

## 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. If you believe someone has violated those rights, this Chapter provides you with the steps you can take. This Chapter details the procedures under New York State law. If you are in a different state, you should use this Chapter to learn about the basic concepts before doing careful research you're your own state's laws. *JLM*, Chapter 2, "Introduction to Legal Research," can help you learn how to do this research.

This Chapter is divided into three parts. **Part B** introduces you to the general law of personal injury, called tort law,<sup>1</sup> and also discusses damage to your personal property. **Part C** provides you with step-by-step instructions for how to file your case, including whom you can sue, where to sue, how to file the right papers, how to obtain evidence, and how to appeal a decision. Part C 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 incarcerated people face additional hurdles in bringing lawsuits for injuries suffered in prison. For example, you will have to exhaust your administrative remedies (meaning, complete your institution's internal grievance procedure) before you are allowed to file a case in court. Part C explains how to do this. Finally, **Part D** provides you with a final checklist to help ensure you correctly file your claim. **Appendix A** at the end of this Chapter includes examples of forms that you might need to fill out if you are pursuing a tort claim.

Tort law also includes excessive force by correction officers and their failure to protect incarcerated people from assault. If you have experienced excessive force, you should look at *JLM*, Chapter 24, "Your Right to be Free from Assault," for more information about excessive force and failure to protect. It explains your rights and what actions you can take.

#### B. Know Your Rights: Tort Actions

The law recognizes that, in general, people have a duty not to injure (to harm) each other and not to damage or destroy each other's property.<sup>2</sup> When someone breaks that duty, it is called a *tort*.<sup>3</sup> A tort can be either intentional or negligent. An intentional tort is when one person hurts another person (or their property) on purpose. For example, where a plaintiff was "grabbed, had his arms twisted and forcefully handcuffed" during an arrest, he had valid claims for the intentional torts of assault and battery.<sup>4</sup> A negligent tort, on the other hand, often occurs when someone fails to take proper precautions to protect other people and their property. For example, a court held that a plaintiff had a claim of negligence when his landlord did not install shatterproof glass in his bathtub, and the glass

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<sup>1</sup> Tort law includes work-related injuries, improper medical care, poorly maintained facilities, and false imprisonment

<sup>2</sup> In legal terms, a "duty" is "a legal obligation that is owed or due to another and that needs to be satisfied; that which one is bound to do, and for which somebody else has a corresponding right." *Duty*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Duty*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

<sup>3</sup> *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Tort (Tortious)*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

<sup>4</sup> *Corcoran v. City of New York*, 186 A.D.3d 1151, 1151, 131 N.Y.S.3d 12, 13 (1st Dept. 2020).

shattered and injured the plaintiff as a result.<sup>5</sup> The person who commits a tort, whether intentionally or through negligence, is called a “tortfeasor.”<sup>6</sup>

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

### 1. Intentional Torts

For most intentional torts, you must prove (1) that the tortfeasor (the person who committed the tort) hurt you or damaged your property, and (2) that they 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, libel (false, defamatory claims in written or printed form),<sup>7</sup> and slander (false, defamatory claims in written or printed form).<sup>8</sup> Intentional torts against property include trespass (wrongful entry onto another’s property)<sup>9</sup> and conversion (taking something that does not belong to you and acting like it is yours).<sup>10</sup>

### 2. Negligent Torts

The biggest difference between intentional torts and negligent torts is the mental state (thought process) 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, which is 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.<sup>11</sup> Third, you must show that the tortfeasor’s action or inaction directly and foreseeably caused your harm (meaning a reasonable person would have known that the tortfeasor’s behavior could cause the type of injury that you suffered). Fourth, you must show an actual injury to your body, or loss or destruction of your property.

#### (a) Duty and Breach

To prove a negligent tort, you need to show 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 with that person. For example, a supervisor in a job owes you a duty of care to maintain a safe workplace, and, therefore, you can sue them if they fail to do so. A coworker, however, does not owe you that duty, and you could not sue them, even if they gave you a piece of defective equipment and you got injured using it.<sup>12</sup> To decide whether or not the person responsible for your injuries owed you a duty of care,

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<sup>5</sup> *Trimarco v. Klein*, 56 N.Y.2d 98, 107, 436 N.E.2d 502, 506, 451 N.Y.S.2d 52, 56 (1982) (finding the jury should determine whether the bathtub was reasonably safe based on evidence of the low cost and high availability of shatterproof glass).

<sup>6</sup> *Tortfeasor (Tort-Feasor)*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Tortfeasor*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>7</sup> *Libel (Libelous)*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Libel*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>8</sup> *Slander (Slanderer)*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Slander*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>9</sup> *Trespass (Trespass to Land)*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Trespass*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>10</sup> *Tortious Conversion (Civil Theft)*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Conversion*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>11</sup> Negligence is defined as “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.” *Negligence*, BLACK’S LAW DICTIONARY (11th ed. 2019). *See also Negligent Tort*, BOUVIER LAW DICTIONARY (Desk ed. 2012) (defining a negligent tort).

<sup>12</sup> *Burke v. Torres*, 120 A.D.2d 283, 284–286, 509 N.Y.S.2d 11, 12–13 (1st Dept. 1986) (finding that worker’s compensation in a negligence case in an employment context is exclusively available under the Worker’s

you can look at 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 an incarcerated person, the state and its employees will owe you a duty of care in most situations. For example, when an incarcerated person was injured after being attacked by another incarcerated person, the court found that the state had a duty to protect him.<sup>13</sup> 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.

After showing the tortfeasor owed you a duty of care, you must show that they “breached” (violated) this duty. When someone breaches their duty, it means they did not exercise the degree of care a competent and careful person in similar circumstances would exercise.<sup>14</sup> In the example above, the court found that the prison “breached” its duty to protect the incarcerated person by not properly supervising the other incarcerated person, who had a known history of assault.<sup>15</sup>

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 “negligence *per se*.”<sup>16</sup> Under negligence *per se*, you do not have to show that the tortfeasor breached their duty. The violation of the statute is an automatic breach.<sup>17</sup> When deciding whether to bring a negligence *per se* claim, you should first make sure you can show several things. For a successful claim, you would need to show (1) the tortfeasor engaged in the behavior prohibited by the statute, (2) that the tortfeasor’s behavior caused an actual injury and that the injury would not have happened otherwise, and (3) that you were in the group of people the statute is meant to protect.<sup>18</sup> Note that the injury you suffered must be the type of injury the statute or regulation is designed to prevent.<sup>19</sup>

#### (b) Reasonableness and Foreseeability

In court, ordinary words like “reasonable” and “foreseeable” have special legal meanings. You should look at cases with facts similar to yours to determine how courts would define those terms in your case.<sup>20</sup> As with a duty of care, certain written laws and statutes may define standards of reasonableness and foreseeability.

People are expected to act “reasonably” in legal terms, meaning they act sensibly and take care to not harm others.<sup>21</sup> They must follow the standard of conduct required by their community to protect

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Compensation Law, and the statute makes the negligent co-worker immune from suit).

<sup>13</sup> *Blake v. State*, 259 A.D.2d 878, 879, 686 N.Y.S.2d 219, 220 (3d Dept. 1999) (“It is well settled that the State has a duty to provide inmates with reasonable protection against the foreseeable risk of attacks by other prisoners.”).

<sup>14</sup> *Care*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Care*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>15</sup> *Blake v. State*, 259 A.D.2d 878, 879–880, 686 N.Y.S.2d 219, 221 (3d Dept. 1999) (“In our view, the foregoing evidence supports the Court of Claims’ conclusion that the State failed to take measures necessary to protect claimant from the foreseeable risk of being assaulted by [another incarcerated person].”).

<sup>16</sup> *Negligence (Negligent)*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Negligence*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>17</sup> *Negligence Per Se*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Negligence*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>18</sup> *Causation (Cause or Causality)*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Cause*, BLACK’S LAW DICTIONARY (11th ed. 2019); *Dance v. Town of Southampton*, 95 A.D.2d 442, 445, 467 N.Y.S.2d 203, 206 (2d Dept. 1983) (stating that the protected class member must show that the statutory violation was the proximate cause of the injury). *See also* *In re Gen. Motors LLC Ignition Switch Litig.*, 154 F. Supp. 3d 30, 46 (S.D.N.Y. 2015) (finding that a plaintiff who was injured during a car accident fell within the class of people a car safety act was meant to protect).

<sup>19</sup> *See Ayala v. Hagemann*, 186 Misc. 2d 122, 125, 714 N.Y.S.2d 633, 636 (Sup. Ct. Richmond County 2000) (stating that “liability results where . . . the injury is the very occurrence the statute is designed to prevent”).

<sup>20</sup> *See Smith v. County of Nassau*, 34 N.Y.2d 18, 23, 311 N.E.2d 489, 492, 355 N.Y.S.2d 349, 353 (1974) (stating that reasonable cause will vary according to the circumstances and exigencies of each particular case); *see also* *Di Ponzio v. Riordan*, 224 A.D.2d 139, 142, 645 N.Y.S.2d 368, 371 (4th Dept. 1996) (holding that the question of whether defendants fulfilled their duty of reasonable care presents a question best left to the trier of fact).

<sup>21</sup> *Care*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Care*, BLACK’S LAW DICTIONARY (11th ed. 2019).

others against unreasonable risk.<sup>22</sup> This community standard is objective (meaning the standard is the same for all people within a community), not subjective (meaning the standard would change from one person to another).<sup>23</sup> For example, within a prison setting, all prison guards would be held to the same standard of reasonableness, as members of the same community.

You must also prove that the tortfeasor's action or inaction directly and "foreseeably" caused your injury. To determine whether your injury was foreseeable and whether the alleged tortfeasor acted responsibly, courts will examine the situation before you were injured. You must show that your injury was predictable even before you became 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) There was actual injury,
  - (b) The person causing the injury meant to cause it, *and*
  - (c) The person causing the injury had no established right to do what he or she did.<sup>24</sup>
- (2) In the case of a negligent tort:
  - (a) There was actual injury,
  - (b) The person causing the injury could have prevented the harm, and
  - (c) The person's action or inaction directly and foreseeably caused your harm, and
  - (d) If the person causing the injury is a state or prison employee, he, in his official capacity, owed you a greater duty of care than you received.<sup>25</sup>

Note that in both intentional and negligent torts, you must prove *actual injury*. It is not enough to show a prison official intended to harm you if you were not actually injured. 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. While it is possible to show that emotional distress you have suffered is an actual injury, it is very difficult. You would have to show that the act that caused you to experience emotional distress was "extreme and outrageous."<sup>26</sup>

## 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 officers and employees are state actors, they also have a duty not to violate your federal or state constitutional rights. If you believe your federal constitutional rights have been violated, you should read *JLM*, Chapter 13, "Federal Habeas Corpus," and *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

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<sup>22</sup> RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965), § 283 CONDUCT OF A REASONABLE MAN: THE STANDARD.

<sup>23</sup> RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965), § 283 CONDUCT OF A REASONABLE MAN: THE STANDARD.

<sup>24</sup> *See, e.g.*, N.Y. CORR. LAW § 137(5) (McKinney 2014) ("No incarcerated individual . . . shall be subjected to degrading treatment, and no officer or other employee . . . shall inflict any blows . . . upon any incarcerated individual, 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.

<sup>25</sup> *See Kagan v. State*, 221 A.D.2d 7, 10-11, 646 N.Y.S.2d 336, 339 (2d Dept. 1996) (finding the state liable for prison employees' failure to bring an incarcerated person to see a nurse in a timely fashion and for the nurse's failure to refer the incarcerated person to a physician because both actions were required under prison regulations).

<sup>26</sup> *See Shenandoah v. Hill*, 9 Misc. 3d 548, 553, 799 N.Y.S.2d 892, 896-897 (Sup. Ct. Madison County 2005) (defining extreme 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" (citing *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122, 612 N.E. 699, 702-703, 596 N.Y.S.2d 350, 354-355 (1993))).

### (a) 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 but not in the Court of Claims. See *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 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. Note that before you can bring a claim under Section 1983, you will need to first exhaust the prison’s grievance system (administrative remedies).<sup>27</sup> For more information on exhausting administrative remedies, see *JLM*, Chapter 14, “The Prison Litigation Reform Act.”

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 below. You might also have both state common law tort claims and federal constitutional claims available. When choosing between a state common law tort claim and a federal constitutional claim, you should consider that you may be able to receive more money in damages from a federal claim.<sup>28</sup> However, the Prison Litigation Reform Act adds several requirements that make it difficult to bring claims in federal court.<sup>29</sup> You should also keep in mind that in certain situations, the court may not allow you to bring a federal claim if you have a state tort claim available.<sup>30</sup> This is particularly true for incarcerated people in private federal prisons.

