Negligence Law Section

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"Pitfalls For The Unwary: Statutory Notice Provisions In Governmental Negligence Cases"

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Introduction

According to Michigan's Department of Technology, Management and Budget[1] there are over 13,000 state-owned vehicles on our roadways. Add to that the vehicles owned by federal agencies including the United States Postal Service, public universities, local municipalities, and governmental transportation authorities.[2] A conservative estimate would indicate that on any given day there can be over a hundred thousand government vehicles on Michigan's roads. Stating the obvious, sometimes government drivers are reckless, causing needless and serious injuries. While the "motor vehicle" exception to the Governmental Tort Liability Act[3] (GTLA) does not contain a pre-suit notice requirement, some governmental actors are entitled to pre-suit notice of a negligence claim under other statutory authority.

The primary purposes of governmental pre-suit notice provisions are to enhance public safety by giving a governmental agency information about a dangerous condition so the agency can remedy it.[4] Further, to give the responsible agency an opportunity to investigate the nature of the accident and the resulting injuries before memories fade or evidence is lost.[5] Unfortunately, strict application of these notice provisions[6] sometimes

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[1] https://www.michigan.gov/dtmb/0,5552,7-358-82547_9347-28213--,00.html

[2] The federal government owns or leases over 250,000 vehicles, excluding the military and Postal Service. https://www.gsa.gov/policy-regulations/policy/vehicle-management-policy/federal-fleet-report

[3] MCL 691.1401, et seq.

[4] *Green v Department of Corr*, 30 Mich App 648, 186 NW2d 792, aff'd, 386 Mich 459, 192 NW2d 491 (1971).

[5] *Nicholson v Lansing Bd of Educ*, 423 Mich 89, 377 NW2d 292 (1985); *Meredith v Melvindale*, 381 Mich 572, 165 NW2d 7 (1969).

[6] In a series of Justice Taylor and Justice Young-era cases, Michigan Courts held that a governmental defendant is not required to demonstrate prejudice to be entitled to dismissal for a claimant's failure to properly file or serve a pre-suit notice. See *e.g., Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), *McCahan v Brennan*, 492 Mich 730, 822 NW2d 747 (2012). See also, *Fields v Suburban Mobility Auth for Reg'l Trans*p, 311 Mich App 231, 874 NW2d 715 (2015) (Despite a public transportation authority having actual notice of the crash and resulting injuries, in, the Court held that a

results in citizens who have been injured by negligent state actors having their access to the civil justice system denied and meritorious claims barred. This leaves seriously injured individuals, their families, and others to carry the burden of governmental negligence.

In this article, we will discuss the three common governmental notices[7] encountered in catastrophic injury practice: The Court of Claims Notice applicable to the State of Michigan and its agencies; the Metropolitan Transportation Authority Notice applicable to certain public transportation authorities; and the Federal Form 95 for submission and exhaustion of administrative remedies for negligence claims arising under the Federal Tort Claims Act.[8]

The Court of Claims Pre-Suit Notice

The Michigan Court of Claims is a court of statewide, limited jurisdiction which was established to hear and determine civil actions filed against the State of Michigan, state agencies including certain public universities, and -- under certain circumstances -- individual state employees.[9]

Under the Court of Claims Act[10], written notice of a claim against the state or its agencies is required within six months in a personal injury case. The six-month clock starts ticking, "following the happening of the event giving rise to the cause of action."[11] The notice must state the time and place where the claims arose, and provide details of the nature of the claims and of the items of injury and damage alleged to have been sustained. The Claimant must also provide a, "designation of any department, commission, board, institution, arm, or agency of the state involved in connection with the claim."[12] The Court of Claims Notice must be verified, *i.e.,* signed by the plaintiff under oath and notarized.[13]

The Court of Claims Notice must be filed with the Clerk of the Court of Claims.[14] The Clerk serves the notice on State agencies where addresses are provided on the notice.

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plaintiff could not rely on defendant transportation authority's own documents, the police reports, or phone calls to satisfy MCL 124.419's 60-day written notice for bringing an "ordinary claim.")

