

CHAPTER 17

THE STATE'S DUTY TO PROTECT YOU AND YOUR PROPERTY: TORT ACTIONS*

A. Introduction

This Chapter explains your rights to protect your body and your property while you are in prison, and the steps you can take if you believe someone has violated those rights. Part B of this Chapter will introduce you to the general law of personal injury, called tort law. It covers injuries caused by excessive force, the failure of prison officials to protect you from other prisoners, improper or inappropriate medical care, and poorly maintained facilities. Part B also covers damage to your personal property. Part C of this Chapter will help you determine whom you can sue, where to sue, and what kind of relief you can get. It also explains how to complete your institution's internal grievance procedures (meaning, how to exhaust your administrative remedies) before filing a case in court. Part D explains how to proceed with your case step-by-step, from filing the right papers to obtaining evidence and appealing a decision. Part D is very important because if you wait too long to file a claim or file it in the wrong place, you could lose the claim for good. Keep in mind that prisoners face additional hurdles in bringing lawsuits about injuries suffered in prison.

At the end of this Chapter there is an Appendix with examples of forms you may need to fill out and submit at various stages of the court process. **DO NOT TEAR THESE FORMS OUT OF THE *JLM***, as the forms are intended to be samples only.

JLM, Chapter 24, "Your Right to be Free from Assault," gives more information about excessive force by correction officers and failure to protect prisoners from assault. If you believe you have been assaulted in prison, Chapter 24 will explain your rights and what actions you can take.

Please note that this Chapter details the procedures under New York State law. Prisoners outside New York State should use this Chapter to learn about the basic concepts of tort law, and then do careful research about their own state's laws. Chapter 2 of the *JLM*, "Introduction to Legal Research," will help you perform this task.

B. Know Your Rights: Tort Actions

The law recognizes that, in general, people have a duty not to injure each other and not to damage or destroy each other's property. When someone breaks that duty, it is called a *tort*.¹ A tort can be either intentional or negligent. An intentional tort is when one person hurts another person (or their property) on purpose. A negligent tort, on the other hand, is often the result of failing to take proper precautions to protect other people and their property. The person who commits a tort, whether intentionally or through negligence, is called a "tortfeasor."²

If you think that you have suffered a tort, you must decide whether it was an intentional or negligent tort. This distinction determines what you will have to prove in order to win your case.

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1. Black's Law Dictionary 1717 (10th ed. 2014).
2. Black's Law Dictionary 1718 (10th ed. 2014).

1. Intentional Torts

For most intentional torts, you must prove: 1) that the tortfeasor hurt you or damaged your property, and 2) that he intended to do so. These two elements are sometimes called the “results prong” and the “intent prong.” Some examples of intentional torts include assault, false arrest, false imprisonment, intentional infliction of emotional distress, libel³ (false, defamatory claims in written or printed form), and slander⁴ (false, defamatory claims in spoken form). Intentional torts against property include trespass⁵ (wrongful entry onto another’s property) and conversion (taking something that does not belong to you and acting like it is yours).⁶

2. Negligent Torts

The biggest difference between intentional torts and negligent torts is the mental state of the person causing the injury. Unlike an intentional tortfeasor, a negligent tortfeasor does not intend to cause damage or injury. Instead, a negligent tortfeasor creates an unreasonably unsafe situation by doing something a reasonable person would not do, or by failing to take some precaution he should have taken. When this unreasonable behavior causes injury or destruction of property, we call it a negligent tort.

To prove a negligent tort, you must first show that the tortfeasor had a responsibility to keep you from being injured, called a “duty of care.” Second, you must show that the tortfeasor violated (or breached) this duty of care by acting negligently, or failing to do what a reasonable person would have done under the circumstances.⁷ Third, you must show that your injury was foreseeable, meaning that a reasonable person would have known that the tortfeasor’s behavior could cause the type of injury that you suffered.

(a) Duty and Breach

To prove a negligent tort, you need to demonstrate that the tortfeasor owed you a duty of care. Whether or not someone owes you a duty of care depends on the particular situation and your relationship to that person. For example, a supervisor in a job owes you a duty of care to maintain a safe workplace, and you can therefore sue him if he fails to do so. A coworker, however, does not owe you that duty, and you could not sue him, even if he gave you a piece of defective equipment and you got injured using it.⁸ To decide whether or not the person responsible for your injuries owed you a duty of care, you can look to what other courts have said about similar situations. The cases mentioned in the footnotes of this Chapter are a good place to start your research.

As a prisoner, the state and its employees will owe you a duty of care in most situations. But, to make sure that the state or a specific state employee owed you a duty of care in your case, you will have to look for cases or laws that apply to your specific situation.

There may also be laws in your state that define which duties people owe each other in certain situations and what counts as a breach of those duties. If a statute or regulation says that a certain type of behavior constitutes negligence, then that behavior is called *per se*

3. Black’s Law Dictionary 1055 (10th ed. 2014).

4. Black’s Law Dictionary 1600 (10th ed. 2014).

5. Black’s Law Dictionary 1733 (10th ed. 2014).

6. Black’s Law Dictionary 406 (10th ed. 2014).

7. Negligence is defined as the “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.” Black’s Law Dictionary 1196 (10th ed. 2014). *See also* Black’s Law Dictionary 1718 (10th ed. 2014) (defining negligent tort).

8. *Burke v. Torres*, 120 A.D.2d 283, 284–86, 509 N.Y.S.2d 11, 12–13 (1986) (finding that worker’s compensation in a negligence case in an employment context is only exclusively available under the Worker’s Compensation Law, and the statute makes the negligent co-worker immune from suit).

negligence.⁹ All you need to show in such cases is that the tortfeasor engaged in the behavior described in the statute, and that you suffered injury as a result.¹⁰ The statute or regulation breached must at least remotely contemplate the type of injury suffered.¹¹

(b) Reasonableness and Foreseeability

In court, ordinary words like “reasonable” and “foreseeable” have special legal meanings. You should look to cases with facts like yours to determine how courts would define those terms in your case.¹² As with a duty of care, certain written laws and statutes may define standards of reasonableness and foreseeability.

To determine whether your injury was foreseeable and whether the alleged tortfeasor acted reasonably, courts will examine the situation before you were injured. This is called an “*ex ante*” perspective. You must show that your injury was predictable apart from the fact that you ended up injured; in other words, you cannot use the fact that you were injured to show that your injury was foreseeable.

(c) Checklist for General Tort Claims

Before filing a tort claim, make sure you can establish the following elements in your case:

- (1) In the case of an intentional tort:
 - (a) The person causing the injury meant to cause it, *and*
 - (b) The person causing the injury had no established right to do what he or she did.¹³
- (2) In the case of a negligent tort:
 - (a) The person causing the injury could have prevented the harm, and
 - (b) The person’s action or inaction caused your harm directly and foreseeably, and
 - (c) If the person causing the injury is a state or prison employee, he or she, in his or her official capacity, owed you a greater duty of care than you received.¹⁴
- (3) In both intentional and negligent torts, you must prove actual injury:
 - (a) It is not enough to show a prison official intended to harm you if you were not actually injured.
 - (b) You must show signs of injury to your body, or proof of loss or damage to your property. Medical records will be helpful in proving this element. It is possible to show that emotional distress you have suffered is an actual injury, but this is very difficult. The act necessary to produce such emotional distress must be “extreme and outrageous.”¹⁵

9. Black’s Law Dictionary 1197 (10th ed. 2014).

10. *Dance v. Town of Southampton*, 95 A.D.2d 442, 445, 467 N.Y.S.2d 203, 205 (1983).

11. *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 398, 2 L. Ed. 2d 382 (1958) (stating the general tort doctrine where liability for violation of a statutory duty is imposed only where the injury is one in which the statute was designed to prevent).

12. *Smith v. Nassau Cnty.*, 34 N.Y.2d 18, 23, 355 N.Y.S.2d 349 (1974) (holding that reasonable cause will vary according to the circumstances and exigencies of each particular case); *Di Ponzio v. Riordan*, 224 A.D.2d 139, 141, 645 N.Y.S.2d 368 (4th Dept. 1996) (holding that the question whether defendants fulfilled their duty of reasonable care presents a question best left to the trier of fact).

13. *See, e.g.*, N.Y. Correct. Law § 137(5) (McKinney 2014) (“No inmate . . . shall be subjected to degrading treatment, and no officer or other employee . . . shall inflict any blows . . . upon any inmate, unless in self-defense, or to suppress a revolt or insurrection.”). Thus, if a guard hits you and was not acting in self-defense, the guard would be acting outside the scope of his authority.

14. *See, e.g.*, *Kagan v. State*, 221 A.D.2d 7, 11–12, 646 N.Y.S.2d 336, 339 (2d Dept. 1996) (finding the state liable for failure of prison employees to bring complaining prisoner to see nurse in a timely fashion, and of the nurse to refer prisoner to a physician, when both actions were required by prison regulations).

15. *See, e.g.*, *Shenandoah v. Hill*, 9 Misc. 3d 548, 553, 799 N.Y.S.2d 892, 896–97 (Sup. Ct. Madison County 2005) (citing *Howell v. New York Post Co.*, 81 N.Y.2d 115, 612 N.E. 699 (1993)) (defining extreme

3. Constitutional Torts

The violation of your constitutional rights is another type of tort. The state officers and employees you encounter have the same duty not to harm you and your property that other citizens have. However, because they are state actors, they also have a duty not to violate your federal or state constitutional rights. You should read *JLM*, Chapter 13, “Federal Habeas Corpus,” and Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law” if you believe your federal constitutional rights have been violated.

(a) Violation of State Constitutional Rights

When the state government violates your rights under the state constitution, you may be able to sue the state for damages.¹⁶ Part C of this Chapter explains more about choosing the right court in which to file your claim. But if you wish to sue the State of New York, you must file your case in the New York Court of Claims.¹⁷ To prove a constitutional tort against the state, you must show that the state harmed you and that the state’s actions violated specific rights listed in the state constitution. For example, you can sue the state government if the state discriminated against you because of your race or religion.¹⁸

The New York Court of Appeals¹⁹ established the right to bring claims for violations of the state constitution in the 1996 case *Brown v. State*.²⁰ However, *Brown* only addressed tort claims based on the equal protection clause and the search and seizure clause of the New York Constitution.²¹ The court did not decide whether individuals can sue for damages based on violations of other parts of the state constitution.²² So far, at least one New York court has allowed damages based on another part of the state constitution (the “cruel and unusual punishment” provision).²³

and outrageous behavior as conduct “so outrageous of character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community”).

16. Not all states permit civil suits based on violations of the state constitution, but New York does. *See Brown v. State*, 89 N.Y.2d 172, 188, 674 N.E.2d 1129, 1139, 652 N.Y.S.2d 223, 233 (1996).

17. *See Brown v. State*, 89 N.Y.2d 172, 183, 674 N.E.2d 1129, 1136, 652 N.Y.S.2d 223, 230 (1996) (“[D]amage claims against the state based upon violations of the State Constitution come within the jurisdiction of the Court of Claims.”).

18. N.Y. Const. art. I, § 11: “No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.”

19. The New York Court of Appeals is the highest court in the State of New York. The intermediate court is the New York Appellate Division, and the trial level court is called the New York Supreme Court.

20. *See Brown v. State*, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

21. *See Brown v. State*, 89 N.Y.2d 172, 188, 674 N.E.2d 1129, 1139, 652 N.Y.S.2d 223, 233 (1996) (“[W]e conclude that a cause of action to recover damages may be asserted against the state for violation of the Equal Protection and Search and Seizure Clauses of the State Constitution.”); *see also* N.Y. Const. art. I, § 11 (equal protection clause); N.Y. Const. art. 1, § 12 (search and seizure clause); *Bin Wahad v. FBI*, 994 F. Supp. 237, 239 (S.D.N.Y. 1998) (stating that *Brown* recognized a “narrow remedy” against the State of New York for violations of the equal protection and search and seizure guarantees of the New York State Constitution).

22. *See Augat v. State*, 244 A.D.2d 835, 837, 666 N.Y.S.2d 249, 251–52 (3d Dept. 1997) (stating that the availability of damages under New York’s due process and freedom of association protections was “not specifically resolved in *Brown*”).

23. *See De La Rosa v. State*, 173 Misc. 2d 1007, 1010–11, 662 N.Y.S.2d 921, 924 (N.Y. Ct. Cl. 1997) (holding that a state’s violation of the cruel and unusual punishment provision in Article I, § 5 of the New York Constitution can give rise to a civil rights cause of action under 42 U.S.C. § 1983, provided that injunctive and declaratory relief are inadequate and money damages would further the constitutional purpose).

After *Brown*, New York courts have refused to award damages for state constitutional violations if other remedies are available.²⁴ This means that if you can bring a regular tort claim or a federal civil rights claim under 42 U.S.C. § 1983,²⁵ New York courts will not allow you to bring a state constitutional tort claim. However, you can still sue the state in the Court of Claims for violations of ordinary tort law. Since it is usually easier to prove a simple tort law claim than a constitutional claim, your chance of success is also better under tort law (intentional and negligent torts, as above).

(b) Federal Constitutional Violations

If you want to recover damages for a violation of your rights under the U.S. Constitution, you must file a claim in either a federal district court or in the New York Supreme Court—not in the Court of Claims. See *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law,” for more information about using Section 1983 to bring a claim for violations of federal constitutional rights. Remember that the New York State Constitution has similar provisions to the U.S. Constitution, so you may be able to use the same facts to sue in the Court of Claims by alleging violations of the state constitution, as described above.

4. Examples of Common Tort Actions

This Section describes five torts that can happen in prison and the elements you must prove to win damages for these torts. Excessive force and failure to protect from other prisoners are two types of actions that are not included in this Chapter, because they are covered in *JLM*, Chapter 24, “Your Right to be Free from Assault.” You should read that Chapter if you have been assaulted by a corrections officer or if you feel that the prison failed to protect you from assault by another prisoner. While the footnotes for this Section include citations to relevant cases, you should use these cases only as a starting point for your research. If you use the cases cited here, you should read the full text of those cases.

This Chapter only includes cases from New York and some federal cases. While New York cases are not binding on the courts of any other state, the tort law of most states is very similar to New York's. For that reason, the case summaries in this Chapter should serve as a useful starting point for determining the types of claims that other states' courts will hear. However, you should make sure to research the law in your state so that you know which cases to cite in your lawsuit.

The following are just a few examples of claims that you can bring; there are many other torts that happen in prison that can form the basis of a lawsuit. Look for cases with similar facts to your situation where the prisoner won, and use those cases to support your claim.

