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CPLR 5222, 5230, 5232: Public Officials Held Liable for Acting in Conformity with a Statute Subsequently Declared to Be Unconstitutional

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CPLR 5222, 5230, 5232: Public officials held liable for acting in conformity with a statute subsequently declared to be unconstitutional

Article 52 of the CPLR governs the enforcement of money judgments against judgment debtors.[45] Among the provisions in the Article are CPLR 5222, 5230, and 5232, which, respectively, enable the post-judgment creditor to restrain, execute, and levy upon the property of the judgment debtor.[46] In 1982, a federal district

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[45] N.Y. CPLR 5201-5252 (McKinney 1978 & Supp. 1983-1984).

[46] *Id.* 5222, 5232 (1978 & Supp. 1983-1984); *id.* 5230 (1978). CPLR 5222(a) provides in pertinent part:

A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court. It may be served upon any person, except the employer of a judgment debtor . . . . It shall specify all of the parties to the action, . . . the amount of the judgment and the amount then due thereon . . . .

CPLR 5222(a) (1978).

The restraining notice serves the function of an injunction, "prohibiting the transfer of the judgment debtor's property." Aspen Indus., Inc. v. Marine Midland Bank, 52 N.Y.2d 575, 579, 421 N.E.2d 808, 810, 439 N.Y.S.2d 316, 318 (1981); Medi-Physics v. Community Hosp., 105 Misc. 2d 574, 575, 432 N.Y.S.2d 594, 596 (Rockland County Ct. 1980); CPLR 5222, commentary at 187 (1978). The restraining notice may be served on the debtor himself or a third party garnishee in possession of property belonging to the judgment debtor and to whom the garnishee is indebted. *Aspen*, 52 N.Y.2d at 579, 421 N.E.2d at 810, 439 N.Y.S.2d at 318; *see* CPLR 5222, commentary at 185 (1978); *see also* Ivor B. Clark Co. v. Hogan, 296 F. Supp. 407, 411 (S.D.N.Y. 1969) (person served with notice cannot transfer property in which judgment debtor has an interest).

Inasmuch as the restraining order does not create a lien preventing third-party intervention, the judgment creditor must proceed to execution and levy. *Aspen*, 52 N.Y.2d at 579-80, 421 N.E.2d at 811, 439 N.Y.S.2d at 319. A valid judgment is a necessary predicate for the issuance of an order of execution. *See* Gravino v. Gravino, 3 App. Div. 2d 641, 641, 158 N.Y.S.2d 130, 130 (4th Dep't 1956). In addition, the sheriff is required to exercise "reasonable diligence" in carrying out the order of execution, *see* Williamson Mill & Lumber Co. v. Valentine, 206 App. Div. 252, 257, 200 N.Y.S. 527, 530 (4th Dep't 1923), and can be compelled under the order to compute and collect accrued interest against a delinquent debtor, *see* Beneficial Discount Co. v. Spike, 91 Misc. 2d 733, 734, 398 N.Y.S.2d 651, 653 (Sup. Ct. Yates County 1977).

CPLR 5230(a) provides that "an execution shall direct that only the property in which a named judgment debtor who is not deceased has an interest, or the debts owed him, be levied upon." CPLR 5230(a) (1978). CPLR 5230(b) further provides that "[a]t any time before a judgment is satisfied . . . an execution may be issued . . . by the clerk of the court or the attorney for the judgment creditor as officer of the court." *Id.* 5230(b).

