

Late Notices of Claim on Behalf of Infants

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A notice of claim must be served in accordance with General Municipal Law (GML) §50-e on any public corporation as a condition precedent to commencing a lawsuit against the corporation, and medical malpractice actions are no exception. The notice must generally be served within 90 days after the claim arises, although that requirement is satisfied if the notice of claim is filed within 90 days of a continuous course of treatment.¹ Where a notice of claim is not timely filed, GML §50-e[5] provides a court discretion to extend the time, provided the extension does not exceed the time limit for commencing an action. Therefore, an application for a late notice of claim sounding in medical malpractice on behalf of an infant must be brought within the 10-year statute of limitations running from the date of the malpractice.²

This column examines two Court of Appeals decisions addressing such applications—*Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531 (2006), and *Wally G. ex rel. Yoselin T. v. New York City Health and Hospitals Corp.*, ___ N.Y.3d ___, 2016 WL 3188975 (2016). Both affirmed Appellate Division decisions denying motions for late notices of claim on behalf of infants allegedly injured as a result of malpractice around the time of their birth. Late notice motions are particularly important in cases of this nature because the parents themselves often will not know that there was malpractice or even an injury until months or years later.

While the combined implication of those decisions would appear ominous for such applications, the results must be construed in the context of the Court of Appeals' limited review of those discretionary determinations. Regardless, the Court of Appeals has offered little solace to young victims of malpractice in public hospitals whose parents did not file a timely notice.

GML §50-e[5] specifies the factors to be considered in deciding an application for a late notice of claim. Insofar as pertinent to this column, it provides:

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 the 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...and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

Most of the above language was added by a 1976 amendment that expanded the grounds on which a court may allow a late filing.³ Before that, this discretion was limited to three circumstances, one of which was infancy or incapacity and it expressly required that the disability be the reason for the failure to timely serve the notice. The amendment removed that requirement.

Williams Case

The infant claimant in *Williams* was born at a county hospital in September 1993 via forceps delivery after attempts at vacuum extraction had failed. The hospital chart indicated that he had good Apgar scores and that the delivery was without complication, but also that he had suffered a broken clavicle. He began experiencing seizures at 1 or 2 years of age. An EEG performed in 1995 was normal, but EEGs in 1998 and 1999 were not.

A notice of claim was not served until he was nearly 10 years old, and a motion was made to permit the late notice. It was supported by a physician's affidavit asserting that based upon its records, the hospital knew or should have known that complications would and did occur as a result of departures from proper practice. The motion was opposed on the ground that the disability was not apparent until the infant began having seizures and developmental delays at age 1 or 2. The Supreme Court granted leave to serve the late notice, but the Second Department reversed on the law and as a matter of discretion. The Court of Appeals affirmed the Appellate Division's determination, finding that it had not abused its discretion. It analyzed three factors—actual knowledge of the essential facts, infancy and prejudice.

On the first, the court agreed with the plaintiff that the proper inquiry is whether the defendants had actual knowledge of the essential facts constituting the claim, as opposed to the specific legal theory, but found that the Appellate Division applied that standard. It noted that while the hospital chart documented a difficult delivery, "when it was over there was scant reason to identify or predict any lasting harm to the child, let alone a developmental disorder or epilepsy."

Citing the Apgar scores and the normal EEG two years later, the court stated that the defendants could have concluded that there was nothing wrong with the infant when he was discharged from the hospital with nothing more than a broken clavicle. Without more, the court found, the hospital chart "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 during the birth process."

With regard to infancy, the plaintiff argued that the Appellate Division improperly required proof of a nexus between the infancy and the failure to serve a timely notice. The court acknowledged that the 1976 amendment removed the requirement that the late notice be related to the infancy, but observed that such a nexus, "while not a requirement, remains a statutory factor that a court should take into account." It observed that the Appellate Division noted the absence of a nexus, but did not treat it as fatal to the application. It reasoned that while causation of the delay by the infancy "would make a more compelling argument to justify an extension," its absence "may make the delay less excusable, but not fatally deficient."

