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N.Y. General Municipal Law Section 50-e(5): Ameliorating New York's Notice of Claim Requirements

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I. Introduction

A multitude of provisions scattered throughout New York's consolidated and unconsolidated laws require that plaintiffs serve "notice of claim" of their tort actions[1] on defendant public corporations.[2] New York General Municipal Law section 50-e governs the New York procedure for serving this notice of claim upon public corporations including when and upon whom service should be made, the form and contents of the notice of claim, and how notice of claim may be served.[3] Compliance with the requirements of section 50-e is a condi-

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1. TWENTY-FIRST ANN. REP. OF THE N.Y. JUDICIAL CONF. 286 (1976) [hereinafter cited as ANNUAL REPORT]. The most widely applicable of these provisions is GEN. MUN. LAW § 50-i(1), which provides in part:

> No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district . . . unless, (a) a notice of claim shall have been made and served . . . in compliance with section fifty-e of this chapter . . . .

N.Y. GEN. MUN. LAW§ 50-i(1) (McKinney 1977 & Supp. 1983-1984). Section 50-i is the most often applicable notice of claim provision because it applies to such a wide variety of public corporations. However, other specific public corporations, such as the New York City Health & Hospitals Corporation, have their own notice provisions. *See* N.Y. UNCONSOL. LAWS § 7401(2) (McKinney 1979). A complete listing of New York statutory provisions relating to notices of tort claims against public corporations can be found in Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes*, TWENTY-FIRST ANN. REP. OF THE N.Y. JUDICIAL CONF. 358, 420-21 (1976).

2. N.Y. GEN. CONSTR. LAW § 66(1) (McKinney Supp. 1983-1984) defines a public corporation as a municipal corporation, district corporation or public benefit corporation. A municipal corporation as defined under this section "includes a county, city, town, village and school district." *Id.* § 66(2). A district corporation as defined under this section "includes any territorial division of the state, other than a municipal corporation, . . . which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate . . . ." *Id.* § 66(3). A public benefit corporation as defined under this section "is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof." *Id.* § 66(4).

3. N.Y. GEN. MUN. LAW § 50-e(1-3) (McKinney 1977).

tion precedent to commencement of a tort action against a public corporation[4] whenever such notice of claim is required by law.[5]

Subdivision five[6] of General Municipal Law section 50-e is designed to mitigate the harshness of New York's statutory notice of claim requirements.[7] Under subdivision five, the courts are granted broad, general authority to use their discretion[8] to extend the time to serve notice of claim beyond the limit prescribed by General Municipal Law section 50-e(1)(a): ninety days after the cause of action arises.[9] The extension cannot exceed the statute of limitations for commence-

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4. Cohen v. Pearl River Union Free Sch. Dist., 51 N.Y.2d 256, 264, 414 N.E.2d 639, 644, 434 N.Y.S.2d 138, 142 (1980); Colantuono v. Valley Cent. Sch. Dist., 90 Misc. 2d 918, 920, 396 N.Y.S.2d 590, 591 (Sup. Ct. Orange County 1977); Clark v. City of New York, 98 Misc. 2d 660, 661, 414 N.Y.S.2d 481, 483 (Civ. Ct. Kings County 1979).

5. *See supra* note 1.

6. N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977) provides:

> Upon application, the court, in its discretion, may extend the time to serve notice of claim . . . . [T]he extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within [90 days] or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations . . .; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

Id.

7. *See* Beary v. City of Rye, 44 N.Y.2d 398, 411, 377 N.E.2d 453, 457, 406 N.Y.S.2d 9, 13 (1978); Weinzel v. County of Suffolk, 92 A.D.2d 545, 546, 459 N.Y.S.2d 112, 113 (2d Dep't 1983); Heiman v. City of New York, 85 A.D.2d 25, 26-28, 447 N.Y.S.2d 158, 159-60 (1st Dep't 1982); Robb v. New York City Hous. Auth., 71 A.D.2d 1000, 1001, 420 N.Y.S.2d 291, 292 (2d Dep't 1979); Zeicker v. Town of Orchard Park, 70 A.D.2d 422, 425, 421 N.Y.S.2d 447, 449 (4th Dep't 1979); Segreto v. Town of Oyster Bay, 66 A.D.2d 796, 796, 410 N.Y.S.2d 898, 899 (2d Dep't 1978); Dickey v. County of Nassau, 65 A.D.2d 780, 781, 410 N.Y.S.2d 333, 335 (2d Dep't 1978); Matey v. Bethlehem Central Sch. Dist., 89 Misc. 2d 390, 394, 391 N.Y.S.2d 357, 360 (Sup. Ct. Albany County 1977), *aff'd* 63 A.D.2d 807, 405 N.Y.S.2d 156 (3d Dep't 1978); ANNUAL REPORT, *supra* note 1, at 287, 288; Farrell, *1976 Survey of N.Y. Law*, 28 SYRACUSE L. REV. 379, 379 (1977).

8. *See Beary*, 44 N.Y.2d at 411, 377 N.E.2d at 457, 406 N.Y.S.2d at 13; ANNUAL REPORT, *supra* note 1, at 13.

9. *See* GEN. MUN. LAW § 50-e(5) (McKinney 1977).

ment of an action by the claimant against the public corporation.[10] Since the most widely applicable notice of claim provision has a one year and ninety day statute of limitations, the extension beyond the ninety day period usually cannot exceed one year.[11]

This Note will analyze the functions and malfunctions[12] of General Municipal Law section 50-e(5). Although subdivision five sets forth factors to guide the courts in using their discretion, the bounds of this discretion have not been explicitly delineated.[13] This Note will rank the factors set forth in subdivision five according to their intended weight in court decisions, and will suggest a standard judicial approach to subdivision five motions to extend the time to serve notice of claim. This approach would dispel the uncertainty that faces plaintiffs' counsel when they move to extend or defendants' counsel when they raise as a defense the ninety day limit of section 50-e(1). Before outlining this proposal, the Note will discuss the history, purposes and intent behind section 50-e(5) and will analyze New York case law involving section 50-e(5).

II. History

Effective September 1, 1976, General Municipal Law section 50-e was amended,[14] resulting in a total overhaul of the statute.[15] The amendment resulted in particularly significant changes to subdivision five, the ameliorative provision.[16] Prior to the amendment, a court could grant an extension only if certain "excuses" were available: plaintiff's infancy, plaintiff's mental or physical incapacity, or plaintiff's justifiable reliance upon settlement representations.[17] Under the present form of section 50-e(5), in addition to the above three grounds for extension,

> the court shall consider, *in particular*, whether the public corporation or its attorney or its insurance carrier acquired actual knowl-

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10. *Id.*

11. In all suits arising under GEN. MUN. LAW § 50-i, the most widely applicable notice of claim provision (set forth *supra* note 1), the statute of limitations is one year and 90 days, making the outside limit of the extension beyond the 90 day period one year. *See* D. SIEGAL, NEW YORK PRACTICE 33, n.12 (1978).

12. *See infra* text section V.

13. Phillips v. City of New York, 98 Misc. 2d 1124, 1126, 415 N.Y.S.2d 349, 350 (Civ. Ct. Kings County 1979).

14. 1976 N.Y. Laws ch. 745, § 2.

15. Zeicker v. Town of Orchard Park, 70 A.D.2d 422, 424-25, 421 N.Y.S.2d 447, 448-49 (4th Dep't 1979).

16. *See supra* note 7 and accompanying text.

17. *See* 1959 N.Y. Laws ch. 814; ANNUAL REPORT, *supra* note 1, at 301.

> the essential facts constituting the claim within [ninety days] or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including . . . whether the delay in serving notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.[18]

III. Purposes Behind Notice of Claim

The functional purpose of New York's notice of claim requirements is to protect a public corporation against stale or unwarranted claims and to enable it to conduct timely and efficient investigations.[19] The New York Court of Appeals has stated that the primary purpose of section 50-e "is to give a municipality prompt notice of such claims so that investigation may be made before it is too late for [it] to be efficient."[20] Specifically, " '[t]he only legitimate purpose served by the notice' is prompt investigation and preservation of evidence of the facts and circumstances out of which claims arise."[21] Other jurisdictions, too, have posited that the purpose behind their notice of claim requirements is prompt and efficient investigation.[22]

IV. Intent Behind the Amendment to Section 50-e(5)

The amendment to section 50-e followed a recommendation by the New York Judicial Conference.[23] The Judicial Conference stated that

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18. N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977)[emphasis added].

19. ANNUAL REPORT, *supra* note 1, at 286.

20. Winbush v. City of Mount Vernon, 306 N.Y. 327, 333, 118 N.E.2d 459, 462 (1959); *see* Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes*, TWENTY-FIRST ANN. REP. OF THE N.Y. JUDICIAL CONF. 358 (1976). Certain of Professor Graziano's recommendations were incorporated into the Judicial Conference CPLR Advisory Committee's report, which in turn formed the basis for the amendment to section 50-e. *See* ANNUAL REPORT, *supra* note 1, at 287.