CPLR 5232(a) states in relevant part that "[t]he sheriff shall levy upon any interest of the judgment debtor in personal property not capable of delivery . . . by serving a copy of the execution upon the garnishee." *Id.* 5232(a). CPLR 5232(b) stipulates that "[t]he sheriff shall levy upon any interest of the judgment debtor in personal property capable of delivery by taking the property into his custody." *Id.* 5232(b). The sheriff may act either under subdivision (a) or (b) depending on the nature of the property. *See id.* 5223(a), (b). Proceeding under the wrong subdivision may prejudice the rights of the judgment creditor and expose the sheriff to liability. *See id.* 5232, commentary at 387.

court declared these sections of the CPLR unconstitutional, holding that they violated procedural due process of law by failing to require notice to judgment debtors prior to the application of their property in satisfaction of a judgment.[47] In response, the New York Legislature amended CPLR 5222 and 5232.[48] Recently, in *Warren v. Delaney*,[49] the Appellate Division, Second Department, reaf-

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[47] Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1185 (S.D.N.Y. 1982). In *Deary*, the court confronted the issue of whether the New York procedures for restraint, execution, and levy in the post-judgment context were unconstitutional to the extent that they did not provide the judgment debtor with notice and did not afford him reasonable opportunity to contest the enforcement process. *Id.* at 1183. The court rejected the argument that notice given by the garnishee bank to the judgment debtor was sufficient to satisfy minimum due process requirements, holding that such notice does not apprise the judgment debtor of the statutory mechanisms for asserting exemptions. *Id.* at 1187-88. Similarly, the court reasoned that the post-seizure remedial provisions, CPLR 5239 and 5240, were of little value if the debtor was not aware of them. *Id.* at 1188. Thus, the court concluded that evolving conceptions of due process made it essential that notice be given to the judgment debtor before initiating the enforcement process. *See id.* at 1188.

The due process clause of the fourteenth amendment is directed at "state action" that interferes with the exercise of protected rights of individuals. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974); Montalvo v. Consolidated Edison Co., 110 Misc. 2d 24, 28, 441 N.Y.S.2d 768, 773 (Sup. Ct. N.Y. County 1981) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)), *rev'd*, 92 App. Div. 2d 389, 460 N.Y.S.2d 784 (1st Dep't 1983), *aff'd*, 61 N.Y.2d 810, 742 N.E.2d 149, 473 N.Y.S.2d 972 (1984). The classic conception of due process was articulated in Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950), wherein the Court said that due process requires the opportunity to be heard, which is vitiated if notice to avail oneself of that opportunity is not given. *Id.*

A due process analysis involves two considerations: first, whether a recognizable right or interest has been infringed upon, and, if so, what process is due to the aggrieved party under the circumstances. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); *see also* Lugar v. Edmonson Oil Co., 457 U.S. 922, 930 (1982) (threshold due process inquiry is whether there exists a right or privilege); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (initial step is to examine the nature of the asserted protected interest).

[48] *See* ch. 882, §§ 1-2, [1982] N.Y. Laws 2241 (McKinney). The amendments to CPLR 5222 and 5232 became effective September 1, 1982. *Id.* The most prominent feature of the amendments is the requirement that a statutorily prescribed notice, informing the judgment debtor of the exemptions and the procedure for asserting them, precede or accompany the restraining notice. CPLR 5222, commentary at 32 (McKinney Supp. 1983-1984); *id.* 5232, commentary at 57 (McKinney Supp. 1983-1984); *see* CPLR 5222(d), 5232(c) (McKinney Supp. 1983-1984). The notice must enumerate the types of property immune from seizure, although the list need not be all-inclusive. *See* CPLR 5222(e) (McKinney Supp. 1983-1984); *see also* CPLR 5205, 5206 (1978 & Supp. 1983-84) (listing of exempt real and personal property). The constitutionality of the statute in its amended form has been questioned as well. *See* CPLR 5222, supplementary commentaries at 32 (McKinney Supp. 1983-1984); *see also* Deary v. Guardian Loan Co., 550 F. Supp. 642, 643 (S.D.N.Y. 1982) (court declined to comment on success of New York Legislature in alleviating constitutional infirmities of statute). In *Deary*, the court was unwilling to adjudicate the constitutionality of the amended statute solely on its face; instead, the court preferred to wait to see how the rules operated in practice. 550 F. Supp. at 643.

