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I. INTRODUCTION

On Thanksgiving Eve 1979, an unsupervised second-year OB-GYN resident physician performed operative deliveries of twins.[1] That inexperienced resident physician applied forceps to extract a first-born twin who would be named Amanda.[2] Upon discovering that there was another baby to be delivered, the resident physician proceeded to perform a total breech extraction for the child who would be named Thomas.[3] Amanda and Thomas were born preterm; they were premature at and following birth. Although prematurity can trigger injury-producing complications in newborns, Amanda and Thomas' injuries were the result of the negligent actions of the delivering resident physician.[4]

Amanda and Thomas were born at Elmhurst General Hospital in Elmhurst, New York, a member municipal hospital of the New York City Health and Hospitals Corporation (HHC).[5] As they failed to meet milestones during their first years of life, it became apparent that the twins had brain injury-related disabilities.[6] Although Amanda and Thomas developed speech and an ability to understand, both were diagnosed with cerebral palsy.[7] Their cerebral palsy was understood to be a result of disabling brain damage. What had yet to be established was when and how the brain injuries occurred, and whether they were avoidable. It was not until March 1989 that Amanda and Thomas' mother was informed by another parent that her children's conditions were possibly the result of medical malpractice.[8] This prompted her to consult with attorneys who advised her that Amanda's brain injuries had been caused by a negligent forceps delivery and that Thomas's brain injuries had been caused by a negligent breech extraction.[9]

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1. Interview with Steven Pegalis, Esq., Senior Partner, Pegalis and Erickson, LLC, in New York, N.Y. (June 13, 2018) [hereinafter Pegalis Interview]. Mr. Pegalis was the attorney representing Amanda and Thomas during the trial. *Id.* He is a member of the Board of Trustees and an Adjunct Professor at New York Law School teaching medical malpractice. *Id.* Mr. Pegalis provided the author of this Note with detailed statements made on behalf of Amanda and Thomas during the actual trial.

2. Kurz v. N.Y.C. Health & Hosps. Corp., 571 N.Y.S.2d 533, 534 (N.Y. App. Div. 1991).

3. *Id.* The resident was unaware that the mother was pregnant with twins and thus, unprepared to deliver twins. Pegalis Interview, *supra* note 1.

4. Pegalis Interview, *supra* note 1.

5. *See Kurz*, 571 N.Y.S.2d at 534. The HHC is the largest public healthcare system in the United States, providing treatment to over one million New Yorkers each year. *About Us*, NYC Health + Hosps., https://www.nychealthandhospitals.org/about-nyc-health-hospitals/ (last visited Mar. 25, 2020).

6. Pegalis Interview, *supra* note 1.

7. *See Kurz*, 571 N.Y.S.2d at 534. Thomas required the use of canes to ambulate and Amanda's limited use of her arms and legs rendered her wheelchair-bound. Pegalis Interview, *supra* note 1.

8. Amanda and Thomas' parents met another parent of prematurely born twins, one of whom had cerebral palsy. *Kurz*, 571 N.Y.S.2d at 534. This parent informed Amanda and Thomas' parents that their children's condition could be the result of medical malpractice. *Id.*

9. *See id.*; Pegalis Interview, *supra* note 1.

Because Amanda and Thomas were delivered at a municipal hospital, General Municipal Law 50-e governed the filing of the claim on the twins' behalf.[10] General Municipal Law 50-e dictates that a notice of claim be served within ninety days after the claim arose.[11] In Amanda and Thomas' case, the ninety-day period had long passed, requiring their attorneys to file an application for leave to serve a late notice of claim with the court, as allowed by Subdivision Five of General Municipal Law 50-e.[12] However, if the children had been born in a private hospital, the notice of claim requirement would not have applied and the case would have been timely filed despite the expiration of the ninety-day period.[13] The court granted—and ultimately sustained on appeal—Amanda and Thomas' application for leave to serve a late notice of claim.[14] The lawsuit proceeded, finally coming up for trial after the children reached their eighteenth birthdays.[15] The trial went well for Amanda and Thomas and each were awarded a substantial sum to compensate for their injuries.[16]

In 2020, forty years after the birth of Amanda and Thomas, a pregnant woman could arrive at a municipal or private hospital with preterm twins. Notwithstanding the advances in medical care made over the prior forty years, the very same safety issues remain. Learning from past errors, such as the errors of the second-year resident who delivered Amanda and Thomas, can prevent similar avoidable tragedies.[17] For Amanda and Thomas, justice was served not only in the form of needed compensation, but also in the knowledge that their pursuit of justice has added to patient safety.