21. *Beary*, 44 N.Y.2d at 412, 377 N.E.2d at 458, 406 N.Y.S.2d at 13 (quoting from ANNUAL REPORT, *supra* note 1, at 302; *see* Adkins v. City of New York, 43 N.Y.2d 346, 350, 372 N.E.2d 311, 312, 401 N.Y.S.2d 469, 471 (1977)).

22. *See, e.g.*, Murray v. City of Milford, 380 F.2d 468, 473 (2d Cir. 1967) (applying Connecticut law); Newlan v. State, 96 Idaho 711, 714, 535 P.2d 1348, 1351 (1975); King v. Johnson, 47 Ill.2d 247, 250-51, 265 N.E.2d 874, 876 (1970); Jenkins v. Board of Educ., 303 Minn. 437, 441, 228 N.W.2d 265, 269 (1979); Marino v. City of Union City, 136 N.J. Super. 233, 235-36, 345 A.2d 374, 375 (1975); *see also* 18 E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 53:153 (rev. 3d ed. & Supp. 1981) ("[p]rovisions as to notice of claim are enacted in furtherance of a public policy, and their object and purpose is to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit").

23. *Beary*, 44 N.Y.2d at 411, 377 N.E.2d at 457, 406 N.Y.S.2d at 13 (1978); Farrell, *1976 Survey of N.Y. Law*, 28 SYRACUSE L. REV. 379, 379 (1977).

the basic purpose of its statutory recommendations was to follow the suggestion of the Court of Appeals in *Camarella v. East Irondequoit Central School Board*[24] to reconsider "the harsher aspects of section 50-e . . . 'in order that a more equitable balance may be achieved between a public corporation's reasonable need for prompt notification of claims against it and an injured party's interest in just compensation.' "[25] The Judicial Conference sought to achieve this equitable balance by articulating the factors that should guide the court in permitting a late filing.[26] It intended to use the remedial amendments to render prior judicial decisions construing section 50-e rigidly and narrowly inapplicable.[27] The anticipated result of the amendments was to enable the courts to apply section 50-e more flexibly to achieve substantial justice.[28] Since the purpose of these remedial amendments was to mitigate the harshness of pre-amendment notice of claim decisions, the Judicial Conference did not intend to affect statutes which provided for a longer filing period than ninety days.[29]

The case law and comments addressing section 50-e's amendment overwhelmingly acknowledge the remedial intent behind the amendment.[30] It is clear from legislative history,[31] case law,[32] and commentators[33] that any suggested approach to section 50-e(5) motions to

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24. 34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1974).

25. ANNUAL REPORT, *supra* note 1, at 287-88 (quoting Camarella v. East Irondequoit Cent. Sch. Bd., 34 N.Y.2d 139, 142-43, 313 N.E.2d 29, 30, 356 N.Y.S.2d 553, 555 (1974).

26. ANNUAL REPORT, *supra* note 1, at 288.

27. *Id.*

28. *Id.*

29. *Id.*

30. See cases cited *supra* note 7 and accompanying text; State of New York, Office of Court Admin., Memorandum in Support of Assembly Bill No. 10346 (May 20, 1976) (included in Bill Jacket to 1976 N.Y. Laws ch. 745); N.Y. State Consumer Protection Bd., Memorandum Re: Assembly Bill 10346 (May 27, 1976) (included in Bill Jacket to 1976 N.Y. Laws ch. 745); Law Revision Comm., Memorandum Relating to Assembly Bill No. 10346 (May 28, 1976) (included in Bill Jacket to 1976 N.Y. Laws ch. 745); City of New York, Office of the Mayor, Memorandum Recommending Disapproval of Assembly Bill No. 10346 (June 3, 1976) (included in Bill Jacket to 1976 N.Y. Laws ch. 745); Graziano, *Recommendations Relating to section 50-e of the General Municipal Law and Related Statutes*, TWENTY-FIRST ANN. REP. OF THE N.Y. JUDICIAL CONF. 358 (1976); NOTE, *The Survey of New York Practice*, 53 ST. JOHN'S L. REV. 107, 159 (1978); Note, *The Survey of New York Practice*, 51 ST. JOHN'S L. REV. 201, 225 (1976); N.Y.L.J. April 16, 1973, at 5, col. 4 (proposing amelioration of section 50-e).

31. *See supra* notes 7 & 30.

32. *See supra* notes 7 & 30.

33. *See supra* notes 7 & 30.

extend must consider the remedial intent of the statute. In the words of the Court of Appeals in *Beary v. City of Rye*[34] "the flexibility introduced by the amendment appears designed to encourage greater fairness . . . ."[35]

V. New York Case Law

Section 50-e of New York's General Municipal Law has been amended[36] to add several factors for the courts to consider when deciding a motion to serve a late notice of claim, or a motion to deem a notice of claim to have been timely served. These added factors include: (1) "all other relevant facts and circumstances," (2) "whether the public corporation . . . acquired actual knowledge of the essential facts constituting the claim within [ninety days]" and, (3) "whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits."[37] This section of the Note will analyze New York case law to ascertain whether each of these factors has been treated by the various judicial departments in accordance with the remedial intent[38] behind the amendment.

A. Knowledge of the Essential Facts Constituting the Claim Within Ninety Days or Within a Reasonable Time Thereafter

The courts are directed by section 50-e(5) to pay particular attention to whether the public corporation, its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within ninety days or within a reasonable time thereafter.[39] The New York Court of Appeals has interpreted this requirement to mean knowledge of the underlying facts as distinguished from knowledge that a tort claim will be prosecuted.[40] This view has been widely

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34. 44 N.Y.2d 398, 377 N.E.2d 453, 406 N.Y.S.2d 9 (1978).
35. *Id.* at 412, 377 N.E.2d at 458, 406 N.Y.S.2d at 13.
36. *See supra* notes 14 & 15 and accompanying text.
37. See *supra* note 6 for complete text of section 50-e(5).
38. *See supra* notes 7 & 30 and accompanying text.
39. See *supra* note 6 for complete text of section 50-e(5).
40. *See Beary*, 44 N.Y.2d at 412-13, 377 N.E.2d at 458, 406 N.Y.S.2d at 14. The *Beary* court stated:

> [W]e consider it significant that the amendment expressly directs that whether the public corporation did or did not have knowledge be accorded great weight. Obviously, this is intended to meet legislative concern for assuring reasonably prompt investigative opportunity under the amendment. For even when a public body has had no formal alert that a

adopted by New York's lower courts.[41] However, the terms "actual knowledge" and "a reasonable time thereafter"[42] have been subject to various interpretations by the different judicial departments.[43]

Where a defendant public corporation has actual knowledge of the claim itself within the ninety day period, it is clear that a late filing will be permitted.[44] In *King v. City of New York*,[45] the defendant city had actual notice of plaintiff's claim within hours after it accrued.[46] The plaintiff in this case was accidentally shot in the face by a police officer who was in pursuit of an alleged criminal.[47] The plaintiff was questioned by both a police captain and an assistant district attorney just hours after the shooting.[48] Notice of claim was filed one day late due to a mistake in computing the ninety day period, but the defendant did not raise the late filing as a defense until after the statutory period of limitations on the tort action had lapsed.[49] The court held that, given the actual knowledge of the claim and the inaction of the City in not raising the defense until after the period of limitations had lapsed, (1) the City had waived its right to assert that the plaintiff was barred from applying for an extension after the statute of limitations had expired and (2) it was an abuse of discretion for special term to have denied the plaintiff's request that the notice of claim be deemed

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> claim in fact will be brought, actual knowledge of the facts within 90 days or shortly thereafter makes it unlikely that prejudice will flow from a delay in filing that does not reach beyond the statutory period of a year.

Id.

41. *See* Raczy v. City of Westchester, 95 A.D.2d 854, 854, 464 N.Y.S.2d 223, 224 (2d Dep't 1983); Lucas v. City of New York, 91 A.D.2d 637, 637, 456 N.Y.S.2d 816, 817 (2d Dep't 1982); Whitehead v. Centerville Fire Dist., 90 A.D.2d 655, 655-56, 456 N.Y.S.2d 450, 451 (3d Dep't 1982); Somma v. City of New York, 81 A.D.2d 889, 890, 439 N.Y.S.2d 50, 51 (2d Dep't 1981); Jakubowicz v. Dunkirk Urban Renewal Agency, Inc., 75 A.D.2d 1019, 1020, 429 N.Y.S.2d 333, 334 (4th Dep't 1980); Hubbard v. County of Suffolk, 65 A.D.2d 567, 568, 409 N.Y.S.2d 24, 24 (2d Dep't 1978); Wemett v. County of Onondaga, 64 A.D.2d 1025, 1026, 409 N.Y.S.2d 312, 314 (4th Dep't 1978); Van Horn v. Village of New Paltz, 57 A.D.2d 642, 643, 393 N.Y.S.2d 218, 219 (3d Dep't 1977).

42. See *supra* note 6 for complete text of section 50-e(5).

43. *See infra* notes 44 to 111 and accompanying text.

44. King v. City of New York, 90 A.D.2d 714, 715, 452 N.Y.S.2d 607, 608-09. (1st Dep't 1982); *see* Gelles v. New York City Hous. Auth., 87 A.D.2d 757, 758, 449 N.Y.S.2d 36, 36 (1st Dep't 1982) (housing department report was filed and claims investigator sent to site of accident within 90 days, thereby proving actual knowledge of essential facts constituting claim, and of claim itself).

