

CPLR 214-a: Appellate Division, Third Department Holds that a Surgical Suture Negligently Placed in a Patient's Body in the Course of an Operation is a "Foreign Object" so as to Toll the Statute of Limitations

Brian G. Friel

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

CIVIL PRACTICE LAW AND RULES

CPLR 214-a: Appellate Division, Third Department holds that a surgical suture negligently placed in a patient's body in the course of an operation is a "foreign object" so as to toll the statute of limitations

Public concern beginning in the mid-1970s over the medical malpractice crisis¹ prompted the New York Legislature to respond with various tort reform measures.² The earliest of these reforms

¹ See Russell S. Schwartzman, Note, *Orderlies in the Court? A Proposal for the Proper Designation of Medical Malpractice Claims*, 8 CARDOZO L. REV. 287, 287-90 (1986). The crisis witnessed an unprecedented increase in insurance premiums, the withdrawal of many insurance carriers from the medical malpractice insurance market, a rise in the number of medical malpractice claims, and an increase in the size of medical malpractice damage awards. *Id.* The effect of such conditions was to seriously threaten the availability of health care services. See Betsy A. Rosen, Note, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis With a Prescription for Comprehensive Reform*, 52 BROOK. L. REV. 135, 137-44 (1986). The last two decades have been characterized by double- and triple-digit percentage increases in malpractice premiums. See Phillip S. Gutis, *Malpractice Rates Ease, But Many are Skeptical*, N.Y. TIMES, June 25, 1989, at A24. In 1985, the crisis led to physician work stoppages and slowdowns across upstate New York. See Edward A. Gargan, *Governor Approves Bill to Reduce Malpractice-Insurance Premiums*, N.Y. TIMES, July 3, 1985, at B20. In fact, dozens of doctors, particularly specialists, "announced that they would cease practice or confine themselves to less-risky specialties." *Id.* But see Gutis, *supra* (statistics of 1988 show dramatic drop in number of medical malpractice cases filed in New York).

The medical malpractice crisis has not been limited to New York but is perceived as a national problem. See U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973) (outlining severity of malpractice crisis in United States). While there was only one claim per 37 physicians in 1968, by 1975 there was one claim for every eight physicians. See Johnson, et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1373 (1989). Between 1975 and 1985 the average medical malpractice jury award increased from \$220,018 to \$1,017,716. *Id.* Moreover, between 1960 and 1970 surgeon's premium rates increased approximately 940% and in some states, the premiums increased 100% between 1974 and 1975. See Thomas L. Stachler, Note, *Repose vs. Right-to-a-Remedy: Physician vs. Patient Under the Ohio Constitution*, 57 U. CIN. L. REV. 423, 425 (1988). But see Richard C. Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?* 32 VILL. L. REV. 1299, 1299-300 & n.3 (1983) (discussing congressional reports and other forums that questioned bona fide nature of supposed crisis).

² See *infra* note 3 and accompanying text (discussing various provisions enacted in New York to assess and counter medical malpractice crisis). The majority of states in the 1970s had also undergone a medical malpractice crisis which prompted legislative responses to remedy the situation. See, e.g., California Medical Injury Compensation Reform Act, ch. 2,

was the enactment of CPLR 214-a,³ which provided that a medical malpractice suit be commenced within two years and six months from the time of the alleged malpractice.⁴ The legislature has provided certain specific exceptions, including the codification of the "foreign object" doctrine.⁵ Under this exception, when a foreign

2d Extra Sess., § 1.192, [1975] West's Cal. Legis. Service No. 9, at 3809 (codified at CAL. CIV. PRO. CODE § 340.5) (shortening statute of limitations); Medical Malpractice Reform Act, ch. 75-79, § 7, [1975] West's Fla. Sess. Law Service No. 1, at 13 (codified at FLA. STAT. ANN. § 95.11(4)) (same). See generally John H. French, *Florida Departs From Tradition: The Legislative Response to the Medical Malpractice Crisis*, 6 FLA. ST. U. L. REV. 423 (1978) (analyzing scope of malpractice crisis in Florida and effectiveness of legislative response).

³ See CPLR 214-a (McKinney 1990). CPLR 214-a provides, in relevant part:

An action for medical, dental, or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment . . . however . . . where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. . . . For the purpose of this section the term "foreign object" shall not include a chemical compound, fixation device or prosthetic aid or device.

Id.