This Note focuses on the issue of whether claims filed against municipal hospitals—in contrast to those filed against private hospitals—should be subject to General Municipal Law 50-e's restrictive timely notice of claim requirements that

10. *Kurz*, 571 N.Y.S.2d at 534. *See also* Davidson v. Bronx Mun. Hosp., 473 N.E.2d 761, 762 (N.Y. 1984) ("Service of a notice of claim—the contents of which are prescribed by section 50-e of the General Municipal Law . . . is a condition precedent to a lawsuit against a municipal corporation.").

11. N.Y. Gen. Mun. Law § 50-e(1)(a) (McKinney 2020). Service is required:

> In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises[.]

Id.

12. *See Kurz*, 571 N.Y.S.2d at 534; N.Y. Gen. Mun. Law § 50-e(5).

13. Pegalis Interview, *supra* note 1.

14. *See generally Kurz*, 571 N.Y.S.2d at 534.

15. Pegalis Interview, *supra* note 1.

16. *Id.*

17. To make healthcare safer, hospitals and physicians must utilize the root cause analysis. Joint Commission, Root Cause Analysis in Health Care: Tools and Techniques vii (James Parker ed., 5th ed. 2015). The root cause analysis "is a process for identifying the basic or causal factor(s) underlying variation in performance" and focuses on "[the] process or processes, the causes or potential causes of variation that can lead to error, and identify process changes that would make variation less likely to recur." *Id.* at 1.

would bar otherwise meritorious claims. Lessons learned from what occurred forty years ago to very real people breathe life into the letter and the spirit of the law. This Note contends that a potentially unfair, unjust, and unsafe burden has been placed on plaintiffs in medical malpractice cases against the government and its subdivisions. Current law may close courthouses to plaintiffs who have meritorious claims, especially infant plaintiffs, by requiring the timely filing of a notice of claim as a precondition to suing the government and its subdivisions. This Note proposes legislative action in New York to remove the requirement of the notice of claim in medical malpractice cases, or at the very least, liberalizing the notice of claim requirement, especially with regard to infancy.

Part II of this Note discusses the traditional common law and moral concepts relative to medical malpractice claims and examines data-driven risk-management techniques to improve patient safety. Part III outlines the adoption of General Municipal Law 50-e and evaluates the discretionary power of the courts. Part IV addresses the burden placed on plaintiffs in medical malpractice claims against the government and its subdivisions. Part V proposes solutions for alleviating this heavy burden, and Part VI concludes this Note.

II. COMMON LAW, MORALITY, AND QUALITY OF CARE

According to the National Academy of Medicine,[18] quality of care is measured by "the degree to which health services for individuals and populations increase the likelihood of desired health outcomes and are consistent with the current professional knowledge."[19] However, problems in the delivery of these health services can lead to errors, which in turn, can result in serious harm to patients.[20]

Generally, the medical profession has long been permitted to establish its own standard of care.[21] When practicing medicine, physicians must use reasonable care

18. The National Academy of Medicine (NAM), founded in 1970 as the Institute of Medicine, constitutes one of the three National Academies, along those of Sciences and Engineering. *About the NAM*, Nat'l Acad. of Med., https://nam.edu/about-the-nam/ (last visited Mar. 25, 2020). Operating under the 1863 Congressional Charter of the National Academy of Sciences, the Academies are non-profit, private institutions, tasked with advising the U.S. government and other entities across the globe on matters related to science, technology, and health. *Id.*

19. *Crossing the Quality Chasm: The IOM Healthcare Quality Initiative*, Nat'l Acad. of Sci., http://www.nationalacademies.org/hmd/Global/News%20Announcements/Crossing-the-Quality-Chasm-The-IOM-Health-Care-Quality-Initiative.aspx (last updated Oct. 19, 2018). *See also* Steven Pegalis, *A Proposal to Use Common Ground that Exists Between the Medical and Legal Professions to Promote a Culture of Safety*, 51 N.Y.L. Sch. L. Rev. 1057, 1065 (2006) [hereinafter *Common Ground*].