45. 90 A.D.2d 714, 452 N.Y.S.2d 607 (1st Dep't 1982).

46. *Id.* at 715, 452 N.Y.S.2d at 608.

47. *Id.*

48. *Id.*

49. *Id.*

timely served.[50] It is not essential that the defendant public corporation be afforded actual knowledge of the claim itself; rather, actual knowledge of the essential facts constituting the claim is sufficient under the language of section 50-e(5).[51] Such knowledge may be acquired within ninety days or within a reasonable time thereafter.[52]

1. *Reasonable Time*

New York's judicial departments have consistently emphasized the importance of actual knowledge of the essential facts constituting the claim acquired after the ninety day period, but within a reasonable time thereafter. In *Heiman v. City of New York*,[53] the Appellate Division for the First Department stated that the reasonableness of the delay depends upon the circumstances, and that it was within the court's broad discretion under section 50-e(5) to find that notice three and one-half months after the expiration of the ninety day period was within a reasonable time.[54]

In *Centelles v. New York City Health & Hospitals Corp.*,[55] the Appellate Division for the Second Department unanimously modified a supreme court decision denying plaintiff's application for leave to serve a late notice of claim. In this case a plaintiff applied for leave to serve a notice of claim only twelve days beyond the statutory ninety day period. Such a delay was held to be "clearly" within a reasonable time after the expiration of the ninety day limitation.[56] Numerous other Second Department cases have considered actual knowledge of the essential facts constituting the claim that is acquired after the ninety day period has lapsed, and even as long as five months late, to be determinative in favor of granting the application to file a late notice of claim.[57]

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50. *Id.* at 715-16, 452 N.Y.S.2d at 608-09.

51. *See supra* note 40 and accompanying text.

52. N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977).

53. 85 A.D.2d 25, 447 N.Y.S.2d 158 (1st Dep't 1982).

54. *Id.* at 29, 447 N.Y.S.2d at 161 (plaintiff fell on sidewalk, was hospitalized periodically over a six month period, and filed notice shortly after his discharge from hospital).

55. 84 A.D.2d 826, 444 N.Y.S.2d 193 (2d Dep't 1981).

56. *Id.* at 826, 444 N.Y.S.2d at 194.

57. *See, e.g.*, Monge v. City of New York Dep't of Social Servs., 95 A.D.2d 848, 848, 464 N.Y.S.2d 207, 208 (2d Dep't 1983) (reversing supreme court's denial of leave to serve late notice of claim and holding that 5 months beyond 90 day period is within reasonable time); Segreto v. Town of Oyster Bay, 66 A.D.2d 796, 796-97, 410 N.Y.S.2d 898, 899 (2d Dep't 1978) (reversing supreme court order denying application to serve late notice of claim, and holding that "[t]he respondent had actual

In *Hutchins v. Village of Tupper Lake Housing Authority*,[58] the Appellate Division for the Third Department held that ten days beyond the ninety day period can be considered "within a reasonable time." In a later Third Department case, *Beatty v. County of Saratoga*,[59] the same court modified a denial of a motion to extend, holding that:

> although Saratoga County maintains it did not become aware of the essential facts constituting the claim until plaintiff sought the instant relief, we do not regard that circumstance as a sufficient basis to warrant the denial of her motion. The amended statute directs attention to the question of whether the municipality gained such knowledge within ninety days of the incident "or within a reasonable time thereafter" . . . . Here, the nature of the claim was made known within four months after the expiration of the ninety day period. We conclude that this was a reasonable time, particularly since it is not even contended that there has been any subsequent change[60] in the conditions of the highway which might hinder the investigation or defense of this action.[61]

In *Kornowski v. County of Erie*,[62] the Appellate Division for the Fourth Department affirmed the granting of an application to extend the time to file notice of claim on the grounds that (1) plaintiff moved to extend less than three weeks late and (2) defendants had suffered no prejudice as a result of plaintiff's delay in serving notice of claim. Prior to that decision, in *Snyder v. City of Utica*,[63] the same court reversed an unreported Special Term decision which denied the claimant's motion to extend. The appellate court granted the extension because (1) service of notice was only four days late and (2) no prejudice was shown. The Fourth Department implied in these cases that, although late, the notice of claim was served and knowledge was therefore acquired within a reasonable time. In an earlier case with similar facts, the Fourth Department more correctly explicated the

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knowledge of the essential facts at the time the motion was returnable (61 days after the 90 day period) which is clearly within a reasonable time after the expiration of the 90 day limitation"); Dickey v. County of Nassau, 65 A.D.2d 780, 781, 410 N.Y.S.2d 333, 335 (2d Dep't 1978) (17 days late is within reasonable time).

58. 72 A.D.2d 875, 421 N.Y.S.2d 946 (3d Dep't 1979).

59. 74 A.D.2d 662, 424 N.Y.S.2d 772 (3d Dep't 1980).

60. Subsequent change of the scene of the occurrence might well result in substantial prejudice to the defendant in maintaining a defense. *See infra* note 137 and accompanying text.

61. 74 A.D.2d at 663, 424 N.Y.S.2d at 773.

62. 75 A.D.2d 1019, 429 N.Y.S.2d 137 (4th Dep't 1980).

63. 69 A.D.2d 991, 416 N.Y.S.2d 126 (4th Dep't 1979).

reasons for their decision.[64] The court held: "[h]ere claimant served her notice of claim within 35 days after expiration of the 90 day statutory period . . . [and] we find that the filing was effected within a reasonable time after the expiration of the statutory period."[65]

2. *Actual Knowledge*

A court must determine not only what constitutes a reasonable time, but also what constitutes actual knowledge.[66] Although delay in filing may be inexcusable, the defendant's actual knowledge of the essential facts constituting the claim will, in the absence of substantial prejudice, weigh heavily in favor of extending the time for service of notice of claim.[67] It is therefore important to delineate some of the circumstances under which New York courts have or have not found such actual knowledge. As a threshold matter, it should be noted that a valid notice of claim, by definition, affords actual knowledge of the facts constituting the claim and of the claim itself.[68] When a plaintiff serves a late notice of claim and then moves to have that notice be deemed timely served, the next question should be whether the notice of claim was served within a reasonable time after the ninety day period.[69]

In one First Department case, a hearing held soon after an automobile accident was held to have provided the defendant with actual knowledge of the essential facts constituting the claim.[70] In another case in that department, the existence of a Housing Department report concerning the alleged occurrence was held to prove actual knowledge of essential facts.[71] In a Second Department case the court held that a partial description of an accident sent to the defendant city will not constitute actual knowledge because it did not contain all

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64. Rippe v. City of Rochester, 57 A.D.2d 723, 395 N.Y.S.2d 556 (4th Dep't 1977).

65. *Id.* at 723, 395 N.Y.S.2d at 557.

66. *See* N.Y. GEN. MUN. LAW § 50-e(5).

67. *See* Hubbard v. County of Suffolk, 65 A.D.2d 567, 568, 409 N.Y.S.2d 24, 24 (2d Dep't 1978). *See* cases cited *infra* note 108.

68. *See* N.Y. GEN. MUN. LAW § 50-e(2) for the required content of a valid notice of claim.

69. *See* Heiman v. City of New York, 85 A.D.2d 25, 28, 447 N.Y.S.2d 158, 160 (1st Dep't 1982).

70. *See* King v. City of New York, 90 A.D.2d 714, 715, 452 N.Y.S.2d 607, 608-09 (1st Dep't 1982) (court held that defendant had actual knowledge of claim itself). *See supra* note 44.

71. *See* Gelles v. New York City Hous. Auth., 87 A.D.2d 757, 758, 449 N.Y.S.2d 36, 36 (1st Dep't 1982).

essential facts constituting the claim.[72] Similarly, in another case in the Second Department, a police report which did not set forth the facts constituting the claim was deemed insufficient to provide the defendant with actual knowledge.[73]

Communication of the essential facts constituting the claim by the defendant to the plaintiff was held to prove actual knowledge of those facts.[74] In *Matter of Somma v. City of New York*,[75] an injured sanitation worker filed a line of duty injury report with the Department of Sanitation.[76] The court held that the City of New York was thereby provided with actual knowledge of the essential facts constituting the claim.[77] Similarly, a police report of an accident in which the police were involved and the plaintiff, a policeman, was injured afforded the defendant city with actual knowledge of essential facts.[78] In a malpractice action, the facts that the doctors were present and performed the acts in question and that the hospital maintained records of the occurrence were considered sufficient to furnish defendants with "actual knowledge of the essential facts constituting the malpractice claim."[79] The defendant board of education was considered to have actual knowledge where its supervisory employees were present at an accident and assisted the plaintiff.[80] Thus, where high-level employees are present at the occurrence which engenders the lawsuit, their knowledge will be imputed to the defendant employer.[81]

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72. *See* Matter of Raczy v. County of Westchester, 95 A.D.2d 854, 854, 464 N.Y.S.2d 223, 224 (2d Dep't 1983).

