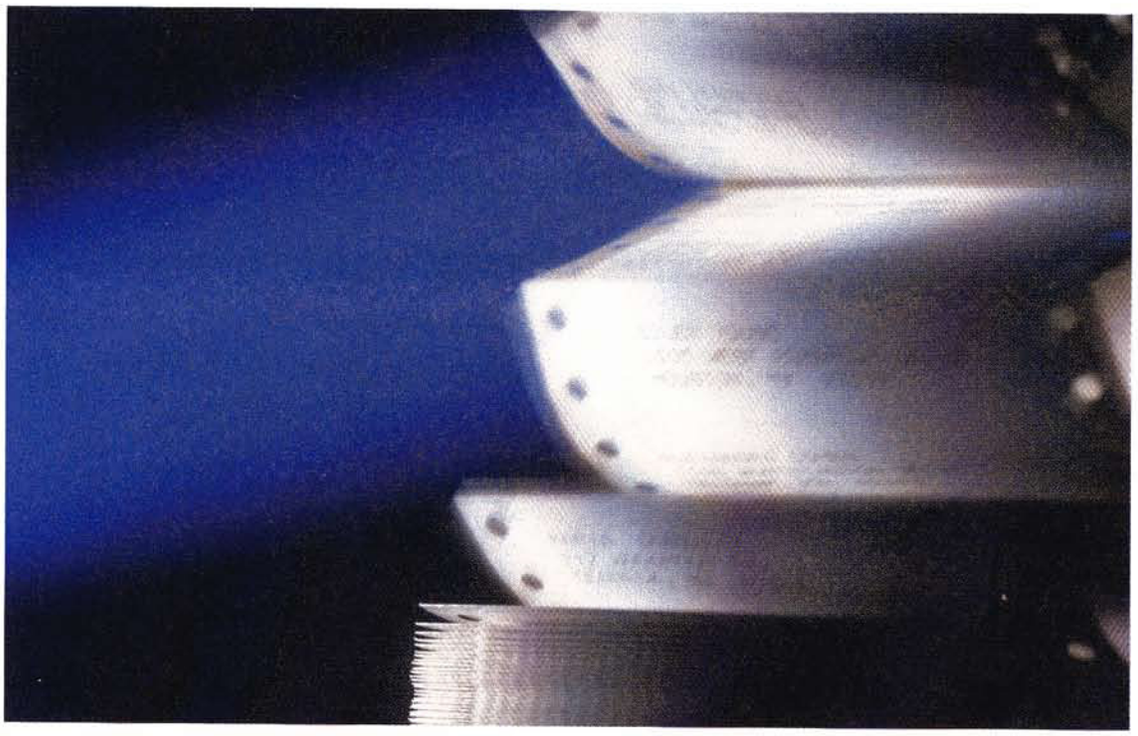

Fay Leoussis has been Chief of the Tort Division of the New York City Law Department since 2001. She served as the Division's Deputy Chief from 1993 to 2001 after serving in the office's Appeals Division, where she became an Assistant Chief. She is a 1972 graduate of the State University of New York at Buffalo (magna cum laude) and 1979 recipient of a J.D. (magna cum laude) from Benjamin N. Cardozo School of Law – Yeshiva University, where she was also Managing Editor of the Law Review.

Progress Against the Tide

Managing Tort Claims Against the City of New York

By Fay Leoussis

In 1994, the City of New York faced a litigation crisis. The number of pending tort claims had risen to 60,000 and, given a steady increase in new filings, it was forecast that the City would face an even greater accumulation of open cases by 2007 – a huge 110,000. There was no reason to expect any abatement in these new filings, and annual payouts were projected to approach a staggering $1 billion.

These dire predictions did not materialize, but not because the forecasting was inaccurate. Ten years after the first steps were taken by the City's Law Department and Office of the Comptroller to meet the coming tide, the City's tort caseload has shrunk from 60,000 to 33,000. New case filings are at a 15-year low. By fiscal year 2001, the total amounts paid out to resolve tort cases had stabilized, and remained so through 2004 – and in fiscal year 2005 a substantial drop in payouts was realized. This article offers an "inside view" of how these results were achieved as City government responded to a significant legal and fiscal crisis.