(a) Injuries Relating to Work and Work-Release Programs

Injuries sustained during the course of work within the prison or while on work release are considered work injuries. Tort actions under this category include the state's failure to

24. See *Bin Wahad v. FBI*, 994 F. Supp. 237, 240 (S.D.N.Y. 1998) (refusing to find a cause of action for violation of the State Due Process Clause because plaintiffs had alternative remedies under 42 U.S.C. § 1983); see also *Augat v. New York*, 244 A.D.2d 835, 837–38, 666 N.Y.S.2d 249, 251–52 (3d Dept. 1997) (holding that plaintiff's constitutional tort claims were related to existing common-law torts for which there were adequate remedies); *Remley v. State*, 174 Misc. 2d 523, 527–28, 665 N.Y.S.2d 1005, 1009 (N.Y. Ct. Cl. 1997) (refusing to find a private right of action for violations of the State Due Process Clause under *Brown* analysis because plaintiff had alternative remedies under State tort law).

25. See Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law,” for more information on how to obtain relief for violations of federal law under 42 U.S.C. § 1983.

provide reasonably safe equipment, as well as the state's failure to warn prisoners of specific dangers they might face when using the equipment.²⁶

For example, one court awarded damages to a prisoner who lost his fingers working in an on-site prison sawmill because his wood chipping machine was missing a safety guard.²⁷ The state violated its duty to maintain safe machinery since it failed to provide a safety guard for the machine. Similarly, another court awarded damages to a prisoner who was injured in the course of repair work when the scaffolding beneath him collapsed.²⁸

Just as the state has a duty to maintain a safe workplace, you too have a responsibility to take proper care of yourself while working in the prison or work-release program. If the court finds that your carelessness played a role in your injury, it can reduce your damages by the amount for which it believes you were responsible, or even prevent you from recovering altogether. This is called "comparative negligence" or "contributory negligence."²⁹

For example, in the wood chipping case above, the court only awarded half of the total damages to the prisoner, because the prisoner should not have climbed onto the chipping machine in the first place.³⁰ In another case, the court reduced damages because the prisoner did not follow safety instructions.³¹ However, if you were ordered to do the dangerous act that caused your injury, courts may not reduce your damages under a contributory negligence theory.³² This is because courts know that prisoners can be punished for disobeying instructions.³³

Furthermore, if the court believes that you behaved recklessly in a work-related setting, it can refuse to award you damages at all. Recklessness in this context means ignoring a known or obvious risk.³⁴ Whether the court considers that you were reckless depends partially on how knowledgeable you were about the field or area in which you were working. For instance, one court denied a prisoner damages for injuries suffered after touching a live wiring because his previous electrical training made him aware that touching wires was dangerous.³⁵ By contrast,

26. *See* *Kandrach v. State*, 188 A.D.2d 910, 913, 591 N.Y.S.2d 868, 871 (3d Dept. 1992) (finding that when a prisoner participates in a prison work program, the State has a duty to provide reasonably safe equipment and warn prisoners of any potential dangers).

27. *Kandrach v. State*, 188 A.D.2d 910, 912, 915, 591 N.Y.S.2d 868, 870, 872 (3d Dept. 1992) (recommending that damages be split between the prisoner and the State because, although the State failed to provide a safe environment, the plaintiff ignored safety warnings).

28. *Shulenberg v. State*, 35 Misc. 2d 751, 751–52, 231 N.Y.S.2d 816, 817 (N.Y. Ct. Cl. 1962) (finding that the State failed to provide the prisoner with a safe place to work where the prisoner fell while working on a scaffolding because one of the planks of the scaffolding broke.)

29. *Black's Law Dictionary* 1196 (10th ed. 2014). States that use a contributory negligence rule will not grant damages if the plaintiff was negligent in a way that contributed to his injury. Comparative negligence systems are less harsh and allow the plaintiff to recover partial damages even if he shared in responsibility for the accident. New York and thirteen other states employ comparative negligence systems. N.Y. C.P.L.R. 1411, 1413 (McKinney 2014).

30. *Kandrach v. State*, 188 A.D.2d 910, 914–15, 591 N.Y.S.2d 868, 872 (3d Dept. 1992).

31. *Hicks v. State*, 124 A.D.2d 949, 949–50, 509 N.Y.S.2d 152, 152–53 (3d Dept. 1986) (upholding a damages award as reasonable but reducing it because the prisoner had not followed instructions).

32. *See* *Lowe v. State*, 194 A.D.2d 898, 899, 599 N.Y.S.2d 639, 641 (3d Dept. 1993) (finding that the prisoner faced an unfair choice between disobeying orders and risking injury).

33. *See* *Lowe v. State*, 194 A.D.2d 898, 899, 599 N.Y.S.2d 639, 641 (3d Dept. 1993) (finding that the prisoner faced an unfair choice between disobeying orders and risking injury).

34. *Black's Law Dictionary* 1462 (10th ed. 2014); *see* *People v. Angelo*, 246 N.Y. 451, 455, 159 N.E. 394, 396 (1927) (explaining that culpable negligence is something more than the slight negligence necessary to support a civil action for damages, and involves disregard of consequences and indifference to the rights of others).

35. *Martinez v. State*, 225 A.D.2d 877, 879, 639 N.Y.S.2d 145, 147 (3d Dept. 1996) ("The court also held that, even if claimant had not actually been qualified to perform this task, 'there [was] virtually no question about the fact that he created the impression among State employees that he indeed was qualified' and, therefore, when asked to perform the electrical work, the State had every reason to believe

a prisoner who had received only minimal training was not held responsible for his own injuries.³⁶

Note that you may be unable to recover from the state for work-release injuries that do not occur on prison grounds, especially if the state was not the owner or contractor at the work site.³⁷ Also, the state cannot be sued on the grounds of recommending a prisoner for a work-release program if the officers that made the recommendation had discretion to do so under their job title.³⁸ Finally, the state has no duty to inspect possible work sites for work-release programs.³⁹

You may be able to determine whether the state is liable for your injury by researching New York State labor laws, which courts have found applicable to prison work.⁴⁰

(b) Medical Care Provided to Prisoners⁴¹

Claims relating to inadequate or inappropriate medical care are negligence claims. The state has a duty to provide prisoners with reasonable and adequate medical care in a timely manner.⁴² If you believe the state has violated this duty to you in a way that caused you actual harm, you may have a successful medical tort claim.

In order to pursue a tort claim for medical negligence, you will have to prove that the treatment the state gave you (or failed to give you) was not standard—that it was not within “accepted medical practice.”⁴³

Second, you will have to prove that the state’s action or inaction directly caused your injury and that the injury would not have happened otherwise. This is called proximate cause.⁴⁴ For example, even if you had to wait a long time for treatment, you would not be able to recover damages unless the waiting caused your injury or made it significantly worse.⁴⁵ In order to

that claimant was qualified to do so.”).

36. *See* *Kandrach v. State*, 188 A.D.2d 910, 910–11, 591 N.Y.2d 868, 869 (3d Dept. 1992) (upholding partial damages for a prisoner who had received only five minutes’ training on how to operate a woodchipper).

37. *See* *Gress v. State*, 157 A.D.2d 479, 479, 549 N.Y.S.2d 666, 667 (1st Dept. 1990) (prisoner who fell from scaffolding while doing demolition work on a work release program did not have a claim against the State because the State was not the owner or contractor at the work site and the prisoner participating in the work release program was not a state employee but instead an employee of the private employer that he was placed with).

38. *See* *Santangelo v. State*, 101 A.D.2d 20, 21, 474 N.Y.S.2d 995 (App. Div. 1984) (“we hold that the actions of the Temporary Release Committee and the Superintendent were of a discretionary and quasi-judicial nature for which the State enjoys absolute immunity.”).

39. *See* *Gress v. State*, 157 A.D.2d 479, 479, 549 N.Y.S.2d 666, 667 (1st Dept. 1990) (“the State does not have any duty or obligation to inspect and ensure the safety of the possible jobsites for inmates in a temporary release program”).

40. *See* *Callahan v. State*, 19 A.D.2d 437, 438, 243 N.Y.S.2d 881, 882–83 (3d Dept. 1963), (holding that the Labor Law establishes a standard of care against which the state should be judged), *aff’d*, 14 N.Y.2d 665, 198 N.E.2d 903, 249 N.Y.S.2d 871 (1964).

41. For more information about inadequate medical care claims in federal court, see Chapter 23 of the *JLM*, “Your Right to Adequate Medical Care.”

42. *See, e.g., Kagan v. State*, 221 A.D.2d 7, 11, 646 N.Y.S.2d 336, 339 (2d Dept. 1996) (citing *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d. 251, 259 (1976) (prisoners who rely on prison authorities to treat their medical needs have a fundamental right to reasonable and adequate medical care).

43. *See, e.g., Larkin v. State*, 84 A.D.2d 438, 445–46, 446 N.Y.S.2d 818, 823 (4th Dept. 1982) (holding the state liable where a doctor failed to diagnose and treat a prisoner’s headaches, resulting in the prisoner’s death by aneurysm).

44. *Black’s Law Dictionary* 265 (10th ed. 2014).

45. *See, e.g., Brown v. State*, 192 A.D.2d 936, 938–39, 596 N.Y.S.2d 882, 884–85 (3d Dept. 1993) (refusing to award damages for delay in treatment to prisoner who had to have his larynx (voice box) removed because it was determined that by the time he complained the larynx would have had to be removed anyway), *appeal denied*, 82 N.Y.2d 654, 622 N.E.2d 304, 602 N.Y.S.2d 803 (1993).

prove the cause of your injury, you will almost always need testimony from medical experts.⁴⁶ As with other negligence tort claims, you must also show that the injury you suffered was a foreseeable result of the improper treatment you received.⁴⁷

If you believe you have been injured due to improper or inadequate medical care, you can also seek damages under the theory of “ministerial neglect,” which means that when the state makes rules describing its duty to provide medical care and then fails to follow those rules, it is liable for the resulting harm.⁴⁸ For example, if the prison has a formal process by which prisoners can see medical staff and fails to follow that process for you, the prison may have automatically breached its duty to you.⁴⁹

The court may decide to eliminate or reduce damages if your actions or your failure to act contributed to your medical injury. For example, if you know that you have tuberculosis but do not tell prison officials of this fact, you might not receive damages if your condition goes untreated.⁵⁰ The court may also reduce any damages that you might receive if you failed to continue with the prescribed course of treatment after being released on bail.⁵¹

A court may also refuse to hold the state liable if your injuries were due to the negligence of a private physician not directly employed by the state.⁵² In this case, you may have to take legal action against the medical official or private hospital that treated you instead. However, the state could potentially be held liable for the actions of a private physician if you reasonably believed the physician worked for the state and had no reason to believe otherwise.⁵³

(c) Destruction or Loss of Prisoner Property

State employees have an obligation not to take, damage, or destroy your property without just cause⁵⁴ (a legally sufficient reason)—whether intentionally or through negligence. If they

46. *See* *Zi Guang v. State*, 263 A.D.2d 745, 747, 695 N.Y.S.2d 142, 145 (3d Dept. 1999) (finding that prisoner failed to establish medical malpractice by prison officials in part because the prisoner’s medical expert at trial “often . . . appeared unfamiliar with [prisoner’s] medical records”); *Duffen v. State*, 245 A.D.2d 653, 654, 665 N.Y.S.2d 978, 980 (3d Dept. 1997) (dismissing prisoner’s claim against the state because medical expert’s testimony was too speculative to prove causation).

47. *See* *Kagan v. State*, 221 A.D.2d 7, 16–17, 646 N.Y.S.2d 336, 342 (2d Dept. 1996) (finding that prisoner’s loss of hearing was foreseeable result of not treating the pain or bleeding in her ear); *Williams v. State*, 164 Misc. 2d 783, 785, 626 N.Y.S.2d 659, 661 (N.Y. Ct. Cl. 1995) (stating that court would not award damages for delay in receiving dental care unless prisoner could show the delay was “a deviation from good and accepted dental practice.”).

48. *See* *Kagan v. State*, 221 A.D.2d 7, 10–11, 646 N.Y.S.2d 336, 338–39 (2d Dept. 1996) (finding that there is “no governmental immunity for the negligent performance of . . . ministerial duties” and that “whenever delays in diagnosis and/or treatment are a proximate cause or aggravating cause of a claimed injury, the State may be liable”); *see also* *Ogle v. State*, 191 A.D.2d 878, 881, 594 N.Y.S.2d 824, 826 (3d Dept. 1993) (stating that the State’s failure to administer a tuberculosis treatment consistent with its policies made it liable for damages when surgery was ultimately necessary).

49. *See* *Kagan v. State*, 221 A.D.2d 7, 11–12, 17, 646 N.Y.S.2d 336, 339, 343 (2d Dept. 1996) (finding negligence where, contrary to policy, prison officials failed to allow prisoner to make appointment for next available screening, to make her medical records available to the screening nurse, and to properly enter her complaints into the record).

50. *See* *Ogle v. State*, 191 A.D.2d 878, 881, 594 N.Y.S.2d 824, 826 (3d Dept. 1993) (stating that it is “well established that culpable conduct, including the failure to reveal part of one’s medical history, may diminish a victim’s recovery in a medical malpractice case.”).

51. *See* *Ogle v. State*, 191 A.D.2d 878, 881, 594 N.Y.S.2d 824, 826 (3d Dept. 1993) (holding that the prisoner contributed to the development of his Potts disease by failing to continue with the prescribed course of INH therapy while he was released on bail).

52. *See* *Williams v. State*, 164 Misc. 2d 783, 785, 626 N.Y.S.2d 659, 661 (N.Y. Ct. Cl. 1995) (holding that the state was not liable for the negligence of a private dentist not working for the state).

53. *See* *Soltis v. State*, 172 A.D.2d 919, 920, 568 N.Y.S.2d 470, 471–72 (3d Dept. 1991) (refusing to dismiss case against state where prisoner could reasonably have believed that the private physician was a state employee).

54. *Black’s Law Dictionary* 266 (10th ed. 2014).

do, you may be able to sue the state in the Court of Claims.⁵⁵ Remember that before you can file a claim for damages in any court, you must first exhaust all of your prison's administrative remedies.⁵⁶ A full description of when you can access the courts and which courts you should use is in Part C below.

If your items were stolen from you, you may be able to hold the state responsible for failing to provide adequate security in the area from which your property was taken.⁵⁷ However, you also have a responsibility for securing your own belongings. If you fail to lock a footlocker or leave your valuables in an open space, the court may reduce your damages to the degree it thinks you were responsible, or may prevent you from recovering damages at all.⁵⁸ If you believe that prison officials have intentionally taken or destroyed your property without authorization, refer to Part B(1) above (intentional torts). If you believe that your property was destroyed due to negligently maintained prison facilities, see Part B(4)(d) below.