73. *See* Fox v. City of New York, 91 A.D.2d 624, 625, 456 N.Y.S.2d 806, 807 (2d Dep't 1982) ("police report merely described the collision . . . and made no connection between the accident and the handling of the oil spill by the responsible city agencies"); *accord* Morris v. County of Suffolk, 88 A.D.2d 956, 956, 451 N.Y.S.2d 448, 449 (2d Dep't 1982) (police report did not furnish actual or constructive knowledge of claim of defective road maintainance where it did not mention road condition).

74. Williams v. New York City Health & Hosps. Corp., 93 A.D.2d 885, 886, 461 N.Y.S.2d 411, 412 (2d Dep't 1983).

75. 81 A.D.2d 889, 439 N.Y.S.2d 50 (2d Dep't 1981).

76. *Id.* at 889, 439 N.Y.S.2d at 51.

77. *Id.* at 890, 439 N.Y.S.2d at 51.

78. *See* Lucas v. City of New York, 91 A.D.2d 637, 637, 456 N.Y.S.2d 816, 817 (2d Dep't 1982).

79. *See* Newson v. City of New York, 87 A.D.2d 630, 631, 448 N.Y.S.2d 224, 225 (2d Dep't 1982).

80. *See* Mestel v. Board of Educ., 90 A.D.2d 809, 809, 455 N.Y.S.2d 667, 667 (2d Dep't 1982) (plaintiff had also sent notorized report of incident to defendant one week after incident).

81. See *supra* notes 79 & 80 and accompanying text for cases in which knowledge of employees was imputed to their employers.

Similarly, in the Third Department, the presence of the defendant's employees at the occurrence which engendered the tort claim is likely to constitute actual knowledge of the essential facts on the part of the defendant. In *Whitehead v. Centerville Fire District*,[82] the presence of firemen at an accident involving a fire engine and the plaintiff's automobile afforded the defendant fire district actual knowledge of the essential facts constituting the claim.[83] Similarly, the presence of the school principal and superintendent at the scene of a bus accident was held to be determinative on the issue of whether actual knowledge existed.[84]

The defendant's conduct after the occurrence can show that it has actual knowledge. In *Van Horn v. Village of New Paltz*,[85] the fact that disciplinary proceedings were commenced against allegedly negligent police officers shortly after a shooting proved that the defendant city had actual knowledge of the essential facts constituting the claim.[86]

Unlike the Third Department,[87] the Fourth Department has held that knowledge of school officials will not be imputed to the defendant school district.[88] However, the Fourth Department, like the other three departments, has found actual knowledge to exist in a variety of circumstances, including one case in which it held that newspaper accounts of an accident afforded the defendant public corporation actual knowledge of the essential facts constituting the claim.[89] Like

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82. 90 A.D.2d 655, 456 N.Y.S.2d 450 (3d Dep't 1982).

83. *Id.* at 655-56, 456 N.Y.S.2d at 451.

84. *See* DeGroff v. Bethlehem Cent. Sch. Dist., 92 A.D.2d 702, 702, 460 N.Y.S.2d 630, 631 (3d Dep't 1983).

85. 57 A.D.2d 642, 393 N.Y.S.2d 218 (3d Dep't 1977).

86. *Id.* at 643, 393 N.Y.S.2d at 219.

87. *See supra* note 84 and accompanying text.

88. *See* Persi v. Churcheville-Chili Cent. Sch. Dist., 72 A.D.2d 946, 946-47, 422 N.Y.S.2d 232, 233 (4th Dep't 1979), *aff'd appeal dismissed*, 52 N.Y.2d 79, 419 N.E.2d 1078, 438 N.Y.S.2d 79 (1981)(reversing supreme court order granting permission to file late notice). However, a sharp dissent aptly pointed out that:

> The legislature in amending General Municipal Law § 50-e (1976) conferred upon the court broad discretion to grant leave in cases where the public corporation had knowledge of the incident . . . . In this case the appellant does not dispute the fact that the school officers were witnesses to the incident and were the parties who notified the parents. Therefore, since appellant had timely notice of the essential facts constituting the claim and an opportunity to investigate the claim's underlying circumstances and will not be substantially prejudiced by a late filing, it was proper for Special Term . . . to grant . . . the application.

Id. at 447, 422 N.Y.S.2d at 233.

89. *See* Jakubowicz v. Dunkirk Urban Renewal Agency, Inc., 75 A.D.2d 1019, 1020, 429 N.Y.S.2d 333, 334 (4th Dep't 1980).

the other departments, the Fourth Department weighs such actual knowledge heavily in its decision to grant claimants' motions to extend.[90]

3. *Cases Which Exceed the Bounds of Discretion Under Section 50-e*

Some courts extend their discretion by going beyond the usual 50-e(5) analysis and examining the merits of the plaintiff's case. For example, in *Goodson v. New York City Transit Authority*,[91] the First Department reversed, as an abuse of discretion, an order of the supreme court granting the claimant's motion for leave to serve a late notice of claim.[92] The claimant alleged that she was injured by stepping into a depression on a platform at the Seventh Avenue subway station and that she was aided by a uniformed Transit Authority (T.A.) employee.[93] However, neither the name of this employee nor any other identification of him was furnished to the court.[94] The court, therefore, determined that the T.A. was not afforded actual knowledge of the essential facts constituting the claim by the actions of this phantom employee.[95] The court also determined that neither the late notice of claim nor the moving papers gave the T.A. sufficient facts to have allowed them a chance to investigate.[96] The court,

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90. *See* Ziecker v. Town of Orchard Park, 70 A.D.2d 422, 428, 421 N.Y.S.2d 447, 451, (4th Dep't 1979); Wemett v. County of Onondaga, 64 A.D.2d 1025, 1026, 409 N.Y.S.2d 312, 314 (4th Dep't 1978).

91. 66 A.D.2d 675, 410 N.Y.S.2d 855 (1st Dep't 1978).

92. *Id.* at 675, 410 N.Y.S.2d at 856.

93. *Id.* at 675, 410 N.Y.S.2d at 855.

94. *Id.*

95. *Id.*

96. *Id.* at 675, 410 N.Y.S.2d at 856 ("[t]he location of the accident has not been specified, other than the general statement that the accident occurred within the station on the platform at the bottom of the stairway leading down to the Seventh Avenue IRT uptown trains . . . on the first step onto the platform off the stairway"). Whether the above-quoted information is sufficient to supply actual knowledge of the underlying facts presents a factual question. The First Department in *Goodson*, at least impliedly, determined that Special Term could not have reached an affirmative conclusion. It seems more likely that the court has allowed its determination of the merits of the claimant's case to interfere with its judgment on the above issue. It ended its opinion by stating: "Nor has claimant submitted any substantiating proof to establish a causal relationship between the injuries . . . and the alleged occurrence." *Id.* While such a determination may be allowable under a broad view of the court's discretion under section 50-e(5), courts should be careful not to allow their judgments as to the merits of claimants' cases to interfere with their determination of the explicitly delineated factor of whether actual knowledge was afforded the defendant public corporation.

however, overstepped the bounds of its discretion by allowing its determination of the merits of the plaintiff's case to sway its decision on whether actual knowledge existed.[97] However, even if the court had determined that such notice was sufficient, it would then have had to determine that the notice was received "within a reasonable time" after the ninety day period in order to grant the plaintiff's motion.[98] In this instance, notice was received two and one-half months beyond the ninety day period.[99]

One other decision must be noted because, although its holding is incorrect, it has never been overruled. In *Phillips v. City of New York*,[100] the plaintiff suffered multiple fractures in both arms resulting from a fall on a street which, allegedly, was maintained negligently. The plaintiff required nursing care for almost two months. Due to factors including pain, difficulty in carrying on her affairs and bad weather, she filed her notice of claim thirteen days late.[101] The court held that, in the absence of compelling circumstances, parties should be bound by the requirements of section 50-e(5). Since the plaintiff was not completely immobilized during the final weeks of the ninety day period, such compelling circumstances did not exist.[102] This court's analysis and decision is clearly incorrect. No requirement of complete incapacitation for ninety days exists under the amended statute.[103] The courts are directed to pay particular attention to whether the defendant possesses actual knowledge within a reasonable time after the ninety day period.[104] Here, a notice of claim which, by definition, affords actual knowledge, was filed thirteen days late. The court focused on whether notice to the plaintiff's employer, New York City, of the reasons for the plaintiff's lengthy absence would constitute actual knowledge to the defendant.[105] The court decided that such knowledge was not present, without addressing whether thirteen days was within a reasonable time given the circumstances.[106] In this case, the plaintiff was incapacitated for much of the ninety day period, the

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97. See *supra* note 96 for a discussion of how the court in *Goodman* is overstepping the bounds of discretion.

98. See *supra* note 6 for complete text of section 50-e(5).

99. 60 A.D.2d at 675, 410 N.Y.S.2d at 856.

100. 98 Misc.2d 1124, 415 N.Y.S.2d 349 (Civ. Ct. Kings County 1979).

101. *Id.* at 1125, 415 N.Y.S.2d at 350. For further criticism of *Phillips*, see *infra* notes 149-51 and accompanying text.

102. *Id.* at 1126, 415 N.Y.S.2d at 351.

