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Article 12

GML § 50-e: Liberalized Notice of Claim Requirements Applicable to Claims that Accrued Within 1 Year of the Amendment's Effective Date

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without a warrant.[199] Under *Payton,* however, the police can circumvent the search warrant requirement by predicating a warrantless entry on "probable cause" to arrest for possession of contraband, and, once inside the home, may conduct a limited search and seize incriminating evidence in plain view or within the suspect's "grab area."[200] Since the *Payton* decision increases the number of situations in which the police may conduct a warrantless search of private premises, it appears inconsistent with prior cases holding warrantless searches "reasonable" only when conducted under exigent circumstances.[201] In this respect, the *Payton* decision raises serious constitutional questions meriting consideration by the Supreme Court.[202]

Ernest R. Stolzer

GENERAL MUNICIPAL LAW

Gen. Mun. Law § 50-e: Liberalized notice of claim requirements applicable to claims that accrued within 1 year of the amendment's effective date

Where a notice of claim is mandated by statute[203] as a condition

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[199] People v. Sciacca, 57 App. Div. 2d 846, 393 N.Y.S.2d 999 (2d Dep't 1977); People v. Schwab, 52 App. Div. 2d 732, 382 N.Y.S.2d 158 (4th Dep't 1976) (mem.); People v. Chestnut, 43 App. Div. 2d 260, 351 N.Y.S.2d 26 (3d Dep't 1974), *aff'd mem.*, 36 N.Y.2d 971, 335 N.E.2d 865, 373 N.Y.S.2d 564 (1975); People v. Pits, 84 Misc. 2d 708, 377 N.Y.S.2d 407 (Sup. Ct. N.Y. County 1975).

[200] *See* notes 196-197 *supra.* The *Payton* decision raises an additional analytical problem when applied in the context of warrantless entries to arrest for possessory crimes. In such instances, the police would be on the premises lawfully, since they have probable cause to believe that the suspect has committed a felony by possessing contraband. Under the "plain view" doctrine, the police ordinarily would be permitted to seize any immediately visible evidence. *See* People v. Jackson, 41 N.Y.2d 146, 150, 359 N.E.2d 677, 681, 391 N.Y.S.2d 82, 85 (1976). The courts have consistently suppressed evidence found in "plain view," however, when its discovery was not entirely inadvertent or unexpected. *E.g.*, People v. Spinelli, 35 N.Y.2d 77, 315 N.E.2d 792, 358 N.Y.S.2d 743 (1974). It is submitted that when the police enter under *Payton* to arrest for a possessory crime, their "reasonable" belief that the suspect possesses such contraband would negate the element of "inadvertence." Thus, although this contraband may have been found in plain view, it logically should be suppressed.

[201] *See* notes 171 & 186 *supra.* The Court of Appeals has noted that "where there is 'ample time for the law enforcement officials to secure a warrant' the warrantless seizure of evidence, even if it is in plain view, is unreasonable." People v. Jackson, 41 N.Y.2d 146, 150, 359 N.E.2d 677, 681, 391 N.Y.S.2d 82, 85 (1976) (citing People v. Spinelli, 35 N.Y.2d 77, 81, 315 N.E.2d 792, 795, 358 N.Y.S.2d 743, 747 (1974)).

[202] *See* note 171 and accompanying text *supra.* In view of the potential constitutional and analytical problems inherent in the *Payton* decision, it is hoped that the lower courts will scrutinize warrantless arrests carefully before according them legal effect.

[203] The purpose of notice of claim statutes is to prevent fraud and permit prompt and

precedent for bringing a tort suit against a public corporation,[204] section 50-e of the General Municipal Law requires that the notice be served within 90 days of the claim's accrual.[205] Under the prior version of section 50-e, courts had discretion to grant leave to serve late notice only in narrow circumstances[206] where application was made within 1 year of the accrual of the plaintiff's claim.[207] In 1976,

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efficient investigation of claims against municipal entities. *See, e.g.*, Adkins v. City of New York, 43 N.Y.2d 346, 350, 372 N.E.2d 311, 312, 401 N.Y.S.2d 469, 471 (1977); Sandak v. Tuxedo Union School Dist. No. 3, 308 N.Y. 226, 232, 124 N.E.2d 295, 299 (1954). For a partial compilation of general, special and local laws which require preliminary notice of claim, 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, 424-27 (1976).