### (b) 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.<sup>31</sup> Part C of this Chapter explains more about choosing the right court 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.<sup>32</sup> 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.<sup>33</sup>

The New York Court of Appeals<sup>34</sup> established the right to bring claims for violations of the state constitution in the 1996 case, *Brown v. State*.<sup>35</sup> However, *Brown* only addressed tort claims based on the equal protection clause and the search and seizure clause of the New York Constitution.<sup>36</sup> The

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<sup>27</sup> 42 U.S.C. § 1997e(a).

<sup>28</sup> See *Minnece v. Pollard*, 565 U.S. 118, 129, 132 S. Ct. 617, 626, 181 L. Ed. 2d 606, 616 (2012) (noting that state tort law may provide less generous remedies by capping damages or preventing recovery for emotional suffering).

<sup>29</sup> See *JLM*, Chapter 14, “The Prison Litigation Reform Act,” for detailed information on the hurdles to bringing a federal claim.

<sup>30</sup> See *Minnece v. Pollard*, 565 U.S. 118, 131, 132 S. Ct. 617, 626, 181 L. Ed. 2d 606, 616–617 (2012) (holding that when a person incarcerated in a private federal prison brings a claim “where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is the kind that typically falls within the scope of traditional state tort law . . . the prisoner must seek a remedy under state tort law.”).

<sup>31</sup> See *Brown v. State*, 89 N.Y.2d 172, 188, 674 N.E.2d 1129, 1138–1139, 652 N.Y.S.2d 223, 232–233 (1996) (concluding that a cause of action to recover damages could be asserted against the state for violation of clauses of the state constitution).

<sup>32</sup> 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.”).

<sup>33</sup> 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.”).

<sup>34</sup> 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.

<sup>35</sup> See *Brown v. State*, 89 N.Y.2d 172, 176, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996) (finding causes of action based on violations of the New York State Constitution facially sufficient).

<sup>36</sup> See *Brown v. State*, 89 N.Y.2d 172, 188, 674 N.E.2d 1129, 1138–1139, 652 N.Y.S.2d 223, 232–233 (1996)

court did not decide whether people can sue for damages based on violations of other parts of the state constitution.<sup>37</sup> 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).<sup>38</sup>

After *Brown*, New York courts have refused to award damages for state constitutional violations if other remedies are available under State tort law.<sup>39</sup> This means that if you can bring a regular tort claim, 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 higher under tort law (intentional and negligent torts, as above).

There is some disagreement among the New York courts about whether you can bring a state constitutional tort claim if a federal civil rights claim under 42 U.S.C. § 1983 is also available.<sup>40</sup> Some New York courts have denied relief if a Section 1983 claim is available,<sup>41</sup> but the Court of Claims allows state constitutional claims even if you could bring a Section 1983 claim.<sup>42</sup> When deciding what type of claim to bring, you should consider which court you are bringing the claim in, and see how the court has decided cases with facts similar to yours.

#### 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 (compensation) for these torts. Excessive force and failure to protect you from other incarcerated people 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 by Prison Guards and Other Incarcerated People.” 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 incarcerated person. 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 courts in states other than New York are not required to follow the decisions of cases in New York, the tort law of most states is very similar to New York’s. For that reason, the case summaries in this Chapter should serve

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(“[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 (amended 2001) (equal protection clause); N.Y. CONST. art. I, § 12 (search and seizure clause); *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); *Brown v. State*, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

<sup>37</sup> *See Augat v. State*, 244 A.D.2d 835, 837, 666 N.Y.S.2d 249, 251–252 (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*”); *Brown v. State*, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223, (1996).

<sup>38</sup> *See Boggs v. State*, 51 Misc. 3d 376, 25 N.Y.S.3d 545 (N.Y. Ct. Cl. 2015) (holding that the New York State Constitution’s prohibition against cruel and unusual punishment can be the basis for a constitutional tort cause of action because the provision is self-executing and because a damage remedy furthers the provision’s purpose and is necessary to assure its effectiveness).

<sup>39</sup> *See Augat v. New York*, 244 A.D.2d 835, 837–838, 666 N.Y.S.2d 249, 251–252 (3d Dept. 1997) (finding that plaintiff’s constitutional tort claims were properly denied because they could be analogized to existing common-law torts for which there were adequate remedies); *Remley v. State*, 174 Misc. 2d 523, 527–528, 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); *Brown v. State*, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

<sup>40</sup> *See JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law,” for more information on how to get relief for violations of federal law under 42 U.S.C. § 1983.

<sup>41</sup> *See 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 constitution Due Process Clause because plaintiffs had alternative remedies under 42 U.S.C. § 1983).

<sup>42</sup> *Boggs v. State*, 51 Misc. 3d 376, 382, 25 N.Y.S.3d 545, 552 (N.Y. Ct. Cl. 2015) (holding that an available remedy under 42 U.S.C. § 1983 did not foreclose a claim for cruel and inhuman treatment under the state constitution).

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.

There are many torts that happen in prison that can form the basis of a lawsuit and the following are just a few examples of those. Look for cases with similar facts to your situation where the incarcerated person 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 provide reasonably safe equipment, as well as the state's failure to warn incarcerated people of specific dangers they might face when using the equipment.<sup>43</sup>

For example, one court awarded damages to an incarcerated person who lost his fingers working in an on-site prison sawmill because his wood-chipping machine was missing a safety guard.<sup>44</sup> 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 an incarcerated person who was injured in the course of repair work when the scaffolding beneath him collapsed.<sup>45</sup>

Just as the state has a duty to maintain a safe workplace, you also 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 receiving damages altogether. This is called "comparative negligence" or "contributory negligence."<sup>46</sup>

For example, in the wood-chipping case above, the court only awarded half of the total damages to the incarcerated person because the incarcerated person should not have climbed onto the chipping machine in the first place.<sup>47</sup> In another case, the court reduced damages because the incarcerated person did not follow safety instructions.<sup>48</sup> However, if a prison employee ordered you to do the dangerous act that caused your injury, courts may not reduce your damages under a contributory

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<sup>43</sup> See *Kandrach v. State*, 188 A.D.2d 910, 913, 591 N.Y.S.2d 868, 871 (3d Dept. 1992) (finding that when an incarcerated person participates in a prison work program, the State has a duty to provide them with reasonably safe equipment and adequately warn them of any potential dangers).

<sup>44</sup> *Kandrach v. State*, 188 A.D.2d 910, 913, 591 N.Y.S.2d 868, 871 (3d Dept. 1992) ("[W]hen the State, through its correctional authorities, directs a prison inmate to participate in a work program during incarceration, it owes the inmate a duty to provide reasonably safe machinery and equipment with which to work and adequate warnings and instructions for the safe operation of such machinery and equipment.").

<sup>45</sup> *Shulenberg v. State*, 35 Misc. 2d 751, 751-752, 231 N.Y.S.2d 816, 817 (N.Y. Ct. Cl. 1962) (finding that the State failed to provide an incarcerated person with a safe place to work when he fell while working on a scaffolding because one of the planks of the scaffolding broke).

<sup>46</sup> *Contributory Negligence*, BOUVIER LAW DICTIONARY (Desk ed. 2012) (jurisdictions 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*, BOUVIER LAW DICTIONARY (Desk ed. 2012) (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 several other states employ comparative negligence systems. N.Y. C.P.L.R. § 1411 (McKinney 2012); see, e.g., ARIZ. REV. STAT. ANN. § 12-2505 (2016); FLA. STAT. ANN. § 768.81(2) (West 2011); LA. CIV. CODE ANN. art. 2323 (West 2010); MISS. CODE ANN. § 11-7-15 (West 2008).

<sup>47</sup> *Kandrach v. State*, 188 A.D.2d 910, 915, 591 N.Y.S.2d 868, 872 (3d Dept. 1992).

<sup>48</sup> *Hicks v. State*, 124 A.D.2d 949, 949-950, 509 N.Y.S.2d 152, 153 (3d Dept. 1986) (upholding trial court's decision to reduce an incarcerated person's damages award by half where the incarcerated person was contributorily negligent since he failed to follow safety instructions).

negligence theory.<sup>49</sup> This is because courts know that incarcerated people can be punished for disobeying instructions.<sup>50</sup>

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.<sup>51</sup> Whether the court considers your actions reckless depends partially on how knowledgeable you were about the field or area in which you were working. For instance, one court denied an incarcerated person damages for injuries suffered after touching a live wiring because his previous electrical training made him aware that touching wires was dangerous.<sup>52</sup> In such a situation, the prison will likely also have no duty to warn you about the dangers if you are familiar with the equipment.<sup>53</sup> By contrast, an incarcerated person who had received only minimal training was not held fully responsible for his own injuries.<sup>54</sup>

While the state has a general duty to warn you about dangers you may face at work, this duty does not extend to “open and obvious hazards” (meaning the danger is readily apparent) if those hazards are inherent in (an unavoidable part of) the work.<sup>55</sup> For example, a court found that the state did not have to warn an incarcerated person about the dangers of a tree stump when her job was to clear branches from a fallen tree. The court held that the presence of a tree stump was an obvious hazard that was part of the work of picking up tree branches.<sup>56</sup>

Note that you may be unable to recover from the state for the work-release injuries that do not occur on prison grounds, especially if the state was not the owner or contractor at the work site.<sup>57</sup> Also,

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<sup>49</sup> See *Mariano v. State*, 31 Misc. 2d 241, 244, 222 N.Y.S.2d 968, 971 (N.Y. Ct. Cl. 1961) (holding that an incarcerated person who injured his hand while doing assigned work could not be found to be contributorily negligent, because he was following prison orders); see also *Lowe v. State*, 194 A.D.2d 898, 899, 599 N.Y.S.2d 639, 641 (3d Dept. 1993) (noting that the penalties which can be imposed for not following orders in prison made an incarcerated person's dangerous behavior in compliance with such orders not unreasonable, and thus declining to find him contributorily negligent).

<sup>50</sup> See *Bernard v. State*, 34 A.D.3d 1065, 1068, 824 N.Y.S.2d 481, 484 (3d Dept. 2006) (“[C]laimant was faced with either obeying the order to roll the log down the hill or subjecting himself to possible disciplinary measures . . . . Consequently, even though he testified that he perceived the risk, it was not unreasonable for claimant to proceed as he did.”).

<sup>51</sup> *Recklessness (Reckless)*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

<sup>52</sup> See *Martinez v. State*, 225 A.D.2d 877, 877, 639 N.Y.S.2d 145, 146 (3d Dept. 1996) (affirming Court of Claims' dismissal of incarcerated person's complaint due to incarcerated person's training and experience and because “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 that claimant was qualified to do so”).

<sup>53</sup> See *Manganaro v. State*, 24 A.D.3d 1003, 1004–1005, 805 N.Y.S.2d 710, 711 (3d Dept. 2005) (holding that prison officials had no duty to warn an incarcerated person about dangerous machinery when the incarcerated person had 20 years of experience working with similar machinery and was familiar with the dangers).

<sup>54</sup> See *Kandrach v. State*, 188 A.D.2d 910, 910–911, 913, 591 N.Y.S.2d 868, 869, 871 (3d Dept. 1992) (holding the State partially liable for an incarcerated person's injuries because the incarcerated person had received only five minutes of training on how to operate a woodchipper, which the court found inadequate to fulfill the prison's “duty to provide . . . adequate warnings and instructions for the safe operation of such machinery and equipment.”).

<sup>55</sup> See *Landahl v. City of Buffalo*, 103 A.D.3d 1129, 1131, 959 N.Y.S.2d 306, 308 (4th Dept. 2013); see also *Parkhurst v. Syracuse Reg'l Airport Auth.*, 165 A.D.3d 1631, 1632, 86 N.Y.S.3d 362, 364 (4th Dept. 2018) (holding that a plastic sheet on the floor was not an open and obvious hazard inherent in the decedent's drywall finishing work).

<sup>56</sup> See *Leggio v. State*, 171 A.D.3d 1564, 1565, 99 N.Y.S.3d 187, 188 (4th Dept. 2019) (“Inasmuch as claimant and her fellow workers were tasked with cleaning up the branches from a felled tree, the existence of the tree stump was an open and obvious hazard inherent in the nature of the work and thus . . . could not ‘serve as a basis for liability.’” (citing *Parkhurst v. Syracuse Reg'l Airport Auth.*, 165 A.D.3d 1631, 1632, 86 N.Y.S.3d 362, 364 (4th Dept. 2018))).