The enactment of CPLR 214-a was preceded by a thorough assessment of the state of the health care industry. See Governor's Memoranda, Medical Malpractice, reprinted in [1975] N.Y. LEGIS. ANN. 225. "The purpose of the Governor's Program Bill is to deal comprehensively with the critical threat to the health and welfare of the State by way of diminished delivery of health care services as a result of the lack of adequate medical malpractice insurance coverage at reasonable rates." *Id.* In addition to a revised statute of limitations, the bill included: 1) significant changes in the substantive law of torts and authorization of the promulgation of court rules and procedures to assure prompt and fair disposition of medical malpractice claims; 2) establishment of a Medical Malpractice Insurance Association to supply malpractice insurance should such insurance be unavailable in the voluntary market; and 3) providing improved procedures for professional discipline of doctors. *Id.* Further legislation was enacted in 1985 with the Medical Reform Act which provided: 1) periodic payments of large future awards; 2) reduced contingency fees; 3) broadened recognition of other available sources of plaintiff compensation; 4) sanctions against frivolous claims and defenses; and 5) mandated hospital malpractice prevention and physician privilege review procedures. See Medical Malpractice Reform Act, ch. 294, [1985] N.Y. Laws 685 (McKinney); see also Gutis, *supra* note 1 (discussing enactment of Medical Reform Act).

⁴ See *supra* note 3 (relevant section of CPLR 214-a regarding actual time period involved in statute of limitations). Prior to CPLR 214-a, the statute of limitations was three years for a medical malpractice claim. See *Mirabile v. Profy*, 172 A.D.2d 729, 730, 569 N.Y.S.2d 115, 116 (2d Dep't 1991); *Conklin v. Draper*, 229 A.D. 227, 227, 241 N.Y.S. 529, 529 *aff'd* 254 N.Y. 620, 620, 173 N.E. 892, 892 (1930). CPLR 214-a simply codified the case law with respect to when a cause of action accrues. See *e.g.*, *Dobbins v. Clifford*, 39 A.D.2d 1, 2-3, 330 N.Y.S.2d 743, 745-46 (4th Dep't 1972) (setting forth general rule and recognized exceptions as developed in courts); *Flanagan v. Mount Eden General Hosp.*, 24 N.Y.2d 427, 431, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 27 (1969) (establishing "foreign object" exception subsequently codified by CPLR 214-a).

⁵ See generally *supra* note 3 and accompanying text (stating provisions and legislative history of CPLR 214-a). The foreign object rule was first developed in New York in *Flana-*

object is negligently left within a patient's body, the statute of limitations is tolled until the foreign object has been or reasonably should have been discovered ("discovery rule").⁶ The exception is a limited one, and CPLR 214-a specifically excludes fixation devices⁷ from the definition of "foreign objects."⁸ Recently, however, the Appellate Division, Third Department, in *Rockefeller v. Moront*,⁹ held that a suture—a fixation device—inserted into a patient during the course of an operation was a foreign object within the

gan v. Mount Eden General Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969). In *Flanagan*, the patient underwent an operation in 1958 for a gall bladder ailment. *Id.* at 428, 248 N.E.2d at 871, 301 N.Y.S.2d at 24. The surgeon failed to remove surgical clamps used in the operation. *Id.* In 1966, eight years after the surgery, the plaintiff experienced abdominal pain and upon an examination, the clamps were discovered. *Id.* The plaintiff filed a malpractice claim and the defendant moved for dismissal on the grounds that the statute of limitations had expired. *Id.* at 428-29, 248 N.E.2d at 871, 301 N.Y.S.2d at 24-25. The Court, in denying the defendant's motion, held that the statute of limitations did not begin to run until discovery of the clamps, based on the notion that the clamps were "foreign object[s]." *Id.* at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27; see also Richard T. Farrell, *New York Civil Practice, Statute of Limitations*, 418 PLI/LIT 37 (1991) (discussing provisions of CPLR 214-a).

The *Flanagan* rule was motivated in part by four considerations: 1) discovery of the wrong was very difficult; 2) there was no question regarding professional diagnostic judgment or credential issues; 3) there was no danger of a frivolous claim; and 4) there was objective evidence that a tort had been committed. *Flanagan*, 24 N.Y.2d at 430-31, 248 N.E.2d at 873, 301 N.Y.S.2d at 26; see also CPLR 214-a, commentary C214-a:3 at 603 (McKinney 1990) (outlining reasons in support of "foreign object" exception).

The courts also carved out an additional exception known as the "continuous treatment" doctrine. See *Borgia v. City of New York*, 12 N.Y.2d 151, 155, 187 N.E.2d 777, 778, 237 N.Y.S.2d 319, 321 (1962). The doctrine was later codified in CPLR 214-a which provided that "[a]n action . . . must be commenced within two years and six months of the . . . last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." CPLR 214-a (McKinney 1990). Furthermore, in situations in which a person is under a disability due to infancy or insanity at the time of accrual, the statute of limitations may be tolled until the disability ends. See CPLR 208 (McKinney 1990).

The purpose of these exceptions was to lessen the harsh results that the general rule of the statute of limitation would otherwise impose on a plaintiff. See Jocelyn B. Lamm, Note, *Easy Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2192 (1991); cf. Carl M. Wagner, Comment, *U.S. v. Kubrick, Scope and Application*, 120 MIL. L. REV. 139, 154-55 (1988) (discussing need to expand discovery rule of medical malpractice to other tort claims).