20. *See* To Err is Human: Building a Safer Health System 4–5 (Linda T. Kohn et al. eds., 2000) [hereinafter To Err].

21. *See* Peter Moffett & Gregory Moore, *The Standard of Care: Legal History and Definitions: the Bad and Good News*, XII W. J. of Emergency Med. 109, 112 (2011) (explaining that "the standard of care is what a minimally competent physician in the same field would do in the same situation, with the same resources"); Dan B. Dobbs et al., Hornbook on Torts 503 (2d ed. 2000); *Common Ground*, *supra* note 19, at 1059–60.

and their best judgment to foster patient safety[22] by looking at the foreseeable likelihood that the conduct will result in some type of harm, the foreseeable severity of that harm, and the precautions taken to eliminate or reduce that risk of harm.[23]

Traditional common law dictates that the responsibility is on the tortfeasor to make payment for his or her wrong.[24] The law is based on a long-standing moral concept that a negligent party should bear the full responsibility for their wrongdoing.[25] This obligation is intended to act as a "warning that the law demands the exercise of due care."[26] The tort liability system can, and should, be used to promote patient safety.[27] The letter and the spirit of the law support the idea that those who have suffered a serious physical injury as a result of medical malpractice should be compensated in a fair and reasonable amount.[28] Moreover, those responsible for the injury should be held accountable.[29] In fact, accountability is necessary to reduce harm that stems from improper care.[30] As such, reviewing the consequences of errors through effective peer review is of utmost importance.[31] For example, in July 2014, the Office of the New York City Comptroller issued an executive summary on embracing data-driven risk-management techniques to examine the thousands of cases filed against the City and improve practices.[32] The summary recognized that the HHC had already embraced risk and litigation management reforms to analyze malpractice cases.[33] In fact, the Comptroller explained, the "HHC has made significant progress in improving patient safety, analyzing past malpractice cases to learn from mistakes and introducing new technology that reduces errors such as pharmacy robots, electronic medical records, and automated medication administration with built-in

22. *See* Meghan C. O'Connor, *The Physician-Patient Relationship and The Professional Standard of Care: Reevaluating Medical Negligence Principles to Achieve the Goals of Tort Reform*, 46 Tort Trial & Ins. Prac. L.J. 109, 113–16 (2010) (detailing physician's duties to patients in the physician-patient relationship).

23. *See* Restatement (Third) of Torts: Physical & Emotional Harm § 3 (Am. Law Inst. 2010).

24. *See* Dobbs, *supra* note 21 at 15 (explaining that the aims of tort law are "(1) to compensate injured persons and (2) to deter undesirable behavior"); *Common Ground*, *supra* note 19, at 1059.

25. *See* Dobbs, *supra* note 21 at 15–16; *Common Ground*, *supra* note 19, at 1060.

26. *Common Ground*, *supra* note 19, at 1060. *See also* Dobbs, *supra* note 21 at 16 (discussing the social policy behind tort law, which is to "provide a system of rules that, overall, works toward the good of society").

27. *See Common Ground*, *supra* note 19, at 1064–65.

28. *See id.* at 1060 ("Monetary damages recoverable for medical injury should be in an amount equal to the 'harm' done (i.e., compensatory damages).").

29. *See* Dobbs, *supra* note 21 at 15–16; *Common Ground*, *supra* note 19, at 1060.

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

31. To Err, *supra* note 20, at 10.

32. *ClaimStat: Protecting Citizens and Saving Taxpayer Dollars*, Off. of the N.Y.C. Comptroller 1–2 (July 9, 2014), https://comptroller.nyc.gov/reports/claimstat/reports/claimstat-protecting-citizens-and-saving-taxpayer-dollars/.

33. *Id.*

checks."[34] Because the HHC is responsible for their medical malpractice liabilities, it has an incentive to reduce costs associated with improper care.[35]

If meritorious cases are precluded due to the notice of claim requirement, how will the HHC learn from those mistakes to improve patient safety? Why should this incentive for safety be different for patients who are seen in a City hospital rather than in a privately-owned hospital? Why would the legislature deny patients' rights or place a burden on their claims? These questions, when considered, should lead to a change in the law.