On the question of substantial prejudice, the court found that while the 10-year delay in moving is not dispositive, it is influential. It observed that the defendants' knowledge of the essential facts constituting the claim "is an important factor in determining whether the defendant is substantially prejudiced by such a delay," and saw no cause to disturb the Appellate Division's determination of no knowledge. Noting that the directive to consider all relevant facts and circumstances "provides flexibility for the courts and requires them to exercise discretion," it found no abuse of that discretion by the Appellate Division.

Before turning to the court's more recent decision, some comments regarding *Williams*. First, it is difficult to conceive of a circumstance in which there is no nexus between infancy and lateness where a child is injured at birth. The very latest that an application for a late notice can be made is when the child is ten years old, and no child of that age or less has any ability to protect his or her legal rights. Since children of such tender years are entirely dependent on their parents or guardians, the nexus must be presumed.

As the court recognized in *Matter of Murray v. City of New York*, 30 N.Y.2d 113, 118 (1972), "[o]nly where the infant has attained the age, or has demonstrated a certain capacity whereby he may be said to have knowingly acted or refrained from acting, usually the ages of 18-20, will he be held strictly accountable for a failure to comply with the statutory directive, whether it be his neglect or that of his parents or retained counsel." Infancy should always militate in favor of granting permission for a late notice, so long as the defendant is not prejudiced by the delay.

There can be no such prejudice where the defendant had actual knowledge of the essential facts underlying the claim. Citing the 1976 Judicial Conference report that precipitated the amendment of that year, the court noted in *Matter of Beary v. City of Rye*, 44 N.Y.2d 398, 412 (1978), that "[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." Actual knowledge of the facts underlying the claim will always put a defendant on notice, such that it will have a reason to preserve the evidence. In fact, medical malpractice actions are almost always founded upon the medical records, which preserve the evidence. Where that is the circumstance, there will be no prejudice by the late notice.

The court in *Williams* found that the Apgar scores and normal EEG at 2 years of age could have led the defendants to conclude there was nothing wrong with the infant when he was discharged. However, EEGs two years later could not have factored into the defendants' knowledge during the 90 days after discharge, and evidence in the chart of difficulties in the delivery provides actual notice of a potential birth-related injury. The evidence preserved in the chart should be sufficient to prevent prejudice to a defendant. In short, where the claim is based on the records, the purpose of a notice of claim is protected, the defendant is not likely to be prejudiced by the delay, and in such a circumstance, a young child who could not protect his or her rights should not be penalized.

'Wally G.'

Nevertheless, the restrictive direction set upon in *Williams* was continued in *Wally G*. The infant claimant in that case was delivered prematurely at 7 months gestation by emergency cesarean section on June 15, 2005. The defendant's records indicated that the infant's mother presented to the defendant HHC's hospital (Health and Hospitals Corporation) on multiple occasions complaining of vaginal bleeding and blood clots, was ultimately diagnosed with a possible chronic placental abruption, and was discharged on each occasion. The records also indicated that she returned to the hospital with bleeding, clots, symptoms of chorioamnionitis, and fetal heart rate abnormalities, and a cesarean section was performed for placental abruption.

The baby's Apgar scores were 5 at one minute and 7 at five minutes. He had hypoxia, was transferred to the neonatal intensive care unit and was placed on a ventilator. He suffered a grade III intraventricular hemorrhage (IVH), which an attending physician told them may mean there was possible brain damage, and a referral was made for early intervention. He was discharged on Aug. 10, 2005, in stable condition. Five months later, he was brought back to the hospital with complaints of seizures. He was eventually diagnosed with cerebral palsy, a seizure disorder and speech deficits.

A notice of claim was served on Jan. 14, 2007, and a lawsuit was started in August of 2008. A motion to deem the late notice timely was brought in December 2010, supported by medical records and expert affidavits opining that the child's injuries were the result of deviations from the standards of care in failing to prescribe antibiotics to the mother during the earlier visits, not performing a cesarean section sooner, and not immediately intubating the baby after birth. The defendant cross-moved to dismiss for failure to timely serve the notice of claim. The Supreme Court denied the plaintiff's motion and granted the cross-motion.