(d) Negligently Maintained Prison Facilities

As with injuries in the workplace, the state is not responsible for preventing all injuries that could occur on its property.⁵⁹ The state is only responsible for maintaining facilities in a "reasonably safe condition."⁶⁰ To determine what reasonably safe means, a court might consider how likely it was that an injury would occur, how serious that injury was likely to be, and how much it would have cost the state to prevent the injury.⁶¹

For example, a court refused to award damages to a prisoner who was injured in an icy exercise yard because prison staff had taken reasonable precautions to prevent such injuries by checking the area daily and salting it when it was slippery.⁶² To recover in that case, the prisoner would have had to show that the particular area of the track was abnormally dangerous, and that officials knew or should have known about the danger.⁶³

55. See *Tigner v. New York*, 559 F. Supp. 25, 27 (W.D.N.Y. 1983), *aff'd*, 742 F.2d 1432 (2d Cir. 1983) (holding that the Court of Claims provides a remedy for lost and damaged property claims that is sufficient to satisfy constitutional guarantees of due process).

56. See Part C below. N.Y. Ct. Cl. Act § 10(9) (McKinney 2007) (also providing that such a claim must be filed within 120 days after the date in which the prison's administrative remedies have been exhausted).

57. See *Foy v. State*, 182 A.D.2d 670, 671, 582 N.Y.S.2d 262, 263 (2d Dept. 1992) (holding that the state is not immune from liability in a prisoner's claim for loss of personal property when the prisoner alleged that the state negligently failed to properly secure the area of his cell).

58. See *Pollard v. State*, 173 A.D.2d 906, 907–08, 569 N.Y.S.2d 770, 771 (3d Dept. 1991) (addressing the state's contributory negligence defense, but deferring to findings of trial court that prisoner had locked his locker and thus was not contributorily negligent).

59. See, e.g., *Killeen v. State*, 66 N.Y.2d 850, 851–52, 489 N.E.2d 245, 246, 498 N.Y.S.2d 358, 359 (1985) (holding that while the state "owes patients in its institutions a duty of reasonable care to protect them from injury, whatever the source," that does not "render the state an insurer or require it to keep each patient under constant surveillance," and finding the state not liable for injury that resulted when a patient in a state mental facility accidentally spilled hot water on himself (internal citation omitted)).

60. See *Basso v. Miller*, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976) ("A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances.") (quoting *Smith v. Arbaugh's Rest., Inc.*, 469 F.2d 97, 100, 152 U.S. App. D.C. 86, 89 (D.C. Cir. 1972)).

61. *Basso v. Miller*, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976) (quoting *Smith v. Arbaugh's Rest., Inc.*, 469 F.2d 97, 100 (D.C. Cir. 1972)).

62. *Condon v. State*, 193 A.D.2d 874, 875, 597 N.Y.S.2d 531, 532 (3d Dept. 1993) (correction officer testified that area was checked daily and sand was applied if slippery or someone complained).

63. *Condon v. State*, 193 A.D.2d 874, 875, 597 N.Y.S.2d 531, 532 (3d Dept. 1993) (prisoner failed to show that the surface was abnormally dangerous or that the state should have had notice of a dangerous condition).

(e) False Arrest and False Imprisonment

False imprisonment primarily applies to prisoners who are wrongfully confined in special housing units or on keeplock.⁶⁴ For additional information on confinement to special housing units, refer to *JLM*, Chapter 18, “Your Rights at Prison Disciplinary Proceedings.”

A plaintiff making a false arrest claim must prove four elements: (1) the defendant intended to confine the plaintiff; (2) the plaintiff was aware of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged.⁶⁵ The elements for proving false imprisonment are essentially the same as the elements for proving false arrest.⁶⁶

The Court of Appeals has found that when prison employees discipline prisoners under the authority of and in compliance with statutes and regulations, both the employees and the state have absolute immunity from suit.⁶⁷ This means that even if you are placed on keeplock or in administrative segregation for charges that are eventually dismissed, you may not be able to recover damages.⁶⁸

Note also that a judge is not a state officer within the meaning of the Court of Claims Act, and thus you cannot sue in the Court of Claims for an erroneous decision by a judge.⁶⁹ A judge may be found personally liable for an erroneous decision only if he did not have the authority to make that particular decision.⁷⁰

(f) Excessive Force and Failure to Protect

Perhaps the most common tort lawsuits by prisoners are those alleging that corrections officers used excessive force against them or failed to protect them from other prisoners. Actions to recover for excessive force and failure to protect are covered in detail in *JLM*, Chapter 24, “Your Right to be Free from Assault.”

64. See, e.g., *Gittens v. State*, 132 Misc. 2d 399, 406–07, 504 N.Y.S.2d 969, 974 (N.Y. Ct. Cl. 1986) (finding that prisoner held in keeplock nine days beyond the penalty imposed by a disciplinary hearing could sue the state for false imprisonment).

65. See *Broughton v. State*, 37 N.Y.2d 451, 456, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87, 93 (1975) (listing the elements of proving a false arrest claim). Note that in some jurisdictions, the plaintiff does not need to show that he was aware of the confinement. See *Scofield v. Critical Air Med., Inc.*, 52 Cal. Rptr. 2d 915, 923–24, 45 Cal. App. 4th 990, 1003–07 (Cal. Ct. App. 1996) (harm may result even if victim is not aware at the time of the imprisonment or its wrongfulness).

66. See *Broughton v. State*, 37 N.Y.2d 451, 455–56, 335 N.E.2d 310, 313–14, 373 N.Y.S.2d 87, 92–93 (1975).

67. See *Arteaga v. State*, 72 N.Y.2d 212, 217–21, 527 N.E.2d 1194, 1197–99, 532 N.Y.S.2d 57, 60–62 (1988) (finding that acts by employees in compliance with regulations constitute discretionary conduct for which the State has absolute immunity); see also *Gittens v. State*, 132 Misc. 2d 399, 403, 504 N.Y.S.2d 969, 972 (N.Y. Ct. Cl. 1986) (finding prison employee’s disciplinary confinement of prisoner to be in compliance with applicable regulations and thus not false imprisonment).

68. See *Arteaga v. State*, 72 N.Y.2d 212, 220–21, 527 N.E.2d 1194, 1198–99, 532 N.Y.S.2d 57, 61–62 (1988) (finding the state and prison officers not liable for confinement of prisoners even though charges against prisoners were later dismissed); see also *Gittens v. State*, 132 Misc. 2d 399, 403 n.5, 504 N.Y.S.2d 969, 972 n.5 (N.Y. Ct. Cl. 1986) (“[R]egardless of a disposition ultimately favorable to the inmate, [confinement during the period when the charges are pending] does not constitute an actionable deprivation.”).

69. See *Murph v. State*, 98 Misc. 2d 324, 326, 413 N.Y.S.2d 854, 856 (N.Y. Ct. Cl. 1979) (“it follows inescapably from this analysis that the State of New York can never be liable for the acts of its Judges).

70. See *Koeppe v. City of Hudson*, 276 A.D. 443, 446, 95 N.Y.S.2d 700, 703 (App. Div. 1950) (“when a judge acts he must be clothed with jurisdiction, and acting without this he is but an individual, falsely assuming an authority he does not possess.”).

C. Protecting Your Rights

This section provides an overview of the ways that you can seek relief for your tort claim. It covers both administrative remedies available through the prison and remedies available through the courts.

1. Facility Grievance Procedures

(a) Exhaustion

If you are filing a claim for damages based on loss or damage to personal property, you cannot file in the Court of Claims until you have exhausted the prison's own administrative remedies for personal property claims.⁷¹ This means that you must use all Department of Corrections and Community Supervision Services (DOCCS) internal procedures for compensating prisoners for loss or damage to property before suing in the Court of Claims. If DOCCS grants your claims as requested, then you will not be able to pursue a suit in the Court of Claims.⁷² If not, after you have used all those procedures, you have 120 days to file and serve your claim in the Court of Claims.⁷³ Part D describes how to file a claim in the Court of Claims.

(b) Administrative Remedies

DOCCS may pay you if (1) another prisoner has damaged or destroyed your personal property or (2) an employee of DOCCS has damaged or destroyed your personal property. According to Directive #2733, claims are limited to \$350 if another prisoner caused the loss of property and \$5000 if a DOCCS employee is responsible for the loss or damage. You should ask prison officials for a copy of Directive #2733, which includes sample forms for applying for reimbursement.⁷⁴

2. Pursuing a Remedy in Court

(a) Choosing a Court

Where you file suit depends on the circumstances of your case, whom you want to sue, and what kind of relief you are seeking. Generally, the Court of Claims hears suits against the state, including people acting as representatives of the state, and the New York State Supreme Court hears suits against people acting as individuals. If you want to sue individuals for violating your federal constitutional rights, you would sue in federal court.

(i) Filing in the Court of Claims

If you wish to sue the State of New York (if, for example, you are a prisoner in a state prison and you believe the state's employees have harmed you), you must sue in the New York Court of Claims.⁷⁵ In fact, the State of New York, and certain public authorities, are the *only*

71. N.Y. Ct. Cl. Act § 10(9) (McKinney Supp. 2011).

72. In order to preserve your claim, it may be necessary to begin the filing process even though your DOCS procedures are not yet completed.

73. N.Y. Ct. Cl. Act § 10(9) (McKinney Supp. 2011). But note that, as a prisoner, you cannot use the late deadline extension available to other Court of Claims claimants. *McCann v. State*, 194 Misc. 2d 340, 754 N.Y.S.2d 819 (N.Y. Ct. Cl. 2002) (even if delay was excusable, the plain language of the Court of Claims Act § 10(9) prohibited late filings by prisoners).

74. N.Y. State Fin. Law § 8(12), (12-a) (McKinney 2010) (establishing that (1) heads of state departments are authorized to pay out of a cash advance account up to \$250 at their own discretion through facility grievance procedures; (2) payments over \$250 must be submitted to the State comptroller; (3) payments over \$1000 must be approved by the State Attorney General; and (4) payments from internal grievance procedures cannot exceed \$5000); State of New York, Department of Corrections and Community Supervision, Directive No. 2733, Inmate Personal Property Claim § III(B)(2) (2015) *available at* <http://www.doccs.ny.gov/Directives/2733.pdf>.

75. N.Y. Ct. Cl. Act § 9(2) (McKinney Supp. 2010) (giving the Court of Claims jurisdiction to hear

defendants you can name in a suit before the Court of Claims.⁷⁶ If a state guard or other employee has harmed you in the course of his employment, you may sue the state for damages in the Court of Claims.⁷⁷ As long as the employee was acting in his official capacity, you may not sue him personally.⁷⁸ If the employee's actions (or lack of action) are discretionary,

cases against the state for damages).

76. N.Y. Ct. Cl. Act § 9(2) (McKinney Supp. 2010); New York State Unified Court System, Court of Claims: Frequently Asked Questions, <http://www.nycourts.gov/courts/nyscourtofclaims/faq.shtml#who> (last visited Jan. 31, 2017) ("The Court of Claims has jurisdiction over the State of New York as well as certain authorities that are sued under their own name.").

77. N.Y. Correct. Law § 24(2) (McKinney 2010) ("Any claim for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties of any officer or employee of the [D]epartment [of Correctional Services] shall be brought and maintained in the court of claims as a claim against the state."). Note that if you seek a remedy other than money damages, such as injunctive relief, you do not have to sue in the Court of Claims. Furthermore, the above requirement does not apply to § 1983 actions, which may be filed in any court of general jurisdiction. *Haywood v. Drown*, 556 U.S. 729, 733, 129 S. Ct. 2109, 2113, 173 L.Ed.2d 920 (2009).

78. N.Y. Correct. Law § 24 (McKinney 2010). The test for whether an employee can be held personally liable, or whether the State must instead be sued for the employee's tortious acts, is "whether the act was done while the [employee] was doing [the State]'s work, no matter how irregularly, or with what disregard of instructions." *See Riviello v. Waldron*, 47 N.Y.2d 297, 302, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 302 (1979) (considering employee to be within the scope of his employment so long as he is discharging his duties, "no matter how irregularly, or with what disregard of instructions") (quoting *Jones v. Weigand*, 134 A.D. 644, 645, 119 N.Y.S. 441, 443 (2d Dept. 1909)). This test is complicated, however. An employee is not personally liable for an act simply because he was not ordered to do that act. Rather, you may be able to find liability against New York State instead of the individual employee if the tort can be explained as a necessary step to the employee's ordered task or responsibility. In deciding whether an employee's conduct falls within the definition of "employment," the New York Court of Appeals has listed the following factors for consideration:

- (1) The time, place, and occasion of the act;
- (2) The history of the relationship between employer and employee in actual practice;
- (3) Whether the act is one commonly done by such an employee;
- (4) The extent of departure from normal methods of performance; and
- (5) Whether the employer could have "reasonably anticipated" the act.

Riviello v. Waldron, 47 N.Y.2d 297, 303, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 303 (1979). The Court of Appeals of New York has applied these factors liberally in a range of situations. *See, e.g., Riviello v. Waldron*, 47 N.Y.2d 297, 302, 391 N.E.2d 1278, 1281, 418 N.Y.S.2d 300, 302 (1979) (considering employee to be within the scope of his employment so long as he is discharging his duties, "no matter how irregularly, or with what disregard of instructions."); *Cepeda v. Coughlin*, 128 A.D.2d 995, 996, 513 N.Y.S.2d 528, 530 (3d Dept. 1987) (finding that corrections officers' use of force when supervising movement of prisoners was within the scope of their employment), *appeal denied*, 70 N.Y.2d 602, 512 N.E.2d 550, 518 N.Y.S.2d 1024 (1987). While these cases do not establish a clear point at which a state employee becomes personally liable, it is clear that the level of violence or disregard must be very high to satisfy the test. Courts have determined that custody and control of prisoners and the maintenance of safety and security in prisons are the main responsibilities of prison employees. *Cepeda v. Coughlin*, 128 A.D.2d 995, 997, 513 N.Y.S.2d 528, 530 (3d Dept. 1987). A New York Supreme Court has held that "it is entirely foreseeable that correction officers will be called upon to quell disturbances and subdue violence among inmates." *Mathis v. State*, 140 Misc. 2d 333, 340, 531 N.Y.S.2d 680, 684 (Sup. Ct. Albany County 1988). *But see Sharrow v. State*, 216 A.D.2d 844, 846, 628 N.Y.S.2d 878, 880 (3d Dept. 1995) (finding that no justification existed for correction officers to use force after they had already quelled a disturbance among the prisoners because, at this point, the use of force was counter to the goal of maintaining order and discipline in the facility). The Court of Appeals of New York has found that even some intentional torts can be considered within the scope of an employee's job if they were foreseeable. *Riviello v. Waldron*, 47 N.Y.2d 297, 304, 391 N.E.2d 1278, 1282, 418 N.Y.S.2d 300, 304 (1979). This means that even if a prison employee means to harm or injure you, if the employee can prove that situations in the past led the employee to think the act was necessary to keep control, the employee will not be found personally liable.

which means they have a choice to act, they cannot even if they have bad intentions.⁷⁹ If, however, an employee does something to you that is clearly outside the scope of his employment (for example, a criminal act unrelated to any part of the employee's duty), you may then sue that individual in the New York Supreme Court (New York's general trial court) or in federal court under Section 1983.⁸⁰ Remember that in federal prisons, officials are employed by the federal government rather than the state; you cannot bring a suit against a state for the actions of federal employees.⁸¹

Though there are some exceptions that will be discussed below, the Court of Claims can generally only award money damages. It cannot prohibit the prison from using punishment that violates your constitutional rights, or fix unconstitutional conditions in the prison. You must address these concerns in either a Section 1983 proceeding or an Article 78 claim.⁸²

You also cannot bring suit in the Court of Claims to attack your sentence or any decision made by prison or parole officials regarding your status. Such complaints must be made under New York Civil Practice Law Article 78 (proceedings against body or officer) or Article 70 (state habeas corpus), or New York Criminal Procedure Law Article 440 (post-judgment motions).⁸³ You may, however, attack your conviction under the Court of Claims Act § 8-b, which allows a suit for damages if the prosecutor used improper means to secure your conviction.⁸⁴ But, to win this suit, you must prove by clear and convincing evidence that you have served all or any part of your sentence resulting from your felony or misdemeanor conviction(s),⁸⁵ that you have been pardoned of the crime,⁸⁶ or that the judgment of conviction against you has been reversed or vacated and the document that accuses you has been dismissed.⁸⁷ You must also prove that you did not commit the charged acts or that your acts did not constitute a felony or misdemeanor,⁸⁸ and that you did not cause your conviction by your own conduct.⁸⁹

(ii) Filing in the New York State Supreme Court

You can sue an individual state employee (for example, a prison employee) in the New York Supreme Court (the trial court) only if that employee (1) owes you a duty as an individual, and (2) was not acting in an official capacity in the exercise of governmental functions. If the

79. See *Tango v. Tulevech*, 61 N.Y.2d 34, 40, 459 N.E.2d 182, 471 N.Y.X.2d 73 (1983) (“when official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice”).