While many of the notice of claim statutes are directed at tort suits, there are a number of provisions requiring prior notice as a condition precedent to the institution of a contract or other non-tort action against a government entity. *See, e.g.*, CPLR 9802; N.Y. CT. CL. ACT § 10(4) (McKinney 1963); N.Y. EDUC. LAW § 3813(1) (McKinney Supp. 1978-1979); N.Y. TOWN LAW § 65 (McKinney 1965); NEW YORK, N.Y., ADMIN. CODE ch. 16, § 394a-1.0 (1976). In the absence of a specific statutory requirement, however, preliminary notice of intention to make a claim is not necessary. *See* Meed v. Nassau County Police Dep't, 70 Misc. 2d 274, 275, 332 N.Y.S.2d 679, 680 (Sup. Ct. Nassau County 1972). Similar rules apply in claims against the federal government. *See, e.g.*, Owen v. City of Independence, 560 F.2d 925, 934 (8th Cir. 1977), *vacated and remanded*, 98 S. Ct. 3118 (1978); Kostka v. Hogg, 560 F.2d 37, 41 (1st Cir. 1977); Hostrop v. Board of Junior College Dist., 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); Hander v. San Jacinto Junior College, 519 F.2d 273, 277 (5th Cir. 1975).

[204] For the definition of "public corporation," see N.Y. GEN. CONSTR. LAW § 66(1) (McKinney Supp. 1978-1979).

[205] N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney 1977). Section 50-e was enacted to provide uniform time and procedural requirements for the myriad notice of claim statutes adopted by local governments. Martin v. School Bd. of Union Free Dist. No. 28, 301 N.Y. 233, 235, 93 N.E.2d 655, 655 (1950). For a discussion of the original version of § 50-e, see *Recommended Improvements and Unification of Requirements of Notices of Claim Against Municipal Corporations*, TENTH ANN. REP. N.Y. JUD. COUNCIL 265 (1944).

[206] Ch. 694, § 1, [1945] N.Y. Laws 1486, *as amended*, ch. 814, § 1, [1959] N.Y. Laws 2130. Under the earlier provisions of § 50-e(5), the courts could grant leave to file a late notice of claim only if the claimant was unable to take timely legal action by reason of infancy or physical or mental incapacitation, the claimant had died during the 90-day filing period, or the claimant delayed serving notice because he reasonably relied upon the written "settlement representations" of the defendant's authorized agent or insurer. *Id.* The inflexibility of these narrow categories sometimes led to unjust results. *See, e.g.*, Shankman v. New York City Hous. Auth., 21 App. Div. 2d 968, 252 N.Y.S.2d 707 (1st Dep't 1964), *aff'd*, 16 N.Y.2d 500, 208 N.E.2d 175, 260 N.Y.S.2d 442 (1965); Ringgold v. New York City Transit Auth., 286 App. Div. 806, 141 N.Y.S.2d 365 (1st Dep't 1955). Although the Court of Appeals attempted to minimize these harsh effects, *see, e.g.*, Sherman v. Metropolitan Transit Auth., 36 N.Y.2d 776, 329 N.E.2d 673, 368 N.Y.S.2d 842 (1975) (mem.), the need for legislative reform was clear. *See* Sherman v. Metropolitan Transit Auth., 36 N.Y.2d 776, 778, 329 N.E.2d 673, 674, 368 N.Y.S.2d 842, 843-44 (1975) (Gabrielli, J., dissenting); Camarella v. East Irondequoit Cent. School Bd., 34 N.Y.2d 139, 142, 313 N.E.2d 29, 30, 356 N.Y.S.2d 553, 555 (1974); Murray v. City of New York, 30 N.Y.2d 113, 121, 282 N.E.2d 103, 108, 331 N.Y.S.2d 9, 16 (1972) (Breitel, J., concurring), *discussed in The Survey*, 47 ST. JOHN'S L. REV. 530, 571 (1973); Crume v. Clarence Cent. School Dist. No. 1, 43 App. Div. 2d 492, 498, 353 N.Y.S.2d 579, 585 (4th Dep't 1974) (Moule, J., dissenting); McLaughlin, *Civil Practice, 1968 Survey of N. Y. Law*, 20 SYRACUSE L. REV. 449, 454 (1968); Thornton & McNiece, *Torts and Workmen's Compensation, 1955 Survey of N.Y. Law*, 30 N.Y.U. L. REV. 1621, 1632 (1955).