[7] Although not covered in the limited pages of this article, it is important for practitioners to be aware of the notices required under the defective highways exception, MCL 691.1404, and the public building defect exception, MCL 691.1406, of the GTLA, as well as the 60-day notice requirements found in MCL 224.21(3) for county roads.

[8] For further discussion and a more complete list of statutory notice provisions, see Tom Sinas's ICLE Michigan Civil Procedure , Chapter 2: Written Notice and Statutes of Limitations (2012).

[9] For an excellent primer on the Court of Claims, see the ICLE materials and On-Demand Webinar featuring Michigan Court of Appeals Judge Amy Ronayne Krause. This year, Judge Ronayne Krause was the well- deserved recipient of the Negligence Law Section's Judicial Excellence Award.

[10] MCL 600.643.1

[11] MCL 600.6431(3).

[12] MCL 600.6431(1,2).

[13] In *Progress Michigan v Attorney Gen*, Nos. 158150 and 158151, ___ Mich ___, ___ NW2d ___ (July 27, 2020), the current majority of the Michigan Supreme Court, reversing the Court of Appeals, held that nothing in the Court of Claims Act suggests that failure to comply with the verification requirements would render a complaint null and void, and permitting a plaintiff to amend its original complaint to correct a lack of verification does not undermine the verification requirement.

[14] MCL 600.6410.

Failure to provided addresses may result in the filing being returned to the filing attorney for service. As a practice pointer, the notice caption should contain the appropriate state agency and Attorney General office addresses for service, unless the practitioner intends to serve them himself or herself. Sufficient copies should also be given to the Clerk of the Court of Claims to serve upon the agencies listed in the notice and Attorney General's office.

Importantly, claims against individual state employees are not included in the Court of Claims statutory Notice requirements. This would include statutory violations by individual employees, as well as negligence or gross negligence claims brought under circuit court jurisdiction.[15,16] Under §6421, circuit court jurisdiction can be obtained by suing the individual employee on a statutory basis that allows for a jury or on common law basis with a jury demand.

Likewise, crashes involving motor vehicles owned by local municipalities and employees are not subject to the Court of Claims Act.[17] However, local ordinances and/or charter provisions may contain periods within which a notice of claim must be given to the municipality. The Court of Appeals has held that municipal charter notice provisions do not apply when the alleged injury was caused by a motor vehicle owned by the municipality, as preempted by the GTLA.[18] However as is often the case in the law, the legal battle best won maybe the battle not fought—and practitioners are urged to provide notices when they have the ability to do so.

Notice to Metropolitan Transportation Authorities

Safe public transportation is essential to the quality of living in our community. Even more so for the disabled, who may not have any other practical options and rely on local transportation authorities that provide federally subsidized paratransit services. The Americans with Disabilities Act (ADA)[19] and its accompanying federal regulations, requires public transit agencies to provide "paratransit" service to people with disabilities who cannot use the fixed-route bus or rail service. Some of the public transportation in Michigan is provided by metropolitan transportation authorities created under the Metropolitan Transportation Authorities Act of 1967 (MTAA).[20] The MTAA contains a 60-day pre-suit notice requirement for claims which sound in negligence.[21,22]

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[15] MCL 600.6421

[16] *Pike v Northern Michigan Univ*, 327 Mich App 683, 935 NW2d 86 (2019), see also, *Doe v Department of Transp*, 324 Mich App 226, 919 NW2d 670 (2018).

[17] *Doan v Kellogg Cmty Coll*, 80 Mich App 316, 319–320, 263 NW2d 357 (1977)

[18] *Republic Franklin Ins Co v Walker*, 17 Mich App 92, 169 NW2d 175 (1969). *Northup v Jackson*, 273 Mich 20, 262 NW 641 (1935) (voiding six-month notice requirement in city charter as in conflict with statute of limitations). For a more in-depth discussion, see Ronald E. Baylor, Governmental Immunity in Michigan Ch 8 (ICLE 2d ed 2005).

[19] 42 USC §12101 *et seq*.