III. GENERAL MUNICIPAL LAW 50-E

When suing the government or its subdivisions in New York State, one must file a notice of claim within ninety days of the incident.[36] This is a precondition to suing, and if it is not met, or without leave of court to file a late notice of claim, one is forever barred from bringing suit.[37] The stated purpose of the notice of claim requirement is to protect the government and its subdivisions against stale or unwarranted claims, as well as to enable timely and efficient investigations.[38] According to the New York Court of Appeals, the primary purpose of this requirement "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."[39] Further, the court acknowledged that "the only legitimate purpose served by the notice is prompt investigation and preservation of evidence of the facts and circumstances out of which claims arise."[40] But why are investigations and preservation of evidence more important for cases against City hospitals than privately-owned hospitals? In a medical liability case, if the passage of time does not make the case stale or unmeritorious, make the investigation by the municipality inefficient, or in any way prejudice the ability of the municipal hospital to defend the legal claim on the true merits, then the rationale for this time limitation disappears.

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34. *Id.* at 6.

35. *Id.* at 6–7.

36. *See* N.Y. Gen. Mun. Law § 50-e(1)(a) (McKinney 2020).

37. *See id.*

38. Felice v. Eastport/S. Manor Cent. Sch. Dist., 851 N.Y.S.2d 218, 222 (N.Y. App. Div. 2008) ("The notice of claim requirement is supposed to give public corporations such as school districts an opportunity for timely and efficient investigation of tort claims, as well as to protect them against stale claims.") (citation omitted).

39. Winbush v. City of Mount Vernon, 118 N.E.2d 459, 462 (N.Y. 1954) (citation omitted).

> Subdivision 6 makes it plain that the Legislature, to carry out the prime purpose of section 50-e, insists on a precise time limit for claims, and precise compliance with the requirements as to what officers are to be served, but leaves it to the discretion of the courts to correct any other kind of mistake or defect in such a paper.

Id.

40. Beary v. City of Rye, 377 N.E.2d 453, 458 (N.Y. 1978) (citation omitted).

Should a plaintiff fail to file the notice of claim within the applicable statutory time frame, an application for leave to file a late notice of claim can be made.[41] In 1976, General Municipal Law 50-e was amended, resulting in significant changes to Subdivision 5—the subdivision governing applications for leave to serve a late notice of claim.[42] Prior to the 1976 amendments, Subdivision 5 gave courts authority to grant extensions to file claims on three limited grounds: plaintiff's infancy, plaintiff's mental or physical incapacity, or plaintiff's justifiable reliance on settlement representations.[43] The 1976 amendments expanded the court's ability to grant extensions by adding other factors for courts to consider.[44] For example, a court can now consider whether the plaintiff has demonstrated a reasonable excuse for the delay, whether the municipality had actual knowledge of the essential facts of the claim within ninety days after their alleged occurrence or a reasonable time thereafter, and whether the delay in bringing the claim would substantially prejudice the municipality in its defense of the claim.[45] Infancy is now but one of several factors to be considered by the court in deciding whether to grant an application for leave to serve a late notice of claim.[46]

Still, why should any discretion be permitted at all, if it can be used to bar what could be a meritorious suit? If we must have some elements of discretion, why not liberalize the process, and put the burden on the municipality to affirmatively establish that the delay has impaired its ability to defend the case on the merits?

IV. THE PROBLEM

The forceps delivery of Amanda and the breach extraction of Thomas were operative deliveries,[47] and thus, mandated detailed contemporaneous notes in their medical records.[48] It should make no difference to the health care providers or their medical defense experts whether potential liability was investigated nine days or nine years later, as the health care provider is obligated to make detailed medical records

41. N.Y. Gen. Mun. Law § 50-e(5) ("Upon application, the court, in its discretion, may extend the time to serve a notice of claim[.]").

42. Lawrence M. Nessenson, *N.Y. General Municipal Law Section 50-e(5): Ameliorating New York's Notice of Claim Requirements*, Fordham Urb. L.J. 563, 565 (1984).

43. *Id.* at 564.

