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Discovering Justice in Toxic Tort Litigation: CPLR 241-c

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NOTES

DISCOVERING JUSTICE IN TOXIC TORT LITIGATION: CPLR 214-c

In the typical negligence action, the statute of limitations[1] accrues at the time the tortious conduct injures the plaintiff.[2] Difficulties arise, however, when the potential plaintiff is exposed to a harmful substance which causes an injury that does not become apparent for several years.[3] New York traditionally has held that

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[1] *See generally* D. SIEGEL, NEW YORK PRACTICE §§ 33-57 (1978) (general discussion of statutes of limitations); Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950) (discussing functions and purposes of statutes of limitations). The purpose of a statute of limitations is to prescribe the time in which a plaintiff must commence an action, thereby protecting defendants from the burden of defending against stale claims. *See* Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944). In *Railway Express*, the Supreme Court stated that:

> Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Id. at 348-49.

[2] *See* Comstock v. Wilson, 257 N.Y. 231, 235, 177 N.E. 421, 424 (1931). In negligence claims the essence of a cause of action is damage or injury to the plaintiff. *Id.* The statute of limitations is generally held not to begin to run until some type of damage has occurred. *See* White v. Schnoebelen, 91 N.H. 273, 274-76, 18 A.2d 185, 186-87 (1941); W. PROSSER & W. KEETON, THE LAW OF TORTS § 30, at 165 (5th ed. 1984). There is little difficulty in ascertaining the time at which damage occurs and the cause of action accrues in a typical negligence action. *See* D. SIEGEL, *supra* note 1, § 40, at 42. However, in a personal injury action based in negligence, the period runs from the moment of injury, *see id.*, or "when there is a wrongful invasion of personal or property rights." Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936). *See also* Note, *supra* note 1, at 1200 (discussing computation of period of limitations).

[3] *Compare* Locke v. Johns-Manville Corp., 221 Va. 951, 958-59, 275 S.E.2d 900, 905 (1981) (statute runs from date cancer begins, not discovery or exposure to asbestos) *with* Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 1010, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (1981) (mem.) (statute runs from date of last exposure to asbestos), *cert. denied*, 456 U.S. 967 (1982). *See* D. SIEGEL, *supra* note 1, § 40, at 42. "[T]his time-of-injury

the cause of action accrues on the date of exposure, despite the possibility that the plaintiff may become aware of the injury only after the statute of limitations has expired.[4] The harsh results caused by this traditional exposure rule have led a majority of jurisdictions[5] to adopt the "discovery rule," which tolls the com-

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rule can work to the plaintiff's detriment when the cause of the injury is more subtle." *Id.* *See, e.g., Schmidt*, 270 N.Y. at 301, 200 N.E. at 827 (1936) (action accrued when dust inhaled, even though disease resulting from inhalation was not discovered for several years).

"Real difficulties have resulted where, . . . [as in] actions involving toxic drugs or chemicals, the statute has run before the plaintiff discovers that he has suffered injury, and sometimes even before the plaintiff himself has suffered the injury." W. PROSSER & W. KEETON, *supra* note 2, § 30, at 165. Many hazardous substances cause ill-effects that do not manifest themselves for years. *See* Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases*, 13 FORUM 279, 285 (1977). For example, DES, a drug taken by women to prevent miscarriages, has been banned because it has been linked to cancer in the female children of women who used the drug. *See id.* at 285 n.26. If plaintiff does not learn of the carcinogenic qualities of the product until several years after exposure or ingestion, some courts have urged that it would be unreasonable and perhaps unconstitutional to bar a claim before it was possible for the plaintiff to learn of the injury sustained. *See, e.g.*, Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 219, 188 N.E.2d 142, 146, 237 N.Y.S.2d 714, 719 (Desmond, C.J., dissenting), *cert. denied*, 374 U.S. 808 (1963). *See also* Urie v. Thompson, 337 U.S. 163, 168-71 (1949) (statute of limitations does not begin to run until symptoms become manifest).

[4] *See Schmidt*, 270 N.Y. at 300-01, 200 N.E. at 827; *see also Schwartz*, 12 N.Y.2d at 216, 188 N.E.2d at 144, 237 N.Y.S.2d at 717 (citing *Schmidt* as controlling). In *Schmidt*, plaintiff sued for damages resulting from the inhalation of harmful dust. *Schmidt*, 270 N.Y. at 297, 200 N.E. at 825. The New York Court of Appeals held that the "injury to the plaintiff was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust." *Id.* at 301, 200 N.E. at 827.