<sup>57</sup> See *Gress v. State*, 157 A.D.2d 479, 479, 549 N.Y.S.2d 666, 667 (1st Dept. 1990) (holding that an incarcerated person 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 incarcerated person participating in the work release program was not a state employee but instead an employee of the private employer that he was placed with).



the state cannot be sued for recommending an incarcerated person for a work-release program if the officers who made the recommendation had the discretion (authority) to do so under their job title.<sup>58</sup> Finally, the state has no duty to inspect possible work sites for work-release programs.<sup>59</sup>

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.<sup>60</sup>

(b) Medical Care Provided to Incarcerated People<sup>61</sup>

Claims relating to inadequate or inappropriate medical care are negligence claims. The state has a duty to provide incarcerated people with reasonable and adequate medical care in a timely manner.<sup>62</sup> 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 addition to reading the information in this Chapter, you should also read *JLM*, Chapter 23, “Your Right to Adequate Medical Care.”

Note that there are two different types of medical tort claims: medical malpractice and medical negligence. You will bring a claim for medical malpractice when the challenged action involves a specific medical treatment requiring use of *professional* medical skills and judgment.<sup>63</sup> 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.”<sup>64</sup> For example, when a doctor failed to diagnose and treat an incarcerated person’s headaches, resulting in the incarcerated person’s death by aneurysm, the doctor was liable for medical malpractice.<sup>65</sup>

In medical negligence cases, the action in question does not involve medical expertise, and jurors will be able to tell whether the healthcare providers were negligent by using common knowledge and everyday experiences.<sup>66</sup> You will bring a medical negligence claim if those treating you did not exercise

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<sup>58</sup> See *Scott v. State*, 10 Misc. 3d 1073(A), 1073(A), 814 N.Y.S.2d 565, 565 (N.Y. Ct. Cl. 2005) (*unpublished*) (“It is well settled that the State is absolutely immune from liability for the decisions of a temporary release committee in its exercise of discretion to grant or deny temporary release.”); see also *Arteaga v. State*, 72 N.Y.2d 212, 219, 527 N.E.2d 1194, 1198, 532 N.Y.S.2d 57, 61 (1988).

<sup>59</sup> See *Gress v. State*, 157 A.D.2d 479, 479, 549 N.Y.S.2d 666, 667 (1st Dept. 1990) (“[T]he 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.”).

<sup>60</sup> See *Callahan v. State*, 19 A.D.2d 437, 438, 243 N.Y.S.2d 881, 882–883 (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); see also *Oliver v. State*, 17 Misc. 2d 1018, 1020, 186 N.Y.S.2d 151, 153 (Ct. Cl. 1959) (applying child labor provision from the Labor Law and noting that “in appraising the State’s negligence the standards it has created for others by its statutes and rules may be very properly applied”)

<sup>61</sup> For more information about inadequate medical care claims in federal court, see *JLM*, Chapter 23, “Your Right to Adequate Medical Care.”

<sup>62</sup> See *Kagan v. State*, 221 A.D.2d 7, 11, 646 N.Y.S.2d 336, 339 (2d Dept. 1996) (hold that incarcerated people, who rely on prison authorities to treat their medical needs, have a fundamental right to reasonable and adequate medical care (citing *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976))). Additionally, the state has a duty to provide medical care “without undue delay”; when “delays in diagnosis and/or treatment [are] a proximate or aggravating cause of [a] claimed injury,’ the State may be liable.” *Kagan v. State*, 221 A.D.2d 7, 11, 646 N.Y.S.2d 336, 339 (2d Dept. 1996).

<sup>63</sup> *Miller v. Albany Med. Ctr. Hosp.*, 95 A.D.2d 977, 978, 464 N.Y.S.2d 297, 298–299 (3d Dept. 1983) (“[T]he distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts.”).

<sup>64</sup> See, e.g., *Larkin v. State*, 84 A.D.2d 438, 445–446, 446 N.Y.S.2d 818, 823 (4th Dept. 1982) (“So long as a physician remains within the bounds of accepted medical practice, he is immune from liability for an error in judgment or for lack of success in his medical treatment.”).

<sup>65</sup> See *Larkin v. State*, 84 A.D.2d 438, 445–446, 446 N.Y.S.2d 818, 823 (4th Dept. 1982) (finding that the State “failed to exercise any professional judgment” by not testing or referring the incarcerated person to a specialist).

<sup>66</sup> See *Friedmann v. N.Y. Hosp.-Cornell Med. Ctr.*, 65 A.D.3d 850, 851, 884 N.Y.S.2d 733, 734 (1st Dept. 2009) (applying simple negligence principles where the jury could decide whether acts were negligence without expert testimony).

proper care to make sure you were not injured unnecessarily.<sup>67</sup> For example, a court found that when a facility failed to respond to a woman's calls for help after her leg hit a bed rail, the claim was medical negligence. A jury could use their "common everyday experiences" to decide whether the facility was negligent by not responding to the woman's calls for help.<sup>68</sup>

In order to pursue either type of medical tort claim, 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."<sup>69</sup> For example, even if you had to wait a long time for treatment, you would not be able to recover damages unless the waiting was what caused your injury or made it significantly worse.<sup>70</sup> In order to prove the cause of your injury, you may need testimony from medical experts.<sup>71</sup> As with other negligence tort claims, you must also show that the injury you suffered was a foreseeable (unsurprising) result of the improper treatment you received.<sup>72</sup>

If you believe you have been injured due to improper or inadequate medical care, you can also seek damages (money awarded to you by the court as a result of the injury you suffered) 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 (responsible) for the resulting harm.<sup>73</sup> For example, if the prison has a formal process by which incarcerated people can see medical staff and it fails to follow that process for you, then the prison may have automatically breached its duty to you.<sup>74</sup>

You may also have a claim arising from a healthcare provider's actions *before* you ever received medical treatment. Patients have the right to give their "informed consent." Informed consent is when you agree to treatment after your doctor tells you about the treatment's risks and benefits, as well as alternative treatments.<sup>75</sup> If you do not receive this information and are injured during treatment, you can bring a claim against your healthcare provider. You must show that 1) your doctor did not fully

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<sup>67</sup> See *D'Elia v. Menorah Home & Hosp. for Aged & Infirm*, 51 A.D.3d 848, 851–852, 859 N.Y.S.2d 224, 227 (2d Dept. 2008) (holding that a claim that a facility failed to protect an elderly patient from falling out of bed was medical negligence, not medical malpractice).

<sup>68</sup> *Friedmann v. N.Y. Hosp.-Cornell Med. Ctr.*, 65 A.D.3d 850, 851, 884 N.Y.S.2d 733, 734 (1st Dept. 2009).

<sup>69</sup> *Snyder v. State of New York*, 70 Misc. 3d 801, 811, 138 N.Y.S.3d 802 (N.Y. Ct. Cl. 2020) ("[T]o establish proximate causation, the [claimant] must demonstrate that the defendant's deviation from the standard of care was a substantial factor in bringing about the injury." (quoting *Clune v. Moore*, 142 A.D.3d 1330, 1331, 38 N.Y.S.3d 852, 854 (4th Dept. 2016))).

<sup>70</sup> See, e.g., *Brown v. State*, 192 A.D.2d 936, 937–939, 596 N.Y.S.2d 882, 883–885 (3d Dept. 1993) (refusing to award damages for unnecessary delay in treatment to an incarcerated person who had his larynx (voice box) removed because of cancer, since the incarcerated person did not show a "substantial possibility" that the delay worsened the cancer or that his larynx would not have been removed if treatment began earlier).

<sup>71</sup> See *Zi Guang v. State*, 263 A.D.2d 745, 747, 695 N.Y.S.2d 142, 145 (3d Dept. 1999) (finding that an incarcerated person failed to establish medical malpractice by prison officials in part because the incarcerated person's medical expert at trial "often . . . appeared unfamiliar with [the incarcerated person's] medical records"); see also *Duffen v. State*, 245 A.D.2d 653, 654, 665 N.Y.S.2d 978, 980 (3d Dept. 1997) (dismissing an incarcerated person's claim against the state because medical expert's testimony was too speculative to prove causation).

<sup>72</sup> See *Levin v. State*, 32 A.D.3d 501, 502, 820 N.Y.S.2d 626, 628 (2d Dept. 2006) (stating that the state has a duty to provide for the health and care of incarcerated people, but the scope of that duty is "limited to risks of harm that are reasonably foreseeable" (quoting *Sanchez v. State*, 99 N.Y.2d 247, 253, 784 N.E.2d 675, 678, 754 N.Y.S.2d 621, 624 (2002))); see *Kagan v. State*, 221 A.D.2d 7, 16–17, 646 N.Y.S.2d 336, 342–343 (2d Dept. 1996) (finding that an incarcerated person's loss of hearing was foreseeable result of not treating the pain or bleeding in her ear).

<sup>73</sup> See *Kagan v. State*, 221 A.D.2d 7, 10–11, 646 N.Y.S.2d 336, 338–339 (2d Dept. 1996) (explaining that "the release of prisoners from disciplinary confinement and the care of prisoners" qualify as "ministerial acts" and that a failure to follow "nondiscretionary medical standards" can form the basis of an incarcerated person's ministerial neglect claim).

<sup>74</sup> See *Kagan v. State*, 221 A.D.2d 7, 11–12, 17, 646 N.Y.S.2d 336, 339, 343 (2d Dept. 1996) (finding ministerial neglect where, contrary to policy, prison officials failed to allow an incarcerated person 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).

<sup>75</sup> See N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 2023).

inform you about the treatment, 2) a reasonable patient in your position would not have accepted the treatment if you had full information, and 3) the treatment caused your injury.<sup>76</sup>

The court may decide to eliminate or reduce damages if your actions or your failure to act contributed to your medical injury.<sup>77</sup> For example, if you know that you have tuberculosis but do not tell prison officials of this fact, you might receive less in damages if your condition goes untreated.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> In this case, you may have to take legal action against the medical official or private hospital that treated you instead of the state. 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 you had no reason to believe otherwise.<sup>81</sup>

### (c) Destruction or Loss of the Property of an Incarcerated Person

State employees have an obligation not to take, damage, or destroy your property without good cause (a legally sufficient reason)—whether intentionally or through negligence.<sup>82</sup> If they do, you may be able to sue the state in the Court of Claims.<sup>83</sup> Remember that before you can file a claim for damages in any court, you must first exhaust all of your prison's administrative remedies.<sup>84</sup> A full description of when you can access the courts and which courts you should use is in Part C below. ("Protecting Your Rights")

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.<sup>85</sup> 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

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<sup>76</sup> See *Bernard v. Block*, 176 A.D.2d 843, 848, 575 N.Y.S.2d 506, 511 (2d Dept. 1991); see also N.Y. PUB. HEALTH LAW § 2805-d(3) (McKinney 2023). Additionally, you cannot bring a claim based on lack of informed consent for emergency treatment. See N.Y. PUB. HEALTH LAW § 2805-d(2) (McKinney 2023) ("The right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body.").

<sup>77</sup> This is an example of comparative or contributory negligence. For more information on comparative and contributory negligence, see Subsection B(4)(a) of this Chapter, particularly Footnote 46.

<sup>78</sup> See *Ogle v. New York*, 191 A.D.2d 878, 881, 594 N.Y.S.2d 824, 826 (3d Dept. 1993) ("[I]t 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.").

<sup>79</sup> See *Ogle v. New York*, 191 A.D.2d 878, 881, 594 N.Y.S.2d 824, 826 (3d Dept. 1993) (holding that the formerly incarcerated person 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).

<sup>80</sup> 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).

<sup>81</sup> See *Soltis v. State*, 172 A.D.2d 919, 920, 568 N.Y.S.2d 470, 471–472 (3d Dept. 1991) (refusing to dismiss case against state where the incarcerated person could reasonably have believed that the private physician was a state employee).

<sup>82</sup> *Good Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>83</sup> See *Bonds v. Suffolk Cnty. Sheriff's Dept.*, 05 CV 3109 (SFJ), 2006 U.S. Dist. Lexis 93607, at \*7 (E.D.N.Y. Dec. 5, 2006) (*unpublished*) (holding that the opportunity to bring a property claim in the Court of Claims provided a "full and meaningful hearing" that sufficed "for due process purposes." (quoting *Gill v. Stella*, 845 F. Supp. 94, 101 (E.D.N.Y. 1994))).

<sup>84</sup> See Part C of this Chapter. N.Y. CT. CL. ACT § 10(9) (McKinney 2019) (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).