44. *Id.* at 564–65. *See* N.Y. Gen. Mun. Law § 50-e(5).

45. *See* N.Y. Gen. Mun. Law § 50-e(5).

46. *See id.*

47. An operative vaginal delivery, also referred to as an assisted vaginal delivery, is a vaginal delivery of a baby performed with forceps or a vacuum device. *See Assisted Vaginal Delivery*, The Am. C. of Obstetricians & Gynecologists (Feb. 2016), https://www.acog.org/Patients/FAQs/Assisted-Vaginal-Delivery?IsMobileSet=false.

48. *See generally* Alexander Mathioudakis et al., *How to Keep Good Clinical Records*, 12 Breathe 371 (Dec. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5297955/; Julie Loomis, *Contemporaneous Documentation*, St. Volunteer Mutual Ins. Co., (Oct. 2018), https://home.svmic.com/resources/newsletters/165/contemporaneous-documentation.

so that a subsequent analysis could justify or refute a finding of injury-producing negligence.[49] The twins, as plaintiffs, would have the burden of proof whenever a notice of claim were to be filed.

Thankfully, in the case of Amanda and Thomas, justice was served and the court granted leave to file a late notice of claim, which allowed the case to move forward.[50] But why leave open the risk of judicial discretion working against a plaintiff on the misperception that municipalities need to be protected from stale claims? The notice of claim requirement violates traditional notions of fair play and substantial justice and closes the courthouse door on meritorious claims, which ultimately affects patient safety. For example, a study of birth injury cases published in 2011 revealed that using lessons learned from closed cases has improved safety, reduced the number of medical malpractice suits, and the dollar amounts of liability payments.[51]

The amendments to General Municipal Law 50-e were meant to allow for greater discretion for courts to grant applications for leave to serve a late notice of claim. However, it appears that courts are becoming more stringent in allowing leave to file late notices of claim, as made evident by the case law discussed below.

V. ARGUMENT AND PROPOSED SOLUTION

A. The Requirement of Filing a Notice of Claim Must be Eliminated

This Note proposes legislative action that, at a minimum, would promote greater liberalization in medical malpractice cases against municipalities, such as including exceptions to the notice of claim requirement. Studies of closed medical malpractice insurance files indicate "that the litigation process does weed out most of the weaker claims and that frivolous cases are not a major problem."[52] By implementing full disclosure and data-driven risk-management techniques to analyze the meritorious claims, medical errors can be reduced.[53] If these cases are disallowed by statute because of a strict time frame, which is blind to the real-life practicalities of infancy, then the injustice of reduced patient safety is promoted. As such, the requirement of filing a

49. The Code of Medical Ethics outlines that "physicians have an ethical obligation to manage medical records appropriately." Am. Med. Ass'n Council on Ethics & Judicial Affairs, Code of Med. Ethics: Privacy, Confidentiality & Medical Records, at E-3.3.1 (2016). Included in this obligation is the duty to preserve medical records and make them available to patients, their physicians, or as otherwise required by law. *Id.* Pursuant to these obligations, medical records should be available any time potential liability is investigated. In New York, "hospitals must keep obstetrical records of records of children for at least six years or until the child is age 21, whichever is later." *Do I have The Right To See My Medical Records? Yes.*, N.Y. St. Dep't of Health, https://www.health.ny.gov/publications/1443/ (last visited Mar. 28, 2020).

50. *See* Kurz v. N.Y.C. Health & Hosps. Corp., 571 N.Y.S.2d 533, 534 (N.Y. App. Div. 1991).

51. Steven Clark, *Patient Safety in Obstetrics–The Hospital Corporation of America Experience*, 204 Am. J. of Obstetrics & Gynecology 283, 283–87 (2011).

52. *Common Ground*, *supra* note 19, at 1061. *See also* Maxwell J. Mehlman & Dale A. Nance, *The Case Against "Health Courts"*, Am. Ass'n for Just. 34 (Apr. 2007), https://www.justice.org/sites/default/files/file-uploads/The_Case_Against_Health_Courts_1.pdf.

53. *See* Mehlman, *supra* note 52, at 98. *See also Common Ground*, *supra* note 19, at 1070–71.

notice of claim as a prerequisite to filing a medical malpractice action must be eliminated.