[207] Ch. 694, § 1, [1945] N.Y. Laws 1486, *as amended*, ch. 814, § 1, [1959] N.Y. Laws

however, the legislature liberalized the late notice provisions of section 50-e(5) by broadening the grounds upon which an extension to serve notice could be granted and increasing the time period within which a plaintiff could request such relief.[208] Although the amendment took effect on September 1, 1976, its applicability to claims accruing before that date remained unclear.[209] While some courts held that the new provisions were to be applied prospectively only,[210] others reasoned that the amended statute should be given retroactive effect since it was intended as a remedial measure.[211] Recently,

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2130. Under the prior version of § 50-e(5), the claimant also was barred from applying for leave to serve late notice after he commenced suit, even if the time period for making application had not yet expired. *See, e.g.*, Visconti v. City of New York, 45 App. Div. 2d 480, 359 N.Y.S.2d 307 (1st Dep't 1974); Valente v. New York City Hous. Auth., 201 Misc.2d 24, 109 N.Y.S.2d 883 (Sup. Ct. Kings County 1951). This result was based upon a narrow construction of the wording of the statute which required that late notice "shall be made *prior* to the commencement of an action to enforce the claim." Ch. 694, § 1, [1945] N.Y. Laws 1486, 1487 (emphasis added).

[208] Ch. 745, § 2, [1976] N.Y. Laws 1523 (codified at N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 1977)), *discussed in The Survey*, 51 ST. JOHN'S L. REV. 201, 222 (1976). The amended statute provides:

> 5. Application for leave to serve a late notice. Upon application, the court, in its discretion, may extend the time to serve a notice of claim . . . . The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.
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> An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

For an exhaustive study of § 50-e, see Graziano, *supra* note 203.

[209] The amendment was signed into law on July 24, 1976 and was to "take effect on the first day of September next succeeding the date on which it shall become a law." Ch. 745, § 9, [1976] N.Y. Laws 5. Nothing in the amendment's language, however, indicated whether it was intended to be applied to claims accruing before its effective date.

[210] *E.g.*, Dong v. Wandmacher, 61 App. Div. 2d 1023, 403 N.Y.S.2d 85 (2d Dep't 1978); Clemente v. Little, 59 App. Div. 2d 752, 398 N.Y.S.2d 698 (2d Dep't 1977); Willman v. Bowling Green Grade School, 59 App. Div. 2d 739, 398 N.Y.S.2d 849 (2d Dep't 1977) (mem.); Barrow v. New York City Hous. Auth., 59 App. Div. 2d 780, 398 N.Y.S.2d 901 (2d Dep't 1977) (mem.).

[211] *E.g.*, Van Horn v. Village of New Paltz, 57 App. Div. 2d 642, 393 N.Y.S.2d 218 (3d

in *Beary v. City of Rye*,[212] the Court of Appeals resolved this conflict, holding that the liberalized criteria for permitting late service of notice are applicable only to claims which accrued within 1 year of the amendment's effective date.[213]

The *Beary* Court consolidated five separate appeals, each involving tort claims against municipal entities accruing before September 1, 1976.[214] While in each case, the claimant was seeking leave

Dep't 1977) (mem.); Rippe v. City of Rochester, 57 App. Div. 2d 723, 395 N.Y.S.2d 556 (4th Dep't 1977) (mem.); Nolan v. County of Otsego, 55 App. Div. 2d 422, 391 N.Y.S.2d 15 (3d Dep't 1977).

[212] 44 N.Y.2d 398, 377 N.E.2d 453, 406 N.Y.S.2d 9 (1978).

