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Notice of Claim Requirement Under the Minnesota Municipal Tort Liability Act

NOTICE OF CLAIM REQUIREMENT UNDER THE MINNESOTA MUNICIPAL TORT LIABILITY ACT

I. INTRODUCTION

The notice of claim requirement[1] of the Minnesota Municipal Tort Liability Act[2] poses, with few exceptions,[3] a significant hurdle for claimants seeking redress for injuries allegedly suffered through municipal negligence.[4] The Act requires that notice be served upon the municipal governing body, as a condition precedent to suit, within 180 days of the

1. MINN. STAT. § 466.05(1) (1976) provides:
Except as provided in subdivisions 2 and 3, every person who claims damages from any municipality for or on account of any loss or injury within the scope of section 466.02 [torts of municipalities and municipal employees] shall cause to be presented to the governing body of the municipality within 180 days after the alleged loss or injury is discovered a notice stating the time, place and circumstances thereof, and the amount of compensation or other relief demanded. Actual notice of sufficient facts to reasonably put the governing body of the municipality or its insurer on notice of a possible claim shall be construed to comply with the notice requirements of this section. Failure to state the amount of compensation or other relief demanded does not invalidate the notice; but in such case, the claimant shall furnish full information regarding the nature and extent of the injuries and damages within 15 days after demand by the municipality. No action therefor shall be maintained unless such notice has been given and unless the action is commenced within one year after such notice. The time for giving such notice does not include the time, not exceeding 90 days, during which the person injured is incapacitated by the injury from giving the notice.

2. MINN. STAT. ch. 466 (1976).

3. No notice is required for injuries from intentional torts or the use of motor vehicles owned by a municipality or operated by its employees. MINN. STAT. § 466.05(2) (1976). Notice of a claim for wrongful death may be given within one year. *Id.* § 466.05(3) (1976). *See also id.* § 466.03 (exceptions to municipal tort liability). Prior to the adoption of the Municipal Tort Liability Act, the Minnesota Supreme Court had held that notice need only be given in cases involving negligence. *See* Hahn v. City of Ortonville, 238 Minn. 428, 438, 57 N.W.2d 254, 262 (1953) (notice requirement not applicable to action against municipal liquor store under Civil Damages Act). However, the validity of the *Hahn* holding is doubtful in light of the Municipal Tort Liability Act, which specifically applies to all torts by municipalities or their employees or agents. *See* MINN. STAT. § 466.02 (1976). Moreover, it should be noted that since *Hahn*, the Minnesota Legislature has adopted a notice statute specifically applicable to dramshop actions against municipalities. MINN. STAT. § 340.951 (1976), *as amended by* Act of June 2, 1977, ch. 390, 1977 Minn. Laws 888. Unlike the general notice statute, however, the notice period is only 120 days. *Id.*

4. MINN. STAT. § 466.01(1) (1976) defines a municipality as "any . . . city, whether organized under home rule charter or otherwise, any county, town, public authority, public corporation, special district, school district, however organized, or other political subdivision." Thus, for example, the Act applies to torts of a housing and redevelopment authority, McCaleb v. Jackson, ___ Minn. ___, ___, 239 N.W.2d 187, 189 (1976), and to airport commissions, Sorenson v. Minneapolis-St. Paul Int'l Airports Comm'n, 289 Minn. 207, 208-09, 183 N.W.2d 292, 294 (1971), but not to state universities, Walstad v. University of Minn. Hosps., 442 F.2d 634, 641-42 (8th Cir. 1971).

plaintiff's injury.[5] Moreover, suit must be commenced within one year of the date notice is given.[6] With the abolition of sovereign immunity in Minnesota,[7] the notice requirement remains a last vestige of the theory that governmental entities deserve special protection against claims arising from their torts. This Note first will examine the origins and rationales of the notice requirement.[8] Next, the various judicial and legislative modifications of the requirement will be analyzed. These modifications involve incapacitated claimants,[9] estoppel and waiver,[10] the doctrine of substantial compliance,[11] and abolition of the requirement on constitutional grounds.[12] Finally, an amendment of the notice requirement will be proposed which would preserve the protection that notice justifiably affords municipalities while relieving the inequities that often result from a rigid application of the requirement.[13]

II. Historical Background

The doctrine of sovereign immunity, arising from feudal England, provided that the state was above the law and that only with its consent could an action be maintained against it.[14] This doctrine was first applied to local units of government in the 1788 English case of *Russell v. Men of Devon,*[15] where suit was barred against an unincorporated county so the public would not "suffer an inconvenience."[16] From this somewhat dubious beginning, the doctrine became firmly established in this country in the nineteenth century[17] and eventually was extended to

5. Minn. Stat. § 466.05(1) (1976).
6. *Id.*
7. See notes 24-29 *infra* and accompanying text.
8. See notes 14-41 *infra* and accompanying text.
9. See notes 47-57 *infra* and accompanying text.
10. See notes 58-73 *infra* and accompanying text.
11. See notes 74-106 *infra* and accompanying text.
12. See notes 107-96 *infra* and accompanying text.
13. See notes 197-204 *infra* and accompanying text.
14. For a good discussion of the origins of sovereign immunity, see Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 214 n.1, 359 P.2d 457, 458 n.1, 11 Cal. Rptr. 89, 90 n.1 (1961).
15. 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788).
16. *Id.* at 673, 100 Eng. Rep. at 362. The court further observed that it is a principle of law that no man can be responsible for an injury unless it is caused by his own act or default. Since the defendant was composed of a fluctuating number of inhabitants, the court concluded that new residents who might have moved in after an injury, but before a judgment, would thus unlawfully have been liable for damages. *Id.* at 668, 100 Eng. Rep. at 360. Such reasoning has been characterized as "an anachronism without rational basis [that] has existed only by virtue of inertia," Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961), and "unjust, unsupported by any valid reason and [which] has no rightful place in modern day society," Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 25, 163 N.E.2d 89, 96 (1959).
17. After mentioning the doctrine as early as 1810, *see* Riddle v. Proprietors of the Locks & Canals, 7 Mass. 169, 187-88 (1810) (dicta), Massachusetts became the first American jurisdiction to recognize sovereign immunity. *See* Mower v. Leicaster, 9 Mass. 247 (1812).

include virtually all levels of local government.[18]

Although sovereign immunity was the general rule, it was subject to both statutory and judicial exceptions[19] and notice of claim requirements were enacted to apply when any of these exceptions were available against a municipality.[20] The first notice statute of statewide application in Minnesota was enacted in 1897.[21] It contained a thirty-day notice period and required that the action be commenced within one year after the injury.[22] The 1897 statute required that written notice be served upon the municipal governing body and that it contain the time, place, and circumstances of the alleged injury and the amount of compensation or other relief sought.[23]

In *Spanel v. Mounds View School District,*[24] decided in 1962, the Minnesota Supreme Court prospectively abolished municipal tort immunity and attacked headlong the doctrine's arbitrary distinctions, sparing only discretionary governmental activities and judicial, quasi-judicial, legislative, and quasi-legislative functions.[25] The court noted that comparable private institutions have suffered no undue hardships from exposure to tort liability and proposed that municipalities would likewise be able to tolerate such liability.[26] By announcing its intention in *Spanel* to abolish municipal immunity in the future, the court invited the legislature to act[27] and suggested several provisions that might be

Others gradually followed the Massachusetts lead. *See, e.g.,* Dosdall v. County of Olmsted, 30 Minn. 96, 14 N.W. 458 (1882); Bailey v. Mayor of New York, 3 Hill 458 (N.Y. 1842).

18. *See, e.g.,* Bank v. Brainerd School Dist., 49 Minn. 106, 51 N.W. 814 (1892) (school districts); Altnow v. Town of Sibley, 30 Minn. 186, 14 N.W. 877 (1883) (towns); Dosdall v. County of Olmsted, 30 Minn. 96, 14 N.W. 458 (1882) (counties).

19. *See, e.g.,* Hahn v. City of Ortonville, 238 Minn. 428, 437-38, 57 N.W.2d 254, 261-62 (1953) (municipal liquor stores subject to dramshop act); Smith v. City of Cloquet, 120 Minn. 50, 139 N.W. 141 (1912) (city liable for injuries from undue accumulations of ice and snow on sidewalks); MINN. STAT. § 123.41 (1976) (school districts may waive immunity to the extent of permissible liability insurance). The largest exception was created by the distinction between proprietary and governmental functions, whereby tort immunity protected municipalities in the performance of governmental but not proprietary functions. *See* Peterson, *Governmental Responsibility for Torts in Minnesota* (pt. 1), 26 MINN. L. REV. 293, 295-96, 334-58 (1942).

20. *See, e.g.,* Act of Mar. 2, 1885, ch. 7, § 19, 1885 Minn. Special Laws 74.

21. Act of Apr. 23, 1897, ch. 248, § 1, 1897 Minn. Laws 459.

22. *Id.*

23. *Id.*

24. 264 Minn. 279, 118 N.W.2d 795 (1962).

25. *Id.* at 292-93, 118 N.W.2d at 803. *See generally* Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal,* 52 MINN. L. REV. 1047 (1968).

26. 264 Minn. at 291, 118 N.W.2d at 802-03.