80. For a discussion of how to sue state officials in federal court, see *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.”

81. See Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law,” for more information on how to sue federal prison officials if you are a federal prisoner.

82. See *JLM* Chapter 22, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules,” for a discussion of Article 78 proceedings. For more information on injunctive relief in the Court of Claims, see Part C(2)(b)(iii) of this Chapter.

83. See *JLM* Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence,” and Chapter 21, “State Habeas Corpus: Florida, New York, and Michigan,” for more information. In brief, you may challenge your sentence using Article 440, decisions made by prison officials using Article 78, and decisions made by parole officials using Article 78 or state habeas corpus.

84. See N.Y. Ct. Cl. Act § 8-b(3)(b)(ii)(A) (McKinney 2007). § 8-b(3)(b)(i)(A) states that a violation of N.Y. Crim. Proc. § 440.10(1)(b) (McKinney 2012) gives rise to a claim for damages. N.Y. Crim. Proc. § 440.10(1)(b) (McKinney 2012) provides that a court can vacate a conviction if “the judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor.”

85. N.Y. Ct. Cl. Act § 8-b(5)(a) (McKinney 2007).

86. N.Y. Ct. Cl. Act § 8-b(5)(b)(i) (McKinney 2007).

87. N.Y. Ct. Cl. Act § 8-b(5)(b)(ii) (McKinney 2007).

88. N.Y. Ct. Cl. Act § 8-b(5)(c) (McKinney 2007).

89. N.Y. Ct. Cl. Act § 8-b(5)(d) (McKinney 2007).

employee does not owe you a duty as an individual or was acting in his official capacity when he injured you, you will have to sue the state in the Court of Claims.⁹⁰ You cannot sue the State of New York for damages in the New York Supreme Court; as discussed above, those suits must be brought in the Court of Claims. However, if you are suing the state in order to receive something other than money damages, such as injunctive relief (a court order requiring the state to take or refrain from taking some particular action), you may sue in the New York Supreme Court.

(iii) Filing in Federal Court

If you want to sue an individual state employee for violating your federal constitutional rights, federal court is an appropriate place to file suit. In federal court, you may receive damages and injunctive relief. For a full discussion of how to file a claim in federal court against a state employee for the violation of your federal rights, see Chapter 16 of the *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.”

(b) Pursuing Your Case in the Court of Claims

(i) Types of Relief

If you prove that you were the victim of a tort, whether intentional or negligent, the court will order the tortfeasor to compensate you for the loss you suffered, most likely by paying a sum of money. Such a court-ordered payment is called “damages.”⁹¹ A court may award you three kinds of damages: compensatory, punitive, and nominal.⁹²

“Compensatory damages,” the most common form of damages, attempt to match the amount of your loss. For example, the court might order payments that are enough to replace your personal items that were destroyed (such as a watch), or to pay you the money you spent on medical bills after an injury.⁹³ The court can also order payments to compensate you for your pain and suffering,⁹⁴ which can include the time after the injury during which you continue to suffer

“Punitive damages” are court-ordered payments that add to the amount that would repay you for the loss or injury suffered. These extra damages are generally awarded when the tort was accompanied by violence, force, hatred, fraud, or vicious and evil conduct on the part of the wrongdoer.⁹⁵ Punitive damages are intended to punish the wrongdoer, rather than to

90. See *Morell v. Balasubramanian*, 70 N.Y.2d 297, 300, 514 N.E.2d 1101, 1102, 520 N.Y.S.2d 530, 531 (1987) (deeming “actions against State officers acting in their official capacity in the exercise of governmental functions” to be essentially “claims against the State, and, therefore, arguable only in the Court of Claims”).

91. Black’s Law Dictionary 445 (10th ed. 2014).

92. See *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law,” for more information on damages.”

93. *Calabrese v. Allright New York Parking, Inc.*, 93 A.D.2d 973, 461 N.Y.S.2d 612 (4th Dept. 1983) (affirming the lower court’s decision in calculating compensatory damages to consider whether or not the plaintiff had provoked the defendant).

94. Black’s Law Dictionary 472 (10th ed. 2014) (defining “discretionary damages” as damages “such as mental anguish or pain and suffering”).

95. See Restatement (Second) of Torts § 908 (1979):

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant’s act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

compensate the injured party.⁹⁶ It is important to note that the Court of Claims will not order the state to award you punitive damages.⁹⁷

Nominal damages are very small amounts of money awarded by courts in order to acknowledge that a right has been violated, even if there is no big loss or injury to be compensated for.⁹⁸ The Court may also order nominal damages if it does find a real injury, but the evidence does not show what amount would compensate for that injury.

Aside from these money awards, the Court of Claims may force people or organizations to perform or stop performing specific acts. This is called an injunction.⁹⁹ The Court of Claims can only issue an injunction if an injunction is allowed by law or if it is part of a judgment to pay money awards.¹⁰⁰ Otherwise, if you are seeking an injunction, you must bring your suit in the New York Supreme Court or in federal court. This means that you cannot bring a suit in the Court of Claims asking for general changes to the conditions in your prison because the Court of Claims cannot order the state to correct those conditions.¹⁰¹

(ii) Settlements in the Court of Claims

There is no limit to the amount of damages the Court of Claims may award. However, the court must approve the amount.¹⁰² It is also possible to settle your claim against the state out of court. When the state offers you a settlement, it is not necessarily agreeing that it did something wrong, but is offering to pay you some amount of money instead of going to trial. When you reach a settlement with the state, you give up your right to ask the court for more damages. By contrast, if you go to trial and are given damages that you think are too low, you may then appeal to the Appellate Division of the Supreme Court of New York requesting more damages.

(iii) Filing Time Limits

If you want to file a claim because a state employee's negligent or intentional act physically injured your body, you have ninety days from the time of the injury or loss¹⁰³ in which to either

96. Black's Law Dictionary 474 (10th ed. 2014). *See* Zurich Ins. Co. v. Shearson Lehman Hutton, Inc. 84 N.Y.2d 309, 316, 618 N.Y.S.2d 609 (1994).

97. Sharapata v. Town of Islip, 56 N.Y.2d 332, 334, 437 N.E.2d 1104 (1982) ("The waiver of sovereign immunity effected by section 8 of the Court of Claims Act does not permit punitive damages to be assessed against the State or its political subdivisions").

98. Black's Law Dictionary 473 (10th ed. 2014). *See* Buchwald v. Waldron 183 A.D.2d 1080, 1081, 583 N.Y.S.2d 682 (1992).

99. For more discussion of injunctive relief, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

100. *See* Doe v. State, 86 Misc.2d 639, 641, 383 N.Y.S.2d 172, 174 (N.Y. Ct. Cl. 1976); *see also* N.Y. Ct. Cl. Act § 9, Notes of Decisions, n.59 (McKinney 1989 & Supp. 2006).

101. To request an injunction either (1) to prevent forms of punishment which violate your constitutional rights, or (2) to fix unconstitutional conditions in the prison, you must bring another kind of lawsuit. This lawsuit must either be in a § 1983 proceeding or an Article 78 proceeding. *See JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

102. N.Y. Ct. Cl. Act § 20-a (McKinney Supp. 2010) (stating that settlements must be approved by the court); *see also* N.Y. Ct. Cl. Act § 20(6-a) (McKinney Supp. 2010) ("in any case where a judgment . . . is to be paid to an inmate . . . the comptroller shall give written notice, if required pursuant to subdivision two of [§ 632-a] of the executive law, to the office of victim services. . .").

103. For more information on the time of injury or loss and the discovery of injury or loss, see N.Y. Ct. Cl. Act § 10 (McKinney Supp. 2012). Note that if you are assaulted by a corrections officer, for example, but the full extent of the injuries does not become apparent immediately, the 90 days begin when the assault happens, not when the injuries become apparent. The court has been very hesitant to extend a filing deadline to 90 days from the point at which an injury was realized. *Augat v. State* 244 A.D.2d 835, 836, 666 N.Y.S.2d 249, 251 (3d Dept. 1997), *appeal denied*, 91 N.Y.2d 814, 698 N.E.2d 956, 676 N.Y.S.2d 127 (1998). Therefore, you should be very careful not to delay filing.

(1) file your claim, or (2) serve a Notice of Intention to File a Claim with the Attorney General.¹⁰⁴ To “serve” a legal document means to deliver it to the party you are suing. If you do not do either of these things, you may not be allowed to file at all.¹⁰⁵ Whether you are filing a claim or serving a Notice of Intention, the document must be *received* within the ninety-day deadline. Part D(1)(c) below explains how to make sure your document has been received within the deadline. *These time limits exist even if you are proceeding with other administrative remedies required by your institution.*

You must file a Notice of Intention to alert the state of your claim so it has a chance to respond to your complaint or prepare for its defense. See Appendix A-1 of this Chapter for a sample “Notice of Intention” form. If you are asking the court for permission to file a late claim, you need to tell the court why your late filing has not prevented the state from getting its defense ready.

Filing a Notice of Intention is not the same as beginning a lawsuit; it only preserves your right to file a lawsuit against the State in the future. Once you serve a Notice of Intention to File a Claim with the Attorney General, you have two years to file a claim for a negligent or unintentional tort, and one year to file a claim for an intentional tort.¹⁰⁶ These time limits start counting at the moment your claim “accrues” (when the injury is complete enough for the amount of damage to be determined).¹⁰⁷

If you are filing a claim for damage or loss of your personal property, the process is a little different. The time limit for filing is not ninety days after the injury (after the property is stolen), but 120 days after you have gone through all institutional administrative remedies. Within this 120-day period you must file *the claim itself*—NOT a Notice of Intention.¹⁰⁸

Courts are very strict about the time limits on filing a claim and serving the Notice of Intention to File a Claim.¹⁰⁹ The Court of Claims will not allow late filing of claims related to

104. N.Y. Ct. Cl. Act § 10(3) (McKinney Supp. 2012). See Appendix A-1 of this Chapter for a sample Notice of Intention.

105. The claim itself should state the time and place where such claim arose, the nature of the claim, the damage or injuries claimed to have been sustained, and the total sum claimed. In your Notice of Intention to File a Claim, you should state the same matters, except that you do not have to state the items of damage or the total sum claimed. N.Y. Ct. Cl. Act § 11 (McKinney Supp. 2009). Therefore, you do not have to know the extent and severity of your injuries in order to file a Notice of Intention. *Atterbury v. State*, 26 Misc. 2d 422, 424, 210 N.Y.S.2d 460, 463 (N.Y. Ct. Cl. 1961) (explaining that claimant could have filed a notice of intention prior to being referred to a specialist because neither the severity of the injuries nor the sum claimed must be included in the notice and visiting a physician in the first instance shows she knew she had some injuries).

106. N.Y. Ct. Cl. Act § 10(3) (McKinney Supp. 2012).

107. N.Y. Ct. Cl. Act § 10(3) (McKinney Supp. 2012). *Bronxville Palmer, Ltd. v. State*, 36 A.D.2d 647, 647–48, 318 N.Y.S.2d 412, 413 (3d Dept. 1971) (holding that, “where a continuing injury or other circumstance prevents an evaluation of damages at the time of the occurrence of the wrong, the time for filing a claim does not begin to run until such an evaluation can be made.”); *see also Mahoney v. Temp. Comm’n of Investigation of N.Y.*, 165 A.D.2d 233, 240–41, 565 N.Y.S.2d 870, 874–75 (3d Dept. 1991) (holding that causes of action were not limited to conduct that occurred within 90-day period before filing because the violations were ongoing and interrelated and evaluation of damages could not be made within that period).

108. N.Y. Ct. Cl. Act § 10(9) (McKinney Supp. 2012); *see also Wright v. State*, 195 Misc. 2d 597, 598, 760 N.Y.S.2d 634, 635 (N.Y. Ct. Cl. 2003) (“claims for property losses by inmates are no longer measured from the date of loss, but rather within a 120-day period commencing upon exhaustion of institutional remedies.” [internal citation omitted]), *appeal dismissed*, 11 A.D.3d 1000, 782 N.Y.S.2d 209 (4th Dept. 2004).