[213] *Id.* at 413, 377 N.E.2d at 458, 406 N.Y.S.2d at 14. The *Beary* Court also declined to extend the scope of the "foreign object" doctrine, which delays accrual of a medical malpractice claim until the injured patient discovers or should have discovered that an object was negligently left in his body. This doctrine was first articulated in Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969). The *Flanagan* Court reasoned that, when a foreign object is lodged within the patient's body, the danger of fraudulent malpractice claims is minimized. Since the claim is based solely on the presence of the foreign object and issues of credibility, professional judgment or discretion are not involved, the Court found a "defendant's ability to defend a 'stale' claim is not unduly impaired" by a delay in accrual. *Id.* at 431, 248 N.E.2d at 875, 301 N.Y.S.2d at 27. Subsequent to *Flanagan*, the "foreign object" doctrine has been applied in a wide variety of circumstances. *See, e.g.*, Dobbins v. Clifford, 39 App. Div. 2d 1, 330 N.Y.S.2d 743 (4th Dep't 1972) (damage to pancreas discovered 4 years after operation); Murphy v. St. Charles Hosp., 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970) (pin in plaintiff's hip shattered 4 years after its insertion); Le Vine v. Isoserve, Inc., 70 Misc. 2d 747, 334 N.Y.S.2d 796 (Sup. Ct. Albany County 1972) (defective isotope contamination discovered 7 years after treatment). In *Beary*, however, the Court of Appeals held that a doctor's failure to place a foreign object in the patient's body, in this case a suture, could not be used as a predicate for invoking the "foreign object" rule. 44 N.Y.2d at 415, 377 N.E.2d at 459, 406 N.Y.S.2d at 15. Noting that the recently enacted CPLR 214-a represented a *limited* codification of the "foreign object" rule, the *Beary* Court reasoned that "the Legislature left us no room but to conclude that it intended *Flanagan* not to be broadened beyond its existing confines." 44 N.Y.2d at 414-15, 377 N.E.2d at 459, 406 N.Y.S.2d at 15 (citation omitted); *see* CPLR 214-a. It is submitted, however, that this language is an indication that the Court does not intend to use the enactment of CPLR 214-a as an occasion for the *retrenchment* of the "foreign object" doctrine. The argument rejected in *Beary* was that the *Flanagan* rationale should be applied by analogy even though no "foreign object" was present in the claimant's body. *See* note 218 *infra*. Although CPLR 214-a was not directly applicable in *Beary*, since the cause of action in question arose before the statute's 1975 effective date, *see* CPLR 214-a; note 214 *infra*, Judge Fuchsberg used the opportunity to articulate the Court's view of the underlying legislative policy. *Cf.* Simcuski v. Saeli, 44 N.Y.2d 442, 454, 377 N.E.2d 713, 720, 406 N.Y.S.2d 259, 266 (1978) (Fuchsberg, J., concurring) (enactment of CPLR 214-a should not be construed as a broad legislative attempt to limit medical malpractice suits). His carefully chosen language suggests that, in future cases arising under the new statute, the Court will not cut back on the previously recognized applications of the *Flanagan* rule, except for those instances expressly mandated by CPLR 214-a.

[214] Beary v. City of Rye, 59 App. Div. 2d 905, 399 N.Y.S.2d 140 (2d Dep't 1977); Pauletti v. Freeport Union Free School Dist. No. 9, 59 App. Div. 2d 556, 397 N.Y.S.2d 146 (2d Dep't 1977); Merced v. New York City Health and Hosps. Corp., 56 App. Div. 2d 553, 391 N.Y.S.2d 863 (1st Dep't 1977); Smalls v. New York City Health Hosps. Corp., 55 App. Div. 2d 537,

to make late service of notice after failing to serve within the 90-day period prescribed by section 50-e(1)(a),[215] only one of the claimants had made application for leave within the 1-year period prescribed by the unamended version of section 50-e(5).[216] In this case, as well as two of the others, the Appellate Division, Second Department, refused to permit late service, finding that the liberal provisions of the 1976 amendment were not applicable to claims accruing before its effective date of September 1, 1976.[217] In the remaining cases,

389 N.Y.S.2d 372 (1st Dep't 1976); Rodriguez v. City of New York, 54 App. Div.2d 692, 387 N.Y.S.2d 283 (2d Dep't 1976). *Beary* involved a suit for malicious prosecution arising out of a 1975 indictment for burglary. The cause of action accrued on Jan. 14, 1976, when the grand jury dismissed the indictment. 59 App. Div. 2d at 905, 399 N.Y.S.2d at 141; *see, e.g.*, Broughton v. State, 37 N.Y.2d 451, 457, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87, 93-94, *cert. denied*, 423 U.S. 929 (1975); Munoz v. City of New York, 18 N.Y.2d 6, 10, 218 N.E.2d 527, 529, 271 N.Y.S.2d 645, 649 (1966); W. PROSSER, LAW OF TORTS § 121, at 857 (4th ed. 1971). In *Pauletti*, the cause of action accrued in June of 1973 when an 11-year old child fell down a staircase at school. 59 App. Div. 2d at 556, 397 N.Y.S.2d at 147. The injury in *Merced* occurred in 1971 when a sterilization operation was performed on the claimant. The alleged negligence of the defendant was not discovered, however, until the claimant became pregnant in November 1973. 56 App. Div. 2d at 553, 391 N.Y.S.2d at 864. Similarly, the claimant in *Smalls* was injured as a result of the negligent administration of a cervical myelogram in May 1973. Although she was released from the defendant's care 5 months later, the *Smalls* claimant did not learn of the injury until June 25, 1975. 55 App. Div.2d at 538, 389 N.Y.S.2d at 373. Finally, *Rodriguez* involved a medical malpractice claim made on behalf of a newborn infant who was injured in December 1969 as a result of the administration of excessive quantities of oxygen. 54 App. Div. 2d at 693, 387 N.Y.S.2d at 284.