<sup>85</sup> 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 an incarcerated person's claim for loss of personal property when the incarcerated person alleged that the state negligently failed to properly secure the area of his cell).

it may prevent you from recovering damages at all.<sup>86</sup> If you believe that prison officials have intentionally taken or destroyed your property without authorization, see Section B(1), “Intentional Torts,” above. If you believe that your property was destroyed due to negligently maintained prison facilities, see Subsection B(4)(d), “Negligently Maintained Prison Facilities,” 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.<sup>87</sup> The state is only responsible for maintaining facilities in a “reasonably safe condition.”<sup>88</sup> 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.<sup>89</sup>

For example, a court refused to award damages to an incarcerated person who was injured in an icy exercise yard because prison staff had taken “reasonable precautions” to prevent such injuries. In this case, “reasonable precautions” meant checking the area daily and salting the yard when it was slippery.<sup>90</sup> To receive money damages in that case, the incarcerated person 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.<sup>91</sup>

Some New York courts have found that to bring a successful claim for negligently maintained facilities, you must show that the state either 1) “created a dangerous condition or 2) had actual or constructive notice of the condition.”<sup>92</sup> If you bring a claim using the second element, you must also show the danger was there for a significant amount of time.<sup>93</sup>

#### (e) False Arrest and False Imprisonment

False imprisonment applies to incarcerated people who are wrongfully held in special housing units or other long-term confinement units or confined within their own cells (known as “keeplock” in New York). 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 (the state) intended to confine the plaintiff (the incarcerated person); (2) the plaintiff was aware of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not

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<sup>86</sup> See *Pollard v. State*, 173 A.D.2d 906, 907–908, 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 the incarcerated person had locked his locker and thus was not contributorily negligent).

<sup>87</sup> See, e.g., *Reid v. State*, 8 Misc. 3d 1007(A), 1007(A), 801 N.Y.S.2d 781, 781 (N.Y. Ct. Cl. 2005) (*unpublished*) (finding that “the State has a duty to take reasonable precautions to protect those in its institutions from injury. As a landowner, the State owes a duty to keep its premises reasonably safe in view of all the circumstances.” However, “the State . . . is not an insurer and negligence may not be inferred solely from the happening of an accident.”).

<sup>88</sup> 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 (D.C. Cir. 1972))).

<sup>89</sup> *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)).

<sup>90</sup> *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).

<sup>91</sup> *Condon v. State*, 193 A.D.2d 874, 875, 597 N.Y.S.2d 531, 532 (3d Dept. 1993) (incarcerated person failed to show that the surface was abnormally dangerous or that the state should have had notice of a dangerous condition).

<sup>92</sup> *Heliodore v. State*, 305 A.D.2d 708, 709, 759 N.Y.S.2d 554, 556 (3d Dept. 2003) (quoting *Malossi v. State*, 255 A.D.2d 807, 807, 680 N.Y.S.2d 305, 306 (3d Dept. 1998)).

<sup>93</sup> *Heliodore v. State*, 305 A.D.2d 708, 709, 759 N.Y.S.2d 554, 556 (3d Dept. 2003) (“Claimant wholly failed to show that either Dwyer or any other correction officer had actual notice that there was water on the floor or that, if present, it had remained for any ‘appreciable length of time.’” (quoting *Hamilton v. Rite Aid Pharms.*, 234 A.D.2d 778, 779, 650 N.Y.S.2d 887, 889 (3d Dept. 1996))).

authorized.<sup>94</sup> The elements for proving false imprisonment are basically the same as the elements for proving false arrest.<sup>95</sup>

The Court of Appeals has found that when prison employees discipline incarcerated people, and that discipline is allowed either by statute or by regulation, both the employees and the state have absolute immunity from lawsuits.<sup>96</sup> “Absolute immunity” in this case means that the employees or state will not be considered criminally guilty for their actions. The court also will not order them to pay damages for their actions. Because of absolute immunity, 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.<sup>97</sup>

Keep in mind that a judge is not a “state officer” as defined by the Court of Claims Act, so you cannot sue in the Court of Claims for a faulty decision by a judge.<sup>98</sup> A judge may only be found personally responsible for a faulty decision if he did not have the authority to make that particular decision.<sup>99</sup>

#### (f) Excessive Force and Failure to Protect

Incarcerated people often bring tort lawsuits claiming that corrections officers used excessive force against them or failed to protect them from other incarcerated people. Lawsuits to recover for excessive force and failure to protect are covered in detail in *JLM*, Chapter 24, “Your Right to be Free from Assault by Prison Guards and Other Incarcerated People.”

### C. Protecting Your Rights

This Part provides an overview of the ways that you can seek relief for your tort claim and step-by-step instructions on how to do so. It covers both administrative remedies available through the prison and remedies available through the courts. Remember that the instructions below are only for cases in New York Courts. If you are bringing your case in another state, you will need to look up the procedure for your state.

The figure below provides an outline of the steps that are detailed in this Part.

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<sup>94</sup> 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 *Scotfield v. Critical Air Med., Inc.*, 52 Cal. Rptr. 2d 915, 923–924, 45 Cal. App. 4th 990, 1003-1007 (Cal. Ct. App. 1996) (harm may result even if victim is not aware at the time of the imprisonment or its wrongfulness).

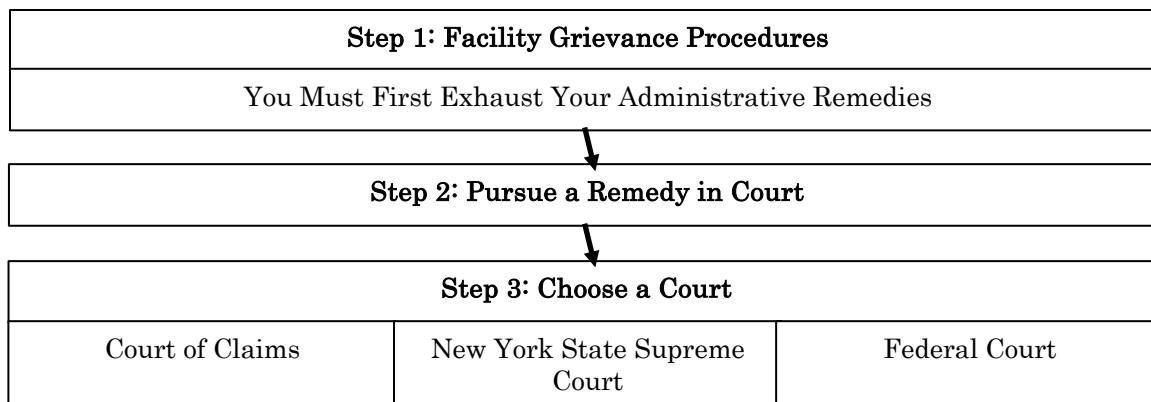
<sup>95</sup> See *Broughton v. State*, 37 N.Y.2d 451, 455–456, 335 N.E.2d 310, 313–314, 373 N.Y.S.2d 87, 92–93 (1975).

<sup>96</sup> See *Arteaga v. State*, 72 N.Y.2d 212, 217–221, 527 N.E.2d 1194, 1197–1199, 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 *Ifill v. State*, 46 Misc. 3d 1228(A), 1228(A), 13 N.Y.S.3d 850, 850 (N.Y. Ct. Cl. 2013) (*unpublished*) (“It is well settled that ‘confinement [is] privileged to the extent that it is imposed under color of law or regulation, specifically in accordance with regulations.’” (quoting *Gittens v. State*, 132 Misc. 2d 399, 402, 504 N.Y.S.2d 969, 971 (N.Y. Ct. Cl. 1986))).

<sup>97</sup> See *Arteaga v. State*, 72 N.Y.2d 212, 220–221, 527 N.E.2d 1194, 1198–1199, 532 N.Y.S.2d 57, 61–62 (1988) (finding the state and prison officers not liable for confinement of incarcerated people even though charges against the people who were incarcerated 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 following a disciplinary hearing while the decision is pending] does not constitute an actionable deprivation.”).

<sup>98</sup> 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.”).

<sup>99</sup> See *Koepp v. City of Hudson*, 276 A.D. 443, 446, 95 N.Y.S.2d 700, 703 (3d Dept, 1950) (“[W]hen 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.”).



## 1. Facility Grievance Procedures

### (a) Exhaustion

If you are filing a claim for money damages based on loss or damage to your personal property, you cannot file in the Court of Claims until you have exhausted the prison's own administrative remedies for personal property claims.<sup>100</sup> "Exhausting administrative remedies" means that you must use all Department of Corrections and Community Supervision Services (DOCCS) internal procedures for compensating incarcerated people before suing in the Court of Claims.

If DOCCS agrees to repay you for your lost or damaged property, then you will not be able to file a lawsuit in the Court of Claims.<sup>101</sup> If you are not satisfied with the outcome of your first administrative request, you may appeal.<sup>102</sup> Depending on the amount of your claim, your appeal will either be reviewed by your facility Superintendent or the Division of Budget and Finance's Office of Inmate Accounts.<sup>103</sup> If DOCCS does not grant your requests for repayment, you are then allowed to file and serve your claim in the Court of Claims. You must file and serve your claim within 120 days of completing all internal procedures.<sup>104</sup> There is, however, one exception to the 120-day time limit. If the DOCCS caused your delay in filing by never answering your administrative request, or answering it extremely late, then your delay in filing your claim may be excused.<sup>105</sup> Subsection C(2)(c) of this chapter describes how to file a claim in the Court of Claims.

Note that before you can file any case in federal court, the Prison Litigation Reform Act requires you to exhaust all of your available grievance procedures.<sup>106</sup> In New York, you must use the Incarcerated Grievance Program. You can find specific information on the Program in DOCCS

<sup>100</sup> N.Y. Ct. Cl. Act § 10(9) (McKinney 2019).

<sup>101</sup> In order to preserve your claim, it may be necessary to begin the filing process even though your DOCCS procedures are not yet completed.

<sup>102</sup> State of New York, Department of Corrections and Community Supervision, Directive No. 2733, Incarcerated Individual Personal Property Claim § III(B) (2022) *available at* <http://www.doccs.ny.gov/Directives/2733.pdf> (last visited Sep. 14, 2023).

<sup>103</sup> State of New York, Department of Corrections and Community Supervision, Directive No. 2733, Incarcerated Individual Personal Property Claim § III(B) (2022) *available at* <http://www.doccs.ny.gov/Directives/2733.pdf> (last visited Sep. 14, 2023).

<sup>104</sup> N.Y. Ct. Cl. Act § 10(9) (McKinney 2019). But note that, as a person who is incarcerated, you cannot typically use the late deadline extension available to other Court of Claims claimants. *McCann v. State*, 194 Misc.2d 340, 341, 754 N.Y.S.2d 819, 820 (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 incarcerated people).

<sup>105</sup> *See Fleming v. State*, 65 Misc.3d 538, 541–542, 109 N.Y.S.3d 571, 574 (N.Y. Ct. Cl. 2019) (holding that plaintiff's delay in filing with the Court of Claims was excused because DOCCS did not answer the administrative request for over 9 months after it was filed, therefore administrative remedies should be deemed exhausted).

<sup>106</sup> 42 U.S.C. § 1997e(a).

Directive 4040.<sup>107</sup> For more information, see *JLM*, Chapter 14, “The Prison Litigation Reform Act,” and Chapter 15, “Incarcerated Grievance Procedures.”

### (b) Administrative Remedies

DOCCS may pay you if (1) another incarcerated person has damaged or destroyed your personal property or (2) an employee of DOCCS has damaged or destroyed your personal property. According to Directive No. 2733, money awards are limited to \$350 if another incarcerated person caused the loss of property and \$5,000 if a DOCCS employee is responsible for the loss or damage. You should ask prison officials for a copy of Directive No. 2733, which includes sample forms for applying for reimbursement.<sup>108</sup>

## 2. Pursuing a Remedy in Court

### (a) Choosing a Court

Where you file your lawsuit depends on the circumstances of your case, who you want to sue, and what kind of remedy you are seeking. Generally, the Court of Claims hears lawsuits against the state, including people acting as representatives of the state, such as prison employees. Although there are some exceptions that will be discussed below, the Court of Claims can generally only award money damages. The court cannot prevent the prison from using punishment that violates your constitutional rights, nor can it fix unconstitutional conditions in the prison. In order to ask for general changes to the conditions in your prison, you must file either a Section 1983 proceeding in federal court or an Article 78 claim in state court.<sup>109</sup> The New York State Supreme Court hears lawsuits against people acting as individuals. If you want to sue individuals for violating your federal constitutional rights, you should sue in federal court.

