# Property Owners Face "Prior Notice" Obstacles When Bringing Claims Against Municipalities

## By Charlotte A. Biblow

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Landlords, managing agents, and other property owners often assert claims against local governments (or seek indemnification for claims brought against them) for injuries suffered on adjoining public property, from sidewalks to parking lots and roads. In many instances, state or local laws bar such claims unless the municipality has prior notice of the defective condition that allegedly led to the harm.

Recently, New York's highest court, the New York Court of Appeals, issued a decision that is likely to make it more difficult for property owners to recover from local governments in these kinds of cases. The ruling, in *Gorman v. Town of Huntington*,[1] limits the ability of injured parties to force the public coffers to compensate them for their damages, at least in New York, but the ultimate impact is likely to be felt by property owners, to whom allegedly injured plaintiffs may now to turn to cover their losses.

## BACKGROUND[2]

The *Gorman* case is a personal injury action commenced by Norma Gorman and her husband against the Town of Huntington, located in Suffolk County, Long Island. The plaintiffs alleged that on June 9, 2002, Norma Gorman sustained injuries as a result of a trip and fall on a town sidewalk located on Cheshire Place, which is alongside and slightly north of Saint Anthony of Padua Roman Catholic Church. Mrs. Gorman claimed she fell when the sole of her shoe allegedly became caught on an uneven slab of sidewalk that was raised approximately two inches. The complaint specifically alleged that prior to the date of the accident, the town had received written notice of the defective sidewalk condition. In its answer, the town denied receipt of any such prior written notice and specifically pleaded, as affirmative defenses, the plaintiffs' noncompliance with two separate "prior written notice" statutes.

Pre-trial discovery included the deposition of Bruce Creamer, who testified that he was employed by the town's Department of Engineering Services (DES) as an engineering inspector. Mr. Creamer also testified that he had previously been a DES traffic technician. He testified that the town's traffic safety division, which is part of the DES and not the town highway department, is responsible for sidewalk inspection, maintenance, and repair within the town. He also testified that as early as 1989, the town DES received complaints regarding the sidewalk at Cheshire Place, in the vicinity of St. Anthony's. The 1989 complaint was received by telephone. In 1995, the traffic safety division received a written memorandum from a town councilman complaining about the sidewalk. Two separate written notices of claim were received by the DES, one in 1998 and the other in 2002, complaining about the sidewalk. Mr. Creamer also testified that the DES received two letters from Reverend Richard Hoerning of St. Anthony's, one dated April 19, 1999, and the

other dated February 19, 2002, complaining about the sidewalk.[3]

Mr. Creamer testified that some of these verbal and written complaints prompted the traffic safety division to investigate the condition of the sidewalk near the church. Partial repairs were made by the traffic safety division to that sidewalk in 1990, 1998, and 1999. The 1999 repairs were extensive and included replacement of several sections of sidewalk adjoining the church's school. However, the work did not include replacing the sidewalk located elsewhere alongside the church, which apparently continued to deteriorate thereafter.

At his deposition, Mr. Creamer testified that he had a telephone conversation with Reverend Hoerning in February 2002 regarding the deteriorating condition of the sidewalk alongside the church. At that time, Mr. Creamer told Reverend Hoerning to request repairs to the sidewalk by writing to the DES director. Reverend Hoerning followed Mr. Creamer's instruction by composing and transmitting a letter, dated February 19, 2002, to the DES director. Reverend Hoerning did not send copies of that letter to any other town official.

In response to a discovery motion filed by the plaintiffs, the town cross-moved for summary judgment, seeking dismissal of the complaint. In its cross-motion, the town presented affidavits from Audrey Jaramillo of the town clerk's office, Derek Baiz of the highway department, and from Mr. Creamer of the DES evidencing that the various written notices sent to the town regarding the subject sidewalk were neither filed, nor copied to, the town clerk's office or the town highway department. The town argued that the prior written notice statutes, Huntington Town Code § 174-3(A) and New York State Town Law § 65-a, mandated that the prior notice of defective sidewalks can only be given to the town clerk or town superintendent of highways. The town further argued that the absence of any prior written notice to either of those two statutory designees of the defective condition that allegedly caused the injuries to Mrs. Gorman, bars plaintiffs' action due to noncompliance with the prior written notice statutes.

The trial court disagreed with the town's arguments and denied the town's motion for summary judgment. The trial court ruled that the town followed a distinct system by which its DES is delegated record-keeping functions for defective sidewalks that are otherwise reserved by statute to the town clerk and superintendent of highways, and which are directly related to DES's own responsibilities to maintain and repair sidewalks. The town appealed the denial of summary judgment to an intermediate New York appellate court.

