. Outside the school, the injured plaintiff was struck by a car. She and her mother sued, inter alia, the School District, alleging that it released her into a potentially hazardous situation that posed a foreseeable harm. The District established its right to summary judgment on the grounds that it owned no duty to plaintiff as she was not on school property or under its physical control at the time of the accident. The plaintiff also sued the Town on the theory that it failed to provide crossing guards, but plaintiff failed to show the "special relationship" with the Town needed to impose liability on it for discretionary governmental activities.

3. Sporting Activities, Gym Class and Playground Liability

Mata v. Huntington Union Free School Dist., 57 A.D.3d 738, 871 N.Y.S.2d 194 (2nd Dep't 2008). Father brought action against school district on behalf of his five-year-old child, a kindergartner at the defendant school district. She was injured when she fell from the third rung of a "Serpentine Trek" set of monkey bars during recess. Evidence at trial established that kindergarteners were not allowed to use the monkey bar, but were allowed to use the adjoining slide. At the time of the accident, there were two playground aides on duty, supervising two classes of kindergartners. When the aide stationed in the area of the monkey bars stepped away to help a crying child near a swing set some 30 feet away, the infant plaintiff climbed on and then slipped off the monkey bars, sustaining injuries. The infant plaintiff testified that her hands were slippery because she had eaten pizza for lunch and had not washed the grease from her hands before going to the playground. The jury returned a verdict finding that, although the defendant school district had been negligent, its negligence was not a substantial factor in causing the accident. The plaintiffs argued weight of the evidence and inconsistent verdict. The majority affirmed the verdict against plaintiffs, but dissent would have reversed because the verdict absurdly found that the kindergartener "was wholly liable for her accident, despite the appalling lack of sufficient supervisory personnel, and the verdict shows a real probability of confusion on the part of the jury" and the "theory that the five-year-old plaintiff should be considered to have been comparatively negligent for not washing her hands after eating pizza is without merit".

Fithian v. Sag Harbor Union Free School Dist., 54 A.D.3d 719, 864 N.Y.S.2d 456 (2nd Dep't 2008). High school student struck in the head by a pitched ball during an interscholastic baseball game sued school district to recover damages for personal injuries, claiming that the district was negligent in providing and allowing the use of a cracked batter's helmet of which it had notice. The 17-year-old student was struck in the head by a pitched ball during an interscholastic baseball game, causing injury. Plaintiff's deposition testimony, along with affidavits of his teammates, raised a triable issue of fact as to whether the alleged cracked batter's helmet unreasonably increased the risk of injury, and was not part of the "risks" normally assumed in the game of baseball. Thus, Court denied defendant summary judgment.

Flanagan v. Canton Central School District, 58 A.D.3d 1047, 871 N.Y.S.2d 775 (3rd Dep't 2009). Infant plaintiff fifth-grader was pushed from behind by another fifth grade student while in the boy's locker room of defendant's middle school. Plaintiff claimed negligent supervision by defendant. The physical education teacher in charge of the boys' locker room on the day of the accident acknowledged that supervision of students is the most important part of ensuring their safety, and that it is recommended that physical education teachers go in the locker room at some point so that the students know that the teacher is close by in order to deter misbehavior, and that there is a great potential for misbehavior to take place in the locker room as compared to the gym. The teacher also stated that the last four or five minutes of a physical education class for this grade level are set aside to allow the students to go to the locker room to change, and, at the end of this particular physical education class, the students were getting out of control and not

listening to directions. This teacher had to lecture the class about stopping its activity and listening to when directed, and that when students were acting the way they were that day, a teacher would have a greater concern to supervise their behavior, including during the time when they were in the locker room. Notwithstanding acknowledgment of these facts, the record reflected that the teacher did not go into the locker room with the students, but stayed in the gym for not "more than three minutes" to talk with a student. It was during this period of time that Plaintiff was injured. Accordingly, there were questions of fact as to whether defendant could have reasonably anticipated the pushing incident that resulted in Flanagan's injury and whether the lack of supervision in the locker room was a substantial factor in bringing about the injury.