27. *Id.* at 281, 118 N.W.2d at 796. State tort immunity was prospectively abolished in the same manner. *See* Neiting v. Blondell, ___ Minn. ___, 235 N.W.2d 597 (1975). As with municipal liability, the Minnesota Legislature has acted to abolish certain state immunities in light of *Neiting. See* MINN. STAT. § 3.736 (1976).

included in a tort liability law, including a notice requirement.[28] This invitation was quickly accepted; in 1963 the Minnesota Municipal Tort Liability Act was enacted.[29] The Act contained a thirty-day notice provision, which survived until 1974 when it was increased to sixty days,[30] and the present 180-day requirement was adopted in 1976.[31]

Under the present Minnesota notice statute, notice must include the place, time, and circumstances of the injury, but defects in compensation or other relief demanded may be corrected after notice is given.[32] In addition, written notice is not required if the municipality obtains actual notice of the injury within the notice period.[33] Moreover, an extension of up to ninety days is granted to claimants incapacitated by the injury.[34]

The Minnesota Supreme Court has enunciated at least four reasons for allowing municipalities to limit their tort liability through the notice requirement. First, notice provides an opportunity to investigate claims while facts are fresh and witnesses readily available.[35] Notice also protects against stale or fraudulent claims and the connivance of public officials.[36] The third reason is to enable the correction of deficient municipal facilities and functions before more people suffer injuries.[37] Finally, notice affords an opportunity for negotiation and settlement without litigation.[38] While these justifications have been endorsed by the courts in Minnesota and elsewhere,[39] legislative and judicial exceptions have developed to mitigate the harshness of the notice requirement.[40] In addition, a small number of courts have taken a more drastic approach and have abolished their states' notice statutes on constitutional grounds.[41] The following section will analyze these developments in more detail.

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28. 264 Minn. at 293, 118 N.W.2d at 804.
29. Act of May 22, 1963, ch. 798, §§ 1-17, 1963 Minn. Laws 1396.
30. Act of Mar. 28, 1974, ch. 311, § 1, 1974 Minn. Laws 518.
31. Act of Apr. 13, 1976, ch. 264, § 4, 1976 Minn. Laws 969.
32. MINN. STAT. § 466.05(1) (1976).
33. *Id.*
34. *Id.*
35. *E.g.*, Hirth v. Village of Long Prairie, 274 Minn. 76, 79, 143 N.W.2d 205, 207 (1966).
36. *Id.* at 79, 143 N.W.2d at 208.
37. *Id.* at 79, 143 N.W.2d at 207-08.
38. *Id.* at 79, 143 N.W.2d at 207.
39. *See, e.g.*, Note, *Notice of Claim Provisions: An Equal Protection Perspective*, 60 CORNELL L. REV. 417, 422-23 (1975) (justifications for notice requirement have as their underlying basis the protection of the public coffers, with only an ancillary concern for public safety).
40. *See* notes 42-106 *infra* and accompanying text.
41. *See* notes 107 & 115 *infra*.

III. JUDICIAL AND LEGISLATIVE MODIFICATIONS OF THE NOTICE REQUIREMENT

Historically, the Minnesota Supreme Court has given a strict construction to the notice requirement,[42] leaving modification to the legislature.[43] Thus, notice has been considered a condition precedent to suit[44] and plaintiffs have been denied recovery for mere technical violations of the requirement.[45] Trivial noncompliance with the statute sometimes has barred plaintiffs' claims despite bad faith or even fraudulent misrepresentation by the municipality.[46] Interpretation of the notice statute has not been uniformly strict, however. Exceptions for incapacitated persons, principles of waiver and estoppel, the substantial compliance doctrine, and suggestions by the Minnesota court that it will hold the statute unconstitutional cumulatively have eliminated much of the harshness inherent in the notice requirement.

A. *Incapacity*

Unduly severe consequences occur when a plaintiff is unable to give

42. *See, e.g.*, Hampton v. City of Duluth, 140 Minn. 303, 305, 168 N.W. 20, 21 (1918) (description of place of accident 25 feet in error held an inaccurate description); Olcott v. City of St. Paul, 91 Minn. 207, 209-10, 97 N.W. 879, 880-81 (1904) (after proclaiming that notice statute should be construed with "reasonable liberality," a description in the notice of the sidewalk as icy, smooth, and defective held insufficient when complaint also alleged the defective character resulted from holes and decay of sidewalk); Doyle v. City of Duluth, 74 Minn. 157, 161, 76 N.W. 1029, 1030 (1898) (notice void when served upon mayor rather than municipal governing body).

43. *See, e.g.*, Jensen v. Downtown Auto Park, Inc., 289 Minn. 436, 438-39, 184 N.W.2d 777, 778 (1971) (legislative acquiesence indicates approval); Olson v. City of Virginia, 211 Minn. 64, 66, 300 N.W. 42, 43 (1941) ("matters concerning the hardship and injustice of [notice] legislation are for legislative and not judicial consideration").

44. *See, e.g.*, White v. Johnson, 272 Minn. 363, 370, 137 N.W.2d 674, 679 (1965) ("The more precise characterization of the notice requirement is that it is a condition precedent to bringing suit for the practical purpose of quickly informing a municipality of injuries for which it might be liable."); Freeman v. City of Minneapolis, 219 Minn. 202, 204, 17 N.W.2d 364, 365 (1945) ("The statute imposes a requirement as a condition precedent to bringing suit against a municipality by an injured party claiming damages for tortious injury that he first present a notice of claim in writing to the governing body of the city."); Szroka v. Northwestern Bell Tel. Co., 171 Minn. 57, 59, 213 N.W. 557, 558 (1927) ("In many cases it is said that the giving of notice is a condition precedent to a cause of action.").

45. *See* cases cited in note 42 *supra*.

46. *See, e.g.*, McGuire v. Hennessy, 292 Minn. 429, 431, 193 N.W.2d 313, 314 (1971) (notice not effective until received by city council despite timely notice given to city attorney who held it beyond notice period before giving it to city council); Hirth v. Village of Long Prairie, 274 Minn. 76, 143 N.W.2d 205 (1966) (municipal hospital fraudulently concealed fact that unauthorized treatment caused amputation of plaintiff's legs); Johnson v. City of Chisholm, 222 Minn. 179, 185-86, 24 N.W.2d 232, 236 (1946) (city not estopped from asserting faulty notice defense despite misrepresentation by city officials to plaintiff about necessity of filing notice).

notice because of incapacity and consequently is barred by the notice requirement. Especially onerous are those situations where the incapacity results from the very injury that gives rise to the plaintiff's cause of action. Many jurisdictions nonetheless make no exception for this unfortunate class,[47] while other jurisdictions, more sensitive to the problems faced by such plaintiffs, have grafted exceptions for incapacitated persons.[48] Minnesota is among the states that grant exceptional treatment for persons incapacitated by the injury, allowing them an extension of up to ninety days to give notice.[49]

Despite the ninety-day extension, the problems faced by incapacitated plaintiffs in Minnesota have by no means been eradicated. For example, the court has held that the extension is available only if the plaintiff was unable to cause another to give notice in his stead.[50] Furthermore, notice by incapacitated plaintiffs is extended only for the time of incapacity, with the ninety-day period representing the maximum.[51] In addition, minors, despite legal incapacity, do not fall within the ninety-day extension provision.[52] Finally, incapacity is a fact ques-

47. *See, e.g.*, City of Birmingham v. Weston, 233 Ala. 563, 567, 172 So. 643, 646 (1937) (failure to file notice against city within required period is not excused because injured person was under ten years of age and was mentally and physically unable to give notice); Sherfey v. City of Brazil, 213 Ind. 493, 503, 13 N.E.2d 568, 572 (1938) (fact that claimant is an infant or is under mental or physical disabilities does not relieve him from the requirement of giving timely notice); Workman v. City of Emporia, 200 Kan. 112, 117, 434 P.2d 846, 850 (1967) (notice requirement as applied to an incompetent claimant does not violate due process).

48. Some state statutes except incapacitated plaintiffs. *See, e.g.*, IOWA CODE ANN. § 613A.5 (West Supp. 1976); ORE. REV. STAT. § 30.275(3) (1953). Some states have judicially created exceptions for incapacitated plaintiffs. *See, e.g.*, Maier v. City of Ketchikan, 403 P.2d 34, 37 (Alas. 1965) (plaintiff incapacitated because of electrocution); Burkard v. City of Dell Rapids, 76 S.D. 56, 59-60, 72 N.W.2d 308, 309 (1955) (incapacitated claimant not required to give timely notice where city was performing a proprietary function).

49. *See* note 1 *supra*. Early municipal charters contained similar provisions. *See, e.g.*, Ray v. City of St. Paul, 44 Minn. 340, 342, 46 N.W. 675, 676 (1890) (to come within this exception, claimant must prove "that his mental operations were so impaired, either through his physical condition or as the result of medical treatment required thereby, as to disqualify him from attending to, or giving needful directions in respect to, the notice" during the period of claimed incapacity). The first uniform incapacity exception in Minnesota was enacted in 1959. *See* Act of Apr. 24, 1959, ch. 599, § 1, 1959 Minn. Laws 971.

50. *See* Wibstad v. City of Hopkins, 291 Minn. 206, 209, 190 N.W.2d 125, 127 (1971); *cf.* Holsman v. Village of Bigfork, 284 Minn. 460, 462, 172 N.W.2d 320, 321-22 (1969) (minor not incapacitated by reason of minority; parents can still give notice).

51. *See* Wibstad v. City of Hopkins, 291 Minn. 206, 209, 190 N.W.2d 125, 126-27 (1971).