109. *See Conquest v. State*, 58 Misc. 2d 121, 121, 294 N.Y.S.2d 892, 893 (N.Y. Ct. Cl. 1968) (holding that, where notice of intention to file claim was filed on the 92nd day after claim arose, the claim itself was not filed within statutory period and court did not have jurisdiction to hear the case). *But see Killeen v. State*, 12 Misc. 2d 89, 92, 174 N.Y.S.2d 1000, 1002 (N.Y. Ct. Cl. 1958) (excusing minor lateness per N.Y. Ct. Cl. Act § 10(5), where there was slight error in attorney’s computation of time and the state was not prejudiced).

loss of property.¹¹⁰ However, there are some situations in which the Court may permit late claims.¹¹¹ Section 10(6) of the New York Court of Claims Act lists factors that the Court may consider when deciding whether to allow a late filing. The Court does not need to find that each of these factors is satisfied in order to allow you to file your claim late.¹¹² The factors listed are:

- (1) Whether there are any excuses for the delay in filing;
- (2) Whether the state knew about the facts of the claim;
- (3) Whether the state had a chance to investigate the situations of the claim;
- (4) Whether the claim appears to be meritorious;¹¹³
- (5) Whether the failure to file a timely claim or Notice of Intention resulted in substantial prejudice to the state, meaning whether late filing significantly hurts the state's defense;
- (6) Whether the person has any other available remedy; and
- (7) Any other relevant factors.¹¹⁴

The court can choose to allow you to file your claim late even if each of the factors is not satisfied.¹¹⁵ For the first factor, some courts will excuse a delay that was caused by the claimant's treatment for physical or mental disabilities that result from the injuries alleged in the lawsuit.¹¹⁶ In addition, Section 10(5) of the New York Court of Claims Act allows late filing

110. *See Roberts v. State*, 11 A.D.3d 1000, 1001, 783 N.Y.S.2d 190, 191–92 (4th Dept. 2004) (holding that, because § 10(6) of the Court of Claims Act only allows a court discretion to permit the late claims mentioned in §§ 10(1)–(4), and loss of property claims are addressed in § 10(9), the court may never allow late claims for loss of property). *But see Wright v. State*, 195 Misc. 2d 597, 602, 760 N.Y.S.2d 634, 638 (N.Y. Ct. Cl. 2003) (holding that it was within the spirit of the Court of Claims Act to allow the court discretion over late claims for loss of property). A subsequent Court of Claims case disagreed with *Wright* and read the 90-day time limit strictly. *Murray v. State*, 5 Misc.3d 398, 403–04, 781 N.Y.S.2d 724, 728–29 (N.Y. Ct. Cl. 2004) (strictly adhering to the 90-day filing period and dismissing § 10(9) claim that was filed late).

111. N.Y. Ct. Cl. Act § 10(6) (McKinney Supp. 2001); *see also Gavigan v. State*, 176 A.D.2d 1117, 1119, 575 N.Y.S.2d 217, 218 (3d Dept. 1991) (upholding Court of Claims' broad discretion under N.Y. Ct. Cl. Act § 10(6) to grant permission to file a late Notice of Claim where an employee of the State Office of General Services knew of an accident and, therefore, the state could not be said to have been prejudiced by the lateness). *But see Jerrett v. State*, 166 A.D.2d 907, 907, 560 N.Y.S.2d 568, 568 (4th Dept. 1990) (holding that Court of Claims abused its discretion in granting motion to serve a late claim where there was no valid excuse for claimant's delay in filing the claim, the state did not have timely notice of the essential facts constituting the claim nor the opportunity to investigate the circumstances underlying the claim, and the three other factors in N.Y. Ct. Cl. Act § 10(6) did not weigh heavily in claimant's favor).

112. *See Butler v. State*, 81 A.D.2d 834, 834, 438 N.Y.S.2d 834, 834 (2d Dept. 1981) (explaining that there is no requirement that claimant comply with all six requirements of § 10(6) for the Court of Claims to grant permission to file a late notice).

113. Black's Law Dictionary 1139 (10th ed. 2014) (defining "meritorious" as "worthy of legal victory; having enough legal value to prevail in a dispute").

114. N.Y. Ct. Cl. Act § 10(6) (McKinney 2011 & Supp. 2010).

115. *See De Olden v. State*, 91 A.D.2d 1057, 1057, 458 N.Y.S.2d 666, 666 (2d Dept. 1983) (acknowledging a reasonable excuse for delay in filing a claim where the claimant's extensive physical therapy and extreme psychological trauma after amputation of his leg seriously affected his ability to function after being discharged from the hospital); *Schweickert v. State*, 64 A.D.2d 1026, 1026–27, 409 N.Y.S.2d 308, 309 (4th Dept. 1978) (holding that the amendment to the Court of Claims Act contained in § 10(6), which grounds and lengthens the time limits for allowing late claims, makes the failure to show a reasonable excuse for the delay no longer fatal to a claim for late filing); *Cole v. State*, 64 A.D.2d 1023, 1024, 409 N.Y.S.2d 306, 307–08 (4th Dept. 1978) (finding excuse to be reasonable when claimant was completely immobilized by his injuries and heavily medicated).

116. *See De Olden v. State*, 91 A.D.2d 1057, 1057, 458 N.Y.S.2d 666, 666 (2d Dept. 1983) (acknowledging a reasonable excuse for delay in filing a claim where the claimant's extensive physical therapy and extreme psychological trauma after amputation of his leg seriously affected his ability to function after being discharged from the hospital); *Cole v. State*, 64 A.D.2d 1023, 1024, 409 N.Y.S.2d 306,

where the claimant has a legal disability, such as insanity or infancy (childhood). In these situations, the claim must be made within two years after the disability is no longer an issue (although, as explained below in this Section, you will not get to use all of this two-year extension because of the statute of limitations on injury claims).¹¹⁷ Being in prison is not itself a legal disability. Incarceration and lack of knowledge of the filing requirements of the New York Court of Claims Act do not excuse you if you file late. However, since prisoners have a right to hire counsel and the right to sue the state, if you are not given a chance to contact a lawyer or are not allowed in the prison's law library to learn your rights, you may have an excuse for filing late.¹¹⁸

In addition, if you filed a Notice of Intention within the time limit but then failed to file the claim on time, you may apply to the court for permission to treat the Notice of Intention as a claim.¹¹⁹ The court may grant your application to treat the Notice of Intention as a claim if:

- (1) The application meets certain time limits in article two of the Civil Practice Law and Rules;
- (2) The Notice of Intention was served and filed on time, and has enough facts to make up a claim; and
- (3) Granting the application would not prejudice the state, meaning it would not damage the state's legal rights or ability to defend itself.¹²⁰

The Court of Claims will *not* allow you to file a negligence tort claim more than three years after an injury,¹²¹ or more than one year after the injury in the case of an intentional tort claim (for example, assault and battery).¹²² Furthermore, even if the Court of Claims has the power to allow late claims in some cases, it cannot put aside the New York "statutes of limitations"

307–08 (4th Dept. 1978) (finding excuse to be reasonable when claimant was completely immobilized by his injuries and heavily medicated).

117. N.Y. Ct. Cl. Act § 10(5) (McKinney 1989 & Supp. 2010); N.Y. C.P.L.R. 208 (McKinney 2003 & Supp. 2010); *see* Vitello v. State, 66 Misc. 2d 582, 585, 321 N.Y.S.2d 787, 790 (N.Y. Ct. Cl. 1971) ("Infancy, along with incompetency, habitual drunkenness, and the like, are legal disabilities."), *aff'd*, 39 A.D.2d 792, 332 N.Y.S.2d 289 (3d Dept. 1972). For an application of insanity to the tolling of statutes of limitations, see McCarthy v. Volkswagen of Am., Inc., 78 A.D.2d 849, 849, 432 N.Y.S.2d 722, 722–23 (2d Dept. 1980) (finding plaintiff's claim to be time-barred because plaintiff's college attendance and participation in athletic activities showed that he was not suffering from a temporary mental incapacity which prevented him from understanding or protecting his legal rights), *aff'd*, 55 N.Y.2d 543, 548–49, 435 N.E.2d 1072, 1075, 450 N.Y.S.2d 457, 460 (1982); Vitello v. State, 66 Misc. 2d 582, 586, 321 N.Y.S.2d 787, 791 (N.Y. Ct. Cl. 1971) (holding that plaintiff was under a legal disability at the time of his conviction even though his status changed from "hospitalization under commitment" to "voluntary hospitalization," and thus was entitled to file within two years after the legal disability ceased), *aff'd*, 39 A.D.2d 792, 332 N.Y.S.2d 289 (3d Dept. 1972).

118. *See* Plate v. State, 92 Misc. 2d 1033, 1037, 402 N.Y.S.2d 126, 129 (N.Y. Ct. Cl. 1978) (stating that denial of claimant's access to attorney and the law library for a substantial part of the 90-day period could constitute an excuse for not filing on time).

119. N.Y. Ct. Cl. Act § 10(8)(a) (McKinney 2011 & Supp. 2010). Section 10(8)(a) provides a claimant who timely serves and files a Notice of Intention, but who fails to timely serve or file a claim, may apply for permission to treat notice of intention as a claim. *See* Wright v. State, 195 Misc. 2d 597, 602, 760 N.Y.S.2d 634, 638 (N.Y. Ct. Cl. 2003) (clarifying debate in previous cases over § 10(8)(a) and affirming that courts do have the discretion to treat a Notice of Intention as a claim). *But see* Murray v. State, 5 Misc. 3d 398, 401, 781 N.Y.S.2d 724, 726–27 (N.Y. Ct. Cl. 2004) (construing subdivision literally, as opposed to more broadly, thus implying there should be no discretion to treat Notice of Intention as a claim).

120. N.Y. Ct. Cl. Act § 10(8)(a) (McKinney 2011 & Supp. 2010); Prejudice is defined as "[d]amage or detriment to one's legal rights or claims." Black's Law Dictionary 1370 (10th ed. 2014).

121. N.Y. C.P.L.R. 214 (McKinney 2003 & Supp. 2010).

122. N.Y. Ct. Cl. Act § 10(3-b) (McKinney 2011 & Supp. 2007); N.Y. C.P.L.R. 215(3) (McKinney 2003 & Supp. 2010). In addition, property claims have shorter deadlines for filing—they must be filed within 120 days of the administrative decision on the claim (that is, after the Directive #2377 decision). N.Y. Ct. Cl. Act § 10(9) (McKinney 2011 & Supp. 2010).

(meaning, time limits for certain types of claims) for the claims you are filing. For example, the statute of limitations for personal injury actions is three years after the incident.¹²³ The statute of limitations for malpractice claims is two and a half years.¹²⁴

(iv) Filing Fees

All individuals must pay a fifty-dollar filing fee whenever they bring a claim in the New York State Court of Claims.¹²⁵ If you cannot afford the fee, you can ask the court to reduce or waive it. Prisoners follow the same steps as everyone else to ask for reduced or excused filing fees.¹²⁶

To get the reduced filing fee, you must submit an affidavit to the court explaining why you cannot afford the full filing fee.¹²⁷ You should include in your affidavit detailed information about your financial situation, including the amount of money in your prison account, any income you receive from a prison job or work release program, and any property you own.¹²⁸ Tell the court if you are unable to work because you are physically or mentally ill, or because you are living in protective custody due to personal danger. In addition, you must write whether any other person has an interest in the money award you may win (for example, if a lawyer is representing you in return for a percentage of any money awarded).¹²⁹ You should also list any financial obligations you have, especially court-ordered obligations such as child support or restitution. If your case has already begun, you will have to tell the State, as the party you are suing, that you have filed this motion.¹³⁰

See Appendix A-5 for a sample affidavit requesting a reduced filing fee. If the court denies your request for the reduced filing fee, it will let you know. You will then have 120 days to pay the full fee (fifty dollars) or else your case will be dismissed.¹³¹

If you win your case, the court will refund any filing fee that you paid.¹³²

(v) Where and How to File

If you are filing a Notice of Intention, you must “serve” the Attorney General with the Notice of Intention (meaning, giving personally or sending to the Attorney General by certified mail with return receipt requested).¹³³ *This is very important—if your case goes to trial, you must show that the Notice of Intention was served on the Attorney General.* You do not need to file your Notice of Intention in the Court of Claims.

Your claim, by contrast, must be filed at the office of the Clerk of the Court of Claims in Albany.¹³⁴ You must also serve your claim to the State of New York by serving the Attorney General. After you serve the Attorney General, you must file proof of service with the Clerk of the Court of Claims within ten days. You can do this by filing an Affidavit of Service describing the service.¹³⁵ Filing is accomplished by delivering the necessary papers to:

123. N.Y. C.P.L.R. 214 (McKinney 2003 & Supp. 2010).

124. N.Y. C.P.L.R. 214-a (McKinney 2003 & Supp. 2010).

125. The fee requirements can be found in N.Y. Ct. Cl. Act § 11-a (McKinney 1989 & Supp. 2010).

126. N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2010).

127. N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2010).

128. N.Y. C.P.L.R. 1101(a) (McKinney 1997 & Supp. 2010).

129. N.Y. C.P.L.R. 1101(a) (McKinney 1997 & Supp. 2010).

130. N.Y. C.P.L.R. 1101(c) (McKinney 1997 & Supp. 2010).

131. N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2010).

132. N.Y. Ct. Cl. Act § 11(a)(i) (McKinney 1989 & Supp. 2010) (“The court shall award to a prevailing claimant as a taxable disbursement the actual amount of any fee paid to file the claim.”)

133. N.Y. Ct. Cl. Act § 11(a)(i) (McKinney 1989 & Supp. 2010).

134. N.Y. Ct. Cl. Act § 11(a)(i) (McKinney 1989 & Supp. 2010).

135. N.Y. Comp. Codes R. & Regs. tit. 22, § 206.5(a). “Service” means you have delivered copies of the legal complaint to the person or government entity you are suing. In the Court of Claims, service is accomplished by sending a copy of the claim to the State Attorney General.

Clerk of the Court of Claims
P.O. Box 7344
Capitol Station
Albany, New York 12224

When you file the original claim, you must also file two copies of each document with the Clerk's office. One copy of each must also be served on the Attorney General. The address is:

Office of the Attorney General
Department of Law
Capitol Building
Albany, New York 12224

Keep at least one copy of each document related to your suit for your own records. There are sample claim and notice forms in Appendix A at the end of this Chapter.

When filing your papers with the court clerk's office and the Attorney General, you can either personally deliver the papers or send them by certified mail with return receipt requested.¹³⁶ "Return receipt requested" means that the postal service will mail you a receipt to prove that the documents were delivered. Do not lose this receipt, because it is the only way to prove that you completed service. If you do not receive a return receipt from both the Court of Claims and the Attorney General's Office within a period of time, you should send a follow-up letter to one or both of these offices asking if they have received your claim.¹³⁷

Service on the state is not complete until both the clerk and the Attorney General's Office have received your papers by.¹³⁸ Remember, mailing your papers is NOT the same as filing them. You must mail your papers early so that they are *received* within the time limits mentioned earlier. Allow enough time for delays in the mail. Do not forget: your claim may be dismissed if you fail to serve the state in the manner and time the law requires.¹³⁹

(vi) What Documents to File

In Appendix A of this Chapter, you will find sample copies of papers that you may need to file, including sample claims and Notices of Intention.