Bellinger v. Ballston Spa Central School Dist., 57 A.D.3d 1296, 871 N.Y.S.2d 432 (3rd Dep't 2008). Plaintiff's daughter, a fifth grader, was playing one-hand touch football at recess when she and a fellow teammate, both running toward the same opponent, collided on the field. The teammate's head hit plaintiff's daughter in the mouth, knocking out three of her teeth and fracturing a fourth. Plaintiff sued based on a theory of negligent supervision. Court granted summary judgment to defendant. Even assuming that plaintiff could demonstrate that the playground supervision was inadequate at the time of her daughter's injuries, defendant established a prima facie case for summary judgment by demonstrating that the alleged breach of negligent supervision was not a proximate cause of the injuries. It was undisputed that there was no history of disciplinary problems or rough play among any of the children involved, and that the collision was spontaneous and accidental. Defendant's experts also opined that coeducational one-hand touch football is appropriate for fifth graders, that safety devices such as helmets or mouth guards are not required during these games, and that even direct supervision could not have prevented the collision. Finally, testimony regarding the nature of the accident-an unintentional collision between children playing on the same team-indicates that it could have happened just as easily in a game of tag, basketball, or any other sport or game in which children were running in different directions. Plaintiff had opposed the motion with an expert affidavit which opined that "one-hand touch football is an inappropriate activity for fifth-graders during recess, especially without formal control of the game or the provision of proper safety equipment" and that "fifth-grade boys should not play touch football with fifth-grade girls at recess because the boys' development at age 10 is more advanced than the girls'." But the Court rejected this opinion as it was not based on "empirical data or foundational facts" and was based upon "unidentified and unsupported standards of supervision, safety and child development."

Muller v. Spencerport Central School Dist., 55 A.D.3d 1388, 865 N.Y.S.2d 455 (4th Dep't 2008). Student's parents brought action against school district to recover for injuries sustained by student during track practice when she was struck by discus thrown by her teammate. District filed third party complaint against teammate. Plaintiffs raised a triable issue of fact whether defendant's coaching staff "failed to provide proper supervision of the discus throwing activities, thereby exposing plaintiffs' daughter to unreasonably increased risks of injury".

Sarnes ex rel. Sarnes v. City of New York, 23 Misc.3d 1103, 881 N.Y.S.2d 366 (Richmond Co. Sup. Ct. 2009). This action arises from plaintiff's fall from a cross bar comprising a part of a scaffold located at or near a school in which he sustained personal injury. The infant claimed that while he was doing "chin-ups" on a cross bar supporting one of the sidewalk sheds, he was bumped from behind by another student and fell to the ground and sustained a broken arm. Plaintiff admitted that he was familiar with the area, and had previously done "chin-ups" using the same support bar. He also admitted that he was familiar with the warnings to stay clear of the scaffolding by the dean of the school and unidentified school aides. A school aide was on the other side of the school yard when the accident occurred. A school aide testified at deposition that whenever she saw one of the students playing on the scaffold, she would admonish him or her to stop and would administer "a time out". The Court concluded that the infant-plaintiff assumed the risk of falling inherent in doing chin-ups on the bar in question. Not only was he sufficiently familiar with the area and activity to appreciate the risk involved, but he admitted that school officials had repeatedly warned students not to play on the scaffolding. Moreover, the child admitted that he only fell after being bumped from behind by an unidentified third person. Where an injury is caused by another student, a plaintiff must establish that the school authorities could reasonably have anticipated the acts of the third party in order to impose liability for the accident, and no such evidence was presented here.

Gray v. South Colonie Central School Dist., 64 A.D.3d 1125, 2009 WL 2252885 (3rd Dep't 2009). Elementary school student's parents sued school district to recover damages sustained by the student in a fall from monkey bars on the school playground. The child testified at deposition that he fell as he tried to swing from the first to the third rung of the structure's horizontal ladder. Plaintiffs asserted, among other things, that the cushioning material beneath was insufficient and that defendants thereby breached their duty as governmental entities to maintain their playground facilities in a reasonably safe condition. Upon summary judgment motion, defendants submitted deposition testimony and other documentary evidence demonstrating that the playground was regularly inspected by various District employees and insurance representatives, that additional wood chips were added under the monkey bars fairly recently before the child fell, and that, in the course of a comprehensive inspection, a District employee determined that 12 inches of wood chips were present under the monkey bars. The employee alleged by affidavit that the District followed playground safety guidelines promulgated by the Consumer Product Safety Commission (hereinafter CPSC). Plaintiff failed to meet his burden in opposition.

Troiani v. White Plains City School Dist., 64 A.D.3d 701, 882 N.Y.S.2d 519 (2nd Dep't 2009). The infant plaintiff was injured when she fell from monkey bars in the school's playground during recess. At the time of the accident, there were approximately 100 students in the schoolyard with six teachers' aides to supervise them. One teacher's aide was specifically assigned to supervise the monkey bars upon which the infant plaintiff was playing at the time of the accident. The theory of liability was negligent supervision. Defendants established their entitlement to summary judgment by proving adequate supervision during recess and, in any event, that the accident occurred in such a manner

that it could not reasonably have been prevented by closer monitoring, thereby negating any alleged lack of supervision as the proximate cause of the infant plaintiff's injuries. In opposition to the motion, the plaintiffs failed to raise a triable issue of fact. They argued, inter alia, that the equipment did not comply with safety guidelines promulgated by the American Society for Testing and Materials. However, even if the equipment did not comply with those guidelines, such guidelines were insufficient to raise an issue of fact regarding negligent design or installation.