Background – Tort Claim Management Under the City Charter

Under the New York City Charter, key decision-making regarding the resolution of tort claims against the City is bifurcated. Decisions are made by two City officials: the Corporation Counsel, who is appointed by the Mayor and is in charge of the Law Department, and the Comptroller, a separately elected official who runs an independent office that is not under mayoral control. The Mayor and Comptroller need not be, and in the last several years have not been, of the same political party. This legislatively created structure requires close cooperation between these two separate offices to achieve the best overall result for the City, but such cooperation was not always forthcoming.

As most attorneys are aware, a prerequisite to the commencement of a personal injury or property damage lawsuit against the City is the filing of a notice of claim by the claimant. This must be done within 90 days of the accrual of the cause of action, which is usually the date of the injury. The City Charter empowers the Comptroller to "adjust" such claims. Any unresolved claim generally becomes a lawsuit. An action may be commenced 30 days after the service of the notice of claim if the claim has not been resolved, provided the Comptroller has not requested a statutory hearing allowed under the General Municipal Law. If a hearing has been requested, commencement of the action should await the conduct of the hearing, for which the statute allows the Comptroller 90 days from the filing of the notice of claim. Also under the Charter, lawsuits against the City are to be defended by

the Corporation Counsel. However, the Corporation Counsel cannot settle these lawsuits without the Comptroller's approval.

For many years, the numbers of tort-claim and tort-case settlements and other dispositions achieved by the Comptroller's Office and the Law Department remained static. The pace of these dispositions had become woefully inadequate in an era of rapidly growing claim and case filings. By 1994, the pending tort caseload had grown to nearly 60,000 because the rate of filings had significantly outpaced the rate of resolutions, with the excess increasing by an average of 5,000 a year. If the same rate of resolution of cases had been allowed to continue, that backlog of pending cases would have reached 110,000 by 2007.

The Hurdles Facing the Law Department

Given the number of attorneys in the Law Department's Tort Division assigned to handle the caseload noted above, the City had long confronted a critical case-management challenge. With certain exceptions, the Tort Division had to use a time-saving "horizontal" case-management system, in which each attorney performs a single task with regard to hundreds of cases, such as drafting pleadings, discovery compliance, or motion practice. Except for designated case categories, the Tort Division has not been able to use "vertical" case assignment, where one attorney handles a case from start to finish.

This horizontal assignment system, coupled with budget cuts made during the recession of the early 1990s (which further limited the Tort Division's attorney head count), left the Division in an essentially "reactive" state in its defense of tort claims. For example, the pre-litigation hearings that are statutorily authorized for municipal defendants after service of a notice of claim (General Municipal Law § 50-h), were fairly cursory, without the depth of a full examination before trial. Further, pre-litigation medical examinations authorized by the same statute were rarely scheduled. Document and witness production by the City were often delayed for years after the commencement of litigation, and long after the plaintiff's service of discovery requests. The City often undertook no affirmative discovery of its own, and hired no experts.

Not surprisingly, the result of the City's delay in responding to discovery requests and orders to produce was the filing of thousands of motions to penalize the City for its tardiness. These motions only caused a further backlog of defensive legal work because scarce attorney resources had to be devoted to fending off the dire sanction of stricken answers. Motions for sanctions, which were often filed several times in the same case, also burdened the courts' motion calendars.

There were other problems for the City. Aside from limited staff, a major contributor to the Tort Division's unwieldy caseload was long-standing case law that rendered the City, not the adjoining landowner, liable in tort for the landowner's failure to comply with the landowner's own statutory obligation to maintain the sidewalks adjoining its premises. Tort cases against the City in which the plaintiff claimed that a crack, hole, rise or slippery condition in or on a City sidewalk had caused an injury-producing slip/trip and fall comprised a very significant 26% of the Tort Division's pending caseload. Although the City's Administrative Code imposed the duty on the adjoining owner to maintain the sidewalk in a safe condition, the penalty was limited to a fine and/or liability for repairs undertaken by the City. The courts had held that the adjoining owner could not be held liable to an injured third party unless the owner had repaired the sidewalk, or had cleared it of ice/snow, in a negligent manner. If the adjoining owner had done nothing to the sidewalk, notwithstanding a deteriorated or dangerous condition, no tort liability would be imposed, and the plaintiff would look to the City for compensation.