[215] The claimant in *Beary* served notice on Apr. 23, 1976, 10 days after the statutory notice period had expired. On Dec. 14, 1976, he applied to Supreme Court, Westchester County, for leave to serve late notice, or, in the alternative, for a declaration that the notice of claim on Apr. 23 was timely. His application was granted. 59 App. Div. 2d at 905, 399 N.Y.S.2d at 141. In *Pauletti*, the child's mother made no claim until 2½ years after the accident. In December of 1975, the mother applied for leave to serve late notice, arguing that the amended § 50-e(5) should be applied to toll the running of the time within which the infant claimant was required to file for leave. *See* note 230 *infra*. The Supreme Court, Nassau County, however, denied the application. 59 App. Div. 2d at 556, 397 N.Y.S.2d at 147. Invoking the "foreign object" doctrine, *see* note 213 *supra*, the claimant in *Merced* contended that her notice of claim was timely since it was served within 90 days after she discovered the alleged malpractice. The Supreme Court, New York County, however, rejected her argument. 56 App. Div. 2d at 553, 391 N.Y.S.2d at 863-64. The claimant in *Smalls* also argued that, under the "foreign object" rule, her claim did not accrue until she discovered the cause of the pain she suffered in her back and leg. The Supreme Court, New York County, agreed and, indicating that the amended § 50-e should be applied retroactively, granted her request for an extension to serve notice of claim. 55 App. Div. 2d at 538, 389 N.Y.S.2d at 372-73. Similarly, the Supreme Court, Queens County, permitted the infant claimant in *Rodriguez* to file a late notice of claim, even though application was made more than 1 year after the claim's accrual. 54 App. Div. 2d at 693, 387 N.Y.S.2d at 284.

[216] *See* note 215 *supra*. Although the *Beary* claimant served formal notice on Apr. 23, 1976, the defendant's insurer had prior actual notice of the claim.

[217] Beary v. City of Rye, 59 App. Div. 2d 905, 399 N.Y.S.2d 140 (2d Dep't 1977); Pauletti v. Freeport Union Free School Dist. No. 9, 59 App. Div. 2d 556, 397 N.Y.S.2d 146 (2d Dep't

however, the first department approved the claimants' delayed service of notice.[218]

On appeal, the Court of Appeals held that only the claimant whose cause of action accrued within 1 year of the amendment's enactment should be permitted to take advantage of the liberalized criteria for allowing late service.[219] Writing for a unanimous Court, Judge Fuchsberg reviewed the general rules for determining whether a particular statute should be given retroactive effect[220] and stated that they were not "ritualistic incantations meriting slavish appli-

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1977); Rodriguez v. City of New York, 54 App. Div. 2d 692, 387 N.Y.S.2d 283 (2d Dep't 1976). The *Pauletti* court stated that, absent a clear legislative expression to the contrary, the amendments to § 50-e should be applied only prospectively. 59 App. Div. 2d at 556, 397 N.Y.S.2d at 147.

[218] Merced v. New York City Health and Hosps. Corp., 56 App. Div. 2d 533, 391 N.Y.S.2d 863 (1st Dep't 1977); Smalls v. New York City Health and Hosps. Corp., 55 App. Div. 2d 537, 389 N.Y.S.2d 372 (1st Dep't 1976). The *Smalls* court held the claimant's application timely after concluding that her cause of action accrued when she discovered the alleged malpractice. 55 App. Div. 2d at 538, 389 N.Y.S.2d at 373. Conceding that "the case [was] not truly one concerning a 'foreign object,'" the court nevertheless found the *Flanagan* rationale applicable to the facts before it. *Id.*; *see* CPLR 214-a, commentary at 100 (McKinney Supp. 1978-1979); note 213 *supra*. The *Merced* court expressly followed *Smalls* and concluded that the claim accrued only when the alleged malpractice was discovered. Since notice was served within 90 days of this discovery, the claimant's service of notice was timely. 56 App. Div. 2d at 553, 391 N.Y.S.2d at 864.