[49] 98 App. Div. 2d 799, 469 N.Y.S.2d 975 (2d Dep't 1983).

firmed the unconstitutionality of the pre-amendment sections of the CPLR and held that a cause of action for wrongful deprivation of due process will lie against individuals who acted under the direction of the stricken provisions.[50]

In *Warren*, the plaintiffs, judgment debtors, commenced an action against all the participants in the collection process including the sheriff, who had levied upon their funds on deposit in the garnishee bank.[51] The defendants had acted in strict compliance with the pre-amendment provisions of Article 52 of the CPLR.[52] The plaintiffs sought monetary, as well as, declaratory and injunctive relief.[53] Special term, on motions for summary judgment from both sides, rejected the constitutional attack on the former sections and dismissed the complaint against all defendants.[54] On appeal, the Appellate Division reversed the dismissal.[55]

After holding the pre-amendment CPLR sections constitutionally deficient,[56] the Appellate Division examined the diverse inter-

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[50] *Id.* at 801, 469 N.Y.S.2d at 978.

[51] *See id.* at 799, 469 N.Y.S.2d at 976. In a consolidated action, plaintiffs Warren and Tolley brought suit against the judgment creditors, the attorneys for the judgment creditors, the garnishee bank, and the sheriff, in both his individual and official capacities. *See id.* at 799, 469 N.Y.S.2d at 975-76.

[52] *See id.* at 799-800, 469 N.Y.S.2d at 975-77. In accordance with CPLR 5222 and 5230, the attorneys for the defendant judgment creditors issued and served the restraining notice upon the defendant garnishee bank. *See id.* at 799, 469 N.Y.S.2d at 976. Pursuant to these sections, the attorneys issued orders of execution and delivered them to the defendant sheriff for levy. *See id.*

[53] *Id.* at 800, 469 N.Y.S.2d at 976. The plaintiffs alleged that the enforcement procedures contravened the due process clause of article I, § 6 of the New York State Constitution by failing to give notification to a judgment debtor of the imminent appropriation of his property and adequate opportunity for contesting the seizure. *Id.* at 799-800, 469 N.Y.S.2d at 976.

[54] *Id.* at 800, 469 N.Y.S.2d at 976. Special term reached its decision on the authority of Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924). 98 App. Div. 2d at 800, 469 N.Y.S.2d at 976. In *Endicott Johnson*, the Court addressed the adequacy of notice in the post-judgment context. *See* 266 U.S. at 286-88.

[55] 98 App. Div. 2d at 801, 469 N.Y.S.2d at 978.

[56] *Id.* at 800, 469 N.Y.S.2d at 977. The court cited Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973), in which the Court of Appeals addressed the constitutionality of a lien law that allowed an innkeeper summarily to seize the property of a non-paying guest without notice. 98 App. Div. 2d at 800, 469 N.Y.S.2d at 977 (citing *Blye*, 33 N.Y.2d at 18, 300 N.E.2d at 713, 347 N.Y.S.2d at 173). The *Blye* Court held that the applicable sections of the innkeeper's lien law were unconstitutional. 33 N.Y.2d at 18-19, 300 N.E.2d at 713, 347 N.Y.S.2d at 173-74.

In addition, the *Warren* court cited with approval Deary v. Guardian Loan Co., 550 F. Supp. 642 (S.D.N.Y. 1982), and a line of United States Supreme Court cases invalidating various state pre-judgment garnishment statutes. *See Warren*, 98 App. Div. 2d at 800-01, 469 N.Y.S.2d at 977. In Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), the Supreme

ests to be accommodated.[57] While noting that the judgment credi-

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Court struck down a pre-judgment enforcement statute, observing that even a temporary deprivation of wages may work a substantial hardship upon an individual. *See id.* at 340. Justice Harlan, in a concurring opinion, stated that neither the fact that the notice of the garnishment accompanied the seizure nor the fact that a permanent dispossession would not occur until after an adverse decision on the merits justified dispensing with a notice requirement. *Id.* at 343 (Harlan, J., concurring).