[20] MCL 124.401, *et seq*. Notably, many transportation authorities were in operation as city bus lines or other entities with local government control prior to the passage of these enabling statutes. Thus careful discovery as to the actual authority, populations and municipalities services and scope of operations of a transportation authority may be required to demonstrate the law that applies.

[21] MCL 124.419

[22] Notably, the 60-day MTAA Notice does not apply to claims for PIP benefits. *See Trent v Suburban Mobility Auth*, 252 Mich App 247, 651 NW2d 171 (2002), holding that the notice provision of the No-Fault

However, the MTAA also creates a statutory exception to governmental immunity as to *all claims* arising against a transportation authority, as could be asserted against any other common carrier for hire. This language is set forth in MCL 124.419, which provides:

> **§ 124.419. Transportation authority claims; notice, allowance, jurisdiction over actions against authority.**
>
> **Sec. 19.** ***All claims that may arise in connection with the transportation authority*** shall be presented as ***ordinary claims*** against a common carrier of passengers for hire: Provided, That written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained and the disposition thereof shall rest in the discretion of the authority and ***all claims that may be allowed*** and final judgment obtained ***shall be liquidated from funds of the authority***: Provided, further, That only the courts situated in the counties in which the authority principally carries on its function are the proper counties in which to commence and try action against the authority. (Emphasis added)

Thus, MCL 124.419 contains four operative sections:

- A waiver of immunity by allowance of claims - the presentation of "all claims that may arise" in connection with the authority to "be presented as ORDINARY CLAIMS against a common carrier of passengers for hire," (Emphasis added);

- A provision to establish the time within which notice must be given to the transportation authority;

- A provision requiring the authority to pay all allowed claims, and

- A provision identifying the courts of proper jurisdiction in which an action against a metropolitan authority may be brought.

In *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707; 822 NW2d 522 (2012), the Supreme Court (1) squarely recognized that the MTAA authorizes the imposition of liability on a transportation authority the same as any other common carrier for hire, and, (2) describes the manner in which the liability may be imposed. The *Atkins* decision makes clear that a transportation authority *can* be held liable under circumstances separate from those described in the statutory exceptions to the GTLA. If this were not true, all of MCL 124.419's language would be rendered surplusage and nugatory, in contravention of well-settled rules of statutory construction. Practitioners should be aware that despite the language of MCL 124.419 and *Atkins*, transportation authorities sometimes argue that this statute is, "simply a notice provision." Typically, this argument is bolstered by reliance on dicta in the unpublished

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Act, MCL 500.3145(4), supersedes the notice statute for transportation authorities because PIP benefits are compulsory statutory benefits, not a species of common law negligence.

case of *Smith v Suburban Mobility Authority*, unpublished per curium opinion of the Court of Appeals, issued December 16, 2010 (Docket No. 294311), rev'd and reinstated 493 Mich 906; 823 NW 2d 284 (2012). The authors submit that such reliance is misplaced for two reasons. First**,** *Smith* is unpublished and thus lacks precedential value. MCR 7.215(C)(1). Second, *Smith* does not apply to the issue because the only two issues presented in *Smith* were the plaintiff's failure to serve notice and the plaintiff's failure to plead in avoidance of governmental immunity. *Id* at 1. Nothing in *Smith* addressed whether MCL 124.419 constituted a waiver of governmental immunity, as that question was not before the Court. Dicta in the unpublished *Smith* case neither supersedes the Supreme Court (in *Atkins*) nor the plain language of MCL 124.419.

Practitioners should further be aware that transportation authorities also offer the argument that the GTLA contains six discrete statutory waivers of governmental immunity, and that therefore no case should lie against them unless it falls within those six categories. While it is true that the GTLA (MCL 691.1407) permits causes of action in six discrete areas, it is equally true that, "the Legislature has elsewhere created causes of action against political subdivisions of the state." *Lash v Traverse City,* 479 Mich 180, 195; 735 NW2d 628 (2007). Examples include the Civil Rights Act, MCL 37.2103(g) and MCL 37.2202(1)(a); and the Persons with Disabilities Civil Rights Act, MCL 37.1103(g), MCL 37.1201(b), and MCL 37.1202.[23] The Legislature can, and has, expressly waived governmental immunity outside the context of the GTLA; the MTAA §124.419 is one example of such an express waiver or allowance of claims.