The First Steps Toward a Solution

In 1995, the Law Department and the Comptroller's Office faced not only a woefully backlogged caseload, but tremendous anticipated liability for judgments and claims as well. Senior managers in both offices had come to realize that progress could be made in addressing their mutual and related problems only if they cooperated fully. Accordingly, the Comptroller and Corporation Counsel, each of whom controlled a different aspect of the City's claims process, began to work collaboratively.

The City often undertook no affirmative discovery of its own, and hired no experts.

That year, they jointly proposed that a study be conducted to evaluate the City's claims process. They retained the firm then known as Price Waterhouse L.L.P. (now PricewaterhouseCoopers L.L.P.) to perform a comprehensive examination of the City's methods in processing tort claims and cases, and to make recommendations for improvement. With the results of the Price Waterhouse study in hand, the Law Department and Comptroller's Office identified the key steps that had to be taken: facilitating early resolution of claims and cases, implementing a risk-management program, vigorously and efficiently defending high exposure cases, and advocating favorable legislative changes in municipal tort law.

The first task to be undertaken was to gain control of the burgeoning caseload, with its constant threat of defaults, stricken answers and inadequate trial preparation, all of which had contributed to skyrocketing num-

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management effort can clearly be seen in the total number of cases on the trial calendar in August 2005 – 4,684, as compared with 7,156 cases at the close of 1999.

For all cases pending in the City of New York, at any stage, the statistics reflect the success of the case reduction effort. As of June 2005, 13,471 City tort cases were pending in the City's supreme courts, as compared with 20,811 cases pending at the end of 1999.

Risk Management

In addition to adopting techniques designed to maintain steady (or, ideally, to reduce) City caseloads, the best way to reduce the number and cost of personal injury claims is to prevent injuries from happening in the first place, whether as a result of defects in premises or as a result of government's activities. In 1999, the Tort Division initiated a pilot risk-management program to further these objectives. The program's broad and ambitious mission was to create a safer city, develop a long-range plan to reduce future litigation, preserve meritorious defenses, and find ways to make the City a less attractive target for fraudulent or baseless litigation.

The Law Department authorized the Tort Division to launch its Risk Management Unit (RMU) three years later, in 2002. The RMU was given four primary objectives: (1) reduce the number of accidents where the City would be named as a defendant; (2) reduce the number of tort claims brought against the City; (3) preserve defenses to claims against the City; and (4) prevent fraudulent tort claims through identification, investigation, and prosecution of suspect claims. At present, the Tort Division's RMU includes three lawyers, five investigators, and a computer specialist. One of the RMU's major functions is to provide advice to City agency in-house legal counsel on a wide range of risk-management concerns. Last year, it responded to more than 200 requests for risk analysis from the general counsel's offices of City agencies.

The RMU's risk assessments involve comprehensive analyses of claims history and agency operational policy. One significant result of its recommendations has been enhanced workplace-safety inspections in Department of Sanitation garages, which have significantly reduced slip-and-fall accidents caused by oil and grease. Another result has been expedited processing of fatal-accident data by the Department of Transportation's Safety Review Unit. That achievement has, in turn, enabled more expedited completion of safety analyses and implementation of preventive safety measures, where advisable. When the City sponsors major events, such as the Olympic Step Out (a televised special event in Times Square involving cabled "flight" by a gymnastic gold medalist), the RMU provides advice to increase safety and concomitantly to avoid City tort claim liability.

To address the problem of fraudulent tort claims, the RMU investigates individual cases in which fraud is suspected, and researches claim patterns suggestive of fraud. RMU staff also trains other personnel in the Tort Division in fraud identification and reporting, investigates identified frauds, and prepares case reports for referral of cases to prosecutorial agencies. Last year, the RMU identified 140 suspected fraudulent cases, of which 43 were referred to the New York City Department of Investigation (DOI) for further investigation. DOI, in turn, has referred 10 of those cases to the appropriate District Attorney for possible prosecution. Several cases initially referred by the Law Department for prosecution have resulted in indictments and convictions, including one in 2003 arising from an alleged sidewalk injury. (The RMU's investigation revealed that the plaintiff settled a claim against her landlord for an injury allegedly incurred in her apartment – an accident that had occurred on the same day she claimed she had fallen on the sidewalk, suffering the same injury.)