⁶ See *Flanagan*, 24 N.Y.2d at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27; CPLR 214-a commentary C214-a:3 at 603 (McKinney 1990) (foreign object exception in CPLR 214-a codified *Flanagan* holding); cf. *Weber v. Scheer*, 58 A.D.2d 520, 520, 395 N.Y.S.2d 183, 184 (1st Dep't 1977) (exception inapplicable because foreign object not involved).

⁷ See STEDMAN'S MEDICAL DICTIONARY 425, 521 (25th ed. 1990).

⁸ See *supra* note 3 and accompanying text.

⁹ 182 A.D.2d 160, 587 N.Y.S.2d 48 (3d Dep't 1992).

meaning of CPLR 214-a.¹⁰

In *Rockefeller*, the plaintiff instituted a medical malpractice action alleging that the defendant physician's negligent placement of a suture was the proximate cause of his sterility.¹¹ In 1971, when the plaintiff was four years old, he underwent a hernia operation performed by the defendant.¹² The defendant negligently sutured the plaintiff's vas deferens¹³ leaving the suture in the plaintiff's body.¹⁴ In 1988, the plaintiff was married and attempted to have a child with his wife. When the couple was unable to conceive, the plaintiff underwent an examination during which it was determined that his semen contained no sperm.¹⁵ Exploratory surgery revealed the negligently placed suture, which confirmed the cause of the plaintiff's sterility.¹⁶

The plaintiff filed a complaint in 1989 shortly after the discovery of the suture.¹⁷ The defendant subsequently moved to dismiss the complaint arguing that the malpractice claim was barred by the statute of limitations¹⁸ since eighteen years had elapsed between the time of the alleged malpractice and the time of the complaint.¹⁹ The Supreme Court, Columbia County, denied the de-

¹⁰ *Id.* at 163, 587 N.Y.S.2d at 50.

¹¹ *Id.* at 161, 587 N.Y.S.2d at 49. In addition to the physician, the hospital in which the surgery was performed was named as a defendant. *Id.*

¹² *Id.* The operation was a left hernia repair known as a herniorrhaphy. *Id.*

¹³ *Id.* The vas deferens is a secretory duct of the testicle, "running from the epididymis, of which it is the continuation, to the prostatic urethra where it terminates as the ejaculatory duct." See *STEDMAN'S MEDICAL DICTIONARY*, *supra* note 7, at 470.

¹⁴ *Rockefeller*, 182 A.D.2d at 161, 587 N.Y.S.2d at 49.

¹⁵ *Id.* The subsequent medical treatment of the plaintiff was performed by a different physician than the one who had sutured the vas deferens. *Id.*

¹⁶ *Id.* In a sworn statement, the doctor, who examined and operated on the plaintiff in 1988, stated that the suture's placement on the plaintiff's vas deferens "is not usually, normally or customarily involved" in the type of surgery performed on plaintiff. *Id.* at 163, 587 N.Y.S.2d at 50. An attempt to repair the damage caused by the suture proved unsuccessful. *Id.* at 161, 587 N.Y.S.2d at 49.

¹⁷ *Id.* The plaintiff filed his complaint within one year of the discovery of the suture pursuant to the discovery rule of CPLR 214-a. *Id.*; see also *supra* note 3 and accompanying text (section of CPLR 214-a relating to one year time limit). The plaintiff sought damages for his sterility and emotional distress. *Rockefeller*, 182 A.D.2d at 161, 587 N.Y.S.2d at 49. In addition, the plaintiff's wife filed a complaint against the defendant stating a derivative cause of action. *Id.* The court dismissed the wife's complaint. *Id.* at 161-62, 587 N.Y.S.2d at 49.

¹⁸ *Id.* at 161, 587 N.Y.S.2d at 49. The defendant also moved to dismiss for failure to state a cause of action upon which relief could be granted. *Id.*

¹⁹ *Id.* Since the claim arose prior to July 1, 1975, the effective date of CPLR 214-a, the statute of limitations was three years and not two years and six months. See CPLR 214(6) (prior statute of limitations for medical malpractice); see also *supra* note 2 (setting forth

fendant's motion²⁰ based on its conclusion that the misplaced suture was a foreign object within the meaning of CPLR 214-a²¹ and the statute of limitations for the plaintiff's cause of action had thus not expired.²²

The Appellate Division, Third Department, in a 3-2 decision, affirmed the judgment of the supreme court.²³ Writing for the majority, Justice Yesawich reasoned that since the suture was not inserted for any proper medical purpose, but rather by mistake, "its placement in plaintiff's body was never intended" and it thus "became a foreign object immediately after its insertion."²⁴ In support of its decision, the court distinguished a 1990 Court of Appeals case, *Rodriguez v. Manhattan Medical Group*,²⁵ which held that an intra-uterine device was not a foreign object.²⁶ Rather, Justice

relevant text of CPLR 214-a). The distinction is irrelevant since the six month difference in the statutes was not a factor in *Rockefeller*. See *Rockefeller*, 182 A.D.2d at 161, 587 N.Y.S.2d at 49.