If lawmakers are reluctant to implement such a change, then absolute exceptions should be adopted.[54] For example, in New Jersey, similar to New York, an individual must file a notice of claim within ninety days of accrual of the claim.[55] However, the New Jersey statute carves out an exception for infancy and mental incapacity by stating: "Nothing in this section shall prohibit a minor or a person who is mentally incapacitated from commencing an action under this act within the time limitations contained herein, after reaching majority or returning to mental capacity." [56] It is crucial for courts to adopt exceptions to the notice of claim requirement for situations that would delay filing.

B. A Bright-Line Test

As noted above, the key factors to be considered by the court are whether the petitioner has demonstrated a reasonable excuse for the delay, whether the municipality acquired actual knowledge of the essential facts within ninety days after the claims arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense of the claim.[57] A court is to consider all relevant statutory factors, but the presence or absence of one is not determinative.[58] As such, discretion is allowed, which can lead to great discrepancies in the application of the law resulting in potentially unfair, unjust, and unsafe outcomes.

For instance, in the 2016 case of *Humsted v. New York City Health and Hospitals Corporation*, the HHC had possession of a police report and the infant plaintiff's medical records.[59] Yet the Second Department held that the plaintiff failed to show that the defendant had actual knowledge of the facts constituting the underlying lawsuit, and therefore, affirmed the lower court's denial of the plaintiff's motion for

54. New York case law has expanded to include mental incapacity as an excuse for failing to timely file a notice of claim. In the 2014 case *Lopez v. County of Nassau*, the plaintiff sustained life threatening injuries requiring constant in-patient medical attention and filed an application for leave to serve a late notice of claim. Brief for Petitioner-Respondent, at iii, Lopez v. Cty. of Nassau, 990 N.Y.S.2d 886 (N.Y. App. Div. 2014) (No. 2012-11373). At the time of filling, the plaintiff's only means of communicating were by nodding his head or blinking his eyes. *Id.* In affirming the lower court's decision to grant the plaintiff's leave to serve a late notice of claim, the court reasoned: "The serious and incapacitating injuries that the claimant suffered in the underlying car accident reasonably excused the minimal delay in seeking leave to serve a late notice of claim against the County of Nassau." *Lopez*, 990 N.Y.S.2d at 886.

55. N.J. Stat. Ann. § 59:8-8 (West 2019).

56. *Id.*

57. *See* N.Y. Gen. Mun. Law § 50-e(5) (McKinney 2020).

58. *See* Ecks v. City of Rockland, 516 N.Y.S.2d 78, 79 (N.Y. App. Div. 1987) ("In determining [whether to grant an application for leave to serve a late notice of claim], the court must consider all of the relevant statutory factors, and the presence or absence of any one of those factors is not necessarily determinative.") (citations omitted); Cicio v. City of New York, 469 N.Y.S.2d 467, 468 (N.Y. App. Div. 1983) (stating that the statutory factors "are to be liberally construed and that the absence of an acceptable excuse is not necessarily fatal").

59. 37 N.Y.S.3d 899, 900 (N.Y. App. Div. 2016).

leave to serve late notice of claim.[60] This decision illustrates that courts are sometimes stringent in analyzing the factors in Subsection 5 when granting motions for late notices of claim on behalf of infant plaintiffs.[61] The court's holding in *Humsted* directly contradicted its prior holding in the 2007 case *Corvera v. Nassau County Health Care Corp.*[62] In *Corvera*, the court found that because the Nassau County Health Care Corporation had possession of the infant petitioner's medical records documenting her injuries at birth, the care received, the procedures performed, and the time of the malpractice, it had actual notice.[63] The facts in *Humsted* and *Corvera* are analogous in that the defendants—municipal hospitals—were in possession of the plaintiffs' medical records.[64] The court's holding in *Humsted* may signal increasing rigidity on the part of courts in granting motions for late notice of claim on behalf of infant plaintiffs. The 2017 case, *Hudson v. Patel*, further illustrates this point.[65]