The New York Court of Appeals most recently reaffirmed its adherence to the *Schmidt* rule in Fleishman v. Eli Lilly & Co., 62 N.Y.2d 888, 890, 467 N.E.2d 517, 518, 478 N.Y.S.2d 853, 854 (1984) (mem.) (cancer victim time barred in action against DES manufacturer), *cert. denied*, 469 U.S. 1192 (1985), and Martin v. Edwards Laboratories, 60 N.Y.2d 417, 422, 457 N.E.2d 1150, 1152, 469 N.Y.S.2d 923, 925 (1983) (action accrues on date of implantation of artificial heart valve).

See generally Birnbaum, *supra* note 3, at 282-84 (discussing New York's date of exposure rule); *infra* notes 10-22 and accompanying text (examining New York's adherence to date of exposure rule).

[5] *See* W. PROSSER & W. KEETON, *supra* note 2, § 30, at 165-67. The apparent injustice of the date of exposure approach has led many courts to seek to circumvent this rule. *Id.* at 166. By 1982, thirty-six jurisdictions had adopted a discovery rule. *See* Note, *Denial of a Remedy: Former Residents of Hazardous Waste Sites and New York's Statute of Limitations*, 8 COLUM. J. ENVTL. L. 161, 170 n.55 (1982). By 1983, this number had increased to thirty-nine. *See* J. TRAUBERMAN, STATUTORY REFORM OF "TOXIC TORTS": RELIEVING LEGAL, SCIENTIFIC, AND ECONOMIC BURDENS ON THE CHEMICAL VICTIM 173 n.94 (citing SUPERFUND SECTION 301(e) STUDY GROUP, INJURIES AND DAMAGES FROM HAZARDOUS WASTES: ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES 115-17 (July 1, 1982 draft) [hereinafter INJURIES AND DAMAGES]). "[T]he trend in most jurisdictions is to start the running of the judicial clock only after the victim has discovered or reasonably could have discovered the harm." J. TRAUBERMAN, *supra*, at 14.

mencement of the statute of limitations until the plaintiff has discovered, or, through the exercise of reasonable diligence, should have discovered, the injury.[6] While New York has for some time applied the discovery rule to certain types of actions,[7] the New

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These jurisdictions have apparently realized that the issue of accrual in exposure cases has taken on greater significance in recent years because of the number of substances linked to cancer. *See* Birnbaum, *supra* note 3, at 284-85. "There is a growing awareness that of the thousands of commercially produced chemical compounds to which we are all . . . exposed, many are causally linked with cancer and other fatal diseases that develop over a sustained period of time with serious or fatal effects." *Id.* at 285.

[6] *See* W. PROSSER & W. KEETON, *supra* note 2, § 30, at 166. The discovery rule has been described, in an oft-cited dissent by Judge Frank, as follows:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as sort of a legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff.

Dincher v. Martin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting).

There are several formulations of the discovery rule. One approach holds that the statute of limitations runs from the time the disease manifests itself. *See* Urie v. Thompson, 337 U.S. 163, 170 (1949); Birnbaum, *supra* note 3, at 281. In *Urie*, plaintiff, a railroad employee, contracted silicosis by inhaling silica dust. *Urie*, 337 U.S. at 165-66. In determining the time of commencement of the cause of action, the Supreme Court stated:

> It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves. . . .

Id. at 170 (quoting Associated Indem. Corp. v. Industrial Accident Comm'n, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (Dist. Ct. App. 1932)).

Another formulation of the discovery rule states that the period runs from the time the disease is diagnosed. *See* Young v. Clinchfield R.R., 288 F.2d 499, 503 (4th Cir. 1961). The *Young* court concluded that the time "when the plaintiff has reason to know he has been injured . . . [g]enerally . . . will be when his condition is diagnosed." *Id.*

Finally, several courts have adopted the view that the cause of action accrues when plaintiff discovers, or should have discovered, his injury and its causal connection to defendant's conduct. *See, e.g.*, Lopez v. Swyer, 62 N.J. 267, 270-72, 300 A.2d 563, 565 (1973) (action accrues when plaintiff discovers radiation therapy was negligently administered); Raymond v. Eli Lilly & Co., 117 N.H. 164, 171, 371 A.2d 170, 173 (1977) (discovery rule applies to case of blindness caused by oral contraceptive).