²⁰ *Id.* at 162, 587 N.Y.S.2d at 49.

²¹ *Id.* Although the claim arose prior to the effective date of CPLR 214-a, the court was bound by the legislative intent of what constitutes a foreign object. See *id.* at 164, 587 N.Y.S.2d at 51 (Mikoll, J., dissenting); accord *Lombardi v. DeLuca*, 130 A.D.2d 632, 632, 515 N.Y.S.2d 811, 812 (2d Dep't 1987), *aff'd*, 71 N.Y.2d 838, 522 N.E.2d 1055, 527 N.Y.S.2d 757 (1988); *Mitchell v. Abitol*, 130 A.D.2d 633, 633-34, 515 N.Y.S.2d 810, 811 (2d Dep't 1987).

²² *Rockefeller*, 182 A.D.2d at 161-62, 587 N.Y.S.2d at 49. The court also determined that sterility is a compensable injury. *Id.* at 162, 587 N.Y.S.2d at 49.

²³ See *id.* at 164, 587 N.Y.S.2d at 51.

²⁴ See *id.* at 162, 587 N.Y.S.2d at 49.

²⁵ 77 N.Y.2d 217, 567 N.E.2d 235, 566 N.Y.S.2d 193 (1990).

²⁶ See *id.* at 222, 567 N.E.2d at 238, 566 N.Y.S.2d at 193. In *Rodriguez*, the plaintiff had an intra-uterine device (IUD) inserted into her uterus in 1980 as a birth control device. *Id.* at 219, 567 N.E.2d at 236, 566 N.Y.S.2d at 194. Two years later the plaintiff visited a doctor to have the IUD removed. *Id.* The doctor failed to locate the IUD and informed the plaintiff that she could attempt to conceive without the need for any further medical treatment. *Id.* The plaintiff failed to become pregnant over the next three years, and in 1986 she experienced heavy vaginal bleeding. *Id.* An examination revealed the presence of the IUD embedded in her uterus wall. *Id.* The Court of Appeals held that the case did not fall within the discovery rule in CPLR 214-a, but rather was a case "no different from any other medical malpractice action in which it is claimed that a physician negligently failed to detect a condition within the patient's body requiring treatment or surgical removal." *Id.* at 224, 567 N.E.2d at 239, 566 N.Y.S.2d at 197.

The *Rockefeller* court distinguished the *Rodriguez* decision by holding that: 1) *Rockefeller* was not an attempt to "transform" a deliberately fixed device into a foreign object; 2) the plaintiff in *Rockefeller* sought recovery against the doctor who inserted the device while the plaintiff in *Rodriguez* sought recovery from the doctor who subsequently failed to remove the device; 3) there was no evidence that the suture had any specific medical purpose while the IUD when originally inserted was used as a valid contraceptive; 4) there was no chain of causation or credibility problems and no question regarding professional diagnostic judgment or discretion in *Rockefeller* while those issues were at the very heart of *Rodriguez*;

Yesawich noted, the suture at issue was analogous to the surgical clamp left within the plaintiff in *Flanagan v. Mount Eden General Hospital*,²⁷ the seminal case for the foreign object doctrine.²⁸ Based on its interpretation of *Flanagan*, and in light of the "harsh consequences" that a contrary decision "would visit on the injured plaintiff," the court determined that its recognition of the suture as a foreign object did not undermine the purpose of CPLR 214-a.²⁹

Writing for the *Rockefeller* dissent, Justice Mikoll protested that the court's holding was an impermissible judicial expansion of the foreign object doctrine in that CPLR 214-a "specifically excluded fixation devices from the 'foreign object' exception."³⁰ The dissent further noted that the adoption of CPLR 214-a prevented the expansion, attempted by lower courts, of the narrow holding of *Flanagan*.³¹ Interpreting the *Rodriguez* case,³² Justice Mikoll con-

and, finally, 5) unlike *Rodriguez*, there was no present danger of "bringing virtually all medical malpractice cases under the discovery rule." *Rockefeller*, 182 A.D.2d at 163, 587 N.Y.S.2d at 50. Based on these circumstances, the court concluded that the "burden of defending a 'stale' claim is not sufficient justification for the harsh consequences that [dismissal] would visit on the injured plaintiff." *Id.*

²⁷ 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969).

²⁸ See *supra* note 5 and accompanying text. The *Rockefeller* court drew its analogy to *Flanagan* by stating that: 1) the placement of both the suture and the surgical clamps were unintentional acts; 2) the plaintiffs in both cases sought recovery from the doctor who negligently inserted the device; 3) both the placement of the suture and the continued presence of the clamps were not for any specific medical treatment. Furthermore, in neither was the defendant's ability to defend a "stale" claim impeded. Compare *Flanagan*, 24 N.Y.2d at 431, 248 N.E. 2d at 873, 301 N.Y.S.2d at 27 (finding no impairment of ability to defend) with *Rockefeller*, 182 A.D.2d at 163, 587 N.Y.S.2d at 50 (same).