Your claim must be clearly typed or printed on 8½-by-11 inch paper. You should include:

- (1) Your name and address;
- (2) Where the incident happened;
- (3) When the incident happened;
- (4) The way in which New York State (through its employees' actions) negligently or intentionally caused your injury;
- (5) A description of the incident (include the names of the individuals responsible, if you know);
- (6) A detailed description of your injuries that resulted from this incident;

136. N.Y. Ct. Cl. Act § 11(a)(i) (McKinney 1989 & Supp. 2010).

137. The Court of Claims sends a letter of acknowledgment once a claim has been received. The Attorney General's Office does not. Therefore, if your claim was served in person, make sure that you get an affidavit that the claim was served. If the claim was sent Return Receipt Requested, keep the green card.

138. N.Y. Ct. Cl. Act § 11(a) (McKinney 1989 & Supp. 2010); *see also* Aetna Cas. & Sur. Co. v. State, 92 Misc. 2d 249, 252, 400 N.Y.S.2d 469, 471 (N.Y. Ct. Cl. 1977) (dismissing claim that was mailed 88 days after accident but not received by the Court of Claims clerk until the 93rd day).

139. *See* Mingues v. State, 146 Misc. 2d 412, 413, 550 N.Y.S.2d 802, 803 (N.Y. Ct. Cl. 1990) (dismissing claim when notice of intention and claim were sent by regular mail). *But see* Colon v. State, 146 Misc. 2d 1034, 1035-36, 553 N.Y.S.2d 979, 980 (N.Y. Ct. Cl. 1990) (holding that the court can choose to allow a claim to proceed even if the claimant did not use the proper method of service required by § 11 of the Court of Claims Act).

- (7) The date and place you served your Notice of Intention to File a Claim (if you served a Notice of Intention);
- (8) A statement that you are filing this claim within the time limits in the Court of Claims Act; and
- (9) A list of the damages you are claiming.¹⁴⁰

If you are filing a claim initially, rather than filing a Notice of Intention to File a Claim, you do not need to include step (7), and step (8) should state that your claim is being filed within the ninety-day statutory limit. At the bottom of your claim form, you must include and sign a verification, which states that all of the information included in your claim is true.¹⁴¹ You must sign this verification in the presence of a notary public, who then must sign his name. The prison librarian may be a notary public or may be able to direct you to the person who provides that service within the prison.

If you are filing a motion for permission to file a late claim, your motion should describe the facts that will convince the Court of Claims that it should permit you to file late and, among other things, that the State will not be substantially prejudiced by the delay, which means that the State will not have a harder time defending itself because you filed late.¹⁴²

See Figure 1, below, to determine how many copies you need to file of each document.

	Clerk of Court	N.Y. Attorney General	Self	Total Number of Copies You Will Need
Notice of Intention to File Claim	0 copies	1 copy	1 copy	2 copies
Claim and Any Supporting Affidavits	1 original and 2 copies	1 copy	1 copy	1 original and 4 copies
Motion for Permission to File Late Claim	1 original and 2 copies	1 copy	1 copy	1 original and 4 copies
Affidavit in Support of Reduction of Fees	1 original and 2 copies	1 copy	1 copy	1 original and 4 copies

Figure 1: Copies needed when filing notices, claims, motions, or affidavits.

(vii) How to Obtain Help from a Lawyer

Since a tort claim filed against New York State is not a criminal action, you do not have the right to be assigned a lawyer. While the court may, at its discretion, require an attorney to represent poor people without charge, it is not likely to do so.¹⁴³

140. N.Y. Ct. Cl. Act § 11(b) (McKinney 1989 & Supp. 2010) (“The claim shall state the time when and place where such claim arose, the nature of same, [that a negligent or intentional action by a state employee has injured you or your property], and the items of damage or injuries claimed to have been sustained and . . . the total sum claimed.”).

141. N.Y. Ct. Cl. Act § 11(b) (McKinney 1989 & Supp. 2010); N.Y. C.P.L.R. 3020, 3021 (McKinney 1991 & Supp. 2010). For a sample Verification, see Appendix A-2 of this Chapter.

142. N.Y. Ct. Cl. Act § 10(6) (McKinney 1989 & Supp. 2010).

143. *See* Stephens v. State, 93 Misc. 2d 273, 274, 404 N.Y.S.2d 536, 537 (N.Y. Ct. Cl. 1978) (refusing to assign counsel in prisoner’s civil case unless State provides for attorney compensation); *see also* Menin v. Menin, 79 Misc. 2d 285, 293, 359 N.Y.S.2d 721, 729 (Sup. Ct. Westchester County 1974) (refusing to assign counsel to represent poor prisoner in a civil case for damages from State for injuries allegedly received during confinement, because the state legislature did not create a fund to compensate

It is often difficult to find a lawyer who will take your case. If it seems likely that you will win a large amount of money from the State, you may be able to find a private attorney to represent you on a contingency fee basis, which means the attorney only charges you if you win the case. If you win, the attorney takes his fee (usually a percentage of the money you won), and any additional costs of representing you, from your award. You may be able to find the phone number of an attorney through the New York State Bar Association. If you cannot find a lawyer, you can file the claim yourself, *pro se*, in the Court of Claims and even appeal its decision to the Appellate Division of the New York Supreme Court.

(viii) Examinations Before Trial: Obtaining Testimony from Witnesses

Like other civil cases, you are allowed to conduct some forms of pretrial discovery. Chapter 8 of the *JLM*, “Obtaining Information to Prepare Your Case: The Process of Discovery,” discusses the processes of discovery for federal and New York State trials. Chapter 8 will help you decide if you need to take discovery in your case. Discovery may include any of the following ways to obtain evidence to support your claim before trial: interviewing witnesses, requesting documents, and demanding physical and mental examinations.¹⁴⁴ The state must follow the same discovery rules as individuals.¹⁴⁵

You must pay any fees and expenses required in obtaining testimony.¹⁴⁶ Poor person status does not permit you to avoid paying these costs.

(ix) Reopening Trial Before Decision

If you discover new evidence favorable to you after you have closed your case in the Court of Claims but before the court has made a decision, you can submit a Notice of Motion to Reopen a Claim. Use a Notice of Motion to Reopen a Claim only if you have discovered important and relevant evidence that could make a difference in the court’s decision.¹⁴⁷ Be aware that courts rarely grant these motions.

(x) Appeal from a Judgment

You can appeal the court’s decision because you think they were wrong about the law, the facts, or both. You can also appeal if the amount awarded was too high or too low. When you make an appeal, the Appellate Division may affirm, reverse, or modify the judgment; dismiss the appeal; grant a new trial; or send the case back to a lower court for further proceedings.¹⁴⁸

Once the Court of Claims makes a decision in your original case, that decision will be entered with the Clerk of the Court of Claims, and then the Attorney General will serve you with a notice that the judgment has been entered. *You must file a Notice of Appeal within thirty days of the date that the Attorney General mails you the notice that your judgment has been entered.*¹⁴⁹ Because you may not be receiving mail timely in prison, be sure to check the date on the envelope when you receive the notice.

an attorney for this purpose), *aff’d mem.*, 48 A.D.2d 904, 372 N.Y.S.2d 985 (2d Dept. 1975).

144. N.Y. C.P.L.R. 3102(a) (McKinney 2005 & Supp. 2010).

145. N.Y. C.P.L.R. 3102(f) (McKinney 2005 & Supp. 2010).

146. N.Y. Ct. Cl. Act § 18 (McKinney 1989 & Supp. 2010).

147. *See Williams v. State*, 90 A.D.2d 882, 884, 456 N.Y.S.2d 528, 530 (3d Dept. 1982) (holding that court below properly reopened the trial to obtain further and more accurate evidence on damages in a case where the Court of Claims could not accurately measure the damages resulting from a partial taking of claimant’s property, which then affected the market value of the remaining premises, the).

148. N.Y. Ct. Cl. Act § 24 (McKinney 1989 & Supp. 2010).

149. N.Y. Ct. Cl. Act § 25 (McKinney 1989 & Supp. 2010).

You must serve both the Attorney General and the Clerk of the Court of Claims with a written Notice of Appeal, which briefly states your reasons for appealing.¹⁵⁰ You must obtain a Notice of Appeal form available at the Court of Claims or on the Court of Claims' official website. The Notice of Appeal form typically contains:

- (1) the name of the case and index or docket number, as written at the top of all the court papers;
- (2) your name;
- (3) the order or judgment you are appealing;
- (4) the date of the order or judgment;
- (5) the name of the court that made the order and entered the judgment; and
- (6) the name of the court that you are appealing to.

You can serve the Notice of Appeal to the Attorney General by mail. Then the person who served the papers must fill out an Affidavit of Service. Note that you can serve the papers yourself only if the Judge has granted you permission to do so. Otherwise, anyone above 18 years old can serve the papers on your behalf. However, the person serving the papers is not allowed to serve more than five papers each year. Then, the Notice of Appeal and the Affidavit of Service must be filed with the court by serving the Clerk of the Court of Claims. There is a court fee to file a Notice of Appeal. The fee is different for different courts, so you should check with the clerk to see what the fee is. If you can't pay the court fees, you can ask the court for a fee waiver. You should ask the clerk for a fee waiver form.¹⁵¹

You will need a transcript of your trial in the Court of Claims. If you were allowed to go through the case as a poor person, you may have a right to a free copy of this transcript.¹⁵² If you have not filed for permission as a poor person, you may wish to apply for the status as a poor person at this point. For information on the procedure for applying for status as a poor person, see Part C(2)(b)(iv) above.

(xi) Final Process

If you win at trial, you will be paid the amount of the judgment, unless either you or the state appeals. The Comptroller of the State of New York will mail you a check once you submit the following:

- (1) A copy of the judgment certified by the Clerk of the Court of Claims;
- (2) A certificate from the Attorney General stating that the state has not and will not take an appeal from the judgment; and
- (3) A release signed by your attorney (if you have one) that he has given up any fee for services provided to you.¹⁵³

Note that this is only a waiver of attorney's fees in the eyes of New York State, which makes it more like a formality. In reality, the state will make out the check to both you and your attorney and will probably mail it to your attorney's office. You and your attorney will most likely have already decided what percentage of any award the attorney will keep. Typically, attorneys will take the costs of trying your case from the total award, then keep one-third of what remains. Thus, you will receive two-thirds of the damages awarded to you, minus expenses.

150. N.Y. Ct. Cl. Act § 25 (McKinney 1989 & Supp. 2010). See Appendix A-10 for a sample Notice of Appeal.

151. You can also find forms for the New York Court of Claims, including the form for a fee waiver on the Court of Claims' website, at <https://www.nycourts.gov/COURTS/nyscourtofclaims/forms.shtml> (last visited Feb. 1, 2017).

152. N.Y. C.P.L.R. 1102(b) (McKinney 1997 & Supp. 2010).

153. N.Y. Ct. Cl. Act § 20(6) (McKinney 1989 & Supp. 2010).

D. Checklist for Filing With the Court of Claims

1. Does your claim include violations of your constitutional rights?

(a) If Yes

If yes, you may bring suit in federal district court under 42 U.S.C. § 1983 or in State Supreme Court. See *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.” Remember that you may also file New York State constitutional claims with the Court of Claims. New York’s state constitution protects many of the same rights as the Bill of Rights.

(b) If No

If no, then you may sue under the state statute that allows for claims such as yours; in New York, you may bring suit against the state in the Court of Claims.

Note: You must use the Department of Correctional Services’ internal procedure to address issues with loss of or damage to property, which allows for prisoner compensation before bringing your claim to the Court of Claims. See Part C(1) of this Chapter.

Note: If you wish to sue the federal government for a tort, and none of your constitutional rights have been violated, you must sue under the Federal Tort Claims Act.¹⁵⁴

Note: The Court of Claims has no jurisdiction over lawsuits involving county, town, city or village governments, agencies or employees. These governmental bodies, such as Rikers Island Jail, are all distinct from the State, and litigation against them is governed by the provisions of the General Municipal Law.

2. If you are bringing a suit in the New York Court of Claims:

(a) File a claim or Notice of Intention

Be sure to serve a claim or Notice of Intention to File a Claim with return receipt requested to the Attorney General’s Office within ninety days of the accident or injury. If you are serving a claim instead of a Notice of Intention, it must be filed within ninety days of the accident or injury at the clerk’s office in Albany. You can serve the Notice of Intention even if you are not certain that you will end up filing the claim. That way, you may still have the chance to file a claim later if you decide to do so. Remember: the papers must be *received* within ninety days.

(b) File the original document and two copies of each document

For every document you include in your claim, file the original document and two copies of each with the clerk’s office when you file your claim. Be sure to:

- (1) Include all required information in your claim,
- (2) Serve one copy of each document on the Attorney General,
- (3) Keep one copy of every document for your own records,
- (4) File proof of service on the Attorney General (the representative of the defendant, the State) at the clerk’s office in Albany within ten days of such service, and
- (5) Include a notarized verification with your claim.

3. If you are appealing a judgment

Serve both the Attorney General and the Clerk of the Court of Claims with a written Notice of Appeal. The Notice should include the basic reason for your appeal, and must be filed within thirty days of when you receive notice that a judgment was entered in your case.

154. Federal Tort Claims Act provisions are found in 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671–80 (2012).

E. Conclusion

You should think about several things before you bring a tort claim. First, you should find out what kind of tort claim you want to bring and whether you can prove that you have had an actual injury. If you feel confident that you have a strong claim, check to see whether you must go through other procedures in prison before you think about the court in which you will file a claim and the kind of award you will seek. Meet all deadlines for filing documents (especially the strict ninety-day time window for filing your claim or Notice of Intention with the Court of Claims), make sure you file the right documents in the right places, and pay the proper fees. Review the checklists provided in this Chapter and the sample documents in the Appendix when filing your tort claims. Last but not least, always hold on to photocopies of all of the documents you file.

APPENDIX A

SAMPLE TORT CLAIM AND SUPPORTING PAPERS

This Appendix contains the following materials:

- A-1. Sample Notice of Intention to File a Tort Claim
- A-2. Sample Verification
- A-3. Sample Assault and Battery Tort Claim
- A-4. Sample Negligence Tort Claim
- A-5. Sample Affidavit in Support of Application for a Reduction of Fees
- A-6. Sample Affidavit in Support of Motion for Permission to File a Late Claim
- A-7. Affidavit of Service
- A-8. Sample Demand for Bill of Particulars
- A-9. Sample Claimant's Bill of Particulars
- A-10. Sample Notice of Appeal

Parts A, B, and C of this Chapter tell you how to use each of these papers. Do not use these forms until you have read this entire Chapter.

These papers are examples of the types of documents that you must file in the Court of Claims for various purposes. You should use the basic form of these papers where appropriate, but you must be careful to substitute the information that applies to your case for the general information in these samples. When these sample forms give details on a particular event, make sure you substitute your own details.

There are endnotes following the sample documents, which give you instructions on how to fill in the necessary information. These are only samples. **DO NOT TEAR THESE FORMS OUT OF THE *JLM***. Many of the following forms can also be found in the New York Consolidated Laws Service Vol. 43 (1987). In addition, the form for applying for a reduction of filing fees can be obtained from the Chief Clerk's Office in Albany.