### (b) Filing in the Court of Claims

If you want to sue the State of New York (if, for example, you are an incarcerated person in a state prison and you believe the state's employees have harmed you), you must sue in the New York Court of Claims.<sup>110</sup> In fact, the State of New York, and certain public authorities, are the *only* defendants you can name in a suit before the Court of Claims.<sup>111</sup> 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.<sup>112</sup>

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<sup>107</sup> State of New York, Department of Corrections and Community Supervision, Directive No. 4040, Incarcerated Grievance Program § 701.1 (2016) *available at* <https://doocs.ny.gov/system/files/documents/2022/12/4040.pdf> (last visited Sep. 14, 2023).

<sup>108</sup> N.Y. STATE FIN. LAW § 8(12), (12-a) (McKinney 2021) (providing that: (1) heads of state agencies or departments can, in accordance with relevant rules and regulations, pay claims of \$250 or less out of a “cash advance account”; (2) payments of more than \$250 must be submitted to the State Comptroller; (3) payments of more than \$1,000 must also be approved by the State Attorney General; and (4) payments for the loss of an incarcerated individual's personal property cannot exceed \$5,000); *see also* State of New York, Department of Corrections and Community Supervision, Directive No. 2733, Incarcerated Individual Personal Property Claim § IV(B)(2) (2022) *available at* <http://www.doocs.ny.gov/Directives/2733.pdf> (last visited Sep. 17, 2023).

<sup>109</sup> 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 Subsection C(2)(c)(i) of this Chapter (“Types of Relief”).

<sup>110</sup> N.Y. CT. CL. ACT § 9(2) (McKinney 2019) (giving the Court of Claims jurisdiction to hear cases against the state for damages).

<sup>111</sup> N.Y. CT. CL. ACT § 9(2) (McKinney 2019); *New York State Court of Claims: Frequently Asked Questions*, N.Y. STATE UNIFIED CT. SYS., *available at* <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.”).

<sup>112</sup> N.Y. CORRECT. LAW § 24(2) (McKinney 2014) (“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.

However, Section 1983 actions, including those for money damages, can be brought in any court of general jurisdiction and can be brought against an officer in their individual capacity.<sup>113</sup> For more information about Section 1983 claims, see *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

As long as the employee was acting within the “scope of his employment” to fulfill his official duties (meaning that his actions were part of the responsibilities of his job), you may not sue him personally.<sup>114</sup> Employees cannot be sued, even if they have bad intentions, if their actions (or lack of action) are discretionary. Discretion means the employee has a choice of how to act.<sup>115</sup> If, however, an employee does something to you that is clearly outside of his responsibilities as an employee (for example, a criminal act unrelated to any part of the employee’s work duties), 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.<sup>116</sup> Remember that in federal prisons, officials are employed by the federal government rather than the state, so you cannot bring a suit against a state for the actions of federal employees.<sup>117</sup>

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<sup>113</sup> *Haywood v. Drown*, 556 U.S. 729, 734, 129 S. Ct. 2108, 2113, 173 L. Ed. 2d 920, 925 (2009).

<sup>114</sup> N.Y. CORRECT. LAW § 24(1) (McKinney 2014). 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)). However, this test is complicated. 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 the 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 people who were incarcerated 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 incarcerated people 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 people who were incarcerated 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). Therefore, 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 that the act was necessary to keep control, the employee will not be found personally liable.

<sup>115</sup> See *Lewis v. City of New York*, 19 Misc. 3d 1109(A) 2, 11, 859 N.Y.S.2d 904 (Sup. Ct. Bronx County 2008) (*unpublished*) (“[W]hen 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.*” (quoting *Tango v. Tulevich*, 61 N.Y. 2d 34, 40, 459 N.E.2d 182, 185, 471 N.Y.S.2d 73, 76 (1983))).

<sup>116</sup> For a discussion of how to sue state officials in federal court, see *JLM*, Chapter 16, “Using 42 U.S.C. § 1982 to Obtain Relief from Violations of Federal Law.”

<sup>117</sup> See *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law,” for more information on how to sue federal prison officials if you are incarcerated in federal prison.



You also cannot bring a lawsuit in the Court of Claims to challenge your sentence or any decision made by prison or parole officials regarding your status. These 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).<sup>118</sup> You may, however, challenge your conviction under the Court of Claims Act § 8-b, which allows a lawsuit for damages if the prosecutor used “improper means” to convict you.<sup>119</sup> But, to win this suit, you must prove the following conditions by clear and convincing evidence:

- (1) that you have served all or any part of your sentence resulting from your felony or misdemeanor conviction(s);<sup>120</sup> *and*
- (2) that you have been pardoned of the crime, which is grounds for the complaint;<sup>121</sup> *or*
- (3) that the judgment of conviction against you has been reversed or vacated and the document that accuses you of a crime has been dismissed.<sup>122</sup>

You must also prove (1) that you did not commit the charged acts or that your acts did not amount to a felony or misdemeanor,<sup>123</sup> and (2) that you did not cause your conviction by your own conduct.<sup>124</sup>

#### (i) *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 when he injured you. If you cannot prove both elements, you will have to sue the state in the Court of Claims.<sup>125</sup> You cannot sue the State of New York for money 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 immediately start or stop doing something), you may sue in the New York Supreme Court.

#### (ii) *Filing in Federal Court*

If you want to sue an individual state employee for violating your federal constitutional rights, you can file a lawsuit in federal court. In federal court, you may receive money 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 *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

### (c) 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 (the person responsible) to compensate you for the loss you suffered, most likely

<sup>118</sup> See *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence,” and *JLM*, 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 officers using Article 78 or state habeas corpus.

<sup>119</sup> See N.Y. CT. CL. ACT § 8-b(3)(b)(ii)(A) (McKinney 2019). This provision states that a violation of N.Y. CRIM. PROC. § 440.10(1)(b) (McKinney 2023) gives rise to a claim for damages. N.Y. CRIM. PROC. § 440.10(1)(b) (McKinney 2023) 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.”

<sup>120</sup> N.Y. CT. CL. ACT § 8-b(5)(a) (McKinney 2019).

<sup>121</sup> N.Y. CT. CL. ACT § 8-b(5)(b)(i) (McKinney 2019).

<sup>122</sup> N.Y. CT. CL. ACT § 8-b(5)(b)(ii) (McKinney 2019).

<sup>123</sup> N.Y. CT. CL. ACT § 8-b(5)(c) (McKinney 2019).

<sup>124</sup> N.Y. CT. CL. ACT § 8-b(5)(d) (McKinney 2019).

<sup>125</sup> See *Derrick v. Bergren*, 2 Misc. 3d 396, 398, 773 N.Y.S.2d 202, 204 (Sup. Ct. Kings County 2003) (“In general, an action against a State officer acting in his official capacity while exercising a governmental function is deemed to be a claim against the State and, therefore, actionable only in the Court of Claims.”).

by paying you a sum of money. Such a court-ordered payment is called “damages.”<sup>126</sup> A court may award you three kinds of damages: compensatory, punitive, and nominal.<sup>127</sup>

“Compensatory damages” are the most common form of damages, and they attempt to pay you the exact amount of your loss. For example, the court might order that you receive enough money to replace personal items that were destroyed (such as a watch) or to pay you the money you spent on medical bills after an injury.<sup>128</sup> The court can also order that you receive “discretionary damages,” or noneconomic damages (money to make up for your pain and suffering during or after your injury.)<sup>129</sup>

“Punitive damages” are court-ordered payments on top of the exact amount of your loss. These extra damages are usually awarded when the tort was accompanied by violence, force, hatred, fraud, or vicious and evil actions on the part of the wrongdoer. Punitive damages are meant to punish the wrongdoer, rather than to compensate the injured party.<sup>130</sup> It is important to note that the Court of Claims will *not* order the state to award you punitive damages.<sup>131</sup>

“Nominal damages” are very small amounts of money awarded by courts in order to recognize that your rights have been violated, even if you didn’t suffer a big loss or injury that would require money to recover from.<sup>132</sup> The Court may also order nominal damages if it finds a real injury but the evidence does not show what amount would be enough to compensate for that injury.<sup>133</sup>

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.<sup>134</sup> The Court of Claims can only issue an injunction if an injunction is specifically allowed by law or if it is a minor part of a judgment to pay money awards.<sup>135</sup> Otherwise, if you are seeking an injunction, you must bring your suit in the New York Supreme Court or in federal court. As a result, 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.<sup>136</sup>

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<sup>126</sup> *Damages*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

<sup>127</sup> See *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law,” for more information on damages.

<sup>128</sup> *Compensatory Damages*, BOUVIER LAW DICTIONARY (Desk ed. 2012) (defining “compensatory damages” as those which “reimburse the plaintiff for the damage actually suffered as a result of the defendant’s breach of duty”); see also *Calabrese v. Allright N.Y. Parking, Inc.* 93 A.D.2d 973, 461 N.Y.S.2d 612, 613 (4th Dept. 1983) (affirming the lower court’s decision in calculating compensatory damages to consider whether or not the plaintiff had provoked the defendant).

<sup>129</sup> *Discretionary Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “discretionary damages” as damages “(such as mental anguish or pain and suffering) that are not precisely measurable but are determined by the subjective judgment of the jury”); *Non-Economic Damages*, BOUVIER LAW DICTIONARY (Desk ed. 2012) (defining “non-economic damages as “compensation determined by the trier of fact [the jury] for all nonpecuniary [non-monetary] losses including, but not limited to, physical pain and suffering and mental and emotional suffering”).

<sup>130</sup> *Punitive Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also *Punitive Damages (Exemplary Damages or Punis or Punitives)*, BOUVIER LAW DICTIONARY (Desk ed. 2012); *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 316, 642 N.E.2d 1065, 1068, 618 N.Y.S.2d 609, 612 (1994) (noting that the purpose of punitive damages is solely to punish the offender).

<sup>131</sup> *Krohn v. N.Y.C. Police Dept.*, 2 N.Y.3d 329, 335, 811 N.E.2d 8, 11, 778 N.Y.S.2d 746, 749 (2004) (holding that the waiver of sovereign immunity in section 8 of the Court of Claims Act [on which this case was brought] “was alone insufficient to subject the State to punitive damages liability” (citing *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 336 n.5, 437 N.E.2d 1104, 1106 n.5, 452 N.Y.S.2d 347, 349 n.5 (1982))).

<sup>132</sup> *Nominal Damages*, BOUVIER LAW DICTIONARY (Desk ed. 2012); see *Hodges v. Cusanno*, 94 A.D.3d 1168, 1170, 941 N.Y.S.2d 772, 774 (3d Dept. 2012).

<sup>133</sup> *Hodges v. Cusanno*, 94 A.D.3d 1168, 1170, 941 N.Y.S.2d 772, 774 (3d Dept. 2012) (holding that the plaintiff could only receive nominal damages because there wasn’t enough evidence to say exactly how much the defendant should have paid).

<sup>134</sup> For more discussion of injunctive relief, see *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law.”

<sup>135</sup> 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.7 (McKinney 2019).

<sup>136</sup> To request an injunction either (1) to prevent forms of punishment which violate your constitutional rights,

(ii) *Settlements in the Court of Claims*

There is no limit to the amount of money damages you can receive in a settlement. However, the Court of Claims must approve the amount.<sup>137</sup> It is also possible to settle your claim against the state out of court. When the state offers you a settlement, it is not always 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 you realized or could have realized the injury or loss<sup>138</sup> to either (1) file your claim, or (2) serve a Notice of Intention to File a Claim with the Attorney General (more detail in footnote and Appendix A-1 of this chapter).<sup>139</sup> To "serve" a legal document means to deliver it to the party you are suing.

Whether you are filing a claim or serving a Notice of Intention, the document must be *received* within the 90-day deadline. Subpart C(2)(c)(v) below explains how to make sure your document has been received within the deadline. Note that this time limit is very strict. It begins at the earlier point of (1) you realize that you were injured or (2) when you could have realized you were injured with enough searching (whichever is earlier).<sup>140</sup>

The court has been hesitant to extend a filing deadline.<sup>141</sup> Therefore, you should be very careful not to delay in filing. *These time limits exist even if you are proceeding with other administrative remedies required by your institution.*

The purpose of a Notice of Intention is 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.

Filing a Notice of Intention is not the same as beginning a lawsuit; it only gives you the 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 tort, and one year to file a

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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 to Obtain Relief from Violations of Federal Law."

<sup>137</sup> N.Y. CT. CL. ACT § 20-1 (McKinney 2019) (stating that settlements must be approved by the court); *see also* N.Y. CT. CL. ACT § 20(6-a) (McKinney 2019) ("[I]n any case where a judgment . . . is to be paid to an incarcerated individual . . . the comptroller shall give written notice, if required pursuant to [N.Y. EXEC. LAW § 632-a(2)], to the office of victim services . . .").