The Appellate Division affirmed, with two judges dissenting, and a divided Court of Appeals affirmed in a 4-3 decision. The majority found that the plaintiff's expert affidavits, interpreting the records, posited that a different course of treatment could have been taken and could have avoided the injuries, but that this does not address whether the defendant "had actual knowledge of the essential facts necessary to properly defend itself in the underlying action." The majority further rejected the notion that the records need only "suggest" an injury from malpractice:

Contrary to plaintiff's argument and the rationale of the dissent below, the medical records must do more than "suggest" that an injury occurred as a result of malpractice. That argument implies that so long as medical experts reasonably disagree as to whether, based on their respective interpretations of the medical records, the medical staff deviated from the standard of care, a factual question is present and an application for service of late notice must be granted as a matter of law.

Quoting *Williams*, the majority held that the records "must 'evince that the medical staff, by its acts or omissions, inflicted an [] injury on plaintiff...' in order for the medical provider to have actual knowledge of the essential facts." Whether they do so, the majority stated, rests in the sound discretion of the court. Noting that the Court of Appeals' review is "limited to whether there was an abuse of discretion in denying service of late notice," the majority discerned no abuse.

The dissenting judges reached a contrary conclusion. They agreed with the majority that the standard under *Williams* "requires that the hospital records evince actual knowledge that the medical staff, by its acts or omissions, inflicted injury on the plaintiff." However, they found that standard satisfied by the medical records and expert affidavits submitted by the plaintiff.

The dissent noted that "[a]ll of the facts relied upon by Wally to support his claims of medical malpractice are in HHC's medical records...." It identified multiple documented facts in the records, and found "[m]ost compelling ... the discussion between the hospital's medical staff and Wally's parents concerning the risk of brain damage after Wally suffered the IVH," which

"clearly indicates that the hospital was aware that the conditions under which Wally was born could have lasting effects." While the defendants' experts asserted that IVH and the other injuries are common with prematurity, the dissent insisted that the merits of the claim "must be distinguished from the conceptually separate legal question of whether the medical records put HHC on actual notice that its staff may have harmed Wally."

The dissent found that since the records provided actual knowledge, the defendant was not prejudiced. It further noted that although the notice was served late without court authorization, it "clearly put HHC on notice of Wally's legal claims, allowing it to commence its investigation." The dissent concluded by noting that since GML §50-e[5], a remedial statute, is to be "liberally construed and not present a barrier to a legitimate claim," it was an abuse of discretion to deny the motion.

Discretion to Lower Courts

The majority's holding in *Wally G.* is sobering. The infant claimant's expert affidavits established that the defendant's records provided actual knowledge of the facts underlying the claims of malpractice, and the grade III IVH alone (even without the discussion between the attending and the parents) demonstrates notice of potentially severe injury. Nevertheless, the significance of this holding ought not be overblown. The Court of Appeals reviewed for an abuse of discretion, and the majority opinion clearly stated that there was sufficient evidence in the record to support the lower courts' exercise of their discretion.

The record seems equally capable of supporting an affirmance by the court if the lower courts had permitted the late notice. In other words, the majority's decision speaks more to its limited review of discretionary decisions by the Appellate Division than to the substantive requirements for a late notice. However, *Wally G.*, clearly indicates that where the Appellate Division denies permission for a late notice on behalf of a child injured at birth, that plaintiff will need a very powerful record for the Court of Appeals to overturn that result.

Endnotes:

1. See *Young v. New York City Health & Hosp. Corp.*, 91 N.Y.2d 291, 295-96 (1998); *Allende v. New York City Health & Hosp. Corp.*, 90 N.Y.2d 333, 337-38 (1997).
2. See *Matter of Daniel J. v. New York City Health & Hosp. Corp.*, 77 N.Y.2d 630, 633-34 (1991).
3. See *Matter of Beary v. City of Rye*, 44 N.Y.2d 398, 407 (1978).