In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court considered the validity of a replevin statute that permitted anyone claiming an interest in property to seize the property by making an ex parte application and posting a security bond without notification at any time. *Id.* at 69-70. The property seized had been the subject of a consumer sales contract that provided that title was retained by the seller until final payment on the installment contract was made. *Id.* at 70. The Court concluded that despite the temporary and non-essential nature of the seizure, and the absence of a perfected interest, the judgment debtor was entitled to due process safeguards. *See id.* at 89-90.

It is submitted that the expansive holding in *Fuentes* apparently has been undercut by Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), in which the Court held, on facts nearly identical to *Fuentes*, that pre-attachment notice was not constitutionally mandated. *Id.* at 601-03. The *Mitchell* Court determined that *Sniadach* was not precedent since wages, a special type of property, were the object of the garnishment. *Id.* at 614.

Mitchell rejected the analysis presented in Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924), in which the Court held that due process does not require notification to the judgment debtor of the enforcement process, reasoning that the underlying action that culminated in a judgment being rendered against the debtor was sufficient to alert him to the commencement of the enforcement process. *Id.* at 288-89. This rationale has come under increasing criticism, with courts distinguishing *Endicott Johnson* on the basis of a default judgment, *see* Cole v. Goldberger, Pedersen & Hochron, 95 Misc. 2d 720, 726-27, 410 N.Y.S.2d 950, 953 (Sup. Ct. Broome County 1978), a cognovit agreement, *see* Scott v. Danaher, 343 F. Supp. 1272, 1277 (N.D. Ill. 1972), and the presence of exempt funds, *see* Finberg v. Sullivan, 634 F.2d 50, 56-57 (3d Cir. 1980) (en banc).

[57] *See Warren*, 98 App. Div. 2d at 800-01, 469 N.Y.S.2d at 977-78. The court in *Warren* employed a balancing test that has become a hallmark of due process jurisprudence. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (court must look not to weight but to nature of interest at stake); Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (private interest in unrestricted receipt of public assistance weighed against state concern for increasing financial burden). The balancing process embodies three elements: the private interest at stake, the probability of the loss of that interest, and the governmental stake in the outcome. *See Mathews*, 424 U.S. at 335; Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). In *Warren*, the judgment creditor's interest in ensuring satisfaction of his judgment was subordinated to the judgment debtor's interest in the unfettered use and unencumbered title to statutorily exempt funds. *See* 98 App. Div. 2d at 801, 469 N.Y.S.2d at 977-78. Moreover, the state interest in the prompt and efficient enforcement of judgments was subordinated to the correlative interest in the protection of the judgment debtors. *See id.* at 801, 469 N.Y.S.2d at 978.

Courts generally observe that the form of the opportunity to be heard always depends upon the particular facts and circumstances. *See* Arnett v. Kennedy, 416 U.S. 134, 155 (1974); *Morrissey*, 408 U.S. at 481; Montalvo v. Consolidated Edison Co., 110 Misc 2d 24, 36-37, 441 N.Y.S.2d 768, 776-78 (Sup. Ct. New York County 1981), *rev'd*, 92 App. Div. 2d 389, 460 N.Y.S.2d 784 (1st Dep't 1983), *aff'd*, 61 N.Y.2d 810, 463 N.E.2d 149, 473 N.Y.S.2d 972 (1984).

tor's interest in the swift and inexpensive satisfaction of his award is of considerable import, the court determined that the countervailing interest of the judgment debtor in protecting exempt property is paramount.[58] It is submitted that the court, in deciding that a cause of action existed in *Warren*, has placed an impermissible burden on the public official by effectively compelling the official to ascertain the constitutionality of his activities in advance. Moreover, it is suggested that the court, in failing to dismiss the plaintiffs' claim against the defendant sheriff, has undermined the ability of public officials to execute statutorily defined responsibilities in an efficient and expeditious manner.