The RMU has also substantially assisted the City's preservation of defenses to tort claims by creating an intranet portal called TORT-LINK (Litigation Information Network, developed in cooperation with the City's Department of Information Technology & Telecommunications. In July of 2003, LINK went online with one of the City's largest client agencies, the Department of Transportation; more recently, the Department of Parks was added to the system. LINK is now the principal tool used by the Tort Division to communicate with these two agencies about pending lawsuits.

The LINK system also enables the Tort Division to transmit document and witness requests electronically to City agencies for response. Agency documents essential to litigation are then returned either electronically through LINK or by mail, with instantaneous tracking. Investigators review the responsive records and remove the posted request from the LINK site when they are satisfied that the request has been met. The implementation of this electronic litigation support system has greatly increased efficiency, streamlined the document production process, and enabled City agencies to reallocate their own limited resources to more proactive risk- or litigation-related activities.

Insurance Coverage

Another Law Department initiative is to ensure that the City receives the full benefit of private party insurance. The City is self-insured, such that any settlement or judgment it pays comes directly from the City budget and treasury. Frequently, however, another insured party is directly responsible for an injury. To assist in providing the City's extensive array of public services, City agencies often hire independent contractors. In a majority of these instances, the contractors must obtain liability insurance that protects the City as well as the contractor. Thousands

of such contracts are housed City-wide at each City agency office that contracts with private entities.

Until recently there was no central mechanism to access the insurance documents so critically necessary to obtaining coverage and representation. Just 10 years ago, the City took advantage of contractors' private insurance in only a small number of cases. To reverse this state of affairs, the Tort Division's Early Intervention Unit was, from its inception, given the important responsibility of creating a system to obtain insurance defense takeovers whenever possible. That task was made easier this past year when the Comptroller's Office centralized all certificates of insurance in favor of the City in the Comptroller's optically scanned database. As a result of these efforts, the Tort Division has obtained 1,937 insurance defense takeovers in the past five years.

When the Tort Division confronts a recalcitrant insurer, it refers the case to the Law Department's Affirmative Litigation Division, which thereafter continues to try to persuade the insurer to meet its obligations. If its efforts at persuasion are unsuccessful, the Affirmative Litigation Division commences a declaratory judgment action to compel the defense takeover. Over the past five years, it has handled over 2,500 insurance matters and has obtained over 500 takeovers in disputed cases.

A Reduced Backlog Leads to a More Vigorous Defense

The steady reduction of the City's tort case backlog has enabled the Tort Division and Comptroller to shift resources slowly but surely from a primarily reactive stance in the City's defense of tort claims to one that is more proactive. The Comptroller has engaged outside-contract attorneys to conduct more comprehensive statutory examinations, as permitted under the General Municipal Law, which can often serve the purpose of an examination before trial under the CPLR. The Tort Division can now more frequently devote energy and funds to locating and hiring experts, who provide evidence to contest both liability and damages, and conduct physical examinations of plaintiffs to confirm and assess injuries. In addition, the Tort Division has created a comprehensive expert database easily accessed by staff. The convenience provided by LINK (the Web-based document retrieval system discussed above) as a tool for responding to discovery requests, has also enabled the Tort Division to reallocate many personnel hours to affirmative litigation activities.

As the size of the Tort Division's backlogged caseload and the number of incoming cases has fallen, Division managers have been able to redirect staff from the task of responding to thousands of discovery-related motions to aggressive case investigation and City-initiated, dispositive motion practice. In the past year, these developments have enabled the Tort Division to reassign attorneys in each of the Bronx and Brooklyn borough offices from entirely defensive work to comprehensive assessment of cases as soon as they are filed, which has led to impressive rates of case reduction. Of the 1,033 cases reviewed on intake as of July 2005, 17% were earmarked for affirmative motions to dismiss to be made by the City, another 15% were referred for early settlement, and 5% were referred for insurance takeovers. This means that almost 30% of the incoming cases in the Bronx and Brooklyn will have been targeted for early resolution.

The City's attractiveness as a business and residential location is eroded by out-of-control litigation and judgment costs, which are ultimately paid by City taxpayers.