103. See *supra* note 6 for complete text of section 50-e(5).

104. See *supra* note 6 for complete text of section 50-e(5).

105. 98 Misc. 2d at 1126, 415 N.Y.S.2d at 351.

106. *Id.*

defendant received actual knowledge within thirteen days after the ninety day period and there was no showing of prejudice to the defendant.[107] This is the type of case where section 50-e(5) should be invoked to avoid the harsh results engendered under the pre-amendment form of 50-e(5).[108] *Phillips* compares unfavorably with cases which emphasize the sufficiency of actual knowledge acquired within a reasonable time beyond the ninety day period.[109]

The *Phillips* decision illustrates both a trial court's mishandling of a 50-e(5) motion and the developing problem of inconsistency in trial level decisions. The many unreported trial level decisions that have been reversed to allow extensions[110] demonstrate the need for trial level courts to follow more strictly the higher courts' liberal construction of section 50-e(5) to allow plaintiffs to exercise their rights[111] without unnecessary appeal costs and concomitant delay.

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107. The court in *Phillips* held that any delay beyond 90 days is *ipso facto* prejudicial. *Id.* at 1127, 415 N.Y.S.2d at 351. This is clearly an improper interpretation of section 50-e(5). *See infra* note 144 and accompanying text. To hold that delay beyond 90 days is *ipso facto* prejudicial is nonsensical. Delay beyond 90 days in section 50-e(5) motions to extend will always exist. One of the primary considerations under this section is whether the public corporation will be substantially prejudiced. If the corporation were considered to be substantially prejudiced automatically because of the delay, there would be no need for the substantial prejudice factor to be in section 50-e(5).

108. *See* Camarella v. East Irondequoit Cent. Sch. Bd., 34 N.Y.2d 139, 142-43, 313 N.E.2d 29, 30, 356 N.Y.S.2d 553; *See supra* notes 25 & 28 and accompanying text.

109. See cases cited and discussed *supra* notes 52-65 and accompanying text.

110. *See* Weinzel v. County of Suffolk, 92 A.D.2d 545, 459 N.Y.S.2d 112 (2d Dep't 1983); Ansaldo v. City of New York, 92 A.D.2d 557, 459 N.Y.S.2d 303 (2d Dep't 1983); Lucas v. City of New York, 91 A.D.2d 637, 456 N.Y.S.2d 817 (2d Dep't 1982); King v. City of New York, 90 A.D.2d 714, 452 N.Y.S.2d 607 (1st Dep't 1982); Gelles v. New York City Hous. Auth., 87 A.D.2d 757, 449 N.Y.S.2d 36 (1st Dep't 1982); *In re* Alessi, 85 A.D.2d 725, 445 N.Y.S.2d 817 (2d Dep't 1981); Centelles v. New York City Health & Hosps. Corp., 84 A.D.2d 826, 444 N.Y.S.2d 193 (2d Dep't 1981); Beatty v. County of Saratoga, 74 A.D.2d 662, 424 N.Y.S.2d 772 (3d Dep't 1980); Snyder v. City of Utica, 69 A.D.2d 991, 416 N.Y.S.2d 126 (4th Dep't 1979); Segreto v. Town of Oyster Bay, 66 A.D.2d 796, 410 N.Y.S.2d 899 (2d Dep't 1978); Wemett v. County of Onondaga, 64 A.D.2d 1025, 409 N.Y.S.2d 312 (4th Dep't 1978).

111.

> [S]ince its amendment, subdivision 5 of section 50-e "is remedial in nature in that it was the intention to relieve some of the hardship incurred under the prior statute and, as such, is to be liberally construed." No longer need there be the harsh results encountered under the former section where unfortunate plaintiffs were forever foreclosed from the courts merely because of a harmless error . . . .

Robb v. New York City Hous. Auth., 71 A.D.2d 1000, 1001, 420 N.Y.S.2d 291, 292 (2d Dep't 1979) (quoting Matey v. Bethlehem Cent. Sch. Dist., 89 Misc. 2d 390, 394,

B. Substantial Prejudice in Maintaining a Defense on the Merits

Section 50-e(5) of the General Municipal Law explicitly states that courts deciding motions to permit late service of notice should consider whether the public corporation will be substantially prejudiced in maintaining a defense on the merits.[112] The existence or nonexistence of substantial prejudice has been termed one of the "two critical factors"[113] for courts to consider in deciding section 50-e(5) motions. Virtually all of the case law discusses the substantial prejudice factor, giving it weight equal to the actual knowledge factor.[114] The factors of substantial prejudice and actual knowledge are, perhaps, so significant[115] because they are closely related to each other[116] and to the fundamental purpose of notice of claim requirements: enabling a public corporation to conduct an efficient investigation.[117] In fact, it appears that the importance of actual knowledge of essential facts is that it generally coincides with a lack of substantial prejudice. Where there is actual knowledge and a corresponding lack

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391 N.Y.S.2d 357, 360 (Sup. Ct. Albany County 1977), *aff'd*, 63 A.D.2d 807, 405 N.Y.S.2d 156 (3d Dep't 1978)).

112. *See supra* note 6.

113. Lucas v. City of New York, 91 A.D.2d 637, 637, 456 N.Y.S.2d 816, 817 (2d Dep't 1982) (other factor is actual knowledge of essential facts).

114. *See supra* note 109 and accompanying text. *See also* Williams v. New York City Health & Hosps. Corp., 93 A.D.2d 885, 886, 461 N.Y.S.2d 411, 412 (2d Dep't 1983); *Lucas*, 91 A.D.2d at 637, 456 N.Y.S.2d at 817; Whitehead v. Centerville Fire Dist., 90 A.D.2d 655, 656, 456 N.Y.S.2d 450, 451 (3d Dep't 1982); King v. City of New York, 90 A.D.2d 714, 715, 452 N.Y.S.2d 607, 608-09 (1st Dep't 1982); Mestel v. Board of Educ., 90 A.D.2d 809, 809, 455 N.Y.S.2d 667, 667 (2d Dep't 1982); Somma v. City of New York, 81 A.D.2d 889, 889-90, 439 N.Y.S.2d 50, 51 (2d Dep't 1981); Hutchins v. Village of Tupper Lake Hous. Auth., 72 A.D.2d 875, 875, 421 N.Y.S.2d 946, 946 (3d Dep't 1979); Segreto v. Town of Oyster Bay, 66 A.D.2d 796, 796-97, 410 N.Y.S.2d 898, 899 (2d Dep't 1978); Hubbard v. County of Suffolk, 65 A.D.2d 567, 567-68, 409 N.Y.S.2d 24, 24-25 (2d Dep't 1978); Wemett v. County of Onondaga, 64 A.D.2d 1025, 1026, 409 N.Y.S.2d 312, 314 (4th Dep't 1982); Van Horn v. Village of New Paltz, 57 A.D.2d 642, 643, 393 N.Y.S.2d 218, 219 (3d Dep't 1977).

115. *See, e.g.*, Palazzo v. City of New York, 444 F. Supp. 1089, 1092 (E.D.N.Y. 1978).

> "While the question of the public corporation's knowledge of the facts constituting the plaintiff's claim had played a part in court decisions applying the pre-1976 statute as to whether to allow a late notice of claim . . . the amended statute appears to elevate that factor to a level of significance that it did not have under the pre-1976 statute."

Id. Despite lack of actual knowledge, other factors, including lack of substantial prejudice, warranted granting plaintiff's application to file notice of claim *nunc pro tunc*. *Id.*

116. Where there is actual knowledge of essential facts, there will generally be a lack of substantial prejudice. See *supra* cases cited in note 114.

117. *See supra* notes 19-24.

of substantial prejudice in preparing a defense on the merits, the investigatory purpose behind requiring notice of claim is not frustrated. Therefore, actual knowledge should be subordinate to the factor of substantial prejudice in a court's decision on a 50-e(5) motion. If the defendant shows that he will be substantially prejudiced in maintaining a defense on the merits, the extension generally will be denied. In *Tanco v. New York City Housing Authority*,[118] the First Department held that an eleven month delay in reporting an accident allegedly due to a defective staircase would substantially prejudice the defendants in investigating the accident.[119] In *Heather v. County of Rennselaer*,[120] a ten month delay in filing was found to be deleterious to the defendant public corporation's ability to conduct an investigation and resulted in a finding of substantial prejudice by the Third Department.[121] Both *Tanco* and *Heather* illustrate the relationship between actual knowledge and substantial prejudice. In both cases, the absence of knowledge of the essential facts underlying the claim resulted in substantial prejudice.