<sup>138</sup> 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 2019).

<sup>139</sup> N.Y. CT. CL. ACT §10(3) (McKinney 2019). *See* Appendix A-1 of this Chapter for a sample Notice of Intention. The claim itself should state the time and place where the incident happened, the nature of the claim, the damage or injuries claimed to have been sustained, and the total amount you're suing for. In your Notice of Intention to File a Claim, you should state the same things, except that you do not have to state the items of damage or the total amount you are suing for; *see* N.Y. Ct. Cl. Act § 11 (McKinney 2019). Therefore, you do not have to know the extent and severity of your injuries 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).

<sup>140</sup> N.Y. CT. CL. ACT § 10(7) (McKinney 2019).

<sup>141</sup> *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); *Carter v. State*, 284 A.D.2d 810, 810, 727 N.Y.S.2d 520, 521 (3d Dept. 2001) (where prison pharmacy dispensed the wrong medicine, injuring plaintiff, but plaintiff did not discover the mistake until 2 weeks later, the court held that the 90-day filing period began when the medicine was dispensed).

claim for an intentional tort.<sup>142</sup> These time limits start counting at the moment your claim “accrues” (when you notice—or are able to notice—the injury [whichever is earlier]).<sup>143</sup>

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.<sup>144</sup>

Courts are very strict about the time limits on filing a claim and serving the Notice of Intention to File a Claim.<sup>145</sup> The Court of Claims will not allow late filing of claims related to loss of property.<sup>146</sup> However, there are some situations in which the Court may permit late claims.<sup>147</sup> 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.<sup>148</sup> 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 surrounding the claim;
- (4) Whether the claim seems to be meritorious;<sup>149</sup>
- (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

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<sup>142</sup> N.Y. CT. CL. ACT § 10(3) (McKinney 2019).

<sup>143</sup> N.Y. CT. CL. ACT § 10(3), (7) (McKinney 2019); *see also* *Bronxville Palmer, Ltd. v. State*, 36 A.D.2d 647, 648, 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, 240–241, 565 N.Y.S.2d 870, 874–875 (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).

<sup>144</sup> N.Y. CT. CL. ACT § 10(9) (McKinney 2019); *see also* *Wright v. State*, 195 Misc. 2d 597, 598, 760 N.Y.S.2d 634, 635 (N.Y. Ct. Cl. 2003) (“[C]laims 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.” (citation omitted)), *appeal dismissed*, 11 A.D.3d 1000, 782 N.Y.S.2d 209 (4th Dept. 2004).

<sup>145</sup> *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, 1002–1003 (N.Y. Ct. Cl. 1958) (excusing minor lateness per N.Y. CT. CL. ACT § 10(5), where there was a slight error in attorney’s computation of time, the state was not prejudiced, and the claimant moved for permission to file late).

<sup>146</sup> *See* *Roberts v. State*, 11 A.D.3d 1000, 1001, 783 N.Y.S.2d 190, 191–192 (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 § 10(9), the court may not 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 later Court of Claims case disagreed with *Wright* and read the 90-day time limit strictly. *Murray v. State*, 5 Misc. 3d 398, 403–404, 781 N.Y.S.2d 724, 728–729 (N.Y. Ct. Cl. 2004) (strictly adhering to the 90-day filing period and dismissing § 10(9) claim that was filed late).

<sup>147</sup> N.Y. CT. CL. ACT § 10(6) (McKinney 2019); *see also* *Vazquez v. State*, 23 Misc. 3d 1101(A), 1101(A), 881 N.Y.S.2d 367, 367 (N.Y. Ct. Cl. 2009) (*unpublished*) (“Turning to the statutory factors, this Court has broad discretion in deciding a motion to permit the late filing of a claim.”). *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).

<sup>148</sup> *See* *Lee v. State*, 51 Misc. 3d 201, 202, 22 N.Y.S.3d 297, 298 (N.Y. Ct. Cl. 2015) (“The presence or absence of any specific factor is not determinative.”).

<sup>149</sup> *Meritorious*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “meritorious” as “worthy of legal victory; having enough legal value to prevail in a dispute,” or in other words, having a good chance to win).

(7) Any other relevant factors.<sup>150</sup>

The court can choose to allow you to file your claim late if you have a good reason for the delay, even if you haven't satisfied any of the factors.<sup>151</sup> For the first factor, some courts will excuse a delay that was caused by the claimant's (the person filing the lawsuit) treatment for physical or mental disabilities that result from the injuries alleged in the lawsuit.<sup>152</sup> In addition, Section 10(5) of the New York Court of Claims Act allows late filing where the claimant has a "legal disability," a category that includes insanity or infancy (childhood).<sup>153</sup> 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).<sup>154</sup> 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 incarcerated people 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.<sup>155</sup>

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, unless you are making a claim entirely about damaged or stolen property, as at least one court has said that no court is allowed to hear a late motion regarding property.<sup>156</sup> The court may approve your application to treat the Notice of Intention as a claim if:

- (1) The application is within time limits for filing the same claim against an ordinary citizen (these time limits are in Article 2 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

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<sup>150</sup> N.Y. Ct. Cl. Act § 10(6) (McKinney 2019).

<sup>151</sup> See *De Olden v. State*, 91 A.D.2d 1057, 458 N.Y.S.2d 666, 666 (2d Dept. 1983) (acknowledging that the claimant's extensive physical therapy and extreme mental trauma from having his leg amputated seriously affected his ability to function after being discharged from the hospital and was a reasonable excuse for delay in filing a claim); *Schweickert v. State*, 64 A.D.2d 1026, 1026–1027, 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, 307–308 (4th Dept. 1978) (finding excuse to be reasonable when claimant couldn't move because of his injuries and heavy doses of medication).

<sup>152</sup> See *De Olden v. State*, 91 A.D.2d 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); see also *Cole v. State*, 64 A.D.2d 1023, 1024, 409 N.Y.S.2d 306, 307–308 (4th Dept. 1978) (finding excuse to be reasonable when claimant couldn't move because of his injuries and heavy doses of medication).

<sup>153</sup> N.Y. Ct. Cl. Act § 10(5) (McKinney 2019).

<sup>154</sup> N.Y. Ct. Cl. Act § 10(5) (McKinney 2019); N.Y. C.P.L.R. § 208 (McKinney 2003); 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." (citations omitted)). 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, 722–723 (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, 435 N.E.2d 1072, 450 N.Y.S.2d 457 (1982).

<sup>155</sup> See *Plate v. State*, 92 Misc. 2d 1033, 1037–1042, 402 N.Y.S.2d 126, 128–131 (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).

<sup>156</sup> N.Y. Ct. Cl. Act § 10(8)(a) (McKinney 2019). 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 the Notice of Intention as a claim. See *Wright v. State*, 195 Misc. 2d 597, 602–603, 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, 401–402, 781 N.Y.S.2d 724, 726–727 (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).

- (3) Granting the application would not prejudice the state, meaning it would not damage the state's legal rights or ability to defend itself.<sup>157</sup>

The Court of Claims will *not* allow you to file a personal injury claim accusing another person of negligence more than three years after an injury,<sup>158</sup> or more than one year after the injury in the case of an intentional tort claim (for example, assault and battery).<sup>159</sup> Furthermore, even if the Court of Claims has the power to allow late claims in some cases, it cannot violate the New York “statutes of limitations” (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.<sup>160</sup> The statute of limitations for medical malpractice claims is two years and six months (though there are exceptions).<sup>161</sup>

#### (iv) *Filing Fees*

All people must pay a fifty-dollar filing fee whenever they bring a claim in the New York State Court of Claims.<sup>162</sup> If you cannot afford the fee, you can ask the court to reduce or waive it. However, if a court waives your fee, that amount (even if it was reduced by the court first) will be held against you later as an outstanding payment obligation to the state and will be collected by your institution from you.<sup>163</sup> Incarcerated people follow the same steps as everyone else to ask for reduced or excused filing fees.<sup>164</sup>

To get the reduced filing fee, you must submit an affidavit to the court explaining why you cannot afford the full filing fee.<sup>165</sup> 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.<sup>166</sup> 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). You should also list any financial obligations you have, especially court-ordered obligations such as child support or restitution.<sup>167</sup> If your case has already begun, you will have to tell the State, including the county attorney, that you have filed this motion.<sup>168</sup>

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 or else your case will be dismissed.<sup>169</sup> If you win your case, the court will refund any filing fee that you paid.<sup>170</sup>

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<sup>157</sup> N.Y. Ct. Cl. Act § 10(8)(a) (McKinney 2019). Prejudice is defined as “[d]amage or detriment to one’s legal rights or claims.” *Prejudice*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also Legal Prejudice*, BOUVIER LAW DICTIONARY (Desk ed. 2012) (defining “legal prejudice” as a “hindrance” to some “claim, action, or other legal interest”).

<sup>158</sup> N.Y. C.P.L.R. § 214 (McKinney 2019).

<sup>159</sup> N.Y. C.P.L.R. § 215(3) (McKinney 2019). 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 2019).

<sup>160</sup> N.Y. C.P.L.R. § 214 (McKinney 2019).

<sup>161</sup> N.Y. C.P.L.R. § 214-a (McKinney 2019).

<sup>162</sup> The fee requirements can be found in N.Y. Ct. Cl. Act § 11-a (1) (McKinney 2019).

<sup>163</sup> N.Y. C.P.L.R. § 1101(f)(2) (McKinney 2012).

<sup>164</sup> N.Y. C.P.L.R. § 1101(d), (f) (McKinney 2012).

<sup>165</sup> N.Y. C.P.L.R. § 1101(d) (McKinney 2012).

<sup>166</sup> N.Y. C.P.L.R. § 1101(a) (McKinney 2012).

<sup>167</sup> N.Y. C.P.L.R. § 1101(a) (McKinney 2012).

<sup>168</sup> N.Y. C.P.L.R. § 1101(c) (McKinney 2012).

<sup>169</sup> N.Y. C.P.L.R. § 1101(d) (McKinney 2012).

<sup>170</sup> N.Y. Ct. Cl. Act § 11-a(2) (McKinney 2019) (“The court shall award to a prevailing claimant as a taxable

(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. In other words, you must personally give or send the Notice of Intention to the Attorney General by certified mail with a return receipt requested.<sup>171</sup> *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.<sup>172</sup> 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.<sup>173</sup> Filing is accomplished by delivering the necessary papers to the following address:

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

The Court of Claims also allows electronic filings for tort claims.<sup>174</sup> If you submit an electronic claim, you must still pay the \$50 filing fee and meet the other requirements for paper claims. If you have internet access and would like to use the e-filing system, you may submit your claim electronically to the Court of Claims by following the instructions on the following website: <https://iapps.courts.state.ny.us/nyscef/HomePage>.

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 Clerk of the Court of Claims and the Attorney General, you can either personally deliver the papers or send them by certified mail with return receipt requested.<sup>175</sup> “Return receipt requested” means the postal service will mail you a receipt as proof 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 either the Court of Claims and the Attorney General’s Office, you should send a follow-up letter to one or both of these offices asking if they received your claim.<sup>176</sup>

Service on the state is not complete until both the clerk’s office and the Attorney General’s Office have received your papers either personally or by certified mail, with return receipt requested.<sup>177</sup>

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disbursement the actual amount of any fee paid to file the claim.”).

<sup>171</sup> N.Y. CT. CL. ACT § 11(a)(i) (McKinney 2019).

<sup>172</sup> N.Y. CT. CL. ACT § 11(a)(i) (McKinney 2019).

<sup>173</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 206.5(a) (2024). “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.

<sup>174</sup> For more information on electronic filing, you can review the Uniform Rules for the Court of Claims online, *available at* <http://ww2.nycourts.gov/rules/trialcourts/206.shtml#05aa>, and the New York State Court of Claims Filing By Electronic Means procedures, *available at* <http://ww2.nycourts.gov/COURTS/nyscourtofclaims/efiling-instructions.shtml>.

<sup>175</sup> N.Y. CT. CL. ACT § 11(a)(i) (McKinney 2019).

<sup>176</sup> 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 by mail with Return Receipt Requested, keep the green card.

<sup>177</sup> N.Y. CT. CL. ACT § 11(a) (McKinney 2019); *see also* Aetna Cas. & Sur. Co. v. State, 92 Misc. 2d 249, 252–253,

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.<sup>178</sup>

(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 people responsible, if you know);
- (6) A detailed description of your injuries that resulted from this incident;
- (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.<sup>179</sup>

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). 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.<sup>180</sup> 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. You should explain 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).<sup>181</sup>

The table below tells you how many copies you need to file of each document.