A-1. Sample Notice of Intention to File a Tort Claim

State of New York Court of Claims

_____X
 :
 _____ i :
 :
 - against - :
 :
 :
 The State of New York :
 :
 _____X

Notice of Intention
to File Claim

TO THE ATTORNEY GENERAL OF THE STATE OF NEW YORK:

PLEASE TAKE NOTICE, that the undersigned _____, ⁱⁱ intends to file a claim against the State of New York, pursuant to Sections 10 and 11 of the Court of Claims Act.

The post office address of the claimant herein is: _____ ⁱⁱⁱ

For the time being I am representing myself.

The time when and the place where such claim arose and the nature of my claim are as follows:

 _____ ^{iv}

Claimant, *pro se*

Dated: _____

v
vi

A-3. Sample Assault and Battery Tort Claim^{xii}

State of New York Court of Claims

_____	X
	:
_____ ^{xiii}	:
	:
- against -	: Claim No. _____ ^{xiv}
	:
	:
The State of New York.	:
_____	X

Claimant, _____, ^{xv} appearing pro se, complaining of defendant, the State of New York, alleges the following:

1. The post office address of the claimant herein is _____ ^{xvi}.
2. This claim is for assault and battery of the State committed by its employee _____ ^{xvii} for injuring the claimant while acting within the scope of his/her employment and in the discharge of his/her duties, on _____ ^{xviii} at _____ ^{xix}.

3. *[On September 10, 1999, at approximately 6:00pm, Correction Officer Smith at XYZ Correctional Facility told the claimant [name] to leave the day room where claimant was mopping the floor.*

4. *Claimant responded that he had been told to remain there by another officer, whose name he could not remember.*

5. *Correction Officer Smith then told claimant to leave immediately or he would receive an infraction.*

6. *Claimant, pursuant to Correction Officer Smith's order, began to leave when, without just cause or provocation, the defendant Correction Officer Smith willfully and maliciously grabbed the mop from claimant and hit him across the chest and head with the handle, causing the claimant to sustain serious injury.*

7. *The actions of Correction Officer Smith were intentional and unwarranted.^{xx}*

8. *As a result of this assault and battery, claimant was hospitalized for two weeks and received 26 stitches on his chest and head.*

9. *As a result of this incident, claimant suffered severe physical and mental pain and anguish.*

10. *Claimant's hearing has been permanently impaired as a result of a blow on the head by Correction Officer Smith.]*

11. The particulars of claimant's damages are as follows:^{xxi}

a) Medical expenses^{xxii}

b) Lost earnings^{xxiii}

[Claimant having been a musician prior to his incarceration, claimant having anticipated returning to that profession upon his release, claimant's hearing having been impaired as a result of this incident so as to render him unable to be gainfully employed as a musician, claimant seeks \$_____ in damages for lost potential earnings.]

c) Pain and suffering^{xxiv}

d) Mental anguish^{xxv}

e) Permanent disability

_____.

12. Attached hereto as part of the claim is a sketch of the place of the above-described incident.^{xxvi}

13. Notice of intention to file this claim was served in the Office of the Clerk of the Court of Claims, on the ____ day of _____, 20____, and in the office of the Attorney General on the ____ day of ____ 20____.^{xxvii}

14. This claim is filed within ____ years after the claim accrued, as required by law.^{xxviii}

15. This action is filed pursuant to Sections 10 and 11 of the Court of Claims Act.

WHEREFORE, claimant respectfully requests judgment against the defendant in the sum of _____ dollars (\$_____).^{xxix}

xxx

Claimant, *pro se*

Dated: _____

xxxi

A-4. Sample Negligence Tort Claim^{xxxii}

State of New York Court of Claims

_____X
 :
 _____^{xxxiii} :
 :
 :
 - against - :
 :
 :
 The State of New York. :
 _____X

Claim No. _____^{xxxiv}

Claimant, _____,^{xxxv} appearing pro se, complaining of defendant, the State of New York, alleges the following:

1. The post office address of the claimant herein is _____,^{xxxvi}
2. This claim is for negligence of the State [*for failure to adequately maintain the ceiling of the day room of*]^{xxxvii} _____^{xxxviii} on the ___ day of _____, 20____, so as to cause serious injury to the claimant, _____.^{xxxix}
3. It was the duty of the defendant State of New York [*to maintain in a safe and proper condition the ceilings and walls in the correctional facilities of the State of New York, and more particularly the ceiling in the day room on Tier 3^{xl} at XYZ Correctional Facility.*]^{xli}
4. *On and prior to the 5th day of May, 2000, the defendant disregarded its duty by negligently and carelessly permitting the ceiling at Tier 3 at XYZ Correctional Facility to be improperly and dangerously maintained in an unsafe condition in that the plaster had disintegrated so that large portions had become loosened and not properly held in place.*
5. *On the 5th day of May, 2000, at approximately 1:00pm, claimant [name] was sitting in the day room of Tier 3 at XYZ Correctional Facility reading a newspaper when a large portion of plaster fell from the ceiling striking claimant on the head, shoulder, arm, and leg and causing him to sustain serious injuries.*
6. *On the 5th day of May, 2000, and for three months prior, the defendant had actual knowledge and notice of the defective and dangerous condition of the ceiling of the day room as claimant had filed a grievance requesting the repair of the ceiling with the Superintendent of XYZ Correctional Facility on February 5, 2000.*^{xlii}
7. *As a result of this incident, claimant received a broken arm, a broken leg, and injuries to the shoulder and head, including recurring headaches.*
8. *As a result of this incident, claimant suffered severe physical and mental pain and anguish.*
9. *As a result of this incident, claimant has suffered permanent disabilities including chronic headaches, lameness, and the loss of the full use of his arm.*^{xliii}
10. Attached hereto as part of the claim is a sketch of the place of the above-described incident.^{xliv}
11. The particulars of claimant's damages are as follows:^{xlv}
 - a) Medical expenses^{xlvi}

_____.

 - b) Lost earnings^{xlvii}

[*Claimant was a carpenter prior to his incarceration and anticipated returning to that profession upon his release. As a result of this incident, Claimant lost the full use of*

his arm and is now unable to be gainfully employed as a carpenter. Consequently, Claimant seeks \$_____ in damages for lost potential earnings.]

c) Pain and suffering^{xlvi}

_____.

d) Mental anguish^{xlvii}

_____.

e) Permanent disability

_____.

12. Notice of intention to file this claim was served in the Office of the Clerk of the Court of Claims, on the ___ day of _____, 20 ____, and in the office of the Attorney General on the ___ day of ___ 20 ____.¹

13. This claim is filed within ___ years after the claim accrued, as required by law.^{li}

14. This action is filed pursuant to Sections 10 and 11 of the Court of Claims Act.

WHEREFORE, claimant respectfully requests judgment against the defendant in the sum of _____ dollars (\$_____).^{lii}

lii

Claimant, *pro se*

Dated: _____

liv

In the event that my application for poor person status in the above-captioned case is granted by the Court, I further request and authorize the agency holding me in custody to deduct the filing fee (or other outstanding obligation reported by the Court pursuant to N.Y. C.P.L.R. 1101(f)(2)) from my correctional facility trust fund account (or the institutional equivalent) and to disburse those amounts as instructed by the Court of Claims. This authorization is furnished in connection with the above entitled case and shall apply to any agency into whose custody I may be transferred.

I UNDERSTAND THAT THE FULL AMOUNT OF THE OUTSTANDING OBLIGATION REFERRED TO HEREIN WILL BE PAID BY AUTOMATIC DEDUCTION FROM MY CORRECTIONAL FACILITY TRUST FUND ACCOUNT EVEN IF MY CASE IS DISMISSED.

_____ lxviii

_____ lxix

A-6. Sample Affidavit in Support of Motion for Permission to File a Late Claim^{lxx}

State of New York Court of Claims^{lxxi}

_____ X
 :
 _____ ^{lxxii} :
 :
 - against - :
 :
 The State of New York :
 _____ X

Motion For Permission To
File A Late Claim

Claim No. _____ ^{lxxiii}

TO THE CLERK OF THE COURT OF CLAIMS:
TO THE ATTORNEY GENERAL OF THE STATE OF NEW YORK:

The undersigned claimant, _____, ^{lxxiv} hereby deposes and swears under penalty of perjury that the following is true.

Claimant requests the permission of the Court to file the attached claim against the State of New York, pursuant to the provisions of Section 10(6) of the Court of Claims Act for filing late claims. In support of my motion for permission to file this claim, I respectfully submit that:

1. The incident underlying this claim occurred on _____. ^{lxxv} Under the provisions of Article Two of the Civil Practice Law and Rules, I would not be barred from asserting a like claim against a citizen of the State.

2. The delay in filing this claim is excusable because: [*I am not a lawyer and I had no access to professional legal counsel or to the prison law library during the statutory period for filing because of the illness caused by the incident underlying this claim.*]^{lxxvi}

3. *The State had notice of the essential facts constituting the claim in that medical personnel in the prison dispensary were aware of my illness during my stay in the prison dispensary, and the State also had opportunity to investigate the cause of this illness, which is the subject of this claim, by simply questioning the guards and other persons who were present in the machine shop at the time of my injury.*^{lxxvii}

4. I have no other available remedy for the injury and suffering I sustained because of the State's negligence.

^{lxxviii}
Claimant, *pro se*

Dated: _____, 20 ____ ^{lxxix}

A-7. Affidavit of Service^{lxxx}

State of New York Court of Claims

_____X

_____ ^{lxxxi}

- against -

The State of New York

_____X

STATE OF NEW YORK

COUNTY OF _____ ^{lxxxiii}

_____, ^{lxxxiv} being duly sworn, deposes and says:

I am over the age of 18 and reside at _____ ^{lxxxv}

On _____, ^{lxxxvi} I served the within _____ ^{lxxxvii}
upon the Attorney General of the State of New York by certified mail
No. _____ ^{lxxxviii}, return receipt requested at the following address:

Department of Law
Capitol Building
Albany, NY 12224,

said address being the address designated by the Attorney General for that purpose, by depositing a true copy of the within in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

^{lxxxix}

Claimant, *pro se*

Sworn to before me this _____
day of _____, 20____.

Notary Public^{xc}

A-8. Sample Demand for Bill of Particulars^{xcv}

State of New York Court of Claims

_____X
 :
 _____,^{xcii} :
 :
 - against - :
 :
 The State of New York, :
 :
 _____X

Demand for
Bill of Particulars

Claim No. _____^{xciii}

SIR:

PLEASE TAKE NOTICE that you are hereby required to serve upon the defendants within 30 days after service of a copy of this notice, a verified bill of particulars, setting forth in detail:

- (a) The date and time of the occurrence.
- (b) The exact location of the occurrence.
- (c) A general statement of the acts or omissions constituting the negligence claimed.
- (d) Whether actual or constructive notice is claimed.^{xciv}
- (e) If actual notice is claimed, the name of the person served with notice.
- (f) Statement of the injuries and description of any that are claimed to be permanent.
- (g) Length of time confined to bed and to house.
- (h) Length of time incapacitated from employment, and the nature of such employment.
- (i) Total amounts claimed as special damages for (1) physicians' services and medical supplies; (2) loss of earnings, with name and address of the employer; (3) hospital expenses, with names of hospitals; (4) nurses' services.
- (j) Address and maiden name of claimant (if applicable).
- (k) List of statutes, ordinances, rules, and regulations that were allegedly violated by defendant.

Hon. _____^{xcv}
 Attorney General of the State of New York
 Department of Law
 Albany, NY 12224

By: _____^{xcvi}
 Assistant Attorney General

A-9. Sample Claimant's Bill of Particulars^{xcvii}

State of New York Court of Claims

_____X
 :
 _____^{xcviii} :
 :
 :
 - against - :
 :
 :
 The State of New York, :
 :
 _____X

Bill of Particulars

Claim No. _____^{xcix}

Claimant, pursuant to the demand of the defendant, submits the following for his/her bill of particulars:

1. The occurrence took place on [*May 5, 2000 at approximately 1:00 p.m.*].
2. The occurrence took place in the [*day room of Tier 3 at XYZ Correctional Facility*].
3. The negligence of the defendants consisted of those acts alleged in paragraphs [*4, 5, and 6*] of the claim; specifically, [*the failure to maintain in a safe and proper condition the ceilings and walls of the day room of Tier 3 at XYZ Correctional Facility*].
4. Actual notice claimed.
5. Actual notice was given by the filing of a grievance with the Superintendent of [*XYZ Correctional Facility requesting the repair of the ceiling on February 5, 2000*].
6. As a result of this incident claimant received [*a broken arm, a broken leg, injuries to the shoulder and head, including recurring headaches, and severe physical and mental pain and anguish*]. Permanent disabilities include [*chronic headaches, lameness, and the loss of full use of the arm*].
7. *Claimant was confined in the hospital for three weeks, in the prison infirmary for ten weeks and was bedridden for an additional five months.*
8. Claimant lost employment wages [*as law library clerk within the prison of \$0.75 an hour for eight months*]. Claimant's injuries also render him unable to be gainfully employed [*as a construction worker*] (his employment prior to incarceration) upon his release from prison, which will be no later than [*May, 2004, the date of release based upon the serving of the maximum sentence*].
9. Special damages for:
 - (a) physicians' services and medical supplies—not applicable;^c
 - (b) loss of earnings—not applicable except as set forth in paragraph 8;
 - (c) hospital expenses—not applicable;
 - (d) nurses' services—not applicable.
10. Claimant's address currently is: _____^{ci}
11. Claimant claims that defendant violated _____.^{cii}

 ciii
 Claimant, *pro se*

 civ

Hon. _____^{cv}
Attorney General of the State of New York
Department of Law
Albany, NY 12224

A-10. Sample Notice of Appeal^{evi}

State of New York Court of Claims

_____X
 :
 _____^{cvii} :
 :
 :
 - against - :
 :
 The State of New York :
 :
 _____X

Notice of Appeal
Claim No. _____^{cviii}

SIRS:

PLEASE TAKE NOTICE, that the undersigned _____,^{cix} hereby appeals to the Appellate Division of the New York Supreme Court in and for the ____^{cx} Department, from a judgment entered in the above entitled action in favor of the above named defendant, the State of New York, against the above named claimant _____,^{cxii} entered in the office of the Clerk of the County of _____^{cxii} on the ____ day of _____, 20____,^{cxiii} and this appeal is taken from each and every part of said judgment as well as the whole thereof.