Doyle v. Binghamton City School Dist., 60 A.D.3d 1127, 874 N.Y.S.2d 607 (3rd Dep't 2009). Parent of fourth-grader injured while playing freeze tag in a physical education class brought action against school district, alleging negligent supervision. The incident occurred after plaintiff was apparently accidentally knocked to the ground by a fellow classmate in the course of play. A different classmate then tripped over him as he was trying to rise, causing plaintiff's face to strike the floor, resulting in serious injuries to two of his permanent teeth. Court held that, even assuming that plaintiff could ultimately establish his allegation that the teacher and teachers' aide were conversing at the time of the incident and such a circumstance could be perceived as negligent supervision, plaintiff failed to raise a question of fact that the alleged absence of adequate supervision was the proximate cause of the injury-causing event, rather than, as defendant contended, a "spontaneous and accidental" collision of brief duration involving a second student that even the most careful supervision could not prevent. Furthermore, plaintiff failed to dispute defendant's showing that the teacher-to-student ratio was adequate and the game itself was not "inherently unsafe.

4. Other Cases of Alleged Negligent Supervision

Esponda v. City of New York, 62 A.D.3d 458, 878 N.Y.S.2d 330 (1st Dep't. 2009). Mother of third-grade student who injured her wrist during fire drill when two other students bumped into her from behind, causing her to fall, brought action against city, among others, alleging negligent supervision. Plaintiffs' negligence action was premised on allegedly inadequate supervision by the infant plaintiff's elementary school. Plaintiff testified at her 50-h hearing that she was running to catch up with her teacher and her class when she either stopped or slowed down to a walk, at which point "two big kids" who were not in her class bumped into her. The theory of liability was that her teacher should not have been leading the line of students crossing the street, but instead should have been in the middle or rear of the line to "enable the teacher to observe the actions of his students and assure that none of his students were left behind." Court granted defendant's motion for summary judgment. Plaintiff's argument that the teacher should have been in the middle or at the end of the line defied common sense. If the teacher had not been at the front of the line, third graders would have been responsible for leading the way out of the school building and judging whether it was safe to cross a trafficked street. No reasonably prudent person would endorse that procedure.

Trupia ex rel. Trupia v. Lake George Cent. School Dist., 62 A.D.3d 67, 875 N.Y.S.2d 298 (3rd Dep't 2009). A summer school student was injured during break between classes when he fell off stairway banister he was attempting to slide down. Defendant moved to

amend the complaint to allege primary assumption of the risk. Court noted that traditionally this doctrine has been applied solely to situations in which a plaintiff has been injured 'while voluntarily participating in a sporting or entertainment activity." While defendants correctly asserted that both the Second and Fourth Departments had expanded application of the doctrine beyond sporting and recreational activities (*see e.g. Sy v. Kopet*, 18 A.D.3d 463, 463-464, 795 N.Y.S.2d 75 [2005], *lv. denied* 6 N.Y.3d 710, 813 N.Y.S.2d 46, 846 N.E.2d 477 [2006] [the plaintiff injured while attempting to enter his room through second story window]; *Lamandia-Cochi v. Tulloch,* 305 A.D.2d 1062, 1062, 759 N.Y.S.2d 411 [2003] [the infant plaintiff injured following fall while attempting to slide down wooden handrail]; *Westerville v. Cornell Univ.* 291 A.D.2d 447, 448, 737 N.Y.S.2d 389 [2002] [mental health care professional injured while participating in seminar to teach physical restraint techniques]; *Davis v. Kellenberg Mem. High School,* 284 A.D.2d 293, 294, 725 N.Y.S.2d 588 [2001] [the infant plaintiff injured while jumping off concrete bench]), this Court refused to adopt that line of reasoning because "extensive and unrestricted application of the doctrine of primary assumption of the risk to tort cases generally represents a throwback to the former doctrine of contributory negligence". Accordingly, Court refused to allow defendant to amend its answer to allege the defense of primary assumption of the risk.

E. Cases Involving Alleged Defective Playground Equipment

Carey v. Commack Union Free School District, No. 10, 56 A.D.3d 506, 867 N.Y.S.2d 525 (2nd Dep't 2008). The infant-plaintiff was swinging from a metal ring apparatus in a school playground when he lost his grip and fell. Plaintiff claimed school failed to supervise him and failed to maintain the playground in a reasonably safe manner. The defendant established in its summary judgment motion adequate playground supervision and, in any event, that lack of supervision was not a proximate cause of the accident. The nonmandatory guidelines relied upon by the plaintiff's expert were insufficient to raise a triable issue of fact. The plaintiff was engaged in an approved use of a playground apparatus at the time of the accident. The accident occurred in so short a span of time that closer supervision could not have prevented the accident.