52. *See* Holsman v. Village of Bigfork, 284 Minn. 460, 462, 172 N.W.2d 320, 321-22 (1969) (mother could have given notice); Szroka v. Northwestern Bell Tel. Co., 171 Minn. 57, 60-61, 213 N.W. 557, 558 (1927) (incapacity statute only excepted claimants incapacitated by the injury and minors are not incapacitated for that reason). The weight of authority from other jurisdictions is to the contrary, holding minority to be incapacity excepted from notice. *See, e.g.*, Wills v. Metz, 89 Ill. App. 2d 334, 337, 231 N.E.2d 628, 630 (1967) (minor twenty years old); Fornaro v. Town of Clarkstown, 44 App. Div. 2d 596,

tion which "manifestly intends a case-by-case determination."[53] Therefore, the extension is of little assistance to a person who is incapacitated for longer than 270 days, who could have caused notice to be given by a third party, or who is a minor.

The inherent unfairness of a notice provision that can bar an incapacitated person from recovery is obvious and the justifications for the notice requirement[54] seem singularly unconvincing in such a case, especially where the municipality's negligence causes a serious injury. Although the Minnesota Legislature has taken steps in recent years to alleviate the harshness of the notice requirement in incapacity cases by extending the notice period,[55] a more just and comprehensive approach might be to waive notice for the entire period of incapacity.[56] If the legislature does not take such action, the court might consider following the lead of several other courts, discussed elsewhere in this Note, and hold the notice statute unconstitutional as applied to incapacitated plaintiffs.[57]

B. Waiver and Estoppel

A second possible exception to the notice requirement involves the doctrines of waiver and estoppel. A waiver is a voluntary relinquishment of a known right,[58] and therefore generally only is available where the municipal governing body votes to excuse notice for a particular claimant.[59] Equitable estoppel, on the other hand, has been found where the plaintiff has justifiably relied to his detriment upon actions of the municipality.[60] The two doctrines often are used interchangeably,[61] how-

353 N.Y.S.2d 516 (1974) (child of 13 years presumed not to know his legal rights). *But see* Goncalves v. San Francisco Unified School Dist., 166 Cal. App. 2d 87, 90-91, 332 P.2d 713, 715 (1958). *See generally* 18 E. McQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 53.159 (rev. 3d ed. 1963). At least one court has extended legal incapacity to include inability to obtain legal representation. *See* Torres v. Jersey City Medical Center, 140 N.J. Super. 323, 327, 356 A.2d 75, 77 (1976) (construing statute giving court discretion to permit late notice). Another court has regarded incarceration in a jail as constituting incapacity. *See* Green v. Department of Corrections, 30 Mich. App. 2d 648, 659, 186 N.W.2d 792, 798, *aff'd*, 386 Mich. 459, 192 N.W.2d 491 (1971).

53. Hestbeck v. Hennepin County, 297 Minn. 419, 428, 212 N.W.2d 361, 367 (1973).

54. See notes 35-39 *supra* and accompanying text.

55. *See* note 49 *supra* and accompanying text.

56. This could be achieved by adopting a notice statute similar to that in New York and several other states, giving discretion to the trial judge to forgive late notice when justice requires. *See* notes 197-203 *infra* and accompanying text.

57. See notes 110-21 *infra* and accompanying text.

58. *See, e.g.*, Alsleben v. Oliver Corp., 254 Minn. 197, 203, 94 N.W.2d 354, 358 (1959) (waiver is an intentional relinquishment of a known right and the necessary knowledge may be actual or constructive).

59. *See, e.g.*, Hirth v. Village of Long Prairie, 274 Minn. 76, 78, 143 N.W.2d 205, 207 (1966) (can be no waiver of notice except by formal action of the governing body of the municipality).

60. *See, e.g.*, Brooks v. City of Miami, 161 So. 2d 675, 677 (Fla. Dist. Ct. App. 1964)

ever, with waiver being found because of conduct of municipal employees, even though the governing body did not excuse notice and a waiver was not intended.[62] In such cases, the technically proper approach would be to apply the estoppel doctrine, although in most of these cases the result probably would be the same.[63]

The waiver and estoppel theories have not been widely accepted in notice cases;[64] the courts generally have reasoned that the notice statute is not susceptible to such judicial exceptions.[65] In recent years, however, a sense of fairness and justice has provoked a trend toward allowing an exception based on these theories.[66] Minnesota case law is illustrative. In *Leier v. Twin Cities Area Metropolitan Transit Commission,*[67] the plaintiff was injured on one of defendant's buses. Two days later, defendant's claims adjuster telephoned and advised the plaintiff not to hire an attorney and to let the defendant handle the claim. The plaintiff subsequently submitted late notice, but the Minnesota Supreme Court nonetheless held that the defendant was estopped from invoking the defense of untimely notice.[68]

The *Leier* decision changed the Minnesota court's previous position prohibiting estoppel.[69] *Leier,* however, also appears to have placed some

(city is estopped unless it scrupulously avoids actions which might prejudice claimant in giving notice); City of Waco v. Thralls, 172 S.W.2d 142, 148 (Tex. Ct. App. 1943) (city estopped because of its longstanding policy of paying injured employees regardless of liability, where that policy caused claimant-employee not to give notice).

61. *See* 31 MINN. L. REV. 751, 752 (1947).

62. *See, e.g.,* Rabinowitz v. Town of Bay Harbor Islands, 178 So. 2d 9, 12-13 (Fla. 1965) (actual notice of the plaintiff's injury by the municipality held to waive notice requirement); Housewright v. City of LaHarpe, 51 Ill. 2d 357, 362, 282 N.E.2d 437, 442 (1972) (purchase of municipal liability insurance held to waive notice requirement).

63. *Compare, e.g.,* Lindley v. City of Detroit, 131 Mich. 8, 10, 90 N.W. 665, 665-66 (1902) *with, e.g.,* Rabinowitz v. Town of Bay Harbor Islands, 178 So. 2d 9, 12-13 (Fla. 1965).

64. *See, e.g.,* Fry v. Willamalane Park & Recreation Dist., 4 Ore. App. 575, 584, 481 P.2d 648, 653 (1971); Rabe v. Outagamie County, 72 Wis. 2d 492, 501, 241 N.W.2d 428, 433 (1976); *cf.* Aune v. City of Mandan, 167 N.W.2d 754, 759-60 (N.D. 1969) (estoppel also inapplicable to six-month statute of limitation in notice statute).

65. *See, e.g.,* Heck v. City of Knoxville, 249 Iowa 602, 609, 88 N.W.2d 58, 63 (1958) (the doctrine of waiver "would virtually nullify the statutory requirement of service upon the municipality").

66. *Compare, e.g.,* Hirth v. Village of Long Prairie, 274 Minn. 76, 79, 143 N.W.2d 205, 208 (1966) (municipality cannot be estopped from asserting improper notice defense because to do so "would be to undermine the purposes of the statute and invade the legislative prerogative") *with, e.g.,* Leier v. Twin City Area Metropolitan Transit Comm'n, 299 Minn. 35, 216 N.W.2d 129 (1974) (estoppel doctrine applied in notice case to avoid unjust result).

67. 299 Minn. 35, 216 N.W.2d 129 (1974).

68. *Id.* at 37-38, 216 N.W.2d at 130.

69. *See* Hirth v. Village of Long Prairie, 274 Minn. 76, 79, 143 N.W.2d 205, 207 (1966) (only formal action by municipal governing body can constitute waiver or estoppel); Olson v. City of Virginia, 211 Minn. 64, 67, 300 N.W. 42, 44 (1941) (requirements of notice statute

limitations on the estoppel theory. Apparently, the acts which form the grounds for estoppel must occur within the notice period.[70] In addition, the plaintiff probably must actually serve notice upon the defendant even though late.[71] Consequently, while *Leier* is a relatively liberal decision, it is limited to its "unique fact situation."[72] The doctrine of estoppel is an equitable one, however, and in a case where the equities so require, the court might well allow the doctrine to be invoked even when the requirements alluded to in *Leier* have not been met.[73]

C. *Substantial Compliance*

The most common and significant method of easing the often calamitous effects of the notice requirement is by the doctrine of substantial compliance. Courts frequently announce that notice requirements are to be liberally construed[74] and that technically deficient notice which substantially complies with the statutory requirements is sufficient.[75] This is consistent with the trend away from governmental immunity[76] and the doctrine generally is favored as the judicial exception least offensive to the notice statute.[77]

In Minnesota, the concept of substantial compliance has evolved in two stages. Prior to 1972, the doctrine had been erratically applied and usually was limited to defects in the form and content of notice and manner of service.[78] Because a function of notice is to expedite munici-

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cannot be supplied through waiver or estoppel).

70. *See* Leier v. Twin Cities Area Metropolitan Transit Comm'n, 299 Minn. 35, 37, 216 N.W.2d 129, 130 (1974); Johnson v. City of Chisholm, 222 Minn. 179, 186, 24 N.W.2d 232, 236 (1946).

71. *See* Leier v. Twin Cities Area Metropolitan Transit Comm'n, 299 Minn. 35, 37, 216 N.W.2d 129, 130 (1974).

72. *Id.*

73. *See generally* 3 J. POMEROY, EQUITY JURISPRUDENCE, §§ 802, 805 (4th ed. 1941).

74. *See, e.g.*, Grams v. Independent School Dist., 286 Minn. 481, 489, 176 N.W.2d 536, 541 (1970); Brown v. City of Chattanooga, 180 Tenn. 284, 288, 174 S.W.2d 466, 468 (1943); Frankfort Gen. Ins. Co. v. City of Milwaukee, 164 Wis. 77, 80, 159 N.W. 581, 582 (1916).