Although the principle of state sovereign immunity has largely been abolished by judicial decision or legislative enactment,[59] vestiges of governmental immunity remain under the problematical rubric of "discretionary" activities.[60] Thus, while it is well settled that officials do enjoy immunity in the performance of acts that are classified as discretionary, they do not enjoy immunity in the performance of ministerial or non-discretionary acts.[61]

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[58] *See Warren*, 98 App. Div. 2d at 801, 469 N.Y.S.2d at 977-78. The court affirmed summary judgment for the attorneys for the judgment creditors, but remanded the case, "[w]ithout expressing any opinion as to plaintiffs' individual claims against the . . . defendants," for a trial on the issue of damages. *Id.* at 801, 469 N.Y.S.2d at 978.

[59] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 468-73 (3d ed. 1972); W. PROSSER & W. KEETON, THE LAW OF TORTS 1043-51 (5th ed. 1984). *See generally*, Fox, *The King Must Do No Wrong: A Critique of the Current Status of Sovereign and Official Immunity*, 25 WAYNE L. REV. 177, 182 (1979) (abolition of the principle of state sovereign immunity by judicial decision or legislative enactment); Schoenbrun, *Sovereign Immunity*, 44 TEX. L. REV. 151, 177 (1965) (Texas legislatures have been granting permission to sue "automatically").

New York abrogated its sovereign immunity with the passage of the Court of Claims Act. *See* N.Y. CT. CL. ACT § 8 (McKinney 1968). The state waiver of sovereign immunity was held to devolve upon all geo-political subdivisions of the state. Bernadine v. City of New York, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945); *accord* Holmes v. County of Erie, 266 App. Div. 220, 222, 42 N.Y.S.2d 243, 245 (4th Dep't 1943) (waiver of immunity by state stripped counties of their shield against liability). Furthermore, the waiver of immunity rendered the agents of the state subject to liability for their misconduct. Bloom v. Jewish Bd. of Guardians, 286 N.Y. 349, 352, 36 N.E.2d 617, 618 (1941); Foyster v. Tutuska, 44 Misc. 2d 303, 306, 253 N.Y.S.2d 634, 638 (Erie County Ct. 1964), *modified on other grounds*, 25 App. Div. 2d 940, 270 N.Y.S.2d 535 (4th Dep't 1966).

[60] *See* K. DAVIS, *supra* note 59 at 485-87; W. PROSSER & W. KEETON, *supra* note 59, at 1046-51.

[61] *See* Rottkamp v. Young, 21 App. Div. 2d 373, 375, 249 N.Y.S.2d 330, 333-34 (2d Dep't 1964) (liability for ministerial or non-discretionary act but not for judicial or discretionary acts); Drake v. City of Rochester, 96 Misc. 2d 86, 98, 408 N.Y.S.2d 847, 857 (Sup. Ct. Monroe County 1978) (state and its civil division immune for "quasi-judicial" or "discretionary acts").

Under section 1983 of the Civil Rights Act of 1964,[62] public officials have a qualified immunity to protect them from the consequences of their official duties when it is found that they acted in good faith ignorance of the unconstitutionality of the law.[63] It is submitted that section 1983 and the abundant case law it has spawned provide an appropriate analytical model from which to fashion equitable protection for public officials charged with constitutional violations. Until recently, the federal courts used a two part objective/subjective test to determine whether immunity should be applied.[64] Under this standard, a court first considers whether the public official knew that he was violating the Constitution.[65] Second, the court inquires whether there was a malicious

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[62] 42 U.S.C. § 1983 (1982). Section 1983 of the Civil Rights Act of 1964 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . *Id.*

[63] *See* Procunier v. Navarette, 434 U.S. 555, 561-62 (1978) (qualified immunity for prison officials); O'Connor v. Donaldson, 422 U.S. 563, 576-77 (1975) (qualified immunity for superintendent of state hospital); Wood v. Strickland, 420 U.S. 308, 313-22 (1975) (qualified immunity for local school board members); Scheuer v. Rhodes, 416 U.S. 232, 238-49 (1974) (qualified good faith immunity for state governor and other executive officers).

[64] *See infra* notes 64-65 and accompanying text.