²⁹ See *Rockefeller*, 182 A.D.2d at 163, 587 N.Y.S.2d at 50.

³⁰ See *Rockefeller*, 182 A.D.2d at 164, 587 N.Y.S.2d at 51 (Mikoll, J., dissenting). Justice Mercure joined in the dissent. *Id.* at 165, 587 N.Y.S.2d at 51.

³¹ *Id.*; see also *Flanagan*, 24 N.Y.2d at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27 (finding surgical clamps were foreign objects since unintentionally left within plaintiff's body). Many courts since *Flanagan* have followed this narrow holding by limiting the exception only to situations in which objects were unintentionally left inside the body. See, e.g., *Beary v. City of Rye*, 44 N.Y. 2d 398, 415, 377 N.E.2d 453, 459, 406 N.Y.S.2d 9, 15 (1978) ("[l]egislature left us no room but to conclude that it intended that *Flanagan* not be broadened beyond its existing confines") *rev'g*, *Smalls v. New York City Health & Hosps. Corp.*, 55 A.D.2d 537, 537, 389 N.Y.S.2d 372, 373 (1st Dep't 1976) (extending *Flanagan* despite acknowledgement that "case is not truly one concerning a 'foreign object'"), and *rev'g*, *Merced v. New York City Health & Hosps. Corp.*, 56 A.D.2d 553, 554, 391 N.Y.S.2d 863, 864 (1st Dep't 1977) (following *Smalls*); *Famulare v. Huntington Hosp.*, 78 A.D.2d 547, 547, 432 N.Y.S.2d 33, 33-34 (2d Dep't 1980) (holding broken tooth not foreign object pursuant to holding in *Flanagan*); see also CPLR 214-a commentary at 61 (McKinney supp. 1993) (discussing case law development limiting *Flanagan* to its facts).

³² See *Rodriguez*, 77 N.Y.2d at 222, 567 N.E.2d at 238, 566 N.Y.S.2d at 196. In its

tended that *Flanagan* is now limited "to cases where an object is 'accidentally . . . left inside the patient's body at the time of surgery and not where the object is deliberately, albeit negligently, placed in the patient.'"³³ It was Justice Mikoll's position, therefore, that legislative intent compelled the court not to expand the foreign object exception beyond the narrow confines of *Flanagan*.³⁴

It is submitted that by recognizing a surgical suture as a foreign object, the *Rockefeller* decision runs contrary to both the express language of CPLR 214-a and the obvious policy determination of the legislature to ease the medical malpractice insurance crisis. While the court recognized the express statutory language stating that fixation devices, including sutures, were excluded from the meaning of "foreign object,"³⁵ it nevertheless determined the exclusion was inapplicable because the suture was not for any proper medical purpose and thus "was never intended."³⁶ It ap-

holding that an IUD was not a foreign object, the *Rodriguez* court invalidated the theory known as "transformation," which, the court explained, allows a properly inserted object, such as an IUD, to take on the character of a foreign object by virtue of the failure to remove it in a timely fashion. *Id.*; see also *Darragh v. County of Nassau*, 91 Misc.2d 53, 55, 397 N.Y.S.2d 553, 555 (Sup. Ct. Nassau County, 1977), *aff'd*, 63 A.D.2d 1010, 405 N.Y.S.2d 1020 (2d Dep't 1978) ("[c]ourt is hard pressed to perceive how two IUDs can be said to belong in the body"); *Sternberg v. Gardstein*, 120 A.D.2d 93, 97, 508 N.Y.S.2d 14, 17 (2d Dep't 1986) ("[T]he IUD which the defendant failed to remove from the plaintiff's body does constitute a foreign object as contemplated by CPLR 214-a and the case law . . ."). The lower courts that had adhered to the "transformation" theory determined that "the first IUD became, or took on the character of, a 'foreign object' because it then had no function to perform, no longer belonged in the body, and should have been removed as expected by the patient." *Darragh*, 63 A.D.2d at 1012, 397 N.Y.S.2d at 555.

³³ *Rockefeller*, 182 A.D.2d at 165, 587 N.Y.S.2d at 51 (Mikoll, J., dissenting) (quoting *Rodriguez*, 77 N.Y.2d at 220, 567 N.E.2d at 237, 566 N.Y.S.2d at 195); accord *Lombardi*, 130 A.D.2d 632, 632, 515 N.Y.S.2d 811, 812 ("[S]uture material, intentionally placed in the body . . . does not constitute a foreign object."), *aff'd*, 71, N.Y.2d 838, 522 N.E.2d 1055, 527 N.Y.S.2d 757 (1988); *Ruane v. Niagara Falls Memorial Medical Ctr.*, 91 A.D.2d 1176, 1177, 459 N.Y.S.2d 147, 148 (4th Dep't 1983) (burr hole covers used to fill drilled section of skull not foreign object), *aff'd*, 60 N.Y.2d 908, 458 N.E.2d 1253, 470 N.Y.S.2d 576 (1983); *Daniec v. Synthes Ltd.*, 110 A.D.2d 675, 677, 487 N.Y.S.2d 808, 810 (2d Dep't 1985) (fixation plate inserted near elbow not foreign object).