75. *See, e.g.*, Oakley v. State, 54 Haw. 210, 217, 505 P.2d 1182, 1186 (1973); Galbreath v. City of Indianapolis, 253 Ind. 472, 477-78, 255 N.E.2d 225, 228-29 (1970); Croft v. Gulf & Western Indus., Inc., 12 Ore. App. 507, 514, 506 P.2d 541, 545 (1973).

76. In 1957, Florida became the first jurisdiction to abrogate municipal tort immunity. *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133-34 (Fla. 1957). This trend since has steadily gained momentum. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 985-86 (4th ed. 1971). In addition to abrogation of municipal immunity, it has been limited in other jurisdictions through exceptions. *See* note 19 *supra*.

77. For example, the Minnesota Supreme Court, traditionally strict in its interpretation of the notice statute, applied substantial compliance as early as 1889. *See* Harder v. City of Minneapolis, 40 Minn. 446, 42 N.W. 350 (1889). In contrast, municipal misrepresentations and other conduct by municipal defendants was not held to create an estoppel until 1974. *See* note 67 *supra* and accompanying text.

78. Prior to 1972, substantial compliance had been employed generally only to accomodate errors or omissions in the description of the time, place, and circumstances of the

pal investigations,[79] defects in form, content, and manner of service which did not substantially hinder municipal defendants in ascertaining the time, place, and circumstances of the injury had often, but not uniformly,[80] been allowed.[81] In contrast, defects in timeliness always barred claims because late notice inevitably delays investigation.[82]

Since 1972, a line of cases beginning with *Olander v. Sperry & Hutchinson Co.*,[83] has vigorously embraced and expanded the doctrine of substantial compliance in Minnesota. *Olander* eliminated the prior confusion concerning description of the time, place, and circumstances of the

injury. *See, e.g.*, Russell v. City of Minneapolis, 259 Minn. 355, 357, 107 N.W.2d 711, 713 (1961) (six- to 15-foot error in description of place of injury permissible); Murphy v. City of St. Paul, 130 Minn. 410, 153 N.W. 619 (1915) (time of accident one day in error held acceptable); Harder v. City of Minneapolis, 40 Minn. 446, 449, 42 N.W. 350, 351 (1889) (one-block error in description of place of injury permissible). *But see* Hampton v. City of Duluth, 140 Minn. 303, 305, 168 N.W. 20, 21 (1918) (25-foot error in description of place invalidates notice). Substantial compliance has likewise been held sufficient in describing the nature of the defect. *See, e.g.*, Piscor v. Village of Hibbing, 169 Minn. 478, 482, 211 N.W. 952, 953 (1927) (notice need not be as accurate as pleadings in describing defect). *But see* Olcott v. City of St. Paul, 91 Minn. 207, 209-10, 97 N.W. 879, 880-81 (1904) (insufficient description of injury-causing defect). Substantial compliance also has been acceptable to the extent the municipality is not thereby prejudiced. *See* Brittain v. City of Minneapolis, 250 Minn. 376, 383, 84 N.W.2d 646, 651 (1957); Terryll v. City of Faribault, 81 Minn. 519, 84 N.W. 458 (1900), *aff'd second appeal*, 84 Minn. 341, 87 N.W. 917 (1901); *cf.* Louko v. Village of Hibbing, 222 Minn. 463, 466, 25 N.W.2d 234, 235 (1946) (notice as to place sufficient if municipal authorities, through exercise of reasonable diligence, are able to discover location).

Substantial compliance, however, has been more grudgingly invoked with regard to the manner of service requirement. *See, e.g.*, Grams v. Independent School Dist., 286 Minn. 481, 491, 176 N.W.2d 536, 542 (1970) (service upon superintendent of school district sufficient); Hebert v. Village of Hibbing, 170 Minn. 211, 212 N.W. 186 (1927) (service of notice upon village recorder sufficient); Peterson v. Village of Cokato, 84 Minn. 205, 208, 87 N.W. 615, 616-17 (1901) (same). *But see* McGuire v. Hennessy, 292 Minn. 429, 431, 193 N.W.2d 313, 315 (1971) (city attorney not appropriate official upon whom to serve notice); Aronson v. City of St. Paul, 193 Minn. 34, 36, 257 N.W. 662, 663 (1934) (mayor not appropriate official upon whom to serve notice); Doyle v. City of Duluth, 74 Minn. 157, 161, 76 N.W. 1029, 1030 (1898) (same). The Minnesota court has also permitted substantial compliance with regard to the requirement concerning amount of compensation demanded. *See* Ackeret v. City of Minneapolis, 129 Minn. 190, 196-97, 151 N.W. 976, 978 (1915) (notice sufficient despite failure to specify separate damages of parent arising from injury to child). *But see* Olson v. City of Virginia, 211 Minn. 64, 66, 300 N.W. 42, 43 (1941) (notice with no compensation demanded is void); Bausher v. City of St. Paul, 72 Minn. 539, 75 N.W. 745 (1898) (notice must state amount of compensation demanded, as well as specifying type of relief sought).

79. See note 35 *supra* and accompanying text.

80. *See, e.g.*, Hampton v. City of Duluth, 140 Minn. 303, 305, 168 N.W. 20, 21 (1918) (25-foot error in description of place of injury invalidates notice).

81. *See, e.g.*, Russell v. City of Minneapolis, 259 Minn. 355, 357, 107 N.W.2d 711, 713 (1961) (six- to 15-foot error in description of place of injury is permissible).

82. *See, e.g.*, Almich v. Independent School Dist., 291 Minn. 269, 272, 190 N.W.2d 668, 670 (1971); Hirth v. Village of Long Prairie, 274 Minn. 76, 79, 143 N.W.2d 205, 207 (1966).

83. 293 Minn. 162, 197 N.W.2d 438 (1972).

injury. In overruling prior inconsistent opinions, the court held that, except for the elements of timeliness and manner of service, substantial compliance with the notice provision is sufficient.[84] The court further stated that the test of substantial compliance is reasonablenness; if the reasonable diligence of the municipality could have supplied the information omitted in the notice, the municipality is not thereby prejudiced and the notice is sufficient.[85]

In *Seifert v. City of Minneapolis,*[86] the *Olander* reasoning was expanded to include the manner of service within the substantial compliance doctrine. Notice was held valid despite service upon an alderman at his home after business hours. The court reasoned that notice need only reach a responsible municipal official who is reasonably likely to place it before the municipal governing body.[87] In *Seifert,* the court implicitly acknowledged the insignificance of the short delay caused by technically improper service when compared to the injustice of barring legitimate claims.[88]

The precedent of *Olander* and *Seifert,* and undoubtedly the intervening amendment of the notice requirement from thirty to sixty days,[89] facilitated the extension of substantial compliance to the element of timeliness. In *Jenkins v. Board of Education,*[90] the minor plaintiff was injured in a schoolyard fight and was immediately assisted by the principal and school nurse, who, the following day, filed a detailed report with the school administration.[91] Notice submitted six days late was held substantially to comply with the statute because the delay was short in relation to the notice period, the principal was immediately aware of the injury, the principal's report was filed the day after the injury, and the official who received the report from the principal was the school district's designated agent for receiving notice.[92]

The court in *Jenkins* observed that the notice statute had been amended in 1974,[93] subsequent to the plaintiff's injury,[94] to make actual notice of the injury by the municipality or its insurer sufficient to satisfy the notice requirement.[95] Although not applying the actual notice

84. *Id.* at 169-70, 197 N.W.2d at 442.
85. *Id.* at 170, 197 N.W.2d at 442.
86. 298 Minn. 35, 213 N.W.2d 605 (1973).
87. *Id.* at 42, 213 N.W.2d at 609.
88. *See id.*
89. See note 30 *supra* and accompanying text.
90. 303 Minn. 437, 228 N.W.2d 265 (1975).
91. *Id.* at 438, 228 N.W.2d at 267.
92. *Id.* at 440-41, 228 N.W.2d at 268.
93. *Id.* at 440, 228 N.W.2d at 268.
94. The injury to the claimant in *Jenkins* occurred on January 6, 1972. *Id.* at 438, 228 N.W.2d at 267.
95. See note 33 *supra* and accompanying text.

amendment retroactively,[96] the court reasoned that the rationale of the amendment and the policies underlying *Olander* and *Seifert* mandated that the substantial compliance doctrine be applied to the timeliness requirement.[97] However, because the municipality in *Jenkins* did have actual notice of the injury within the notice period, the case does not resolve the issue whether, absent actual notice, substantial compliance with the timeliness element is sufficient. The *Jenkins* court emphasized that, through the accident report, the municipality was put on notice of the possibility of suit,[98] thus indicating some actual notice is needed for the application of the substantial compliance doctrine to cases involving late notice. This interpretation was reinforced in *Kelly v. City of Rochester,*[99] which also arose prior to the actual notice amendment. In *Kelly* the court, relying on *Jenkins,* found substantial compliance despite late written notice because an accident report had been filed with the city by a city employee within the notice period,[100] thereby giving the municipality actual notice. Therefore, *Jenkins* and *Kelly* both can be read as allowing substantial compliance with the timeliness element only where actual notice is present and thus as having no application in cases arising after the actual notice amendment went into effect.