Finally, practitioners should be aware of The Special Relationship Doctrine for common carriers and their passengers. As a common carrier, a transportation authority owes its passengers an affirmative duty to protect them from foreseeable harm under the special relationship doctrine. In *Dykema v Gus Macker Enterprises*, 196 Mich App 6, 492 NW2d 472 (1992), the Court of Appeals explained this principle: in a special relationship, one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself.[24] The duty to protect is imposed upon the person in control because he is in the best position to provide a place of safety.

Notice Pursuant to the Federal Tort Claims Act

When an employee of the United States acting in their governmental role negligently injures a person, the government has consented to be sued and be held accountable by payment of money damages[25]. This must be accomplished through an administrative

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[23] By the "[e]xcept as otherwise provided in this act" language, the GTLA purports to contain all exceptions to governmental immunity. While the GTLA contains several exceptions, others can and do exist outside that act because the Legislature, in enacting a law, cannot bind future Legislatures. *Malcolm v East Detroit*, 437 Mich. 132, 139; 468 NW2d 479 (1991), citing *Harsha v Detroit*, 261 Mich. 586; 246 NW 849 (1933). As a result, the Legislature remains free to amend or abolish governmental immunity by creating exceptions to it, *Ballard v Ypsilanti Twp*, 457 Mich 564, 569; 577 NW2d 890 (1998)**,** either within the GTLA, or**,** as here, in another statute.

[24] *Id.* Citing *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988).

[25] The FTCA is primarily a vehicle to pursue negligence claims against the United States. Generally speaking, it does not include intentional torts or constitutional violation claims which may be pursued under other statutes such as 42 USC 1983.

claim with the responsible agency, and if that fails, through the judicial system under the Federal Tort Claims Act (FTCA).[26]

While the substantive negligence law of the forum state is used, FTCA claims present a web of federal statutes, regulations, and case law. These claims can be fraught with pitfalls and landmines for the unwary claimant or practitioner. Some very skilled attorneys devote their whole career to litigating these complex claims. We hope to hit a few highlights in the limited scope of this article.

Prior to filing a civil action under the FTCA, the injured party must exhaust their administrative remedies by presenting tier claim, via a properly supported Form 95 to the responsible federal agency, such as the Department of Veteran's Affairs, the United States Postal Services, the Department of Homeland Security, etc.[27] While at first blush, the Form 95 itself appears no more complicated than an average employment application, the body of federal law and regulation surrounding the Form 95 make it ripe for error.

A FTCA Claimant must submit a written demand for a sum certain, and is limited to that amount as a hard cap on their claim.[28] Claims submitted with the qualifiers typically seen in state court filings will be limited to the dollar amount identified - for example, claims pled for damages "in excess of $25,000" will be limited to $25,000, with the descriptor, "in excess of" disregarded.[29]

A "tort claim" against the federal government must be actually presented to the "appropriate federal agency" within two years after accrual of the cause of action.[30] The presentment of the Form 95 tolls the statute of limitations during the administrative claim period. The FTCA claimant can amend their Form 95 submission at any time prior to final agency action.[31] However, an amendment to the sum certain demand restarts the mandatory six months period for filing the civil action.[32]

The "mailbox" rule does not apply to the Form 95. Rather, actual receipt by the proper federal agency constitutes presentment of the demonstrative claim. As a best practice, we send our Form 95 and supporting documentation by certified mail so that it can be tracked and confirmed. As well, receipt of the Form 95 should also be confirmed by letter from the agency, as this is usually required by agency regulation.

Where more than one Federal agency is involved, each should be notified, and each should be informed of the other's role.[33] Likewise, if there is uncertainty about the proper agency, for example the Department of Homeland Security versus the

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[26] 28 USC §§ 1346(b), 2671–80, 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.").