[219] 44 N.Y.2d at 415, 377 N.E.2d at 460, 406 N.Y.S.2d at 15. The Court reversed Beary v. City of Rye, 59 App. Div. 2d 905, 399 N.Y.S.2d 140 (2d Dep't 1977); Merced v. New York City Health and Hosps. Corp., 56 App. Div. 2d 533, 391 N.Y.S.2d 863 (1st Dep't 1977); Smalls v. New York City Health and Hosps. Corp., 55 App. Div. 2d 537, 389 N.Y.S.2d 372 (1st Dep't 1976), and affirmed Pauletti v. Freeport Union Free School Dist. No. 9, 59 App. Div. 2d 556, 397 N.Y.S.2d 146 (2d Dep't 1977); Rodriguez v. City of New York, 54 App. Div. 2d 692, 387 N.Y.S.2d 283 (2d Dep't 1976).

[220] 44 N.Y.2d at 410, 377 N.E.2d at 457, 406 N.Y.S.2d at 12. Judge Fuchsberg acknowledged the general rule that amendments are presumed to apply prospectively unless there is a clear expression of legislative intent to the contrary. *Id.*; *see, e.g.*, Mulligan v. Murphy, 14 N.Y.2d 223, 226, 199 N.E.2d 496, 498, 250 N.Y.S.2d 412, 415 (1964); Richardson v. Deegan, 34 App. Div. 2d 835, 836, 312 N.Y.S.2d 666, 667 (2d Dep't 1970); N.Y. Statutes § 52 (McKinney 1971); 2 A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41.04 (4th ed. C. Sands 1973). In addition, he took note of the fact that if an amendment is enacted with a postponed effective date, it usually will be accorded prospective effect. 44 N.Y.2d at 410, 377 N.E.2d at 457, 406 N.Y.S.2d at 12; *see, e.g.*, Jordan v. Westhill Centennial School Dist., 42 App. Div. 2d 1043, 1044, 348 N.Y.S.2d 620, 622 (4th Dep't 1973); Phyllis W. v. Commissioner of Social Servs., 88 Misc. 2d 242, 243, 387 N.Y.S.2d 365, 367 (Family Ct. Kings County 1976). In contrast, the Court indicated that amendments which are procedural or remedial in nature are frequently applied retroactively. 44 N.Y.2d at 410, 377 N.E.2d at 457, 406 N.Y.S.2d at 12. *See* Deutsch v. Catherwood, 31 N.Y.2d 487, 489-90, 294 N.E.2d 193, 194-95, 341 N.Y.S.2d 600, 602 (1973); Shielcrawt v. Moffett, 294 N.Y. 180, 189, 61 N.E.2d 435, 439 (1945); E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 295 (1940). For a discussion of the rules of statutory construction, see R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 227 (1975).

cation."[221] In addition, Judge Fuchsberg found that there was no "hard and fast rule" to prevent the Court from analyzing the amended criteria for granting extensions to serve notice separately from that portion of the amendment modifying the time for applying for such relief.[222]

Within this analytical framework, the Court examined the legislative purpose underlying section 50-e and its recent amendment.[223] Distinguishing between section 50-e and conventional statutes of limitation,[224] Judge Fuchsberg noted that the sole purpose of the notice requirement is to permit the defendant-municipal entity to "prompt[ly] investigat[e] and preserv[e] . . . evidence of the facts and circumstances out of which claims arise."[225] Judge Fuchsberg further observed, however, that the 1976 amendment was intended to minimize the statute's harsh effects by eliminating the requirement that "an applicant for late filing fall into specified categories" and replacing it with flexible criteria and broad trial court discretion.[226] Thus, Judge Fuchsberg reasoned, the purpose of the amended statute would be effectuated by applying its discretionary provisions for obtaining leave to serve late notice to claims that are still viable under the preamendment limitations period for filing.[227]

In contrast, the *Beary* Court observed that retroactive application of the amendment's expanded time limitations would be inconsistent with the primary statutory purpose of providing prompt notice of claim to municipal entities.[228] Since the amendment indirectly incorporates the insanity and infancy tolling provisions of CPLR 208 into the total period available for requesting leave to

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[221] 44 N.Y.2d at 411, 377 N.E.2d at 457, 406 N.Y.S.2d at 12.