³⁴ See *Rockefeller*, 182 A.D.2d at 164, 587 N.Y.S.2d at 51 (Mikoll, J., dissenting); see also CPLR 214-a commentary at 603-04 (McKinney 1990) (explaining requirements for applicability of foreign object rule pursuant to language of *Flanagan*).

³⁵ *Rockefeller*, 182 A.D.2d at 162, 587 N.Y.S.2d at 49 ("We recognize that '[a] fixation device, [including] suture material, intentionally placed in the [patient's] body' does not constitute a 'foreign object . . .'" (quoting *Lombardi*, 130 A.D.2d at 632, 515 N.Y.S.2d at 812).

³⁶ *Rockefeller*, 182 A.D.2d at 162, 587 N.Y.S.2d at 49. The court asserted that the placement of the suture was a mistake and the case therefore resembled the facts in *Flanagan*. *Id.* The court expressed the opinion that since the suture's placement on the vas defer-

pears the majority concluded that a medical act would be deemed unintentional so long as the act was a deviation from proper medical procedure, and therefore would result in the creation of a "foreign object" for the purposes of CPLR 214-a.³⁷ This conversion of an intentional act into an unintentional act is purely semantical. The surgeon deliberately, albeit mistakenly, placed the suture on the vas deferens and did not intend to remove it, thus the suture was not a "foreign object" in the plaintiff's body.³⁸

The enactment of CPLR 214-a was a direct result of the explosion of medical malpractice claims in New York which had driven malpractice insurance premiums to unprecedented levels.³⁹ The clear intent of the New York State Legislature in enacting legislation such as CPLR 214-a was to restrict malpractice claims in order to stabilize insurance premiums.⁴⁰ The majority's decision,

ens was "not usually, normally or customarily" part of such an operation, it could not have been intended. *Id.* at 163, 587 N.Y.S.2d at 50.

³⁷ *Id.* In support of its contention that the case at hand posed no danger of bringing all medical malpractice cases within the scope of the discovery rule, the court limited its holding to "instances where a physician introduces into a patient's body an object—including a suture to an organ not involved in the medical procedure performed—which is not intended to remain there." *Id.*

³⁸ See CPLR 214-a commentary at 603 (McKinney 1990). A foreign object is one the doctor doesn't intend to leave in the body, so if a doctor sutures a wound with thread that is composed of inappropriate material, that suture will not become a foreign object. *Id.* The rule that the foreign object exception is inapplicable in cases in which an object is intentionally placed in the patient's body has been followed by a majority of courts. See, e.g., *Lombardi*, 130 A.D.2d 632, 515 N.Y.S.2d at 812 (2d Dep't 1987) (involving suture material used in surgery), *aff'd*, 71 N.Y.2d 838, 522 N.E.2d 1055, 527 N.Y.S.2d 757 (1988); *Mitchell v. Abitol*, 130 A.D.2d 633, 633-34, 515 N.Y.S.2d 810, 811 (2d Dep't 1987) (suture material used in Caesarean section); *Ruane v. Niagara Falls Memorial Medical Ctr.*, 91 A.D.2d 1176, 1177, 459 N.Y.S.2d 147, 148 (4th Dep't 1983) (burr hole cover used in skull), *aff'd*, 60 N.Y.2d 908, 458 N.E.2d 1253, 470 N.Y.S.2d 576 (1983); *Cooper v. Edinbergh*, 75 A.D.2d 757, 758, 427 N.Y.S.2d 810, 811 (1st Dep't 1980) (suture material used in appendectomy); *Weber v. Scheer*, 58 A.D.2d 520, 520, 395 N.Y.S.2d 183, 184 (1st Dep't 1977) (prosthetic device used in plaintiff's ear). See generally SIEGEL § 42 (2d ed. 1991 & Supp. 1992) (stating that device intentionally left in patient's body would not fall under discovery accrual rule). *But see Vinciguerra v. Jameson*, 153 A.D.2d 452, 551 N.Y.S.2d 691 (3d Dep't 1990). In *Vinciguerra*, the same department that decided *Rockefeller* held that hemoclips (small metallic devices used to control bleeding during surgery) were foreign objects. *Id.* at 455, 551 N.Y.S.2d at 693. The court held this despite the fact that the hemoclips were intentionally attached to the plaintiff's ureter instead of the blood vessel. *Id.* at 453, 551 N.Y.S.2d at 692. The validity of this decision, however, is questionable in light of the *Rodriguez* decision in the same year. See *Rockefeller*, 182 A.D.2d at 164, 587 N.Y.S.2d at 51 (Mikoll, J., dissenting). Justice Mikoll contended that the application of *Flanagan* should not be expanded and therefore concluded that *Vinciguerra* "has no further validity." *Id.* at 165, 587 N.Y.S.2d at 51.