Butler v. City of Gloversville, 2009 WL 1851002 (Court of Appeals 2009). Infant-Plaintiff fell off a playground slide on property owned and maintained by defendants. It was undisputed that at other playgrounds operated by defendants, protective ground cover, such as pea stone, had been installed around playground equipment to lessen injuries, as recommended in the U.S. Consumer Product Safety Commission's (CPSC) Handbook for Public Playground Safety and the American Society for Testing and Materials' (ASTM) Standard Consumer Safety Performance Specification for Playground Equipment for Public Use. On review of summary judgment motion, the Appellate Division had held that there was an issue of fact regarding defendants' duty to install ground cover but that defendants' expert established that the lack of an adequate ground cover was not the proximate cause of plaintiff's injuries. The case was thus dismissed. Two Justices dissented, however, finding that the conflicting expert opinions presented questions of fact that precluded summary judgment. The Court of Appeals held that defendants failed to meet their initial burden. Defendants' expert calculated that plaintiff

generated 480 foot-pounds of energy when she landed on the ground. Relying on prior research tests in which he used rubber mats, defendants' expert stated that protective surfaces were not sufficiently energy-absorbent to have prevented plaintiff's fractures. Despite the fact that the CPSC and ASTM guidelines were based on the use of various ground covers in addition to rubber mats, the expert opined that plaintiff would have been injured even if the other types of recommended ground covers had been installed. He did not, however, provide a scientific or mathematical foundation to substantiate this assertion, nor did he address the shock-absorbing capacity of pea stone, the ground cover used by defendants at their other playgrounds. Summary judgment was therefore not warranted since defendants failed to sufficiently demonstrate that their alleged negligence was not a proximate cause of plaintiff's injuries.

XII COURT OF CLAIMS PROCEDURE

A. Sufficiency of the Claim or Notice of Intention

Hogan v. State, 59 A.D.3d 754, 872 N.Y.S.2d 250 (3rd Dept 1999). Failure of prisoner, who brought action against state, alleging that correction officers negligently broke his radio by opening it during facility-wide frisk, to set forth total sum claimed, as required by statute governing filing, service, and contents of a claim or notice of intention, rendered claim jurisdictionally defective. The failure to set forth the total sum claimed and that the failure to strictly comply with the substantive pleading requirements of Ct of Claims Act § 11(b) "is a jurisdictional defect warranting dismissal for lack of subject matter jurisdiction". NOTE: THE AMENDMENT TO THE CT OF CLAIMS ACT 11(b) ushered in by the case of *Kolnacki v. State provides that the Claim shall state the total sum claimed* "except in an action to recover damages for personal injury, medical, dental or podiatric malpractice or wrongful death" in all other types of claims (for example, property damage claims), you are still required jurisdictionally to plead the total sum claimed.

B. Leave to Late-Serve a Claim or Notice of Intention

Note: The "factors" considered for granting permission to late-serve a Claim or Notice of Intention of Claim against the State, set forth in Court of Claims Act § 10(6), are similar to, but not identical to, the facts set out in GML § 50-e(5) for permission to late-serve a notice of claim against a municipality.

Smith v. State of New York, 63 A.D.3d 1524, 879 N.Y.S.2d 860 (4th Dept 2009). Plaintiff was injured on May 22, 2007 when he fell from a ladder while working as a sheet metal journeyman on a renovation and construction project at the Central New York Psychiatric Center. On September 17, 2007, claimants filed an application pursuant to Court of Claim Act § 10(6) seeking permission to file a late claim against respondent. Although claimants failed to provide an acceptable excuse for their failure to file a timely claim, the delay was minimal, claimants had sufficiently established the appearance of merit of the claim and we conclude that the remaining factors, i.e., whether respondent had notice of the essential facts constituting the claim, whether respondent had an opportunity to

investigate the claim, and whether the failure to file a timely claim resulted in substantial prejudice to respondent, also weigh in claimants' favor. In support of their application, claimants alleged that respondent had inspectors on the job site, that claimant's employer prepared an accident report and took photographs of the ladder and accident site, and that the employer was contractually obligated to procure insurance for respondent's benefit and to defend and indemnify respondent for claims arising from the renovation and construction project. Defendant failed to establish that any effort was made to determine whether it had notice of the accident or an opportunity to investigate, nor did it substantiate its conclusory allegations that it would be substantially prejudiced as the result of claimants' delay.