In *Schaefer v. City of Bloomington,*[101] however, the court seemed to invoke the substantial compliance doctrine against a county where no actual or written notice was given within the required notice period. *Schaefer* may be of only limited applicability, though, because the accident was caused by a facility under the joint control of the county and city and the city had been given proper notice. The court simply imputed the city's notice to the county, observing that the county was not thereby prejudiced.[102]

Consequently, the Minnesota Supreme Court has not yet invoked substantial compliance in a situation where the municipality received no actual or imputed notice within the required period. The court in recent years clearly has shown a willingness to invoke the substantial compliance doctrine when necessary to avoid injustice[103] and thus probably would be willing to apply the doctrine in any case where the municipality by reasonable diligence could have obtained actual notice within the notice period.[104] However, it seems unlikely that the court would

96. *See* MINN. STAT. § 645.21 (1976) ("No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.").
97. *See* 303 Minn. at 439, 228 N.W.2d at 267.
98. *See id.* at 441, 228 N.W.2d at 268-69.
99. 304 Minn. 328, 231 N.W.2d 275 (1975).
100. *Id.* at 332, 231 N.W.2d at 277.
101. ___ Minn. ___, 244 N.W.2d 45 (1976).
102. *See id.* at ___, 244 N.W.2d at 46.
103. See notes 83-102 *supra* and accompanying text.
104. *Cf.* Louko v. Village of Hibbing, 222 Minn. 463, 466, 25 N.W.2d 234, 235 (1946)

ignore completely the time limitations of the notice statute and invoke the substantial compliance doctrine in a case where no actual or imputed notice occurs within the notice period or where the municipality, through its own efforts, could not reasonably have obtained notice.[105] Thus, the substantial compliance doctrine, while it has alleviated much of the harshness of the notice statute,[106] does appear to have definite limitations and in cases where the doctrine is not available, and the grounds for waiver or estoppel are not present, the only alternatives available to the court would be to hold the statute unconstitutional or to deny relief.

D. Constitutional Attack

Another means of mitigating the harshness of the notice requirement is to eliminate completely the requirement of notice on grounds that it is unconstitutional. Constitutional attacks have been based upon due process and equal protection and have been endorsed by four states[107] and a number of commentators.[108] In addition, the Minnesota Supreme Court has hinted strongly on several occasions that it will find the re-

(notice as to place of injury is sufficient if municipal authorities, through exercise of reasonable diligence, are able to discover location).

105. *See, e.g.*, Freeman v. City of Minneapolis, 219 Minn. 202, 205, 17 N.W.2d 364, 365 (1945) ("It is not for the courts to pass upon the merits, wisdom and justice of legislation. So long as the legislature does not transgress constitutional limits, matters concerning the hardship and injustice of legislation are for legislative and not judicial consideration.").

106. One remaining area in which the substantial compliance doctrine should apply is that concerning the problems faced by third-party plaintiffs seeking contribution or indemnity from municipalities. For example, if a defendant is sued for an injury which he believes was the responsibility, in whole or in part, of a municipality, he may wish to join the municipality as a third-party defendant. However, the third-party plaintiff may not have been aware of the injury within the notice period, and if the plaintiff did not give the municipality notice, the third-party plaintiff's claim against the municipality may be barred. In Minnesota, the court has consistently held that in such cases the third-party plaintiff may not join the municipality. *See, e.g.*, American Auto Ins. Co. v. City of Minneapolis, 259 Minn. 294, 298, 107 N.W.2d 320, 323 (1961). The better view, adopted by most courts, permits the third-party plaintiff to join the municipality despite improper notice, since he has no control over whether the municipality receives notice and should not have his rights made contingent upon the plaintiff giving notice. *See, e.g.*, Olsen v. Jones, 209 N.W.2d 64, 67 (Iowa 1974); Cotham v. Board of County Comm'rs, 260 Md. 556, 567, 273 A.2d 115, 120-21 (1971); Geiger v. Calumet County, 18 Wis. 2d 151, 156-57, 118 N.W.2d 197, 200 (1962); Note, *Notice of Claim Under the Municipal Tort Claim Act—The Watchdog with Plenty of Teeth*, 23 DRAKE L. REV. 670, 672 (1974).

107. *See* Reich v. State Highway Dept., 386 Mich. 617, 194 N.W.2d 700 (1972); Turner v. Staggs, 89 Nev. 230, 510 P.2d 879, *cert. denied*, 414 U.S. 1079 (1973); Hunter v. North Mason High School, 85 Wash. 2d 810, 539 P.2d 845 (1975); O'Neil v. City of Parkersburg, ___ W. Va. ___, 237 S.E.2d 504 (1977).

108. *See* Note, *supra* note 39; Note, Noll v. Bozeman: *Notice of Claim Provision in Montana*, 37 MONT. L. REV. 206 (1976) [hereinafter cited as *Notice Provisions in Montana*]; Comment, *The Constitutionality of California's Public Entity Tort Claim Statutes*, 6 PAC. L.J. 30 (1975).

quirement constitutionally infirm.[109] Yet, as the following discussion indicates, most courts have rejected the constitutional attacks, and the reasons for rejection are not entirely without merit.

1. *Due Process*

The due process clause of the fourteenth amendment is designed, in part, to ensure that procedural requirements for judicial proceedings are fair.[110] Several courts have held that notice statutes, as applied to incapacitated and minor claimants, violate procedural due process.[111] These courts have reasoned that incapacitated and minor claimants cannot be required to do that which is clearly impossible as a condition precedent to suit.[112] This procedural due process argument, however, is only available for physically and legally incapacitated claimants and therefore is of somewhat limited utility.[113] A more fundamental due process attack

109. In Olander v. Sperry & Hutchinson Co., 293 Minn. 162, 197 N.W.2d 438 (1972), the court, after reviewing its decisions finding the notice statute constitutional, noted that "judicial patience should not be confused with judicial impotence, especially where constitutional rights may be concerned." *Id.* at 164-65, 197 N.W.2d at 440. The issue was next raised in Altendorfer v. Jandric, Inc., 294 Minn. 475, 199 N.W.2d 812 (1972), with the defendant's contention that it was unconstitutional to require notice to join a municipality as a third-party defendant. Declining to pass on the constitutionality issue, the court nonetheless noted that "[u]nlike an issue of purely statutory construction, judicial resolution of which becomes engrafted upon the statute by subsequent inaction by the legislature, the issue of the constitutionality of a statute is not so circumscribed." *Id.* at 481, 199 N.W.2d at 816. Most recently, three concurring justices in Jenkins v. Board of Education, 303 Minn. 437, 442, 228 N.W.2d 265, 269 (1975) declared the notice requirement constitutionally infirm. The court in Kelly v. City of Rochester, 304 Minn. 328, 330, 231 N.W.2d 275, 276 (1975) indicated that future constitutional attack may be on due process grounds, and in Ebel v. Village of South International Falls, ___ Minn. ___, ___, 244 N.W.2d 496, 497 (1976) the court was willing to decide the constitutional issue if relief was not obtained on remand.

110. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (procedural due process requires a "fair process of decisionmaking" when constitutionally affected rights are involved); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (the opportunity to be heard must be granted "at a meaningful time and in a meaningful manner"); Railroad Comm'n v. Pacific Gas & Elec. Co., 302 U.S. 388, 393 (1938) ("The right to a fair and open hearing is one of the rudiments of fair play assurred to every litigant by the Federal Constitution as a minimal requirement.").

111. *See, e.g.*, Reich v. State Highway Dept., 386 Mich. 617, 622, 194 N.W.2d 700, 701-02 (1972) (alternative holding); City of Tyler v. Ingram, 157 S.W.2d 184, 189 (Tex. Ct. App. 1941), *rev'd on other grounds*, 164 S.W.2d 516 (Tex. 1942); Cook v. State, 83 Wash. 2d 599, 606, 521 P.2d 725, 729 (1974). An important consideration in granting due process relief is the period of time allowed to give notice. Deprivation of due process becomes less likely as the time period for notice increases. *Compare* Ocampo v. City of Racine, 28 Wis. 2d 506, 513, 137 N.W.2d 477, 481 (1965) (120-day notice period not unreasonable) *with* Hughes v. City of Fond du Lac, 73 Wis. 380, 382, 41 N.W. 407, 408 (1889) (five-day notice period unreasonable).

112. *See, e.g.*, Cook v. State, 83 Wash. 2d 599, 604, 521 P.2d 725, 728 (1974).

113. *See* Shearer v. Perry Community School Dist., 236 N.W.2d 688, 692 (Iowa 1975), where the court held the notice statute did not violate the due process but also observed

on notice statutes has been made on substantive due process grounds.

Under substantive due process principles a statute is invalid if it is arbitrary, capricious, and unreasonable.[114] In *Grubaugh v. City of St. Johns*[115] the Michigan Supreme Court employed a substantive due process approach, holding the notice statute unconstitutional because it arbitrarily and unreasonably deprived claimants of a vested property right.[116] In *Grubaugh* the claimants were minors,[117] but the court's reasoning has been applied to adults as well.[118] The rationale invoked by the *Grubaugh* court basically was that under Michigan's municipal tort liability law, liability for municipal negligence arises at the time the tort occurs, thereby vesting the claimant with an immediate property right.[119] As a result, the court held that notice is not a condition precedent to the municipality's liability[120] and that barring a cause of action for improper notice was an arbitrary and unreasonable deprivation of this property right and therefore violative of due process.[121]

Although the Minnesota Supreme Court recently suggested it would entertain a substantive due process argument like that utilized in *Grubaugh*,[122] such an approach may be an inappropriate means for attacking the constitutionality of the Minnesota notice statute. A rather technical reason for this conclusion is that, in Minnesota, notice apparently is a condition precedent to liability,[123] although there is some con-

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that "[w]e might find some difficulty in upholding § 613A.5 [the Iowa notice statute] against a constitutional challenge if it were shown the condition attached to the right of action was so unreasonable as to render compliance almost impossible or to give an injured person, in essence, no right of recovery." Thus, virtual exclusion of a remedy seems to be necessary before this due process argument will apply, and that is likely to occur only in cases where the claimant is incapacitated and thereby is rendered unable to give notice.

114. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 537 (1934); Hylen v. Owens, ___ Minn. ___, ___, 251 N.W.2d 858, 861 (1977); *cf.* Vlandis v. Kline, 412 U.S. 441, 446 (1973) (irrebuttable presumption, created by a statute, arbitrarily and unreasonably caused a deprivation of property in violation of due process).

115. 384 Mich. 165, 180 N.W.2d 778 (1970).

116. *Id.* at 176, 180 N.W.2d at 783-84.

117. *Id.* at 167, 180 N.W.2d at 780.

118. *See* Howell v. Lazaruk, 32 Mich. App. 548, 555, 189 N.W.2d 50, 54 (1971); O'Neil v. City of Parkersburg, ___ W. Va. ___, ___, 237 S.E.2d 504, 509 (1977). In *O'Neil*, however, the court based its decision primarily on equal protection grounds, with its due process discussion representing either dictum or an alternative holding. In addition, *O'Neil* is unique in that the notice statute involved granted only 30 days to give notice, an unusually short time, and that obviously affected the court's decision. See notes 188-89 *infra* and accompanying text.

119. 384 Mich. at 171-74, 180 N.W.2d at 781-83.

120. *Id.* at 173-75, 180 N.W.2d at 782-84.

121. *Id.*

122. *See* Kelly v. City of Rochester, 304 Minn. 328, 330, 231 N.W.2d 275, 276 (1975). *But see* Altendorfer v. Jandric, Inc., 294 Minn. 475, 480-81, 199 N.W.2d 812, 816 (1972) (*Grubaugh* rationale inconsistent with existing Minnesota law).

123. *See, e.g.*, Holsman v. Village of Bigfork, 284 Minn. 460, 462, 172 N.W.2d 320, 321

flict on this point.[124] Consequently, a vested property right to a cause of action against the municipality might not arise in Minnesota until notice is given and therefore no due process rights would commence prior to the giving of notice.[125] At least one other court recently applied such reasoning in holding a notice statute not to be violative of due process.[126]

A more basic reason for rejecting the substantive due process attack is the recent decline of substantive due process and the concurrent rise of equal protection analysis.[127] The modern judicial trend has been to analyze the substantive validity of statutes that create classifications on equal protection grounds,[128] while limiting due process analysis primarily to the issue of procedural safeguards.[129]

Although substantive due process has by no means been abandoned,[130]

(1969) ("It is settled that the requirement of notice to the municipality, even by an injured minor, is an essential part of the cause of action.").

124. *See* White v. Johnson, 272 Minn. 363, 370-71, 137 N.W.2d 674, 679 (1965) (municipal duty to exercise due care is breached at time injury occurs and thus its liability accrues not upon service of notice but rather upon commission of the tort). *But see id.* at 374, 137 N.W.2d at 681 (Otis, J., dissent) (plaintiff's cause of action cannot arise until service of notice).

125. *See, e.g.*, Shearer v. Perry Community School Dist., 236 N.W.2d 688, 692-93 (Iowa 1975).

126. When interpreting a municipal tort liability statute similar to that in Minnesota, IOWA CODE ANN. § 613A.5 (West Supp. 1977), the Iowa Supreme Court held that the right of action is coextensive with, and no broader than, the notice requirement. *See* Shearer v. Perry Community School Dist., 236 N.W.2d 688, 692-93 (Iowa 1975).

127. *See, e.g., Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1131-32 (1969) [hereinafter cited as *Developments*] (if the case is an appropriate one for equal protection analysis, substantive due process analysis should not be invoked). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) (leading article predicting the rise of equal protection analysis to replace substantive due process).

128. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 806-11 (1969). *See generally* Tussman & tenBroek, *supra* note 127.

129. *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433, 436-37 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969). One such procedural issue is access to the courts. The Supreme Court has held that such access cannot be denied if (1) courts provide the only available method of redress, and (2) the rights for which redress is sought are "basic." *Compare* United States v. Kras, 409 U.S. 434, 443-46 (1973) (filing fees are valid as a condition to discharge a voluntary bankruptcy; eliminating debt not a basic right) *with* Boddie v. Connecticut, 401 U.S. 371, 374-77 (1971) (judicial proceeding is the only effective means of dissolving a marriage and the associational rights involved in marriage are constitutionally fundamental). Notice requirements have been held to deny access to the courts in violation of due process on this basis under circumstances where plaintiffs are unable to give notice. *See* notes 110-13 *supra* and accompanying text.

130. The application of substantative due process to economic regulation has long been severely restricted. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-92 (1937); Nebbia v. New York, 291 U.S. 503, 531-39 (1934). *See generally* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. However, the incorporation of many of the rights guaranteed in the Bill of Rights into the

its present scope is not clearly defined,[131] and equal protection analysis is more specifically applicable to constitutional problems caused by legislative classifications.[132] Thus, because the most significant constitutional question with notice statutes concerns the classification between municipal and private defendants, as well as between claimants against such defendants, the constitutionality of those statutes most properly is resolved under the equal protection clause, not through substantive due process.[133]

2. *Equal Protection*

a. *Background*

The equal protection clause of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[134] Thus, although legislation need not be drawn with mathematical precision to ensure absolute equality, persons similarly situated must be similarly treated and legislation cannot discriminate by creating an unconstitutional classification.[135]

The United States Supreme Court generally employs one of two tests when determining the constitutionality of legislative classifications. In most situations, a relatively relaxed test is utilized, whereby the classification is valid so long as it is not arbitrary and bears a reasonable relation to a legitimate governmental objective.[136] The Court normally is easily persuaded to find the requisite reasonable relation, declaring in *McGowan v. Maryland*,[137] for example, that "[t]he constitutional

due process clause of the fourteenth amendment has spawned a new form of substantative due process affecting state regulation. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961). *See generally* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

131. For a discussion of the varying interpretations regarding the scope of modern substantive due process, see Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968).

132. For an early analysis of the superiority of equal protection in reviewing legislative classifications, see Railway Express Agency v. New York, 336 U.S. 106, 111-12 (1949) (Jackson, J., concurring).

133. *See* note 127 *supra*. *See also* Bolling v. Sharpe, 347 U.S. 497, 499 (1955) (while due process and equal protection are often interchangeable, discriminations apparently must be more unjust to violate due process).

134. U.S. CONST. amend. XIV, § 1.

135. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) (fourteenth amendment "does not require absolute equality or precisely equal advantages"); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (minor variations in the application of laws to different groups are not necessarily violative of equal protection); Schwartz v. Talmo, 295 Minn. 356, 362-63, 205 N.W.2d 318, 322-23 (1973) (similarly situated persons must be similarly treated).

136. *See, e.g.*, Madden v. Kentucky, 309 U.S. 83, 88 (1940); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

137. 366 U.S. 420 (1961).

safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective . . . . A statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it."[138]

A second, stricter equal protection test is applied if the statutory classification involves either a "suspect criteria,"[139] such as race,[140] alienage,[141] and ancestry,[142] or affects a "fundamental interest,"[143] such as first amendment rights,[144] voting,[145] the right of criminal appeal,[146] interstate travel,[147] procreation,[148] and rights of a uniquely private nature.[149] These classifications are sustained only if a compelling state interest is present[150] and if the statute is well-tailored to effectuate that interest.[151]

This two-tier equal protection formula has drawn criticism as being too rigid and having no middle ground between its minimum scrutiny and strict scrutiny tests.[152] Some recent decisions have reflected this view by requiring a "fair and substantial" relation between the classifi-

138. *Id.* at 425-26.

139. "Suspect" criteria include a history of purposeful unequal treatment, a position of political powerlessness, or such other disabilities as to command extraordinary protection from the political process. *E.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1972).

140. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

141. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).

142. *See, e.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948).

143. The test of a fundamental interest is whether the interest is expressly or implicitly guaranteed by the Constitution and not whether, on balance, the interest has the social significance of another indentified fundamental interest. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1972). Moreover, the state carries a heavy burden of justification when a statutory classification affects a fundamental interest, including proof that no less drastic means of effectuating its objective exist. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

144. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

145. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

146. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 18 (1956).

147. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

148. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

149. *See* Roe v. Wade, 410 U.S. 113, 152-54 (1972) (decided under due process clause).

150. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Only rarely has the Court found a government interest powerful enough to validate a suspect criteria classification. *See* Korematsu v. United States, 323 U.S. 214, 216-18 (1944) (national security was the prevailing interest where a congressional act was subject to equal protection analysis under the fifth amendment); Hirabayashi v. United States, 320 U.S. 81, 100-01 (1943) (same).

151. *See, e.g., Developments, supra* note 127, at 1122.