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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).

<sup>178</sup> See *Chaudry v. State*, 167 A.D.3d 704, 704, 87 N.Y.S.3d 507, 508 (2d Dept. 2018) (“The timeliness of the service and filing requirements of Court of Claims Act § 10 are to be strictly construed and are jurisdictional in nature, thereby divesting the Court of Claims of jurisdiction if the service and filing requirements are not met.” (citations omitted)). *But see* *Colon v. State*, 146 Misc. 2d 1034, 1035–1036, 553 N.Y.S.2d 979, 980–981 (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).

<sup>179</sup> N.Y. CT. CL. ACT §11(b) (McKinney 2019) (“The claim shall state the time when and place where such claim arose, the nature of the 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.”).

<sup>180</sup> N.Y. CT. CL. ACT §11(b) (McKinney 2019); N.Y. C.P.L.R. §§ 3020–3021 (McKinney 2010). For a sample Verification, see Appendix A-2 of this Chapter.

<sup>181</sup> N.Y. CT. CL. ACT §10(6) (McKinney 2019).



	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

(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.<sup>182</sup>

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 money 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 appeal its decision to the Appellate Division of the New York Supreme Court if necessary.

(viii) *Examinations Before Trial: Obtaining Testimony from Witnesses*

Like other civil cases, you are allowed to carry out some forms of pretrial discovery. *JLM*, Chapter 8, “Obtaining Information to Prepare Your Case: The Process of Discovery,” discusses the processes of discovery for federal and New York State trials and can help you decide if you need discovery in your case. Discovery may include any of the following ways of obtaining evidence to support your claim before trial: interviewing witnesses, requesting documents, and demanding physical and mental examinations.<sup>183</sup> The state must follow the same discovery rules as individuals.<sup>184</sup>

You must pay any fees and expenses required to obtain testimony that is taken on commission (for example, if an expert requires payment to testify).<sup>185</sup> Poor person status does not permit you to avoid paying these costs.

(ix) *Reopening Trial Before Decision*

If you discover new evidence that benefits 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.

(x) *Appeal from a Judgment*

<sup>182</sup> See *Planck v. County of Schenectady*, 51 A.D.3d 1283, 1283, 858 N.Y.S.2d 824, 825 (3d Dept. 2008) (“Generally, in a civil action ‘there is no absolute right to assigned counsel; whether in a particular case counsel shall be assigned lies instead in the discretion of the court.’” (quoting *In re Smiley*, 36 N.Y.2d 433, 438, 330 N.E.2d 53, 55, 369 N.Y.S.2d 87, 91 (1975))).

<sup>183</sup> N.Y. C.P.L.R. § 3102(a) (McKinney 2018).

<sup>184</sup> N.Y. C.P.L.R. § 3102(f) (McKinney 2018).

<sup>185</sup> N.Y. Ct. CL. ACT § 18 (McKinney 2019).

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 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.<sup>186</sup>

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. *If you would like to appeal that decision, 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.*<sup>187</sup> Because you may not be receiving mail in prison in a timely manner, be sure to check the date on the envelope when you receive the notice.

You must serve both the Attorney General and the Clerk of the Court of Claims with a written Notice of Appeal. The Notice of Appeal should briefly state your reasons for appealing.<sup>188</sup> 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 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, or someone on your behalf, can serve the Notice of Appeal to the Attorney General by mail. Note that you can serve the papers yourself only if the judge has granted you permission to do so. Otherwise, anyone who is eighteen years old or older can serve the papers on your behalf. However, the person serving the papers is not allowed to serve more than five papers each year.

Next, you or the person who served the papers on your behalf must fill out an Affidavit of Service. 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.<sup>189</sup>

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.<sup>190</sup> 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.

#### (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.<sup>191</sup>

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

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<sup>186</sup> N.Y. Ct. Cl. Act § 24 (McKinney 2019).

<sup>187</sup> N.Y. Ct. Cl. Act § 25 (McKinney 2019).

<sup>188</sup> N.Y. Ct. Cl. Act § 25 (McKinney 2019). See Appendix A-10 for a sample Notice of Appeal.

<sup>189</sup> 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, *available at* <https://www.nycourts.gov/COURTS/nyscourtofclaims/forms.shtml> (last visited Feb. 6, 2024).

<sup>190</sup> N.Y. C.P.L.R. § 1102(b) (McKinney 2012).

<sup>191</sup> N.Y. Ct. Cl. Act § 20(6) (McKinney 2019).

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.

#### D. Checklist for Filing with the Court of Claims

##### Does your claim include violations of your constitutional rights?

**Yes** → You may sue in a federal district court under 42 U.S.C. § 1983 or in State Supreme Court. See *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 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.

**No** → 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/damage to property, which allows for incarcerated person compensation before bringing your claim to the Court of Claims. See Section 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.

*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 provisions of the General Municipal law.

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

- 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.

- 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:

- Include all required information in your claim,
- Serve one copy of each document on the Attorney General,
- Keep one copy of every document for your own records,
- 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
- Include a notarized verification with your claim.

##### 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 must:

- Include the basic reason for your appeal and
- Be filed within 30 days of when you receive notice that a judgment was entered in your case.

### **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 keep a photocopy of all 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 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 footnotes throughout the sample documents that tell you how to fill in the necessary information. These are only samples. ***DO NOT TEAR THESE FORMS OUT OF THE JLM.*** If you submit a form torn out from the *JLM*, the court may not accept it. Instead, copy the text on these forms and change it to fit your institution and state. 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

:

\_\_\_\_\_ <sup>192</sup>

:

:

Notice of Intention  
to File Claim

- against -

:

:

:

:

The State of New York

:

\_\_\_\_\_X

TO THE ATTORNEY GENERAL OF THE STATE OF NEW YORK:

PLEASE TAKE NOTICE, that the undersigned \_\_\_\_\_, <sup>193</sup> intends to file a claim against the State of New York, pursuant to Sections 10 and 11 of the Court of Claims Act.

The postal address of the claimant herein is: \_\_\_\_\_

\_\_\_\_\_. <sup>194</sup>

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:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_. <sup>195</sup>

\_\_\_\_\_ <sup>196</sup>

Claimant, *pro se*

Dated: \_\_\_\_\_ <sup>197</sup>

<sup>192</sup> Your name.

<sup>193</sup> Your name.

<sup>194</sup> Your complete address.

<sup>195</sup> 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.

<sup>196</sup> Your signature.

<sup>197</sup> The date on which you sign the notice and your address. Attach a Verification. See Appendix A- 2 for a sample Verification.

## A-2. Sample Verification

STATE OF NEW YORK                    )  
   ) ss:  
 COUNTY OF \_\_\_\_\_<sup>198</sup>            )

\_\_\_\_\_,<sup>199</sup> being duly sworn, says:

I am the claimant above named; I have read the foregoing claim<sup>200</sup> against the State of New York and know its contents; the same is true to my knowledge, except as to the matter therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

\_\_\_\_\_<sup>201</sup>  
 Claimant

Sworn to before me this \_\_\_\_\_ day  
 of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
 Notary Public<sup>202</sup>

---

<sup>198</sup> The name of the county in which you signed the affidavit.

<sup>199</sup> Your name.

<sup>200</sup> Your tort claim. See Appendices A-3 and A-4 for sample tort claims.

<sup>201</sup> Your signature. Sign this only in the presence of a notary public, as the next footnote explains.

<sup>202</sup> 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 incarcerated person 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 incarcerated person 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)

### A-3. Sample Assault and Battery Tort Claim<sup>203</sup>

State of New York Court of Claims  
 \_\_\_\_\_X  
 :  
 \_\_\_\_\_<sup>204</sup> :  
 :  
 :  
 :  
 - against - :  
 :  
 :  
 :  
 :  
 The State of New York :  
 \_\_\_\_\_X

Claim No. \_\_\_\_\_<sup>205</sup>

Claimant, \_\_\_\_\_,<sup>206</sup> appearing pro se, complaining of defendant, the State of New York, alleges the following:

1. The postal address of the claimant herein is \_\_\_\_\_.<sup>207</sup>
2. This claim is for assault and battery of the State committed by its employee \_\_\_\_\_<sup>208</sup> for injuring the claimant while acting within the scope of his/her employment and in the discharge of his/her duties, on \_\_\_\_\_<sup>209</sup> at \_\_\_\_\_.<sup>210</sup>
3. *[On September 10, 2020, 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*

<sup>203</sup> 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 you must prove all of the allegations set forth in your claim at trial, and 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 intentional, not accidental.
- (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) 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.

<sup>204</sup> Your name.

<sup>205</sup> Leave this blank. This will be filled in by the clerk of the Court of Claims.

<sup>206</sup> Your name.

<sup>207</sup> Your prison address, including the name of your prison and the county where it is located.

<sup>208</sup> Name of the state official who is responsible for your injury.

<sup>209</sup> Insert the date (day, month, and year) when your injury or property damage occurred.

<sup>210</sup> Insert the name of the correctional facility where your injury or property damage occurred.



*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.*

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.*<sup>211</sup>

11. The particulars of claimant's damages are as follows:<sup>212</sup>

a) Medical expenses<sup>213</sup>

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

b) Lost earnings<sup>214</sup>

*[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<sup>215</sup>

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

d) Mental anguish<sup>216</sup>

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

e) Permanent disability

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

12. Attached hereto as part of the claim is a sketch of the place of the above-described incident.<sup>217</sup>

<sup>211</sup> In the proceeding 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. The bracketed and italicized text in paragraphs 3–10 is meant to give you an example.

<sup>212</sup> You should only include the factors that apply to your case for determining damages.

<sup>213</sup> 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.

<sup>214</sup> List below any current or future lost earnings.

<sup>215</sup> You should be specific in detailing the location, length, and severity of the pain and suffering you have experienced.

<sup>216</sup> Examples of factors that demonstrate mental anguish are nightmares, loss of sleep, heightened anxiety, and depression.

<sup>217</sup> This paragraph is optional.

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\_\_.<sup>218</sup>

14. This claim is filed within \_\_\_\_ years after the claim accrued, as required by law.<sup>219</sup>

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 (\$\_\_\_\_).<sup>220</sup>

\_\_\_\_\_<sup>221</sup>  
Claimant, *pro se*

Dated: \_\_\_\_\_<sup>222</sup>

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<sup>218</sup> 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.

<sup>219</sup> Paragraphs 13 and 14 will depend upon whether you served a Notice of Intention to File a Claim. N.Y. CT. CL. ACT § 10 (McKinney 2019). 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]."

<sup>220</sup> Insert the total amount of money that you are claiming as damages.

<sup>221</sup> Your signature.

<sup>222</sup> 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.

### A-4. Sample Negligence Tort Claim<sup>223</sup>

State of New York Court of Claims	X	
	:	
_____ <sup>224</sup>	:	
	:	
- against -	:	Claim No. _____ <sup>225</sup>
	:	
The State of New York	:	
	X	

Claimant, \_\_\_\_\_, <sup>226</sup> appearing pro se, complaining of defendant, the State of New York, alleges the following:

1. The postal address of the claimant herein is \_\_\_\_\_, <sup>227</sup>
2. This claim is for negligence of the State [for failure to adequately maintain the ceiling of the day room of] <sup>228</sup> \_\_\_\_\_ <sup>229</sup> on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, so as to cause serious injury to the claimant, \_\_\_\_\_, <sup>230</sup>

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<sup>223</sup> 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.

<sup>224</sup> Your name.

<sup>225</sup> Insert claim number.

<sup>226</sup> Your name.

<sup>227</sup> Your prison address, including the name of your prison and the county where it is located.

<sup>228</sup> 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 incarcerated person’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].

<sup>229</sup> Insert the name of the facility where the injury occurred.

<sup>230</sup> Your name.

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*<sup>231</sup> *at XYZ Correctional Facility.*<sup>232</sup>

4. *On and prior to the 5th day of May, 2019, 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, 2019, 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, 2019, 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, 2019.*

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.]*<sup>233</sup>

10. Attached hereto as part of the claim is a sketch of the place of the above-described incident.<sup>234</sup>

11. The particulars of claimant's damages are as follows:<sup>235</sup>

a) Medical expenses<sup>236</sup>

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b) Lost earnings<sup>237</sup>

*[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<sup>238</sup>

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<sup>231</sup> 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 incarcerated people, 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.

<sup>232</sup> Insert the name of the facility where your injury occurred.