## THE INTERMEDIATE APPELLATE COURT DECISION

In its decision,[4] the intermediate appellate court explained that Huntington Town Code § 174-3(A) provides that no civil action can be maintained against the town for damages sustained by reason of, among other things, defective sidewalks, unless it has received prior written notice of the specific location and nature of the defective condition. That notice has to be provided to the town by a person with first-hand knowledge. The town also has to fail to correct the condition within a reasonable time after receiving the notice. Section 174-3(A) also requires that the prior notice be "actually given" to the town clerk or town superintendent of highways in accordance with § 174-5. Section 174-5 provides, in turn, that "[s]ervice of such notice upon a person other than as authorized ... shall invalidate the notice." The intermediate appellate court explained that the local code is crystal clear and that for a prior written notice of a dangerous condition to be of legal consequence, it has to be filed with the town clerk or town highway superintendent.

The appellate court further noted that the Huntington Town Code resembled the language of New York State General Municipal Law § 50-g(1) and Town Law § 65-a(2) for the purpose, scope, and procedures applicable to prior written notice to municipalities. General Municipal Law § 50-g(2) provides that where a statute specifies the municipal officer or employee who is to receive prior written notice, the notice records have to be kept by the person so specified. Town Law § 65-a(3) directs that any prior written notices delivered to the superintendent of highways be forwarded to the town clerk within 10 days of receipt. Under Town Law § 65-a(4) and Huntington Town Code § 174-4, the town clerk, not the traffic safety division of the DES, is required to keep indexed records of written notices of defective conditions.

As the appellate court explained, municipalities owe a duty to keep sidewalks in reasonably safe condition,[5] and their failure to perform repairs for which there is prior written notice could result in liability being imposed on them for damages proximately sustained to persons or property.[6] Absent prior written notice of a dangerous or defective condition where a prior written notice statute is in effect, a municipality cannot be held liable for injuries.[7]

The appellate court added that there are two exceptions to the prior written notice rules. The first is when the municipality creates the dangerous or defective condition through affirmative acts of negligence.[8] The second exception is when a "special use" confers a benefit upon the municipality.[9] Because neither exception was at issue in this case, the appellate court focused on whether the town could avail itself of an affirmative defense based upon the failure of any person to file written notice of the alleged defective condition specifically with the town clerk or town highway superintendent.

The appellate court found that the town met its initial burden of establishing prima facie entitlement to summary judgment. It explained that the evidence establishes that neither the town clerk nor the town superintendent of highways received any prior written notice of defective sidewalk conditions at Cheshire Place, alongside St. Anthony's, prior to the plaintiff's accident on June 9, 2002. The burden then shifted to the plaintiffs to tender evidence in admissible form sufficient to raise a question of fact requiring trial. In this regard, the appellate court continued, while neither the town clerk nor the town superintendent of highways received prior written notice as specifically required by Huntington Town Code §§ 174-3 and 174-5, Reverend Hoerning's February 19, 2002, correspondence informed the DES of the alleged defect. The appellate court found that Reverend Hoerning was instructed by Mr. Creamer to memorialize his complaint about the sidewalk in a letter and to send that letter specifically to the DES director, and by implication, not to the town clerk or town superintendent of highways. Reverend Hoerning relied upon the instruction he received from Mr. Creamer, the appellate court found.

It added that the division of labor within the town did not vest the responsibility for sidewalk repairs within the highway department, as envisioned by the prior written notice laws. Instead, in Huntington, the responsibility for investigating, maintaining, and repairing sidewalks belongs to the DES. The appellate court agreed with the trial court's finding that the town, by its actions and practices spanning many years, delegated to the DES record-keeping functions for sidewalk repairs that were, absent such a delegation, the responsibility of the town clerk and superintendent of highways. Thus, it concluded, under the circumstances of this case, the town should be estopped from claiming, as it did in seeking summary judgment, that Reverend Hoerning's written notice, dated February 19, 2002, was sent to the wrong statutory designee. The appellate court reasoned that the DES is the arm of town governance responsible not only for inspecting, maintaining, and repairing sidewalks, but it had also assumed, by practice, the keeping of prior written notice records that would ordinarily have been the responsibility of the town clerk. Significantly, the appellate court found that Reverend Hoerning addressed his notice correspondence to the director of the DES at the instruction of Mr. Creamer, an agent of the town, and Reverend Hoerning's letter was thereafter retained by the DES in accordance with Mr. Creamer's record-keeping procedures. Of equal significance to the appellate court is the fact that the town clerk and town highway superintendent possessed none of the complaint records the town had received for the subject sidewalk in 1989, 1995, 1998, 1999, 2002, or for any other dates. The town, having instructed Reverend Hoerning to send his written notice of February 19, 2002, to the director of the DES, could "not now be permitted to use that instruction as a shield against liability." It found that to do so "would result in an injustice" to any claimant where there has been compliance with a clear directive from a town agent employed by the municipal department that maintains sidewalk complaint records, to file written notice of a dangerous sidewalk condition with someone other than the statutory designees.

The appellate court noted that the "strict construction" that is to be accorded prior written notice statutes is not so strict as to prevent two widely-accepted exceptions, where municipalities create a dangerous condition through their affirmative acts or where municipalities derive a benefit from the special use of the subject matter of the litigation. It then declared that it is recognizing, for the first time a third, narrow exception to a strict construction of the statutory language "grounded in estoppel and based upon these peculiar facts and circumstances."