Legislation Favorable to the City

The City has also aggressively sought and continues to seek the enactment of legislation that would appropriately control and reduce the City's tort liability. The City's overall legislative goals are, first, to assure that the City is treated fairly in litigation and, second, to prevent an unwarranted drain on public resources. The City's attractiveness as a business and residential location is eroded by out-of-control litigation and judgment costs, which are ultimately paid by City taxpayers.

To attack a large component of the City's tort liability at its roots, the Law Department advocated successfully for legislative protection from suits based on sidewalk accidents. After two years of drafting and lobbying efforts undertaken primarily by the Law Department, and at the Mayor's urging, the City Council passed a law that became effective on September 14, 2003, shifting the primary tort liability for injuries sustained from falls on many City sidewalks to the adjoining owners of property.[1] The law covers accidents that occur in front of commercial and multiple dwellings (occupied by four or more families). It recognizes the owners' pre-existing legal responsibility under the City's Administrative Code, and encourages them to keep the sidewalks in front of their buildings free of defects and other dangerous

conditions. The new law also legislatively overturns case law under which the City, not the building owners and their insurance carriers, had to pay damages for claims arising from accidents on those sidewalks. The responsibility for approximately two-thirds of all sidewalk lawsuits thus has been shifted from the City to adjoining commercial or larger residential owners.

Current statistics show that the City is likely to reap the estimated $40 million in annual savings on sidewalk cases that were projected when the law was proposed. During the first 18 months after the law's effective date, 480 viable sidewalk lawsuits were filed, as compared with the filing of 945 such lawsuits during the prior 18-month period, representing a 50% decline in filings. From a public benefit perspective, another gratifying result of the new sidewalk law is that, based on anecdotal evidence, a substantial number of City landowners have undertaken repairs to adjacent sidewalks. Many of the sidewalks had long been in need of such attention, but before the legislation was enacted prior case law had created a deterrent to the undertaking of publicly beneficial repairs; as noted above, the courts had held that the repair itself could lead to owner liability. Now, it is the failure to repair that leads to owner risk.

A unique set of legislative initiatives also arose from the terrorist attacks of September 11, 2001. Within days of that disaster, Congress passed legislation establishing a Victim Compensation Fund available to individuals injured in the attacks and their aftermath, and to family members of those who had died, on condition that they forgo litigation, including claims against the City.[2] In November 2001 the City's efforts led Congress to pass additional legislation, capping the City's liability at $350 million for the lawsuits brought by those who did not, or could not, opt into the Fund. Finally, in February 2003, again in response to the City's efforts, Congress allocated $1 billion to the City to create a captive insurance company insuring the City and its private debris removal contractors for any liability arising from their activities following the disaster.

Proposed Additional Legislative Changes

At present, the City is actively seeking other legislative reforms that increase protection against municipal tort liability. The City currently proposes an enactment allowing governmental defendants to pay damages only for their proportional share of liability for all elements of damages, not solely the element of pain and suffering, as provided under the current law. In addition, City is seeking a legislative cap on pain and suffering awards.

The City also proposes the enactment of an explicit statutory ban on certain double recoveries, available under current case law to public-employee plaintiffs who sue their public employers. The statute applicable to such claims now requires only that past pension benefits be set off against past lost earnings awards. The statute does not explicitly require a similar set-off of reasonably anticipated future pension benefits against duplicative lost future earnings awards. Set-offs of future benefits are explicitly required in tort cases involving privately employed plaintiffs and private defendants.

Conclusion

The City's programs of early investigation and prompt resolution of meritorious tort claims, early settlement, risk management, vigorous claim defense and advocacy for protective legislation, as well as efforts to eliminate the injury-producing conditions themselves, have led to real and measurable successes. There has been a marked decline in the number of actions commenced against the City, and elimination of a backlog of unresolved tort claims.

In the last eight years, the City has achieved a 41% reduction in the number of suits commenced – from 11,189 in fiscal year 1997 to 7,213 in fiscal year 2005. These numbers indicate that through their joint and comprehensive efforts, New York City's Corporation Counsel and the Comptroller have made impressive progress in managing the City's tort claims. The City is dedicated to continuing that progress. ■

1. N.Y.C. Admin. Code § 7-210.

2. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230.