[65] *See* Wood v. Strickland, 420 U.S. 308, 322 (1975). The Court in *Wood* framed the objective prong of the test in the form of "basic, unquestioned constitutional rights." *Id.* That is, the public official must show that the existence of the violated right was not "clearly established." *See* Baker v. City of Detroit, 458 F. Supp. 379, 383 (E.D. Mich. 1978), *aff'd*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984). The Supreme Court has employed this test in a number of cases. In Procunier v. Navarette, 434 U.S. 555 (1978), prison officials were charged with violating the rights of inmates by censoring or failing to deliver the inmates' correspondence. *Id.* at 557 & n.3. The officials contended that when the alleged violations occurred, a right of "protected mailing" had not been recognized and that the right had not been clearly established until several years later. *Id.* at 562-63. The Court held as a matter of law that the prison officials could not be charged with knowledge of a pre-natal constitutional right. *Id.* at 565.

In O'Connor v. Donaldson, 422 U.S. 563 (1975), the Court stated that the officer claiming the immunity is under "no duty to anticipate unforeseeable constitutional developments." *Id.* at 577; *see also* Pierson v. Ray, 386 U.S. 547, 557 (1967) (police officer cannot be "charged with predicting the future course of constitutional law"); Peltack v. Borough of Manville, 547 F. Supp. 770, 776 (D.N.J. 1982) (officials could not know that conduct that previously was never adjudicated as unconstitutional was improper); Rogers v. Okin, 478 F. Supp. 1342, 1382 (D. Mass. 1979) ("defendants are not charged with a duty to anticipate then unchartered constitutional developments").

A public official may safely rely upon a systematic and unbroken practice, long pursued and never before questioned. *See, e.g.*, Landrum v. Moats, 576 F.2d 1320, 1328-29 (8th Cir.) (defendant was entitled to rely upon police manual in conflict with post-incident interpretation of state law), *cert. denied*, 439 U.S. 912 (1978); Adeklau v. New York City, 431 F. Supp.

intent to cause a deprivation of protected rights.[66] It is suggested that where, as in the instant case, a voided statute was previously free from constitutional attack, and its validity was not otherwise cast in doubt by developing case law, the public official should be granted a "presumption of propriety."

Since qualified immunity is an affirmative defense under existing law, a presumption of propriety would shift the burden of proof to the plaintiff asserting that the acts of the official were unconstitutional.[67] This shift will not create insuperable obstacles to recovery, however, since, under the threshold objective test, the burden of the plaintiff to prove that the defendant knew he was violating the Constitution is no greater than the burden the defendant public official must sustain in attempting to disprove his own "knowledge."[68] Furthermore, it is suggested that by shifting the burden of proof to the plaintiff, an equitable balance is reached between the need to compensate victims of constitutional torts,[69] and the policy underlying official immunity, which is to enable public officials to perform their important public functions undeterred by fear of exposure to civil liability.[70] The ruling in *War-*

812, 817 (S.D.N.Y. 1977) (immunity granted if defendant relied in good faith on existing procedures).

[66] The subjective prong of the test requires the court to determine whether there exists a malicious or deliberate intent to cause a deprivation of a constitutional right. *See* Reese v. Nelson, 598 F.2d 822, 825-26 (3d Cir.), *cert. denied*, 444 U.S. 970 (1979).

Recently, in Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court, in the interest of judicial economy, reduced the qualified immunity test to a single, objective inquiry. *Id.* at 818-19. The Court stated that the test is whether the law was clearly established at the time the act occurred. *Id.* at 818. However, it is suggested that the subjective part of the test should not be completely discarded, as it is relevant to the issue of punitive damages. *See* Rogers v. Okin, 478 F. Supp. 1342, 1381 (D. Mass. 1979).

[67] Under existing law, qualified immunity is an affirmative defense, casting the burden of proof on the public official. *See* Bryan v. Jones, 530 F.2d 1210, 1213 (5th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 885 (1976); Farmer v. Lawson, 510 F. Supp. 91, 96 (N.D. Ga. 1981); Wren v. Jones, 457 F. Supp. 234, 245 (S.D. Ill. 1978).