Dated: _____^{cxiv} _____^{cxv}
Claimant, *pro se*

To: _____^{cxvi}
Clerk of the County of _____^{cxvii}

Hon. _____^{cxviii}
Attorney General of the State of New York
Department of Law
Albany, New York 12224

Fill in the forms shown in Appendix A as follows:

-
- i. Your name.
 - ii. Your name.
 - iii. Your complete address.
 - iv. Give clear, detailed information about the basis for your complaint: who did what, where, and when. Include the date of the incident and the facility in which it occurred.
 - v. Your signature.
 - vi. The date on which you sign the notice and your address. Attach a Verification. See Appendix A-2 for a sample Verification.
 - vii. The name of the county in which you signed the affidavit.
 - viii. Your name.
 - ix. Your tort claim. See Appendices A-3 and A-4 for sample tort claims.
 - x. Your signature. Sign this only in the presence of a notary public, as the next footnote explains.
 - xi. This is where the notary public notarizes the Verification by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature and cross out "Notary Public." (But only do this if it is *impossible* for you to find a notary public.) If another prisoner is your witness, you should add the following paragraph at the bottom of the certification:

I declare that I have not been able to have this [*insert claim, or Notice of Intent to file a claim, etc.*] notarized according to law because [*explain here your efforts to get the claim, etc. notarized*]. I therefore declare under penalty of perjury that all of the statements made in this [*claim, or Notice of Intent, etc.*] are true of my own knowledge, and I pray leave of the Court to allow this [*claim, or Notice of Intent, etc.*] to be filed without notarization.

(Your signature)

xii. This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. Assault and battery are intentional torts, in other words torts that were committed purposefully and not by accident. In a claim for assault and battery, as in all claims for intentional torts, you must allege the following:

- (1) The facts of the assault and battery (the intentional tort). You should not simply say that assault and battery was committed by the defendant; rather, you should give the basic facts of what happened. However, remember that not only must you be able to prove all of the allegations set forth in your claim at trial, but that any inconsistencies between the allegations set forth in your claim and the proof you present at trial will make it more difficult for you to win at trial.
- (2) Intent. You must state that the defendant's actions were not accidental but rather were intentional.
- (3) Injury. You must indicate that you were injured as a result of the defendant's actions. You also must include a description of the injuries you received.
- (4) That the person who injured you was working for the State of New York and injured you while acting within the scope of his/her employment and in the discharge of his/her duties.
- (5) That you served the claim or the Notice of Intention to File a Claim upon the Attorney General within 90 days of the incident about which you are complaining.
- (6) That your claim is filed pursuant to §§ 10 and 11 of the Court of Claims Act.

- xiii. Your name.
- xiv. Leave this blank. This will be filled in by the clerk of the Court of Claims.
- xv. Your name.
- xvi. Your prison address, including the name of your prison and the county where it is located.
- xvii. Name of the state official who is responsible for your injury.
- xviii. Insert the date (day, month, and year) when your injury or property damage occurred.

-
- xix. Insert the name of the correctional facility where your injury or property damage occurred.
- xx. Describe in detail how your injury happened, including names and dates. Each point should be in its own paragraph with its own number.
- xxi. You should only include the following factors that apply to your case for determining damages.
- xxii. If applicable, list the medical expenses you have had to pay for or that you can show a high probability of having to pay for in the future. You cannot obtain damages for any money spent on your care while in prison because the State pays those bills. However, in seeking damages, you might consider such factors as the long-term effects of your injury after your release, including whether there is a high probability that you may require hospitalization, specialist care, or the purchase and maintenance of medical or therapeutic equipment such as, in this sample claim, the cost and maintenance of a hearing aid.
- xxiii. List below any current or future lost earnings.
- xxiv. You should be specific in detailing the location, length, and severity of the pain and suffering you have experienced.
- xxv. Examples of factors that demonstrate mental anguish are nightmares, loss of sleep, heightened anxiety, and depression.
- xxvi. This paragraph is optional.
- xxvii. Include the day, the month, and the year when you filed the Notice of Intention with the Clerk for the Court of Claims and the Attorney General, respectively. Do not include this paragraph if you did not serve a Notice of Intention.
- xxviii. Paragraphs 13 and 14 will depend upon whether you served a Notice of Intention to File Claim. N.Y. Ct. Cl. Act § 10 (McKinney Supp. 2004). If you did not serve a Notice of Intention, do not include paragraph 13. Paragraph 14 should now read: "13. This claim is filed within ninety days after the claim accrued as required by law." If you are filing a late motion, add: "I am filing this motion pursuant to the late motion that the Court of Claims granted on [date]."
- xxix. Insert total amount of money you are claiming as damages.
- xxx. Your signature.
- xxxi. The date on which you sign the petition. Also write your mailing address in this space and attach at the end of your claim a Verification exactly like the one illustrated at Appendix A-2.
- xxxii. This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society. An action for personal injury due to negligence, unlike assault and battery, does not require that you plead or prove intent. However, you must show that your injuries were foreseeable—that your injuries were a likely result of the defendant's action or failure to act. You must also show that the negligence of the State employee's actions or failure to act when under a duty to do so was the major cause of the accident. Also, where appropriate, you should plead that the defendant knew or should have known of the defective condition causing the accident.
- xxxiii. Your name.
- xxxiv. Insert claim number.
- xxxv. Your name.
- xxxvi. Your prison address, including the name of your prison and the county where it is located.
- xxxvii. Insert the type of the negligence tort you are claiming. For example, you may claim failure to protect, negligent destruction of property, or inadequate medical care. These claims may be stated as follows:

Sample Failure to Protect Claim:

This claim is for negligence of the State for the failure of its employee [*insert name of the state/prison official responsible for not protecting you*] to protect claimant from the reasonably foreseeable assault by [*insert the prisoner's name who attacked you*] while acting within the scope of his/her employment and in the discharge of his/her duties, on

[insert the date when the attack occurred], at [insert the name of the facility where the attack occurred], so as to cause serious injury to the claimant, [insert your name].

Sample Destruction of Property Claim:

This claim is for negligence of the State committed by its employee [insert the name of the state or prison official responsible for the damage to your property, if known] for the destruction of claimant's property while acting within the scope of his/her employment and in the discharge of his/her duties, on [insert the date when the destruction of your property occurred, if known], at [insert the name of the facility where the destruction of your property occurred].

Sample Inadequate Medical Care Claim:

This claim is for negligence of the State committed by its employee for failure of its employee [insert name of the state/prison official responsible for not treating you] to provide adequate medical care following accepted medical standards on [insert the date when you requested medical care that you did not receive or the date when you received inappropriate medical care] while acting within the scope of his/her employment and in the discharge of his/her duties, on [insert the date when the denial of medical care occurred], at [insert the name of the facility where the denial of medical care occurred], so as to cause serious injury to the claimant, [insert your name].

xxxviii. Insert the name of the facility where the injury occurred.

xxxix. Insert your name.

xl. Insert the duty of reasonable care that the State has violated. Examples of duty of care include: medical care following accepted professional standards, protection from reasonably foreseeable attacks by corrections officers or other prisoners, and other dangers that a reasonable official knew or should have known about. If the duty that an official owes you is defined by a statute or regulation, you may be able to make a claim of negligence per se.

xli. Insert the name of the facility where your injury occurred.

xl.ii. In the preceding paragraphs you should describe in detail how your injury happened, including names and dates. Each point should be in its own paragraph with its own number.

xl.iii. In the preceding paragraphs you should describe your injury in detail. Each point should be in its own paragraph with its own number.

xl.ii. This paragraph is optional.

xl.ii. You should only include the following factors that apply to your case for determining damages.

xl.ii. If applicable, list below the medical expenses you have had to pay for or those you can show a high probability of having to pay for in the future. You cannot obtain damages for the money spent on your care while you were incarcerated, as the State has assumed this cost. However, in seeking damages, you might consider such factors as the long-term effects of your injury after your release, including whether there is a high probability that you may require hospitalization, specialist care, or the purchase and maintenance of therapeutic devices.

xl.ii. List below any current or future lost earnings.

xl.ii. You should be specific in detailing the location, length, and severity of the pain and suffering you have experienced.

xl.ii. Examples of factors that demonstrate mental anguish are nightmares, loss of sleep, heightened anxiety, and depression.

1. Include the day, the month, and the year when you filed the Notice of Intention with the Clerk for the Court of Claims and the Attorney General, respectively. Do not include this paragraph if you did not serve a Notice of Intention.

li. Paragraphs 12 and 13 will depend upon whether you served a Notice of Intention to File Claim. N.Y. Ct. Cl. Act § 10 (McKinney Supp. 2004). If you did not serve a Notice of Intention, do not include paragraph 12. Paragraph 13 should now read: "12. This claim is filed within ninety days after the claim accrued as required by law." If you are filing a late motion, add: "I am filing this motion pursuant to the late motion which the Court of Claims granted on (date)."

lii. Insert total amount of money you are claiming as damages.

liii. Your signature.

liv. The date on which you sign the petition. Also write your mailing address in this space and attach a Verification at the end of your claim, illustrated at Appendix A-2.

lv. Your name.

lvi. Your inmate number.

lvii. Insert claim number.

lviii. The name of the county in which you signed the affidavit.

lix. Your name.

lx. Name and address of your correctional facility.

lxi. Check one of the boxes below.

lxii. If you do not own any property of value, write "NONE." Otherwise, list each item of property and how much it is worth in the spaces below.

lxiii. Your signature. [Note: Do not sign this until you are in front of a notary public.]

lxiv. This is where the notary public notarizes the verification by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature and cross out "Notary Public." (Use this technique only as a last resort.) If another prisoner is your witness, you should add the following paragraph at the bottom of the certification:

I declare that I have not been able to have this application notarized according to law because [*explain here your efforts to get the claim, etc. notarized*]. I therefore declare under penalty of perjury that all of the statements made in this application are true of my own knowledge, and I pray leave of the Court to allow this application to be filed without notarization.

(Your signature)

lxv. By signing this section, you give permission for your facility to send the Court copies of your trust fund account statement. You also authorize the facility to withdraw the filing fee from your account and to send it to the Court. The entire filing fee will be withdrawn automatically from your account even if your case is dismissed.

lxvi. Your name.

lxvii. Your inmate number.

lxviii. Your signature.

lxix. Your name.

lxx. When submitting this form, you will also need to include a Notice of Motion form. *See* N.Y. Ct. Rules § 206.8, which includes a copy of the form.

lxxi. When filing this motion you must attach the proposed claim itself so the court knows what the motion refers to. The court will not consider this copy of your claim as being filed, however. After you receive permission to file a late claim, you must send your claim to the court along with the order granting you permission to file a late claim.

lxxii. Your name.

lxxiii. Insert claim number.

lxxiv. Your name.

lxxv. The date on which the actions upon which you are basing your claim occurred.

lxxvi. These are only *sample* reasons; do not copy them unless they apply to you. The reasons you give here for your failure to file your claim in a timely manner must be persuasive. See Part C(1)(b) of the Chapter for a list of factors that the court considers in ruling on your application for permission to file a late claim.

lxxvii. These are *examples* of the types of justification that you must offer to the court to persuade it to grant your application; do not copy them unless they apply to you.

lxxviii. Your signature.

lxxix. The date and your address.

lxxx. You must complete this form and submit it to the court within 10 days after serving your Notice of Intention to File a Tort Claim or Claim on the Attorney General. N.Y. Comp. Codes R. & Regs. Tit. 22, § 206.5. This form is adapted from “Using the Court of Claims: A Guide for New York State Prisoners,” a manual by the Prisoners’ Rights Project of The Legal Aid Society.

lxxxi. Your name.

lxxxii. Insert claim number.

lxxxiii. Insert the name of the county in which you signed the affidavit.

lxxxiv. Your name.

lxxxv. Insert the name and address of the correctional facility where you are incarcerated.

lxxxvi. Insert the date on which you mailed the Notice of Intention or Claim to the Attorney General.

lxxxvii. Insert either “Notice of Intention to file a Claim” if you filed a Notice of Intention, or “Claim” if you filed a Claim.

lxxxviii. Include the tracking number from the green “return receipt requested” card.

lxxxix. Your signature. [Note: Do not sign until you are in front of the notary public.]

xc. This is where the notary public notarizes the verification by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature and delete “Notary Public.” (Use this technique only as a last resort.) If another prisoner is your witness, you should add the following paragraph at the bottom of the certification:

I declare that I have not been able to have this affidavit of service notarized according to law because [*explain here your efforts to get the claim, etc. notarized*]. I therefore declare under penalty of perjury that all of the statements made in this affidavit of service are true of my own knowledge, and I pray leave of the Court to allow this affidavit of service to be filed without notarization.

(Your signature)

xc. If you do not answer or object to a demand for a Bill of Particulars within 30 days after receiving it, the Court may stop you (preclude you) from introducing evidence at trial of the facts asked for in the demand. *See* N.Y. C.P.L.R. 3042, 3126 (McKinney Supp. 2004). This form is adapted from “Using the Court of Claims: A Guide for New York State Prisoners,” a manual by the Prisoners’ Rights Project of The Legal Aid Society. This is a sample of a demand that the State may serve on you. Appendix A-9 is a sample response.

xcii. Your name.

xciii. Insert claim number.

xciv. This means whether you claim the defendant actually knew of the condition that caused your injury (“actual notice”) or just that they should have known (“constructive notice”).

xcv. The name of the New York State Attorney General.

xcvi. The name of the New York State Assistant Attorney General.

xcvii. This form is adapted from “Using the Court of Claims: A Guide for New York State Prisoners,” a manual by the Prisoners’ Rights Project of The Legal Aid Society. This is not a form you will prepare, but is a form that can be served on you by the State. This response to the Request for a Bill of Particulars

(see Appendix A-9) is loosely based upon the facts set forth in the Sample Tort Claim in Appendix A-4, personal injury due to negligence. Please refer to this Claim to see how closely the Bill of Particulars follows it.

xcviii. Your name.

xcix. Insert claim number.

c. This is because DOCS typically pays for medical expenses (unless you request, and pay for, a private doctor).

ci. Your address.

cii. Insert statutes, ordinances, rules, or regulations the state officials violated.

ciii. Your signature.

civ. Your address.

cv. The name of the New York State Attorney General.

cvi. If you would like to appeal the decision of the Court of Claims to the Appellate Division of the New York Supreme Court, you must file a Notice of Appeal within 30 days after the judgment. *See* N.Y. Ct. Cl. Act § 24 (McKinney 1989). This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual by the Prisoners' Rights Project of The Legal Aid Society.

cvii. Your name.

cviii. Insert the claim number.

cix. Your name.

cx. The Appellate Division is divided into four departments. Each department has a fixed geographic jurisdiction hearing cases from specific counties. You can determine which department your appeal should be taken to by checking the list of counties served by each Appellate Division, which can be found in Appendix II of the *JLM*.

cxii. Your name.

cxiii. The county in which your case was heard.

cxiiii. Insert the date the judgment was filed in the Clerk's office.

cxv. The date on which you sign the notice.

cxvi. Your signature.

cxvii. Insert the name of the Clerk (if known) in whose office the judgment was filed.

cxviii. The county in which your case was heard.

cxix. The name of the New York State Attorney General.