[27] The Form 95 also called a SF95 is readily available from federal agencies, usually with service instructions. For ease of reference, the SF95 and claims manual can be found at *https://www.justice.gov/civil/documents-and-forms-0* or *https://www.gsa.gov/forms-library/claim-damage-injury-or-death*

[28] 28 USC §2401,2675(b); 28 CFR 14.2

[29] Adams by Adams v. U.S. Dept. of Housing & Urban Dev., 807 F.2d 318 (2d Cir. 1986) (administrative claim stating "in excess of $1,000" is limited to $1,000); Fallon v US, 405 F. Supp. 1320 (D. Mont. 1976) ("Approximately $1,500.00" held sum certain, but limited to that amount).

[30] 28 USC § 2401(b).

[31] 28 CFR §14.2.

[32] 28 CFR §14.2(c).

[33] 28 CFR 14.2.

Department of Treasury in a car crash being driven by an officer assigned to an inter-agency task force, sending the Form 95 and copies of the supporting documentation to all potentially involved agencies may be well worthwhile.

Because the Administrative Claim requirement is jurisdictional,[34] failure to properly present and exhaust the administrative process is a defense that is not subject to doctrines of waiver or avoidance, and state law tolling statutes such as minority and disability do not apply.[35] As a practical tip, the spouse of claimant with a loss of consortium claim should present a separate Form 95 for their derivative claim[36].

The FTCA claimant has a duty to cooperate with the agency's investigation and the Form 95 should be accompanied by appropriate evidence and information to allow the agency to undertake an investigation of the claim.[37] Failure to do so is a defense by the government to a later civil action. While the Form 95 itself does not require the level of detail that a federal complaint does, what documents and evidence accompanies the Form 95 may be of critical importance. This can include:

- Medical records and imaging;
- Bills, receipts, and/or other records demonstrating economic loss;
- A list of potential witnesses or interested parties of the Estate (wrongful death claims);
- Police reports along with all witness statements and attachments;
- Photographs and video evidence;
- Expert affidavits;
- Employment or tax records supporting wage loss

A plaintiff is only allowed to file a civil action *after* the administrative claim is pending with the agency for 6 months, or if the agency determines not to settle the claim. Of critical importance, if the administrative claim is affirmatively denied by the agency, the plaintiff has only six months from the date of mailing of the agency's notice of the denial in which to either seek agency reconsideration or file suit.[38] A plaintiff must file a civil action in the federal district court where the plaintiff resides or where the act or omission occurred.[39] The civil action is brought against the United States as the party defendant, not against the negligent employee.[40] Although there are exceptions, generally the United States can only be sued under the FTCA for the negligence of its actual federal employees.[41] As with Michigan Court of Claims actions, there no right to trial by a jury under the FTCA.[42]

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[34] 28 USC §2672, 2675(a)

[35] *See e.g., Ianni v. U.*S., 457 F.2d 804 (6th Cir. 1972); *Executive Jet Aviation Inc. v. U.S.*, 507 F.2d 508 (6th Cir. 1974.) While there is a body of federal law allowing equitable tolling and time extensions for fraudulent government concealment, these are outside the limited scope of this article.

[36] *Rucker v. U.S. Dept. of Labor*, 798 F.2d 891 (6th Cir. 1986). (Identifying claimant's spouse on SF 95 not sufficient to present written demand for spouse's consortium claim.)

[37] 28 CFR 14.4

[38] 28 USC §2401(b).

[39] 28 USC §1402(b

[40] 28 USC §2679(b)(1)

[41] 28 USC §2671. However, there are certain circumstances where independent contractors and non-employees are deemed or treated like federal employees, such as providers at a HRSA federally qualified health center. See e.g, https://bphc.hrsa.gov/ftca/about/index.html

[42] 28 USC § 2402.

Conclusion

Pursuing claims against powerful governmental defendants can be daunting and challenging. Governmental defendants have virtually unlimited resources, and typically retain extraordinarily talented attorneys. An injured person and their counsel must navigate this reality in the setting of law and procedure which does not favor them. But holding negligent governmental actors accountable is an important goal, and one worth the noble fight.

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