[68] *See* Teddy's Drive In, Inc. v. Cohen, 47 N.Y.2d 79, 82, 390 N.E.2d 290, 291, 416 N.Y.S.2d 782, 783 (1979). The inherent unfairness of imposing liability because of the oft-time quixotic nature of constitutional law, it is submitted, militates in favor of the adoption of a rule that requires the plaintiff to establish the defendant's knowledge. As aptly stated by Justice Powell: "[o]ne need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'" Woods v. Strickland, 420 U.S. 308, 329 (1975) (Powell, J., concurring in part and dissenting in part).

[69] *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395-97 (1971); Apton v. Wilson, 506 F.2d 83, 93 (D.C. Cir. 1974).

[70] *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 239-42 (1974); Barr v. Matteo, 360 U.S. 564, 573-74 (1959); Laverne v. Corning, 522 F.2d 1144, 1149 (2d Cir. 1975).

ren, which involved a statute that had never been constitutionally questioned, provides a compelling illustration of the need for a rule to protect a dutiful public official from the vagaries of constitutional law.

Vincent J. Coyle, Jr.

GENERAL MUNICIPAL LAW

GML § 50-e: Statute of limitations is tolled under CPLR 204 when plaintiff's application to serve late notice of claim is sub judice

Section 50-e of the General Municipal Law (GML) requires that, as a condition precedent to suit against a public corporation, a plaintiff must serve a notice of claim upon the defendant public corporation within ninety days after the claim arises.[71] The statute

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[71] GML § 50-e(1)(a) (McKinney Supp. 1983-1984). GML § 50-e provides, in pertinent part:

> (a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action . . . against a public corporation, as defined in the general construction law . . . the notice of claim shall . . . be served . . . within ninety days after the claim arises . . . .

Id. A public corporation includes, among others, "a county, city, town, village and school district." N.Y. GEN. CONSTR. LAW § 66(1)-(2) (McKinney Supp. 1983-1984). Section 50-e applies only to plaintiffs who are required by law to serve the notice of claim as a condition precedent to the commencement of the action. GML § 50-e(1)(a) (McKinney Supp. 1983-1984). The statute was intended and designed to encompass not only statutorily required notices of claim, but also judicially prescribed notices. *See* Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes*, TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE, 358, 374 (1976). The service of the notice of claim is merely a condition precedent to suit, "not a statutory prohibition." Weiss v. Niagara Frontier Transp. Auth., 68 Misc. 2d 1059, 1061, 328 N.Y.S.2d 767, 769 (Sup. Ct. Erie County 1972). As a condition precedent—that is, an act or event other than a lapse of time, that must exist or occur before the duty to perform a promise arises, *see*, RESTATEMENT (SECOND) OF CONTRACTS § 224 & comment b (1981)—performance or excuse is "an essential element of [the plaintiff's] cause of action" and must be pleaded and proved in the same manner as all other elements of his cause of action, *see* Graziano, *supra* at 373-74. The notice of claim must provide the nature of the claim, the time, place and manner in which the claim arose, and for some plaintiffs, the damages, thus far ascertainable, claimed to have been suffered. GML § 50-e(2) (McKinney Supp. 1983-1984). The notice must be served "within ninety days after the claim arises," *id.* § 50-e(1)(a), and must be in writing, sworn to by the claimant, and include the name and address of the claimant and his attorney, *see id.* § 50-e(2).

The primary purpose of the requirement that a municipality be served with a notice of claim is to provide public corporations with "an opportunity to investigate claims and obtain evidence promptly." SIEGEL § 32, at 32; Beary v. City of Rye, 44 N.Y.2d 398, 412-13, 377 N.E.2d 453, 458, 406 N.Y.S.2d 9, 13-14 (1978); *see* Winbush v. City of Mount Vernon, 306 N.Y. 327, 333, 118 N.E.2d 459, 462 (1954); Ziecker v. Town of Orchard Park, 70 App. Div. 2d 422, 427, 421 N.Y.S.2d 447, 450 (4th Dep't 1979), *aff'd*, 51 N.Y.2d 957, 416 N.E.2d 1055, 435