In *Hudson*, an infant plaintiff's mother failed to timely file a notice of claim relative to a medical malpractice action against the HHC.[66] The court held that the plaintiff failed to demonstrate that the HHC had actual knowledge of the essential facts of the claim within ninety days after the claim arose or a reasonable time thereafter by virtue of the hospital records relating to her delivery and follow-up care.[67] But, the HHC maintained an accurate and complete medical record of the labor and delivery, and thus, the HHC would have had knowledge of the essential facts of the claim.[68] Nonetheless, the court granted the defendants' motion to dismiss and the infant plaintiff's mother was unable to bring a lawsuit on behalf of the infant allegedly injured by medical malpractice.[69]

Such inconsistencies in the court's application of discretion suggest that a clear test regarding late notices of claim must be implemented and that greater leniency be afforded to infant plaintiffs. If a bright line exception to the needed time frame for filing a notice of claim is not made for infancy, this factor should be afforded great weight and constitute a reasonable excuse for late filing, rather than one of many

60. *Id.* at 899–900.

61. Thomas A. Moore & Matthew Gaier, *Late Notices of Claim on Behalf of Infants*, L.J. Newsls. (Nov. 2016), http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2016/11/01/late-notices-of-claim-on-behalf-of-infants/?slreturn=20200121102529 (noting that "the [New York] Court of Appeals has offered little solace to young victims of malpractice in public hospitals whose parents did not file a timely notice").

62. 833 N.Y.S.2d 537 (N.Y. App. Div. 2007).

63. *Id.* at 538.

64. *See Humsted*, 37 N.Y.S.2d at 900; *Corvera*, 833 N.Y.S.2d at 538.

65. 45 N.Y.S.3d 497 (N.Y. App. Div. 2017). In addition to Chhaya N. Patel, the HHC was a defendant in the suit and therefore, General Municipal Law Section 50-e applied. *Id.* at 499.

66. *Id.* at 500.

67. *Id.*

68. Hudson v. Patel, No. 1267/2011, 2014 WL 12683876, at *2 (N.Y. Sup. 2014), *aff'd*, 45 N.Y.S.3d 497 (N.Y. App. Div. 2017).

69. *Hudson*, 45 N.Y.S.3d at 500.

factors to be given some consideration. Further, police reports and medical records in the possession of the government entity and its subdivisions should establish actual knowledge. Courts have held that possession of relevant medical records provides health providers with contemporaneous knowledge of the facts underlying the claim.[70] Yet, as indicated in *Humsted* and *Hudson*, some judges do not countenance this as actual knowledge.[71]

VI. CONCLUSION

It is evident that a burden has been placed on plaintiffs in medical malpractice cases against the government and its subdivisions—violating the letter and the spirit of the law. This Note maintains that legislative action removing the requirement of the notice of claim in medical malpractice cases, or at least liberalizing the notice of claim requirement, especially with regard to infancy, should be taken to promote justice, fairness, and safety. Additionally, the courts should adopt a clear test relative to applications for leave to file a late notice of claim rather than leaving it up to the discretionary power of judges. Those who have suffered a serious physical injury as a result of medical malpractice should be compensated fairly and reasonably. Moreover, those responsible for the injury must be held accountable in order to ensure safer care in the future.

Amanda and Thomas suffered because of a hospital's negligence. By bringing a lawsuit, they were able to promote safety for others and make sure their lives are financially secure.[72] The law should be changed so that similarly situated plaintiffs, born in municipal hospitals, can have their day court, and not be subject to the vagaries of individual judges' discretion for so important an outcome, and for no good reason.

70. *See, e.g.*, Moore v. Albany Cty. Dep't of Health, 603 N.Y.S.2d 355, 356 (N.Y. App. Div. 1993); Charles v. N.Y.C. Health & Hosps. Corp., 560 N.Y.S.2d 703, 704 (N.Y. App. Div. 1990); Strevell v. S. Colonie Cent. Sch. Dist., 535 N.Y.S.2d 147, 148 (N.Y. App. Div. 1988); Rechenberger v. Nassau Cty. Med. Ctr., 490 N.Y.S.2d 838, 839 (N.Y. App. Div. 1985).

71. *See* Humsted v. N.Y.C. Health & Hosps. Corp., 37 N.Y.S.3d 899, 899–900 (N.Y. App. Div. 2016); *Hudson*, 45 N.Y.S.3d at 499.

72. Pegalis Interview, *supra* note 1.