The appellate court stated that it would not reach its conclusion, estopping the town from asserting a prior written notice defense, absent the combination of four discrete factors, all of which it found to be present in this case. The appellate court stated that these factors are:

(1) the assumption by the DES of prior written notice record-keeping duties that were otherwise to be performed by the town clerk,
(2) the DES's role in investigating and repairing sidewalks rather than those functions being performed by the town highway department,

(3) the instruction by the DES to Reverend Hoerning to transmit the written notice to the DES, and
(4) Reverend Hoerning's reliance upon Mr. Creamer's instruction.

The appellate court stated that all of the factors, which resulted in the prior notice being transmitted to and retained by the DES in the regular course of its duties of maintaining sidewalks, fulfilled the stated objective of Huntington Town Code § 174-1 for enhancing the community's health and safety. It also at the same time fulfills the objective of § 174-4 that indexed records be maintained for all such notices received. The appellate court then affirmed the trial court's decision denying the town's motion for summary judgment dismissing the complaint. The town appealed to the New York Court of Appeals.

## THE COURT OF APPEALS DECISION

In its decision, the Court of Appeals explained that the purpose of a prior written notice provision is to place a municipality on notice that there is a defective condition on publicly-owned property which, if left unattended, could result in injury. This ensures that a municipality, which is not expected to be cognizant of every crack or defect within its borders, will not be held responsible for injury from such a defect unless given an opportunity to repair it. The policy behind this rule is to limit a municipality's duty of care over its streets and sidewalks "by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specific location."[10]

The Court continued by explaining that this did not mean, however, that every written complaint to a municipal agency necessarily satisfies the strict requirements of prior written notice, or that any agency responsible for fixing the defect that kept a record of such complaints qualifies as a proper recipient of such notice. Simply put, the Court stated, whereas a written notice of defect is a condition precedent to suit, a written request to any municipal agent other than a statutory designee that a defect be repaired is not. Nor could a verbal or telephonic communication to a municipal body that is reduced to writing satisfy a prior written notice requirement, the Court added.

The Court declared that it was "undisputed" that neither the town clerk nor the highway superintendent received prior written notice of the defective sidewalk. Because the DES is not a statutory designee, notice to that department is insufficient for purposes of notice under Town Law § 65-a and § 174-3 of the Huntington Town Code, the Court held. It then stated that it was "unpersuaded" that the DES's practice of recording complaints and repairs warrants a departure from the rule requiring that prior written notice provisions be strictly construed. As the entity charged with repairing town sidewalks, it is expected that the DES would keep a record of needed repairs and complaints but the Court stated that it could not be inferred from that conduct that the town is attempting to circumvent its own prior written notice provision.

The Court also rejected the intermediate appellate court's holding that the town is estopped from relying on its prior written notice provision. Even assuming that estoppel could serve as a third exception to excuse lack of prior written notice, the Court stated that there is "no evidence" that these plaintiffs relied on the correspondence sent by Reverend Hoerning to the DES or on any alleged assurances by the DES that it would repair the condition. The Court noted that the plaintiff testified that she did not learn of Reverend Hoerning's correspondence until after her accident, demonstrating that lack of reliance.

Accordingly, the Court ruled that the order of the intermediate appellate court be reversed, that the town's motion for summary judgment be granted, and the complaint be dismissed.

## CONCLUSION

Prior notice rules serve an important purpose by ensuring that local governments have the opportunity to cure defects, thus avoiding injuries. As the *Gorman* ruling makes clear, however, property owners (and individuals) who inform local governments of dangerous conditions should make certain that they are carefully following the requirements of such prior notice laws. Doing so may make it more likely that any defects will be corrected, and in any event will help to ensure that local governments that fail to act properly will be held responsible for harm that ensues.

## NOTES

1. 2009 N.Y. Slip Op. 2648 (No. 43, Apr. 7, 2009).
2. Most of the facts recited in this article are from the opinion by the intermediate appellate court, which can be found at 47 A.D.3d 30 (2nd Dept. 2007).
3. Both of these letters pre-date Mrs. Gorman's June 9, 2002 fall.
4. 47 A.D.3d 30 (2nd Dept 2007).
5. *See, e.g., Kaufman v. Silver*, 90 N.Y.2d 204 (1997).
6. *See, e.g., D'Ambrosio v. City of New York*, 55 N.Y.2d 454 (1982).
7. *See, e.g., Amabile v. City of Buffalo*, 93 N.Y.2d 471 (1999).
8. *See, e.g., Monteleone v. Incorporated Vil. of Floral Park*, 74 N.Y.2d 917 (1989).
9. *See, e.g., Jacobs v. Village of Rockville Ctr.*, 41 A.D.3d 539 (2d Dept. 2007).
10. *Poirier v. City of Schenectady*, 85 N.Y.2d 310 (1995).