³⁹ See *supra* notes 1-3 and accompanying text (discussing medical malpractice crisis in New York).

⁴⁰ See *supra* note 3 and accompanying text (discussing origin and development of

allowing a fixation device intentionally placed in a patient's body to be termed a "foreign object" for purposes of tolling the statute of limitations, undermines this intent. It is further contended that contrary to Justice Yesawich's assertion, this decision has the potential of "bringing virtually all medical malpractice cases under the discovery rule."⁴¹ Under the *Rockefeller* rule every misplaced suture becomes a foreign object. The issue of medical malpractice is highly complex; thus, expansion of the foreign object exception should be made by the legislature, rather than the judiciary, since the former is in a better position to evaluate the consequences of any change.⁴²

CPLR 214-a). Judge McLaughlin explains in his practice commentary that the enactment of this section was the culmination of a battle between doctors, lawyers, insurance companies, and the legislature. CPLR 214-a commentary at 592 (McKinney 1990). Given the rise in malpractice claims, the objective of CPLR 214-a's enactment was to "limit both the number and size of malpractice judgments." *Id.*

CPLR 214-a reduced the statute of limitations in medical malpractice actions from three years to two years and six months in an effort to decrease rising claims. *See id.* Moreover, the limited definition of the term "foreign object" within CPLR 214-a was an additional legislative mechanism to halt the malpractice crisis. *See* Governor's Memoranda, *supra* note 3, reprinted in [1975] N.Y. LEGIS. ANN. 225; *see also* Daryl L. Jones, Note, *Fein v. Permanent Medical Group: The Supreme Court Uncaps the Constitutionality of Statutory Limitations on Medical Malpractice Recoveries*, 40 U. MIAMI L. REV. 1075, 1083-86 (1986) (medical malpractice crisis legislation purposefully intended to stabilize insurance rates to assure availability of health care to public).

The courts have overwhelmingly adhered to the legislative intent to limit the discovery rule. *See, e.g., Mitchell*, 130 A.D.2d at 633-34, 515 N.Y.S.2d at 811 (suture material not foreign object because of limitations imposed by CPLR 214-a); *DiMarco v. Hudson Valley Blood Servs.*, 141 Misc.2d 59, 60, 532 N.Y.S.2d 488, 489 (Sup. Ct. Bronx County 1988) (virus contained in blood not what was intended as foreign object), *rev'd on other grounds*, 147 A.D.2d 156, 542 N.Y.S.2d 521 (1st Dep't 1989); *Cooper*, 75 A.D.2d at 758, 427 N.Y.S.2d at 811-12 (improper suture does not fall within exception of CPLR 214-a); *cf. Goldsmith v. Howmedica, Inc.*, 67 N.Y.2d 120, 123, 491 N.E.2d 1097, 1098, 500 N.Y.S.2d 640, 641-42 (1986) (although CPLR 214-a not controlling, clear legislative intent not to extend exception to prosthetic devices followed); *see also* CPLR 214-a commentary at 61-62 (McKinney supp. 1993) (*Rodriguez* decision fell in line with other Court of Appeals cases that took restrictive approach to statute of limitations for medical malpractice purposes).

⁴¹ *Rockefeller*, 182 A.D.2d at 163, 587 N.Y.S.2d at 50 (quoting *Rodriguez*, 77 N.Y.2d at 224, 567 N.E.2d at 239, 566 N.Y.S.2d at 193).

⁴² *See, e.g., Neil C. Abramson, Comment, A Right to Privacy Tour de Force Into Louisiana Medical Informed Consent*, 51 LA. L. REV. 755, 785 (1991). In dealing with the topic of medical informed consent, the author noted that generally "[t]he legislature, rather than the courts, is in a better position to assess the needs and interests of the people." *Id.*; Edward A. Lyon, Comment, *The Right to Die: An Exercise of Informed Consent, Not an Extension of the Constitutional Right to Privacy*, 58 U. CIN. L. REV. 1367, 1395 (1990) ("[M]edical . . . questions . . . are better regulated by legislation than by judicial decree."); James T. Landenberger, et al., Case Comment, 60 NOTRE DAME L. REV. 191, 201 (1984) ("[T]he legislature usually can investigate complex problems and balance conflicting inter-