1. *Proving Substantial Prejudice*

Proving substantial prejudice is a difficult burden for the defendant.[122] The Fourth Department has held that a public corporation must make more than a mere conclusory allegation of prejudice for the court to find that the corporation will be substantially prejudiced.[123] In *Wemett v. County of Onondaga*,[124] the appellate division reversed the supreme court and held that the county's claim of prejudice was specious. The county had claimed prejudice merely because of the delay, but did not attempt to avoid prejudice by physically examining the injured plaintiff when it finally did receive notice.[125] In *Snyder v. City of Utica*,[126] a four day delay in filing did not prevent a finding of a clear lack of prejudice.[127] A finding that no substantial prejudice exists may, by itself, be sufficient grounds to grant the

118. 84 A.D.2d 501, 443 N.Y.S.2d 66 (1st Dep't 1981).
119. *Id.* at 501, 443 N.Y.S.2d at 67.
120. 88 A.D.2d 718, 451 N.Y.S.2d 283 (3d Dep't 1982).
121. *Id.* at 718, 451 N.Y.S.2d at 284.
122. *See* Farrell *Civil Practice*, 28 SYRACUSE L. REV. 379, 383 (1977).
123. *See* Jakubowicz v. Dunkirk Urban Renewal Agency, Inc., 75 A.D.2d 1019, 1020, 429 N.Y.S.2d 333, 334 (4th Dep't 1980).
124. 64 A.D.2d 1025, 409 N.Y.S.2d 312 (4th Dep't 1978).
125. *Id.* at 1026, 409 N.Y.S.2d at 314.
126. 69 A.D.2d 991, 416 N.Y.S.2d 126 (4th Dep't 1979).
127. *Id.* at 992, 416 N.Y.S.2d at 127.

extension.[128] Similarly, the Third Department has held that substantial prejudice was not proved where the defendant claimed prejudice based on possible memory loss six years after an occurrence engendering a tort claim.[129] In *Beatty v. County of Saratoga*,[130] the court held that, where the nature of the claim was known within four months after the occurrence and there had been no subsequent change in the condition of the highway, "[it failed] to see how the County of Saratoga will be made to suffer any prejudice as a result of this brief delay except, perhaps that the pertinent events might not be remembered as well by some of the witnesses."[131] Where there is no "demonstrable prejudice . . . tardy filing is hardly of moment."[132] If the defendant can "meet the alleged charges," there will not be a finding of substantial prejudice.[133]

The Second Department is also reluctant to find substantial prejudice. Access to hospital records will remove the possibility of substantial prejudice to a defendant public corporation in a medical malpractice action.[134] Actual knowledge of the essential facts will normally remove any possibility of substantial prejudice.[135] Conversely, without knowledge of the essential facts within a reasonable time, the public corporation will usually be able to demonstrate substantial prejudice.[136] Also, a change in the conditions which engendered the tort claim will result in substantial prejudice.[137]

The First Department has been the least consistent in its handling of substantial prejudice questions. In *Rodriguez v. City of New York*[138]

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128. *See* Kornowski v. County of Erie, 75 A.D.2d 1019, 1019, 429 N.Y.S.2d 137, 137 (4th Dep't 1980); *cf.* Baehre v. County of Erie, 94 A.D.2d 943, 943, 464 N.Y.S.2d 69, 70 (4th Dep't 1983) (need at least a showing of no substantial prejudice to receive extension).

129. DeGroff v. Bethlehem Cent. Sch. Dist., 92 A.D.2d 702, 702-03, 460 N.Y.S.2d 630, 631-32 (3d Dep't 1983).

130. 74 A.D.2d 662, 424 N.Y.S.2d 772 (3d Dep't 1980), *appeal dismissed*, 53 N.Y.2d 939 (1981).

131. *Id.* at 663, 424 N.Y.S.2d at 773.

132. Whitehead v. Centerville Fire Dist., 90 A.D.2d 655, 656, 456 N.Y.S.2d 450, 451 (3d Dep't 1980).

133. Bureau v. Newcomb Cent. Sch. Dist., 74 A.D.2d 133, 135, 426 N.Y.S.2d 870, 871 (3d Dep't 1980).

134. *See* Ansaldo v. City of New York, 92 A.D.2d 557, 557, 459 N.Y.S.2d 302, 303 (2d Dep't 1983); Alessi v. County of Nassau, 85 A.D.2d 725, 727, 445 N.Y.S.2d 817, 820 (2d Dep't 1981).

135. *See supra* note 116.

136. *See, e.g.*, Figueroa v. City of New York, 92 A.D.2d 908, 909, 460 N.Y.S.2d 119, 120 (2d Dep't 1983).

137. *See* Zarrello v. City of New York, 93 A.D.2d 886, 886, 461 N.Y.S.2d 410, 410-11 (2d Dep't 1983) (fall claimed to be due to icy conditions of street).

138. 86 A.D.2d 533, 446 N.Y.S.2d 50 (1st Dep't 1982), *appeal dismissed*, 58 N.Y.2d 899, 447 N.E.2d 80, 460 N.Y.S.2d 531 (1983).

the majority held that "there is no evidence in the record to conclude that the defendants have not been necessarily prejudiced,"[139] thus putting the burden on the plaintiff to show that the defendant will not necessarily be prejudiced.[140] The majority failed to require merely a showing that defendants had not been *substantially* prejudiced. A well-reasoned dissent in this case placed the burden of showing prejudice on the defendant.[141] In *Szvanka v. City of New York*,[142] the majority affirmed, without explanation, the unreported denial of an extension. The dissent would have placed the burden of showing substantial prejudice on the defendant, noting that "the record does not disclose the slightest intimation that the delay in serving the notice of claim prejudiced, much less substantially prejudiced, the respondent City. Indeed, Special Term did not even address that *dispositive* question."[143]

However, in *Heiman v. City of New York*,[144] the First Department affirmed without dissent the significance of the factor of substantial prejudice and placed the burden of showing substantial prejudice on the defendant.[145] Two subsequent decisions continued to weigh the

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139. *Id.* at 533, 446 N.Y.S.2d at 51.

140. *Id.*

141.

> A final factor also weighs heavily in plaintiff's favor. The statute also calls for consideration of the question "whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits." The defense of this claim . . . is hardly unpreparable. Indeed, the two-page affirmation of respondents' counsel . . . utterly fails to establish any prejudice at all . . . .

Id. at 534, 446 N.Y.S.2d at 52 (Birns, J., dissenting) (quoting N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977)).

142. 73 A.D.2d 877, 424 N.Y.S.2d 4 (1st Dep't 1980), *appeal dismissed*, 52 N.Y.2d 894, 418 N.E.2d 1324, 437 N.Y.S.2d 305 (1981).

143. *Id.* at 877, 424 N.Y.S.2d at 4 (emphasis added) (Sandler, J., dissenting). Judge Sandler added that it is obvious that the legislature intended to place primary emphasis on whether or not the delay resulted in substantial prejudice. *Id.*

144. 85 A.D.2d 25, 447 N.Y.S.2d 158 (1st Dep't 1982) (Judge Sandler wrote this opinion and the dissent in *Szvanka*, *supra* notes 142 & 143 and accompanying text).

145. The court stated:

> The amended statute further directs the courts to consider whether the delay "substantially prejudiced the public corporation in maintaining its defense on the merits." The City has urged the court to make a finding of "substantial prejudice" on the basis of the speculative possibility that the condition of the sidewalk in issue may have undergone a deterioration during the three and a half month period that elapsed between the expiration of the statutory period and the filing of the notice of claim. The argument is unpersuasive . . . . Even more decisive on the issue of substantial prejudice is the omission from the City's papers of any claim that the police officer who found plaintiff lying unconscious on the sidewalk

substantial prejudice factor heavily in granting extensions to serve late notice of claim. In *Gelles v. New York City Housing Authority*[146] and *King v. City of New York*,[147] the First Department continued to follow *Heiman* by requiring a showing of substantial prejudice.[148]

2. *Cases Which Exceed the Bounds of Discretion Under Section 50-e*

Phillips v. City of New York,[149] a Second Department civil court case which declared that any delay in filing is *"ipso facto"* prejudicial,[150] is clearly not followed in New York.[151] *Phillips* avoids the question of whether substantial prejudice exists by saying that any delay is prejudicial. This reasoning is inapposite to the intent behind the statute since all section 50-e(5) motions involve delay beyond ninety days while one of the primary factors under the statute is substantial prejudice. However, a lack of substantial prejudice, by itself, may not be a sufficient reason to grant an extension in the Second Department,[152] particularly where the delay is inexcusable.[153]

> was interviewed in an effort to determine whether he had observed the condition of the surrounding sidewalk . . . . Plaintiff should not be denied an opportunity to litigate on the merits on the basis of a finding of substantial prejudice where the City did not undertake the most minimal effort to determine the existence of facts that would have eliminated any possibility of prejudice and might in fact have confirmed the validity of plaintiff's claim.

Id. at 27, 447 N.Y.S.2d at 161 (quoting N.Y. GEN. MUN. LAW § 50-e(5)).

146. 87 A.D.2d 757, 449 N.Y.S.2d 36 (1st Dep't 1982) (reversing Special Term).

147. 90 A.D.2d 714, 715, 452 N.Y.S.2d 607, 609 (1st Dep't 1982) ("the record does not indicate that the City even claims that it has suffered any prejudice").

148. *See supra* notes 141-45 and accompanying text.

149. 98 Misc. 2d 1124, 415 N.Y.S.2d 349 (Civ. Ct. Kings County 1979).

150. *Id.* at 1127, 415 N.Y.S.2d at 351.

151. *See, e.g.*, Centelles v. New York City Health & Hosps. Corp., 84 A.D.2d 826, 827, 444 N.Y.S.2d 193, 194 (2d Dep't 1981) (claimant served notice of claim 12 days late; court held that no substantial prejudice was shown). See *supra* note 107 and accompanying text for further criticism of *Phillips*.