[222] *Id.*

[223] *Id.* at 412, 377 N.E.2d at 458, 406 N.Y.S.2d at 13.

[224] *Id.* at 411-12, 377 N.E.2d at 457, 406 N.Y.S.2d at 13. Judge Fuchsberg observed that notice of claim statutes resemble statutes of limitations in that their time restrictions are computed from the accrual of the cause of action. He further noted, however, that "they differ strikingly from conventional Statutes of Limitations" because they permit the courts to exercise discretion and grant extensions in certain limited instances. *Id.* at 412, 377 N.E.2d at 457, 406 N.Y.S.2d at 13; *see* Graziano, *supra* note 203, at 373-74.

[225] 44 N.Y.2d at 412, 377 N.E.2d at 458, 406 N.Y.S.2d at 13.

[226] *Id.* at 411, 377 N.E.2d at 457, 406 N.Y.S.2d at 13. The *Beary* Court traced the development of the present version of § 50-e and found that the recent amendment was prompted in part by recommendations which stressed the need to relax the existing restrictions on judicial discretion to permit late notice. *Id.; see, e.g.,* Graziano, *supra* note 203; note 206 *supra.*

[227] 44 N.Y.2d at 413, 377 N.E.2d at 458, 406 N.Y.S.2d at 14. Judge Fuchsberg stressed that the defendant in *Beary* would not be prejudiced by the Court's ruling since it had received timely, actual notice of the claimant's intention to sue. *Id.*

[228] *Id.* at 412, 377 N.E.2d at 458, 406 N.Y.S.2d at 14; *see* note 203 *supra.*

serve late notice,[229] Judge Fuchsberg reasoned that the retroactive use of altered application deadlines would "open the door to an unknown number of claims the defense to which is unprepared and unpreparable."[230] Thus, the *Beary* Court refused to apply the amended portions of section 50-e(5) to revive claims that were barred by September 1, 1976 because of the plaintiff's failure to make timely application for leave to serve late notice.[231]

By discarding the shibboleths of statutory construction in favor of an analysis calculated to promote the policies underlying section 50-e,[232] the *Beary* Court has adopted a pragmatic approach to the difficult problem of determining the retroactive effect of newly enacted statutes.[233] In so doing, the Court seems to have applied the principles that were suggested by its recent decision in *Becker v. Huss Co.*[234] Faced with an amendment with an unclear applicability provision,[235] the *Becker* Court held that the remedial measure was

[229] Under the amended provisions of § 50-e(5), the time limit for requesting leave to serve late notice is identical to the limitations period "for the commencement of an action by the claimant against the public corporation." The governing section is N.Y. GEN. MUN. LAW § 50-i (McKinney 1977), which requires that tort suits against public corporations be commenced within 1 year and 90 days of the claim's accrual. When the claimant is under a disability which falls within the ambit of CPLR 208, however, the running of the § 50-i limitations period is tolled accordingly. *See* Hurd v. County of Allegany, 39 App. Div. 2d 499, 502, 336 N.Y.S.2d 952, 956 (4th Dep't 1972); Abbatemarco v. Town of Brookhaven, 26 App. Div. 2d 664, 664, 272 N.Y.S.2d 450, 451 (2d Dep't 1966) (mem.); LaFave v. Town of Franklin, 20 App. Div. 2d 738, 738, 247 N.Y.S.2d 72, 74 (3d Dep't 1964) (mem.). Thus, by making the time period in § 50-e coextensive with the limitations period specified in section 50-i, the legislature indirectly made the CPLR 208 tolling provisions available to applicants for leave to serve late notice.

[230] 44 N.Y.2d at 413-14, 377 N.E.2d at 459, 406 N.Y.S.2d at 14.

[231] *Id.* at 413, 377 N.E.2d at 458, 406 N.Y.S.2d at 14.

[232] *See* note 205 *supra.*

[233] Under the traditional view, amendments are enacted as cohesive products of legislative drafting and, therefore, are "animated by one general purpose and intent." 2A A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.05 (4th ed. C. Sands 1973). It is suggested, however, that even if a single legislative purpose and intent pervades an enactment, it does not necessarily follow that applicability of the statute must be determined woodenly, without regard to the practical results.