152. *See* Dandridge v. Williams, 397 U.S. 471, 519-30 (1970) (Marshall, J., dissenting); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-18 (1972); Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155, 156-60 (1973).

cation and the legitimate governmental objective.[153] This intermediate test is applied to near-suspect categories or rights and has the merit of recognizing that some interests, while not rising to the level of fundamental rights, nonetheless are sufficiently important to deserve more protection than provided by the rational basis, minimum scrutiny test.[154]

b. *Application of the Equal Protection Standards to the Notice Statute*

i. *The Strict Scrutiny Test*

Under the strict scrutiny test, a classification that affects a "fundamental interest" can only be justified if it furthers a compelling state interest.[155] If this test was applied to the notice statute, it seems highly unlikely that the classifications created by the statute could be justified, since few classifications can be justified under this test[156] and the justifications for the notice statute are not strong.[157] However, as yet no courts have subjected the notice requirement to the strict scrutiny equal protection standard. It can be argued that access to the courts is an interest fundamental to our system of justice and that therefore any statute which substantially affects that interest, such as the notice requirement, should be required to satisfy the strict scrutiny test.[158] However, the right of access to the courts has yet to be recognized as a fundamental interest for equal protection purposes and, in light of the Supreme Court's reluctance to expand the fundamental interest category,[159] it is highly unlikely that notice statutes would be subjected to the strict scrutiny test. Indeed, the emergence of an intermediate equal protection standard of review appears to have hampered the expansion of the fundamental interest category.[160] Consequently, the strict scrutiny test probably is not applicable to the notice requirement.

153. *See* Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

154. *See generally* Note, *supra* note 152.

155. *See* note 150 *supra* and accompanying text.

156. *See* note 150 *supra*.

157. *See* notes 164-75 *infra* and accompanying text.

158. *See, e.g.,* Lunday v. Vogelman, ___ Iowa ___, ___, 213 N.W.2d 904, 908 (1973) (Reynoldson, J., dissenting); *cf.* Boddie v. Connecticut, 401 U.S. 371, 386-89 (1971) (Brennan, J., concurring) (access to courts cannot be blocked by legislative classifications). *See generally* Comment, *Equal Protection and State Immunity from Tort Liability,* 1973 WASH. U.L.Q. 716.

159. A number of interests have been promoted as fundamental but have been held not to be by the United States Supreme Court. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 311-12 (1976) (age); San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 29-39 (1972) (education); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (housing); Dandridge v. Williams, 397 U.S. 471, 485-87 (1970) (welfare benefits).

160. *See* Gunther, *supra* note 152, at 26-30.

ii. The Intermediate, "Fair and Substantial Relation" Test

Although of relatively recent origin,[161] the intermediate, fair and substantial relation test has been applied by the Washington Supreme Court in *Hunter v. North Mason High School*[162] to strike down the Washington notice statute. In *Hunter,* the court analyzed the four purported objectives of the notice requirement—investigation of claims, correction of dangerous municipal facilities, settlement of legitimate claims, and protection against stale claims—to determine whether the objectives of the legislative classification are sufficient under the equal protection standard being invoked.[163] The four justifications for the notice statute will be discussed below, in light of *Hunter,* to determine their validity under the intermediate, fair and substantial relation test.

Although the Minnesota Supreme Court has consistently held that the opportunity to investigate claims is a legitimate governmental objective sufficient to justify the distinctions drawn between municipal and private defendants,[164] the court in *Hunter* reasoned persuasively to the contrary. The court doubted that government is any less able to investigate accidents than is a private defendant.[165] Not only are municipalities often no larger than their private counterparts, but they also have available the trained personnel of police departments and insurers.[166] Consequently, the investigation justification is not very convincing.

The justification that notice promotes the detection and removal of dangerous defects also is weak. Defects cause only a fraction of the injuries giving rise to negligence suits against municipalities,[167] yet all victims of municipal negligence must give notice. In addition, notice only partially fulfills this justification because information is received only from those tort victims planning to bring suit, not from everyone injured by municipal defects.[168]

The governmental objective of facilitating settlement without litiga-

161. *See* note 153 *supra* and accompanying text.

162. 85 Wash. 2d 810, 539 P.2d 845 (1975) (en banc).

163. *See id.* at 815-17, 539 P.2d at 849-50.

164. *See, e.g.,* Jenkins v. Board of Educ., 303 Minn. 437, 441-42, 228 N.W.2d 265, 269 (1975); Brittain v. City of Minneapolis, 250 Minn. 376, 383, 84 N.W.2d 646, 651 (1957); O'Brien v. City of St. Paul, 116 Minn. 249, 251, 133 N.W. 981, 982 (1911).

165. 85 Wash. 2d at 816, 539 P.2d at 849; *cf.* Grubaugh v. City of St. Johns, 384 Mich. 165, 176, 180 N.W.2d 778, 784 (1970) (same conclusion reached under due process clause).

166. 85 Wash. 2d at 816, 539 P.2d at 849.

167. *Compare* Schaefer v. City of Bloomington, ___ Minn. ___, ___, 244 N.W.2d 45, 46 (1976) (bicycle wheel caught between bars of sewer grate) *and* Seifert v. City of Minneapolis, 298 Minn. 35, 36, 213 N.W.2d 605, 606 (1973) (plaintiff fell on defective sidewalk) *with* Kelly v. City of Rochester, 304 Minn. 328, 329, 231 N.W.2d 275, 276 (1975) (injury caused by diving accident at a municipal swimming pool) *and* Jenkins v. Board of Educ., 303 Minn. 437, 438, 228 N.W.2d 265, 267 (1975) (injury caused by schoolyard fight).

168. *See* Note, *supra* note 39, at 442; *Notice Provisions in Montana, supra* note 108, at 213-14.

tion, an objective expressed at times by the Minnesota Supreme Court,[169] was held to be insufficient by the Washington court in *Hunter*.[170] The *Hunter* court reasoned that settlement without litigation is equally desirable in cases involving private tortfeasors, and that therefore the imposition of the notice requirement only in cases involving municipal tortfeasors was arbitrary and unreasonable.[171] Moreover, it is not at all clear that municipalities take advantage of the early settlement opportunities afforded by notice statutes.[172] The court in *Hunter* also stated that the expected drain on the municipal treasury could be avoided by municipal liability insurance.[173] It could have added that protection against stale claims is provided by statutes of limitations[174] and that the notice statute thwarts the legislative intent, fundamental to the abolition of governmental immunity, to spread the loss from municipal negligence among municipal taxpayers rather than heaping it upon unfortunate victims.[175]

As the above discussion indicates, the rationales in support of the notice statute are not strong. Consequently, the *Hunter* court appears to be correct in holding the statute violative of the intermediate equal protection test. The court also seems correct in applying the intermediate, fair and substantial relation test to the notice requirement. While the right of access to the courts for redress of a wrong is not presently considered a fundamental right, it is sufficiently important within our system of justice to merit being subjected to the intermediate, fair and substantial relation test.[176] Because the notice statute affects that right, the intermediate test therefore should be applied to the statute. If such a test was invoked by the Minnesota court, the statute's purported justifications probably would be found lacking, especially if the court recognized that the legislature has less drastic means available to achieve the purposes of the notice requirement, such as adoption of a

169. *See* Hirth v. Village of Long Prairie, 274 Minn. 76, 79, 143 N.W.2d 205, 207 (1966); Frasch v. City of New Ulm, 130 Minn. 41, 43, 153 N.W. 121, 122 (1915).

170. *See* 85 Wash. 2d at 817, 539 P.2d at 850.

171. *Id.*

172. *See* Downing & Tehin, *The Constitutional Infirmity of the California Government Claim Statute*, 1 PEPPERDINE L. REV. 209, 225 (citing 9 Cal. Law Revision Comm'n Rep. 55 (1969)).

173. 85 Wash. 2d at 817, 539 P.2d at 849-50.

174. *See* Note, *Delay in Notice of Claim Against a Government Agency*, 20 CLEV. ST. L. REV. 23, 30 (1970); 23 DRAKE L. REV. 696, 705 (1974).

175. *See* Graham v. Worthington, 259 Iowa 845, 860-61, 146 N.W.2d 626, 636-37 (1966); Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 815-41 (1930); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 48-49 (1949).

176. *Cf.* MINN. CONST. art. 1, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.").

notice statute granting discretion to the trial court to disregard late notice where appropriate.[177] Recent Minnesota cases indicate a willingness to strike down the notice statute[178] and therefore a decision to invoke this intermediate test to invalidate the statute would not be surprising.

iii. The Minimum Scrutiny, "Rational Basis" Test

The large majority of cases that have considered the validity of notice statutes under the equal protection clause have applied the minimum scrutiny, rational basis test.[179] These cases almost invariably hold that the justifications for the notice requirement are sufficient to satisfy the minimum scrutiny test,[180] although the cases generally are not particularly well reasoned.[181] Considering the minimal justification required to satisfy the rational basis test,[182] however, these cases are not necessarily erroneous. Although the justifications for the notice statute are not strong,[183] cumulatively they may be sufficient to satisfy this test. Conversely, though, a court with a dislike for the notice statute, such as the Minnesota court,[184] could readily strike down the statute under the minimum scrutiny test. For example, the *Hunter* court, in a footnote, indicated that even if it had applied the minimum scrutiny test, the justifications for the notice requirement would be inadequate.[185] Similarly, the West Virginia Supreme Court of Appeals in the recent case of *O'Neil v. City of Parkersburg,*[186] applying the minimum scrutiny test, found the

177. See notes 197-204 *infra* and accompanying text.

178. *See* cases cited in note 109 *supra.*

179. *See, e.g.,* Dias v. Eden Valley Hosp. Dist., 57 Cal. 2d 502, 504, 370 P.2d 334, 335, 20 Cal. Rptr. 630, 631 (1962); Newlan v. State, 96 Idaho 711, 714, 535 P.2d 1348, 1351 (1975); Saragusa v. City of Chicago, 63 Ill. 2d 288, 293, 348 N.E.2d 176, 180 (1976); Lunday v. Vogelman, 213 N.W.2d 904, 907 (Iowa 1973); Guarrara v. A.L. Lee Memorial Hosp., 51 App. Div. 2d 867, 867, 380 N.Y.S.2d 161, 162 (1975).