152. Morris v. County of Suffolk, 88 A.D.2d 956, 957, 451 N.Y.S.2d 448, 450 (2d Dep't 1982) (although no prejudice was shown, since delay was inexcusable, to allow an extension would emasculate section 50-e(5)). This logic is specious. Section 50-e(5) should be used as a shield to protect plaintiffs from the harshness of the notice of claim requirements and not as a sword for public corporations to avoid meritorious claims. Where there would be no prejudice to the public corporation, there seems to be no valid reason for denying the extension merely because of lack of excuse. *See* Kornowski v. County of Erie, 75 A.D.2d 1019, 1019, 429 N.Y.S.2d 137, 137 (4th Dep't 1980); Robb v. New York City Hous. Auth., 71 A.D.2d 1000, 1001, 420 N.Y.S.2d 291, 292 (2d Dep't 1979); Hubbard v. County of Suffolk, 65 A.D.2d 567, 567-68, 409 N.Y.S.2d 24, 24-25 (2d Dep't 1978); *supra* notes 23-35.

153. See *infra* notes 185-96 and accompanying text for a discussion of cases dealing with excuse as a factor in deciding section 50-e(5) motions.

Where a lack of substantial prejudice is combined with other factors in the claimant's favor, such as the public corporation's actual knowledge of essential facts, the extension will be granted.[154]

In *Lavoie v. Town of Ellenburg*,[155] an infant plaintiff was granted an extension of time to serve notice, but the plaintiff's father, injured in the same accident as his son, was denied an extension.[156] The court held that since the father's excuse of " 'distress and concern, . . . ignorance of the 90 day notice provision, and my efforts to run my household after the accident . . .' " was insufficient to explain the delay in filing, it would not grant the extension.[157] The court acknowledged the remedial nature of the 1976 amendment, but did not consider whether the two and one-half month delay was within a reasonable time.[158] Furthermore, the court never mentioned the word "prejudice" in its decision and seemed to ignore the 1976 amendment by requiring a valid excuse for the delay.[159]

C. Other Relevant Factors

1. *Necessity of Excuse for the Delay*

Section 50-e(5) directs the court to look at all relevant factors and also lists several factors to be considered.[160] Sufficient excuse is not one of the factors listed. Numerous courts, however, allow lack of an excuse to sway their decisions,[161] while others treat sufficient excuse as

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154. *See* Weinzel v. County of Suffolk, 92 A.D.2d 545, 546, 459 N.Y.S.2d 112, 114 (2d Dep't 1983); Lucas v. City of New York, 91 A.D.2d 637, 637, 456 N.Y.S.2d 816, 817 (2d Dep't 1982); Centelles v. New York City Health & Hosps. Corp., 84 A.D.2d 826, 826, 444 N.Y.S.2d 193, 194 (2d Dep't 1981); Segreto v. Town of Oyster Bay, 66 A.D.2d 796, 796-97, 410 N.Y.S.2d 898, 899 (2d Dep't 1978); Hubbard v. County of Suffolk, 65 A.D.2d 567, 568, 409 N.Y.S.2d 24, 24 (2d Dep't 1978).

155. 78 A.D.2d 714, 432 N.Y.S.2d 273 (3d Dep't 1979).

156. *Id.* at 715, 432 N.Y.S.2d at 274.

157. *Id.*

158. *Id.*

159. *Id.* See *infra* notes 160-82 for a discussion of the necessity of having a valid excuse for the delay.

160. See *supra* note 6 for complete text of section 50-e(5).

161. *See* Baehre v. County of Erie, 94 A.D.2d 943, 943, 464 N.Y.S.2d 69, 70 (4th Dep't 1983); Figueroa v. City of New York, 92 A.D.2d 908, 909, 460 N.Y.S.2d 119, 120 (2d Dep't 1983); Fox v. City of New York, 91 A.D.2d 624, 625, 456 N.Y.S.2d 806, 807 (2d Dep't 1982); Morris v. County of Suffolk, 88 A.D.2d 956, 957, 451 N.Y.S.2d 448, 449 (2d Dep't 1982); Goodson v. New York City Transit Auth., 66 A.D.2d 675, 675, 410 N.Y.S.2d 855, 856 (1st Dep't 1978).

a strict requirement without which they will not use their discretion to grant a claimant's motion to extend.[162]

Sufficient evidence exists to support a finding that the failure to mention an "excuse factor" in section 50-e(5) was not an oversight, but rather a deliberate omission.[163] As early as 1973, commentators proposed changes to section 50-e. Joseph Liff, Chairman of the Committee for Reform of the Law, suggested, as part of his proposed amendment to section 50-e, that a motion to extend be based on affidavits showing "a reasonable excuse" for the failure to serve timely notice.[164] Even more relevant is the fact that Professor Graziano, whose study spawned the present amendment to section 50-e,[165] included in his proposed amendment a requirement that a claimant provide the court with a reasonable excuse for the late filing.[166] Neither the Judicial Conference nor the state legislature adopted Professor Graziano's proposed reasonable excuse requirement.[167] Mario Cuomo, then Secretary of State, criticized the absence of a reasonable excuse requirement in a memorandum to the counsel to the Governor.[168] In addition, a reasonable excuse requirement can be found in a closely analogous ameliorative provision of another jurisdiction.[169]

The absence of an excuse requirement was clearly not an oversight.[170] But the fact that there is no strict requirement that a plaintiff have a reasonable excuse for the delay in filing does not mean that the courts are prohibited from considering that factor.[171] However, the

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162. *See* Rodriguez v. City of New York, 86 A.D.2d 533, 533, 446 N.Y.S.2d 50, 50 (1st Dep't 1982); Lavoie v. Town of Ellenburg, 78 A.D.2d 714, 715, 432 N.Y.S.2d 273, 274 (3d Dep't 1980); Szvanka v. City of New York, 73 A.D.2d 877, 878, 424 N.Y.S.2d 4, 5 (1st Dep't 1980), *appeal dismissed*, 52 N.Y.2d 894, 418 N.E.2d 1324, 437 N.Y.S.2d 305 (1981); *In re* Williams, 71 A.D.2d 684, 684, 419 N.Y.S.2d 18, 19 (2d Dep't 1979); Phillips v. City of New York, 98 Misc. 2d 1125, 1126, 415 N.Y.S.2d 349, 350 (Civ. Ct. Kings County 1979).

163. *See infra* notes 164-69 and accompanying text.

164. N.Y.L.J., April 16, 1973, at 5, col. 4.

165. *See supra* note 23.

166. *See* Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes*, TWENTY-FIRST ANN. REP. OF THE N.Y. JUDICIAL CONF. 358, 369 (1976).

167. *See* N.Y. GEN. MUN. LAW § 50-e(5); ANNUAL REPORT, *supra* note 1, at 291.

168. *See* Cuomo, Secretary of State, Memorandum Recommending Disapproval of Assembly Bill No. 10346 (July 8, 1976) (included in Bill Jacket to 1976 N.Y. Laws ch. 745).

169. N.J. STAT. ANN. § 59:8-9.(West 1982).

170. *See supra* notes 164-69.

171. The reason for plaintiff's delay in filing can certainly fit under the category of "all other relevant facts and circumstances. . . ." *See* N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977).

factors of actual knowledge of the essential facts and substantial prejudice should weigh far more heavily in any court's decision.[172]

In *Baehre v. County of Erie*,[173] the Fourth Department denied a motion to extend, allowing the lack of a sufficient excuse to weigh heavily in its decision when neither actual knowledge nor lack of prejudice had been shown.[174] However, where the public corporation has actual knowledge of the essential facts, or will not be substantially prejudiced, the absence of an excuse should not affect the court's decision.[175] For example, in *Hubbard v. County of Suffolk*,[176] the court granted the motion to extend, holding that, "[a]lthough the delay in filing the notice of claim was inexcusable, defendants have at all times had actual knowledge of the essential facts constituting the claim and have not been substantially prejudiced . . . ."[177]

However, numerous decisions which inexplicably require a sufficient excuse for the delay exist.[178] *Rodriguez v. City of New York*[179] holds that a sufficient excuse is a requirement for granting an extension. The court cites a case which was decided under the pre-amendment statute as authority for this proposition.[180] *Morris v. County of Suffolk*[181] holds that, even in the absence of prejudice, the fact that no reasonable excuse was proffered justifies denying the extension. Other cases emphasize the lack of an excuse without even considering the issue of substantial prejudice.[182]

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172. *See, e.g.*, Lucas v. City of New York, 91 A.D.2d 637, 637, 456 N.Y.S.2d 816, 817 (2d Dep't 1982); cases cited *supra* note 114.

173. 94 A.D.2d 943, 464 N.Y.S.2d 69 (4th Dep't 1983).

174. *Id. See also* Figueroa v. City of New York, 92 A.D.2d 908, 908, 460 N.Y.S.2d 119, 120 (2d Dep't 1983); Goodson v. New York City Transit Auth., 66 A.D.2d 675, 675, 410 N.Y.S.2d 855, 856 (1st Dep't 1978).