[234] 43 N.Y.2d 527, 373 N.E.2d 1205, 402 N.Y.S.2d 980 (1978), *discussed in The Survey*, 52 ST. JOHN'S L. REV. 485, 523 (1978). Chief Judge Breitel, writing for the *Becker* Court, recognized the need for a flexible, pragmatic approach to the task of statutory construction when he stated:

> It is thus not the verbal category, be it remedial, nonremedial, substantive, or procedural, into which the amendment might be slotted for lack of more subtle subclassification that sheds light on the issue. It falls comfortably in none. Instead, examination of legislative intent, if it be discernible, recognition of the flexibility of the . . . law in achieving its social goals, and consideration of the practicalities and the realities offer more fruitful and sounder analysis.

Id. at 540-41, 373 N.E.2d at 1209, 402 N.Y.S.2d at 984.

[235] The *Becker* Court had to determine the applicability of an amendment to the

available to plaintiffs whose claims accrued prior to its effective date.[236] Like the *Beary* Court, however, the *Becker* Court refused to permit plaintiffs to take advantage of the amendment if their right to recover had terminated before the amendment became effective.[237] In both cases, the Court found guidance, not in ambiguous axioms of statutory construction, but rather in a realistic analysis of the competing interests and the legislative goals underlying the statute.[238]

It is submitted, however, that a judicial extrapolation is seldom a satisfactory substitute for a clear legislative statement on an amendment's intended applicability. Although the *Beary* result clearly is sound, the decision is unlikely to furnish a reliable basis for predicting the retroactive effect of other statutes with ambiguous applicability provisions.[239] It is therefore suggested that, in drafting future remedial measures, the legislature should take particular care to include clear directions for applying the statute to preexisting causes of action.

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Worker's Compensation Law which required insurers to absorb a proportional share of the attorney fees incurred when the insured successfully sued a third-party tortfeasor. *Id.* at 536, 373 N.E.2d at 1206, 402 N.Y.S.2d at 981-82; *see* WORK. COMP. LAW § 29 (McKinney Supp. 1978-1979). Although the amendment was made effective Sept. 1, 1975, it was uncertain whether it was applicable to suits initiated or judgments entered before that date.

[236] 43 N.Y.2d at 543, 373 N.E.2d at 1210, 402 N.Y.S.2d at 986.

[237] *Id.* at 539, 373 N.E.2d at 1210, 402 N.Y.S.2d at 985. Only those plaintiffs whose judgments or settlements had been paid before the statute's effective date were denied use of its remedial provisions. *Id.* at 542, 373 N.E.2d at 1210, 402 N.Y.S.2d at 985-86.

[238] The *Becker* Court implicitly found that the legislative policy of relieving the insureds of the full burden of attorney fees dictated retroactive application of the amendment. *See id.* at 542, 373 N.E.2d at 1210, 402 N.Y.S.2d at 985. Similarly, the *Beary* Court stressed the clear legislative intent to make § 50-e(5) a more flexible mechanism so as to avoid the harsh effects of notice of claim requirements. In both cases, however, the Court concluded that the defendant's interest in predicting future liability was sufficiently important to preclude the reopening of time-barred or satisfied claims. *See* 43 N.Y.2d at 543, 373 N.E.2d at 1210, 402 N.Y.S.2d at 986.

[239] While the *Beary* decision does not supply a general principle for determining the applicability of new legislation, it should serve as a model for analyzing the applicability of the recent amendments to the Court of Claims Act, which became effective Sept. 1, 1976. Ch. 280, § 2, [1976] N.Y. Laws. Like the revisions to § 50-e(5), the amendments to the Court of Claims Act broaden the discretion of the trial court to permit late service of notice and extend the time limit for requesting leave to make late service. *See* N.Y. CT. CL. ACT § 10(6) (McKinney Supp. 1978-1979). In view of the similarity of these statutes, it appears that the *Beary* rationale would be applicable in cases involving the retroactive use of the Court of Claims Act amendments. *See* Paul v. State, 59 App. Div. 2d 800, 398 N.Y.S.2d 768 (3d Dep't 1977) (mem.); Kelly v. State, 57 App. Div. 2d 320, 395 N.Y.S.2d 311 (4th Dep't 1977); *cf.* Sessa v. State, 88 Misc. 2d 454, 388 N.Y.S.2d 513 (Ct. Cl. 1976) (even if expanded discretionary provisions are retroactively applicable, amendment may not be used to revive time-barred claims).