180. *See* note 179 *supra.* Minnesota also has ample precedent finding notice statutes constitutional. *See, e.g.,* Olson v. City of Virginia, 211 Minn. 64, 300 N.W. 42 (1941); Frasch v. City of New Ulm, 130 Minn. 41, 153 N.W. 121 (1915); Schigley v. City of Waseca, 106 Minn. 94, 118 N.W. 259 (1908).

181. For example, the Minnesota case most often relied upon for the proposition that notice statutes are constitutional, Olson v. City of Virginia, 211 Minn. 64, 300 N.W. 42 (1941), makes only the following cursory statement: "There can be no doubt that the legislature acted within its constitutional powers in enacting the statute here involved." *Id.* at 66, 300 N.W. at 43. Similarly, another leading case noted only that governmental units need notice to correct dangerous defects and to facilitate settlement and therefore the notice requirement does not improperly discriminate against similarly situated private defendants. *See* Frasch v. City of New Ulm, 130 Minn. 41, 43-44, 153 N.W. 121, 122 (1915).

182. *See* notes 137-38 *supra* and accompanying text.

183. *See* notes 164-75 *supra* and accompanying text.

184. *See, e.g.,* cases cited in note 109 *supra.*

185. *See* 85 Wash. 2d at 815 n.8, 539 P.2d at 850 n.8.

186. ___ W. Va. ___, 237 S.E.2d 504 (1977).

justifications for the notice statute to be inadequate.[187] However, the notice period involved in *O'Neil* was an unusually short one[188] and this clearly affected the court's decision.[189]

As opposed to analyzing the justifications for the notice statute, three courts have held the statute unconstitutional under the rational basis test by analyzing the purposes of their states' municipal tort liability laws. The Michigan Supreme Court in *Reich v. State Highway Department,*[190] the Nevada Supreme Court in *Turner v. Staggs,*[191] and the West Virginia Supreme Court of Appeals in *O'Neil v. City of Parkersburg*[192] found that the purpose of those laws was to place governmental defendants on the same footing with private defendants, and, conversely, to place the victims of negligent municipal and private conduct in an equal position.[193] These courts found that the classifications created between municipal and private tortfeasors on the one hand, and the victims of their negligence on the other, bear no rational relation to the legislative objective of equality, and arbitrarily bar suit by those injured through governmental negligence.[194]

Whether the reasoning of *Reich, Turner,* and *O'Neil* would be valid in Minnesota is subject to some doubt. The Minnesota Supreme Court has stated that the Municipal Tort Liability Act is not intended to place municipal defendants on equal footing with private defendants.[195] The

187. *Id.* at ___, 237 S.E.2d at 508. The court in *O'Neil* reasoned that the justifications for the notice statute were equally applicable to private defendants and therefore did not justify the classification. *Id.*

188. *Id.* at ___, 237 S.E.2d at 506 (West Virginia notice statute requires notice within 30 days of injury).

189. *Id.* at ___, 237 S.E.2d at 508 ("Requiring one so injured to give notice of such injury within a short period of thirty days, as a condition precedent to the right to sue, is neither reasonable nor fair.").

190. 386 Mich. 617, 194 N.W.2d 700 (1972).

191. 89 Nev. 230, 510 P.2d 879, *cert. denied,* 414 U.S. 1079 (1973).

192. ___ W. Va. ___, 237 S.E.2d 504 (1977).

193. *See* Reich v. State Highway Dept., 386 Mich. at 623, 194 N.W.2d at 702; Turner v. Staggs, 89 Nev. at 235, 510 P.2d at 882; O'Neil v. City of Parkersburg, ___ W. Va. at ___, 237 S.E.2d at 508-09.

194. *See* Reich v. State Highway Dept., 386 Mich. at 623, 194 N.W.2d at 702; Turner v. Staggs, 89 Nev. at 235, 510 P.2d at 882; O'Neil v. City of Parkersburg, ___ W. Va. at ___, 237 S.E.2d at 508-09.

195. *See* McCarty v. Village of Nashwauk, 286 Minn. 240, 243-44, 175 N.W.2d 144, 147 (1970) ("The argument that in abrogating immunity the legislature intended that governmental units should be liable in the same manner as a private individual under like circumstances ignores the reality that there are many governmental activities which have no private counterpart . . . ."). However, it may be argued that the effect, if not the purpose, of the Minnesota Municipal Tort Liability Act is to place municipal and private tortfeasors upon an equal basis. The Minnesota court has stated that in relation to torts arising from proprietary functions, for which municipalities historically always have been liable, municipal defendants should have no advantage over private defendants in defending claims. *See* McCaleb v. Jackson, ___ Minn. ___, ___, 239 N.W.2d 187, 189-90

court has reasoned that the exceptions within the Act, whereby governmental immunity remains for some activities, evidence a clear intent that municipalities not be liable in the same manner as private defendants.[196] Therefore, unless the court changes its position, it appears that the arguments accepted in *Reich, Turner,* and *O'Neil* are not available in Minnesota.

In summary, if the Minnesota Supreme Court applied the minimum scrutiny test it might have difficulty justifying holding the notice statute unconstitutional. However, if an intermediate, fair and substantial relation test was invoked, *Hunter* provides strong and sound support for holding the statute violative of equal protection. An intermediate test appears to be the most appropriate one for the notice statute, since the statute affects the important right of access to the courts for redress of wrongs. Therefore, if the Minnesota court adopted this intermediate test, it probably would find the notice requirement to be unconstitutional.

IV. CONCLUSION

The doctrines of substantial compliance, waiver, and estoppel have provided the Minnesota courts with the tools necessary to mitigate much of the harshness of the notice requirement. In addition, the extension of time granted incapacitated persons has greatly reduced the inequities such persons face with the notice rule. The above theories, however, represent a piecemeal approach which still leaves some claimants unjustly exposed to the possibility of being denied recovery because of the notice requirement and renders the notice statute susceptible to constitutional attack. For these reasons, a more comprehensive reform of the notice statute is needed, a reform which both protects the legitimate interests of the municipalities and prevents claimants from having their recovery barred when improper notice does not prejudice the municipality. The notice statutes of several other jurisdictions,[197] most notably New York,[198] may serve as a useful guide for the needed reform.

The New York statute, while stating a definite period in which notice must be given, creates an exception whereby late notice is permitted at the sound discretion of the trial court.[199] The New York courts are re-

(1976). Under the Minnesota Municipal Tort Liability Act, the distinction between municipal liability for governmental as opposed to proprietary interests has been abolished, and therefore the reasoning of *McCaleb* should apply to all torts giving rise to liability under the Act.

196. McCarty v. Village of Nashwauk, 286 Minn. 240, 243-44, 175 N.W.2d 144, 147 (1970).

197. *See* CAL. GOV'T CODE §§ 911.4, 946.6 (West 1966); N.J. STAT. ANN. § 59:8-.9 (West Supp. 1977); PA. STAT. ANN. tit. 53, § 5301 (Purdon 1972).

198. N.Y. GEN. MUN. LAW § 50-e (McKinney Cum. Supp. 1976).

199. *Id.* § 50-e(5) provides:

quired to consider all relevant circumstances in the exercise of this discretion, including actual notice by the municipality or its insurer of potential claims, the physical and mental capacity of the claimant, death of the claimant, justifiable reliance upon municipal settlement representations, error in identifying the municipality, and, most significantly, prejudice to the municipality caused by the delay.[200] The statute authorizes the trial court to correct, supply, or disregard defects in the notice, unless such action would prejudice the defendant.[201] It also requires municipalities to return improperly served notice within thirty days of service.[202] An additional provision, not included in the New York statute, which should be considered in Minnesota is that any other legitimate reason, not prejudicial to the municipality, will excuse late notice.[203]

The adoption by the Minnesota Legislature of a notice statute similar to that in New York and several other states would effectively eliminate

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Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one.

The 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 the time specified in subdivision one 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 made by an authorized representative of the public corporation or its insurance carrier; 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.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

200. *Id.* One factor, which the New York statute does not include, but which arguably should be central to the decision to permit the giving of late notice, is whether in the particular case the purposes of the notice statute would be served by not allowing late notice.

201. *Id.* § 50-e(6).

202. Notice must be returned by the municipality, specifying the defect in the manner of service, unless the municipality demands that the claimant or any other person interested in the claim be examined in regard to the claim. *Id.* § 50-e(3)(c). The claimant must properly serve notice within ten days after receipt of the returned notice. *Id.* § 50-e(3)(d).

203. The Pennsylvania notice statute is illustrative. The statute provides simply that the claimant may request "leave of court to enter such action upon a showing of a reasonable excuse for such failure to file said notice . . . ." PA. STAT. ANN. tit. 53, § 5301 (Purdon 1972).

the inequities created by the present Minnesota notice statute. In addition, the threat that the statute will be held unconstitutional would be substantially lessened, thereby retaining legislative control over the liability of municipalities. Moreover, such a revision of the present statute should significantly reduce the large amount of litigation that the notice statute has caused over the years. In light of the Minnesota Legislature's progressive liberalization of the notice statute in the recent past,[204] the possibility that it would approve a statute similar to New York's is not unrealistic.

204. *See* notes 30-34 *supra* and accompanying text.