The *Rockefeller* court also neglected and misinterpreted judicial precedent established since the foreign object exception was first enunciated in 1969. A study of these cases shows several attempts to expand the exception, many of which were disallowed by the Court of Appeals.⁴³ The *Rodriguez* decision provides the most recent illustration of the Court of Appeals' reluctance to expand the exception. Although the *Rockefeller* court did distinguish its facts from *Rodriguez*,⁴⁴ the court neglected the most important aspect of that decision: the limitation of the CPLR 214-a discovery rule to cases involving foreign objects, other than those expressly excepted by CPLR 214-a, which were unintentionally left within the patient's body.⁴⁵ The Court of Appeals should thus reverse the

ests better than a court can."); see also *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 456 n.4 (1983) (O'Connor, J., dissenting) ("Irrespective of the difficulty of the task, legislatures, with their superior fact finding capabilities, are certainly better able to make the necessary judgments than are courts."); William A. Chittenden III, *Malpractice and Managed Health Care: History and Prognosis*, 26 *TORTS & INS. L.J.* 451 (1991) (thorough discussion of competing issues and extent of medical malpractice); *supra* note 1 (discussing state of health care crisis and contrary reports).

⁴³ See *Rodriguez* 77 N.Y.2d at 220-21, 567 N.E.2d at 237, 566 N.Y.S.2d at 195 (discussing efforts to expand discovery rule as enunciated in *Flanagan*). Several lower courts have extended or attempted to extend the *Flanagan* analysis to cases involving a foreign object that was either unintentionally or accidentally placed in a patient. See *id.*; *Beary*, 44 N.Y.2d at 415, 377 N.E.2d at 459, 406 N.Y.S.2d at 15 (negligently performed tubal ligation discovered following emergency surgery for ectopic pregnancy); *Smalls v. New York City Health & Hosps. Corp.*, 55 A.D.2d 537, 538, 389 N.Y.S.2d 372, 373 (1st Dep't 1976), *rev'd sub nom. Beary*, 44 N.Y.2d at 414, 377 N.E.2d at 459, 406 N.Y.S.2d at 15 (lesion caused by negligently performed cervical myelogram); *Dobbins v. Clifford*, 39 A.D.2d 1, 2-3, 330 N.Y.S.2d 743, 746-47 (4th Dep't 1972) (damage to pancreas during course of operation to remove spleen); *Murphy v. St. Charles Hosp.*, 35 A.D.2d 64, 65, 312 N.Y.S.2d 978, 979-80 (2d Dep't 1970) (malfunction in surgically implanted prosthetic device); *cf. Famulare v. Huntington Hosp.*, 78 A.D.2d 547, 547, 432 N.Y.S.2d 33, 33-34 (2d Dep't 1980) (fragment of broken tooth in plaintiff's lip).

Such attempts by the lower courts to expand *Flanagan* were largely the reason that CPLR 214-a explicitly excluded fixation devices from the discovery rule. See *Rodriguez*, 77 N.Y.2d at 220-21, 567 N.E.2d at 237, 566 N.Y.S.2d at 195. "Th[e] exclusion was inserted specifically to overcome efforts by the intermediate appellate courts to expand *Flanagan* by applying it to 'instances where fixation devices were inserted in a patient's body for the purpose of treatment.'" *Id.* at 221, 567 N.E.2d at 238, 566 N.Y.S.2d at 196.

Such attempts to expand the discovery rule were also prevalent in cases concerning the "continuous treatment" exception. See, e.g., *Daniel J. v. New York City Health & Hosps. Corp.*, 77 N.Y.2d 630, 634-35, 571 N.E.2d 704, 706-07, 569 N.Y.S.2d 396, 398-99 (1991); *Rizk v. Cohen*, 73 N.Y.2d 98, 103-05, 535 N.E.2d 282, 284-86, 538 N.Y.S.2d 229, 231-33 (1989).

⁴⁴ See *supra* note 26 and accompanying text (outlining court's attempt to distinguish *Rockefeller* from *Rodriguez*).

⁴⁵ See *Rodriguez*, 77 N.Y.2d at 221-22, 567 N.E.2d at 237-38, 566 N.Y.S.2d at 195-96. The *Rodriguez* court's insistence that the foreign object exception be narrowly construed was further evident when, in dicta, it stated: ". . . even if 'considerations similar to those

Third Department's judgment and once again repel an impermissible expansion of the discovery rule.

Brian G. Friel

which motivated the court in *Flanagan* [c]ould be applied with like effect to the . . . different circumstances [presented here].’” “The codification of the judicially created ‘foreign object’ rule in CPLR 214-a precludes our adoption of a more flexible discovery rule” *Id.* at 223-24, 567 N.E.2d at 239, 566 N.Y.S.2d at 197 (quoting *Beary*, 44 N.Y.2d at 414, 377 N.E.2d at 459, 406 N.Y.S.2d at 15). The *Rockefeller* court neglected to adhere to this statement as evidenced by the court’s reliance on the *Flanagan* factors to support its holding. *See Rockefeller*, 182 A.D.2d at 162-63, 587 N.Y.S.2d at 50.