175. The absence of prejudice ensures that the purpose behind the notice requirement—to allow the public corporation to conduct a timely investigation—is fulfilled; the lack of excuse, then, is really irrelevant. See *supra* notes 112-48 for a discussion of substantial prejudice.

176. 65 A.D.2d 567, 409 N.Y.S.2d 24 (2d Dep't 1978).

177. *Id.* at 567-68; *accord* Somma v. City of New York, 81 A.D.2d 889, 889-90, 439 N.Y.S.2d 50, 51 (2d Dep't 1981).

178. *See supra* note 162.

179. 86 A.D.2d 533, 446 N.Y.S.2d 50 (1st Dep't 1982).

180. *Id.*

181. 88 A.D.2d 956, 451 N.Y.S.2d 448 (2d Dep't 1982).

182. *See* Fox v. City of New York, 91 A.D.2d 624, 625, 456 N.Y.S.2d 806, 807 (2d Dep't 1982); Lavoie v. Town of Ellenburg, 78 A.D.2d 714, 715, 432 N.Y.S.2d 273, 274 (3d Dep't 1980); Szvanka v. City of New York, 73 A.D.2d 877, 878, 424 N.Y.S.2d 4, 4-5 (1st Dep't 1980), *appeal dismissed*, 52 N.Y.2d 894, 418 N.E.2d 1324, 437 N.Y.S.2d 305 (1981). The courts' attentions were misdirected. The fundamental issue is whether defendant would be hindered in preparing a defense, not the worthiness of plaintiff's excuse. *See supra* text section III.

The other factors that the court can consider under section 50-e(5) are not limited to actual knowledge, substantial prejudice and excuse.[183] Other recurring factors are (1) whether the plaintiff acted with due diligence in finding an attorney and (2) whether that attorney acted expeditiously in requesting permission to file late notice of claim.[184]

VI. Analysis

The amendment to section 50-e(5) of the General Municipal Law was intended to ameliorate the hardship[185] of the prior notice of claim statute under which a claimant could file late notice only if he met specific prerequisites.[186] Under the amended statute, the courts are given broad discretion to extend the time to file late notice[187] but are directed by the legislature to pay particular attention to whether the defendant public corporation has acquired actual knowledge of the facts which constitute the claim.[188] This has generally been construed to mean actual knowledge, however acquired,[189] by the public corporation itself,[190] agencies[191] of the public corporation, or high-ranking officials[192] of the public corporation. Actual knowledge of the facts underlying the claim, rather than knowledge that a claim will actually be prosecuted, is required by section 50-e.[193] Actual knowledge can be acquired after the ninety-day period if it is acquired within a

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183. The courts consider all other relevant facts and circumstanses. *See* N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977).

184. *See* Raczy v. County of Westchester, 95 A.D.2d 854, 464 N.Y.S.2d 223, 224 (2d Dep't 1983); Fox v. City of New York, 91 A.D.2d 624, 625, 456 N.Y.S.2d 806, 807 (2d Dep't 1982); Robb v. New York City Hous. Auth., 71 A.D.2d 1000, 1001, 420 N.Y.S.2d 291, 292 (2d Dep't 1979); Segreto v. Town of Oyster Bay, 66 A.D.2d 796, 797, 410 N.Y.S.2d 898, 899 (2d Dep't 1978).

185. *See supra* note 7 and accompanying text.

186. *See supra* note 17 and accompanying text.

187. *See supra* note 8.

188. See *supra* note 6 for the text of section 50-e(5).

189. *See, e.g.*, Jakubowicz v. Dunkirk Urban Renewal Agency, Inc., 75 A.D.2d 1019, 1020, 429 N.Y.S.2d 333, 334 (4th Dep't 1980) (newspaper account of occurrence afforded public corporation actual knowledge of essential facts constituting claim). Notice of claim itself will provide actual knowledge of the essential facts. *See, e.g.*, Centelles v. New York Health & Hosps. Corp., 84 A.D.2d 826, 826, 444 N.Y.S.2d 193, 194 (2d Dep't 1981).

190. *See, e.g., Jakubowicz*, 75 A.D.2d at 1020, 429 N.Y.S.2d at 334.

191. *See supra* notes 75 & 78 and accompanying text. *But see* Tarquinio v. City of New York, 84 A.D.2d 265, 270, 445 N.Y.S.2d 732, 735 (1st Dep't 1982) (knowledge of city agency would not be imputed to defendant city).

192. *See supra* notes 80, 82 & 84 and accompanying text.

193. *See supra* notes 40 & 41.

reasonable time.[194] Reasonableness for this purpose has been interpreted as several months beyond ninety days,[195] and, of course, may vary with the particular circumstances.[196]

Actual knowledge of the essential facts correlates with a lack of substantial prejudice.[197] Where there is actual knowledge of the essential facts within a reasonable time, the public corporation will usually not be substantially prejudiced.[198] When these two factors exist in a particular case, the motion to extend should be granted.[199] Where, however, the public corporation will be substantially prejudiced in defending on the merits despite having actual knowledge, the court should deny the application to extend.[200] Substantial prejudice should consist of more than a conclusory allegation[201] and should only be found where a defense on the merits is unpreparable[202] because of lengthy delay[203] or changed conditions.[204]

Many courts seem reluctant to follow the direction of the legislature. They focus on a claimant's excuse for the delay[205] instead of on the results of delay; that is, whether it would result in substantial prejudice. For the purposes of motions to file late notices of claim, judges should avoid measuring the validity of both the plaintiff's claim[206] and the plaintiff's excuse,[207] particularly where no substantial prejudice is shown. The following proposed approach toward motions to serve late notice of claim would best achieve the "equitable balance"[208] sought by the legislature in enacting section 50-e(5).[209]

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194. N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977).

195. *See supra* note 57 and accompanying text.

196. *See supra* note 60 and accompanying text.

197. *See supra* note 116 and accompanying text.

198. See *supra* note 114 for cases regarding substantial prejudice to the public corporation.

199. The purpose behind the notice requirement would be fulfilled in this situation. *See supra* notes 19-22 and accompanying text.

200. Where substantial prejudice exists, the public corporation will suffer by virtue of not having been given timely notice. The purposes of notice of claim cannot be achieved and the court should deny the motion.

201. *See supra* notes 123, 124 & 129.

202. *See* Beary v. City of Rye, 44 N.Y.2d 398, 413-14, 377 N.E.2d 453, 459, 406 N.Y.S.2d 9, 14 (1978); *supra* note 134.

203. *See supra* notes 118-21 and accompanying text.

204. *See supra* notes 60, 61 & 137 and accompanying text.

205. *See supra* notes 169, 171 & 178-82 and accompanying text.

206. *See supra* note 96.

207. See *supra* notes 160-82 and accompanying text for a discussion of the necessity of having a valid excuse for the delay.

208. *See supra* notes 25 & 26 and accompanying text.

209. *See supra* notes 25 & 26 and accompanying text.

1. If the public corporation acquires actual knowledge of the essential facts constituting the claim and the public corporation will not be substantially prejudiced in maintaining a defense on the merits,

2. If the public corporation gains actual knowledge of the essential facts constituting the claim and it is nevertheless shown that the public corporation will be substantially prejudiced in defending on the merits, the strong tendency of the court should be to deny the extension.[211] The court should, however, consider all relevant facts including those listed in section 50-e(5),[212] the claimant's explanation for the delay and whether the plaintiff and his attorney acted with due diligence.[213]

3. If it is shown that the public corporation will not be substantially prejudiced by the delay, but that it did not have actual knowledge of the essential facts constituting the claim within a reasonable time, the strong tendency of the court should be to grant the extension unless there are overwhelming reasons to deny the application, such as those which would undermine the fairness inherent in section 50-e(5).[214]

VII. Conclusion

Section 50-e(5) of the General Municipal Law, as amended, was intended to ameliorate the hardship and inequity inherent in a statutory arrangement under which persons injured as a result of the negligent acts of public corporations are required to give notice to the corporation within ninety days. In order to ensure that motions to file late notice of claim are decided in accordance with this intention, courts should determine whether the public corporation has acquired actual knowledge of the essential facts constituting the claim within ninety days or within a reasonable time thereafter, and whether the

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210. *See* cases discussed and cited *supra* note 114 and accompanying text.

211. *See* cases discussed and cited *supra* notes 118-21 and accompanying text.

212. Other factors discussed in section 50-e include whether the plaintiff was an infant, disabled or relied on settlement representations. N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977).

213. *See* cases cited *supra* note 184 and accompanying text.

214. It is hoped that the proposed approach will help reduce the number of appeals arising from section 50-e(5) motions to extend by engendering more consistency at the trial level courts. The number of appeals and reversals documented in this Note reveals the uncertainty which faces attorneys litigating under this statute. By paying heed to the remedial intent behind the 1976 amendment to section 50-e, by more strictly following the direction of the legislature and by standardizing the basic approach to section 50-e(5) motions to extend the time to file late notice of claim, the courts will attain the equitable balance sought by the New York legislature.

public corporation would be substantially prejudiced in maintaining a defense on the merits. It is only when substantial prejudice will result, usually from a lack of actual knowledge on the part of the public corporation within a reasonable time, that the purpose behind the notice of claim requirement would be frustrated by allowing the late filing of notice of claim.

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