For a discussion of the various formulations of the discovery rule, see *infra* notes 66-75 and accompanying text. *See also* Birnbaum, *supra* note 3 (discussion of discovery rule and its application).

[7] *See* N.Y. CIV. PRAC. L. & R. § 213(8) (McKinney 1978) (fraud); *id.* § 206(b) (breach of warranty of authority); *id.* § 214-a (foreign object medical malpractice); *id.* § 214-b (McKinney Supp. 1987) (Agent Orange exposure); N.Y. WORK. COMP. LAW § 28 (McKinney Supp. 1987) (occupational diseases). *See also infra* notes 23-39 and accompanying text (discussing gradual acceptance of discovery rule in New York).

York Legislature brought the state in line with the majority of jurisdictions when it enacted Civil Practice Law and Rules ("CPLR") section 214-c,[8] providing that an action arising out of exposure to a harmful substance may be commenced within three years after the injury is discovered.[9]

This Note will first examine the background of accrual in exposure causes of action in New York and the gradual acceptance of the discovery rule. An analysis of the provisions of CPLR section 214-c and the problems likely to arise from its ambiguous language will then be undertaken, with suggested solutions to these problems. Finally, the various formulations of the discovery rule will be discussed, and it will be asserted that while the adoption of a broad discovery rule was a welcomed amendment, the New York Legislature failed to adopt the best formulation of the rule.

THE "FIRST BREATH" RULE

The law in New York governing exposure cases had traditionally been that the statute of limitations commenced upon exposure to the harmful substance which caused the injury.[10] In *Schmidt v. Merchants Despatch Transportation Co.*,[11] the New York Court of Appeals adopted this "first breath" rule,[12] holding that the injury was sustained at the time of exposure to the toxic substance despite the fact that the injury was not discovered until several years later.[13] In *Schmidt*, the plaintiff sued for damages resulting from the prolonged inhalation of silica dust.[14] Since the plaintiff's injury did not become apparent until after the three year statute of limitations had run, as measured from the time of inhalation, the ac-

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[8] N.Y. CIV. PRAC. L. & R. § 214-c (McKinney Supp. 1987). For a discussion of section 214-c, see *infra* notes 41-71 and accompanying text.

[9] *See id.*

[10] *See, e.g.*, Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 301, 200 N.E. 824, 827 (1936) (action accrued on exposure to harmful dust); Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 215-16 188 N.E.2d 142, 143, 237 N.Y.S.2d 714, 716 (action accrued when toxic substance injected into plaintiff), *cert. denied*, 374 U.S. 808 (1963).

[11] 270 N.Y. 287, 200 N.E. 824 (1936).

[12] *See* Birnbaum, *supra* note 3, at 282; *supra* note 4 and accompanying text. Pursuant to the first breath rule, a cause of action accrues upon a plaintiff's exposure to a harmful agent, regardless of whether symptoms of the resulting disease accompany that exposure. Birnbaum, *supra* note 3, at 282. The rule is founded upon the idea that the harmful agent acts immediately upon the plaintiff. *Id.*

[13] *See Schmidt*, 270 N.Y. at 300-01, 200 N.E. at 827.

[14] *Id.* at 297, 200 N.E. at 825. As a result of the exposure, plaintiff contracted a lung disease, pneumoconiosis. *Id.*

tion was not timely. [15] The *Schmidt* court held that exposure to and inhalation of silica dust was the injury which constituted an actionable wrong,[16] and the injury "was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust."[17]

While the full effects of the *Schmidt* decision were not immediately realized, as industrialization progressed, the increasing possibility of exposure to harmful substances caused the injustice of the first breath rule to become readily apparent.[18] Although the New York Court of Appeals recognized that a cause of action accrued only when there was some actual deterioration of the plaintiff's body,[19] it continued to follow the reasoning of *Schmidt* that the dust immediately acted upon the plaintiff's body to cause an injury.[20] Notwithstanding entreaties by many judges that a less

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[15] *Id.* at 298, 200 N.E. at 826. Plaintiff had inhaled the dust while employed by defendant, and his employment had ceased more than three years before the action was commenced. *Id.*

[16] *Id.* at 300, 200 N.E. at 827. After stating that it was the exposure to the silica dust which constituted a wrongful invasion, and, therefore, an actionable wrong, the court went on to say that:

> There can be no doubt that a cause of action accrues only when the forces wrongfully put in motion produce injury. . . .
>
> That does not mean that the cause of action accrues only when the injured person knows or should know that the injury has occurred. The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues.