<sup>233</sup> In the proceeding 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. The bracketed and italicized text in paragraphs 3–9 is meant to give you an example.

<sup>234</sup> This paragraph is optional.

<sup>235</sup> You should only include the factors that apply to your case for determining damages.

<sup>236</sup> If applicable, list 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.

<sup>237</sup> List any current or future lost earnings.

<sup>238</sup> You should be specific in detailing the location, length, and severity of the pain and suffering you have experienced.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

d) Mental anguish<sup>239</sup>

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

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\_\_\_\_.<sup>240</sup>

13. This claim is filed within years after the claim accrued, as required by law.<sup>241</sup>

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 (\$\_\_\_\_).<sup>242</sup>

\_\_\_\_\_  
Claimant, *pro se* <sup>243</sup>

Dated: \_\_\_\_\_<sup>244</sup>

<sup>239</sup> Examples of factors that demonstrate mental anguish are nightmares, loss of sleep, heightened anxiety, and depression.

<sup>240</sup> 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.

<sup>241</sup> Paragraphs 12 and 13 will depend upon whether you served a Notice of Intention to File a Claim. N.Y. CT. CL. ACT § 10 (McKinney 2019). 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]."

<sup>242</sup> Insert the total amount of money that you are claiming as damages.

<sup>243</sup> Your signature.

<sup>244</sup> 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.

**A-5. Sample Affidavit in Support of Application for a Reduction of Fees**

State of New York Court of Claims

\_\_\_\_\_X

:

\_\_\_\_\_ <sup>245</sup>

:

DIN No. \_\_\_\_\_, <sup>246</sup>

:

Application Pursuant to  
N.Y. C.P.L.R. § 1101(f)

:

- against -

:

:

:

:

The State of New York

:

\_\_\_\_\_X

STATE OF NEW YORK

COUNTY OF \_\_\_\_\_ <sup>247</sup>

I, \_\_\_\_\_, <sup>248</sup> being duly sworn, hereby declare as follows:

1. I am the claimant in the above-entitled proceeding, I am a prisoner in a [federal, state, or local] correctional facility, \_\_\_\_\_, <sup>249</sup> and I submit this affidavit in support of my application for a reduction of the filing fee pursuant to C.P.L.R. § 1101(f).

2. During the past six months: <sup>250</sup>

I was not incarcerated at any other correctional facility.

I was incarcerated at the following correctional facilities in addition to the one in which I am currently incarcerated: \_\_\_\_\_.

3. I currently receive income from the following sources, exclusive of correctional facility wages: \_\_\_\_\_.

4. I own the following valuable property (other than miscellaneous personal property): <sup>251</sup>

Property:	Value:
_____	_____
_____	_____

5. I have no savings, property, assets, or income other than as set forth herein.

6. I am unable to pay the filing fee necessary to prosecute this proceeding.

7. No other person able to pay the filing fee has a beneficial interest in the result of this proceeding.

8. The facts of my case are described in my claim and other papers filed with the court.

9. I have made no prior request for this relief in this case.

<sup>245</sup> Your name.

<sup>246</sup> Your inmate number.

<sup>247</sup> The name of the county in which you signed the affidavit.

<sup>248</sup> Your name.

<sup>249</sup> Name and address of your correctional facility

<sup>250</sup> Check one of the boxes below.

<sup>251</sup> 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.

\_\_\_\_\_<sup>252</sup>  
 Sworn to before me this \_\_\_\_\_ day  
 of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
 Notary Public<sup>253</sup>

**AUTHORIZATION<sup>254</sup>**

I, \_\_\_\_\_,<sup>255</sup> inmate number \_\_\_\_\_,<sup>256</sup> request and authorize the agency holding me in custody to send to the Clerk of the Court of Claims certified copies of my correctional facility trust fund account statements (or the institutional equivalent) for the past six months.

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.**

\_\_\_\_\_<sup>257</sup>  
 \_\_\_\_\_<sup>258</sup>

<sup>252</sup> Your signature. [Note: Do not sign this until you are in front of a notary public.]

<sup>253</sup> 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 incarcerated person 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 incarcerated person 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).

<sup>254</sup> 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.

<sup>255</sup> Your name.

<sup>256</sup> Your inmate number.

<sup>257</sup> Your signature.

<sup>258</sup> Your name.

**A-6. Sample Affidavit in Support of Motion for Permission to File a Late Claim<sup>259</sup>**State of New York Court of Claims<sup>260</sup>

\_\_\_\_\_X  
 :  
 \_\_\_\_\_<sup>261</sup> :  
 :  
 - against - :  
 :  
 :  
 The State of New York :  
 \_\_\_\_\_X

Motion for Permission to  
File a Late ClaimClaim No. \_\_\_\_\_<sup>262</sup>TO THE CLERK OF THE COURT OF CLAIMS: TO THE ATTORNEY GENERAL OF THE  
STATE OF NEW YORK:

The undersigned claimant, \_\_\_\_\_,<sup>263</sup> 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 \_\_\_\_\_.<sup>264</sup> 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.]*

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.]*<sup>265</sup>

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

\_\_\_\_\_<sup>266</sup>  
 Claimant, *pro se*

Dated: \_\_\_\_\_, 20\_\_<sup>267</sup>

<sup>259</sup> 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.

<sup>260</sup> When filing this motion, you must attach the proposed claim itself so the court knows what the motion refers to. However, the court will not consider this copy of your claim as being filed. After you get 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.

<sup>261</sup> Your name.

<sup>262</sup> Insert claim number.

<sup>263</sup> Your name.

<sup>264</sup> The date when the actions that you are basing your claim on occurred.

<sup>265</sup> Your reasons for why you failed to file your claim in a timely manner must be persuasive enough to convince the court to grant your application. The bracketed and italicized text in paragraphs 3 and 4 are just examples; do not copy them unless they apply to you. See Subsection C(1)(b) of this Chapter for a list of factors that the court considers in ruling on your application for permission to file a late claim.

<sup>266</sup> Your signature.

<sup>267</sup> The date and your address.



**A-7. Affidavit of Service<sup>268</sup>**

State of New York Court of Claims  
 \_\_\_\_\_X  
 :  
 \_\_\_\_\_<sup>269</sup> :  
 :  
 :  
 - against - :  
 :  
 :  
 The State of New York :  
 \_\_\_\_\_X

Affidavit of Service  
 Claim No. \_\_\_\_\_<sup>270</sup>

STATE OF NEW YORK  
 COUNTY OF \_\_\_\_\_<sup>271</sup>

\_\_\_\_\_<sup>272</sup> being duly sworn, deposes and says:

I am over the age of 18 and reside at \_\_\_\_\_<sup>273</sup>.

On \_\_\_\_\_<sup>274</sup> I served the within \_\_\_\_\_<sup>275</sup> upon  
 the Attorney General of the State of New York by certified mail No. \_\_\_\_\_<sup>276</sup>,  
 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.

\_\_\_\_\_<sup>277</sup>  
 Claimant

Sworn to before me this \_\_\_\_\_ day

<sup>268</sup> 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 (2023). This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual created by the Prisoners' Rights Project of The Legal Aid Society.

<sup>269</sup> Your name.

<sup>270</sup> Insert claim number.

<sup>271</sup> The name of the county where you signed the affidavit.

<sup>272</sup> Your name.

<sup>273</sup> Insert the name and address of the correctional facility where you are incarcerated.

<sup>274</sup> Insert the date on which you mailed the Notice of Intention or Claim to the Attorney General.

<sup>275</sup> Insert "Notice of Intention to file a Claim" if you filed a Notice of Intention, or "Claim" if you filed a Claim.

<sup>276</sup> Include the tracking number from the green "return receipt requested" card.

<sup>277</sup> Your signature. Sign this only in the presence of a notary public, as the next footnote explains.

of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public<sup>278</sup>

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<sup>278</sup> 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 incarcerated person 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 incarcerated person 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)

### A-8. Sample Demand for Bill of Particulars<sup>279</sup>

State of New York Court of Claims <sup>280</sup>	_____X	
	:	
	:	
_____ <sup>281</sup>	:	
	:	Demand for
	:	Bill of Particulars
- against -	:	
	:	
	:	Claim No. _____ <sup>282</sup>
	:	
The State of New York	:	
_____X		

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.<sup>283</sup>
- (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. \_\_\_\_\_<sup>284</sup>  
 Attorney General of the State of New York  
 Department of Law  
 Albany, NY 12224

By: \_\_\_\_\_<sup>285</sup>  
 Assistant Attorney General

<sup>279</sup> 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 2010, 2018). 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.

<sup>280</sup> When filing this motion, you must attach the proposed claim itself so the court knows what the motion refers to. However, the court will not consider this copy of your claim as being filed. After you get 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.

<sup>281</sup> Your name.

<sup>282</sup> Insert claim number.

<sup>283</sup> This is asking you to state whether you are claiming that the defendant actually knew of the condition that caused your injury ("actual notice") or just that they should have known ("constructive notice").

<sup>284</sup> The name of the New York State Attorney General.

<sup>285</sup> The name of the New York State Assistant Attorney General.

### A-9. Sample Claimant's Bill of Particulars<sup>286</sup>

State of New York Court of Claims	_____X	
	:	
_____ <sup>287</sup>	:	
	:	
- against -	:	Bill of Particulars
	:	
	:	Claim No. _____ <sup>288</sup>
	:	
The State of New York	_____X	

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, 2019 at approximately 1:00pm.*].
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, 2019*].
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 2024, the date of release based upon the serving of the maximum sentence*].
9. Special damages for:
  - (a) physicians' services and medical supplies—not applicable;<sup>289</sup>
  - (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: \_\_\_\_\_<sup>290</sup>

<sup>286</sup> This form is adapted from "Using the Court of Claims: A Guide for New York State Prisoners," a manual created by the Prisoners' Rights Project of The Legal Aid Society. A Bill of Particulars is a response to the form described in Appendix A-8, a Request for a Bill of Particulars, which the state may serve you. 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.

<sup>287</sup> Your name.

<sup>288</sup> Insert claim number.

<sup>289</sup> This is because DOCS typically pays for medical expenses (unless you request, and pay for, a private doctor).

<sup>290</sup> Your address.

11. Claimant claims that defendant violated \_\_\_\_\_<sup>291</sup>
- \_\_\_\_\_<sup>292</sup>  
Claimant, *pro se*

Hon. \_\_\_\_\_<sup>293</sup>  
Attorney General of the State of New York  
Department of Law  
Albany, NY 12224

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<sup>291</sup> Insert statutes, ordinances, rules, or regulations the state officials violated.

<sup>292</sup> Your signature.

<sup>293</sup> The name of the New York State Attorney General.

**A-10. Sample Notice of Appeal<sup>294</sup>**

State of New York Court of Claims	_____X	
	:	
	:	
_____ <sup>295</sup>	:	
	:	
	:	Notice of Appeal
- against -	:	
	:	Claim No. _____ <sup>296</sup>
	:	
The State of New York	:	
_____X		

SIRS:

PLEASE TAKE NOTICE, that the undersigned \_\_\_\_\_,<sup>297</sup> hereby appeals to the Appellate Division of the New York Supreme Court in and for the \_\_\_<sup>298</sup> 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 \_\_\_\_\_,<sup>299</sup> entered in the office of the Clerk of the County of \_\_\_\_\_<sup>300</sup> on the \_\_\_ day of \_\_\_\_, 20\_\_\_,<sup>301</sup> and this appeal is taken from each and every part of said judgment as well as the whole thereof.

Dated: \_\_\_\_\_<sup>302</sup> \_\_\_\_\_<sup>303</sup>  
 Claimant, *pro se*

To: \_\_\_\_\_<sup>304</sup>  
 Clerk of the County of \_\_\_\_\_<sup>305</sup>

Hon. \_\_\_\_\_<sup>306</sup>  
 Attorney General of the State of New York  
 Department of Law  
 Albany, NY 12224

<sup>294</sup> 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 created by the Prisoners' Rights Project of The Legal Aid Society.

<sup>295</sup> Your name.

<sup>296</sup> Insert claim number.

<sup>297</sup> Your name.

<sup>298</sup> 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*.

<sup>299</sup> Your name.

<sup>300</sup> The county in which your case was heard.

<sup>301</sup> Insert the date the judgment was filed in the Clerk's office.

<sup>302</sup> The date on which you sign the notice.

<sup>303</sup> Your signature.

<sup>304</sup> Insert the name of the Clerk (if known) in whose office the judgment was filed.

<sup>305</sup> The county in which your case was heard.

<sup>306</sup> The name of the New York State Attorney General.