Id.

[17] *Id.* at 301, 200 N.E. at 827. The court went on to state that the defendant was liable for all damages resulting from this injury, and that plaintiff could have brought an action against defendant immediately after he inhaled the dust. *Id.* "In that action the plaintiff could recover all damages which he could show had resulted or would result therefrom." *Id.* It is submitted that this view, at the very least, is unrealistic. It is further suggested that, since damage is an essential element of a negligence claim, *see* W. PROSSER & W. KEETON, *supra* note 2, § 30, at 165, if plaintiff brought such an action before the damage had resulted, it would be dismissed for a failure to state a cause of action upon which relief can be granted. *See* N.Y. CIV. PRAC. L. & R. § 3211(a)(7) (McKinney 1978).

[18] *See* Marlin & Levy, *New York Adopts Discovery Rule for Latent-Disease Cases*, N.Y.L.J., July 7, 1986, at 30, col. 1. A survey of recent case law reveals the expanding number and type of latent disease cases that would be barred under the *Schmidt* rule. *See, e.g.*, Fleishman v. Eli Lilly & Co., 62 N.Y.2d 888, 467 N.E.2d 517, 478 N.Y.S.2d 853 (1984) (mem.) (DES action), *cert. denied*, 469 U.S. 1192 (1985); Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981) (mem.) (asbestos exposure), *cert. denied*, 456 U.S. 967 (1982); Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979) (plaintiff injected with cancer-causing drug).

[19] *See* Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 217, 188 N.E.2d 142, 144, 237 N.Y.S.2d 714, 717, *cert. denied*, 374 U.S. 808 (1963).

[20] *See Schwartz*, 12 N.Y.2d at 217, 188 N.E.2d at 144, 237 N.Y.S.2d at 717. *See also Fleishman*, 62 N.Y.2d at 890, 467 N.E.2d at 518, 478 N.Y.S.2d at 854 (departure from prior

harsh rule be adopted,[21] the court of appeals maintained that any departure from the traditional rule must come from the legislature.[22]

Emergence of the Discovery Rule in New York

While the *Schmidt* first breath rule remained intact in exposure cases for some fifty years, the discovery rule gained gradual acceptance in other types of actions.[23] New York first extended the discovery rule to causes of action based on fraud.[24] Under CPLR section 213(8), the time within which an action for fraud must be commenced is computed from the time when the fraud was or should have been discovered.[25] Similarly, a discovery accrual is also

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decisions unwarranted); *Steinhardt*, 54 N.Y.2d at 1010, 430 N.E.2d at 1299, 446 N.Y.S.2d at 246 (expressly reaffirming *Schmidt* rule); *Thornton*, 47 N.Y.2d at 781-82, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922 (refusing to adopt discovery rule).

In *Schwartz*, a substance was injected into plaintiff's sinuses in 1944 to make them perceptible to X-rays. *Schwartz*, 12 N.Y.2d at 215, 188 N.E.2d at 143, 237 N.Y.S.2d at 715. Some of the substance remained in plaintiff's head and produced a carcinoma requiring the removal of an eye in 1957. *Id.* An action was commenced in 1959. *Id.* The court stated, in discussing prior New York cases and commentaries, that not one of the "views point to a discovery rule. They would indicate . . . that the action accrues only when there is some actual deterioration of a plaintiff's bodily structure. . . . But Judge Lehman's view in the *Schmidt* case is right as we must assume that the dust immediately acted upon Schmidt's lung tissue." *Id.* at 217, 188 N.E.2d at 144, 237 N.Y.S.2d at 717. While the court recognized that the proper rule may be that the action does not accrue until plaintiff is actually harmed, it is submitted that the court felt constrained by the doctrine of *stare decisis* and applied the *Schmidt* rule.

[21] *See Fleishman*, 62 N.Y.2d at 891, 467 N.E.2d at 519, 478 N.Y.S.2d at 855 (Cooke, C.J., dissenting). Chief Judge Cooke urged that "[i]t is time to abandon that inequitable [*Schmidt*] rule as a mistake of the past that we have a duty to correct." *Id.* The dissent in *Schwartz* argued that plaintiff's theory of action was that "the carcinogenic qualities of the injection were not discoverable by him until after the 1957 surgical operation. If that be the fact, it would be unreasonable and perhaps unconstitutional to hold that his time to sue expired before it was possible for him to learn of the wrong." *Schwartz*, 12 N.Y.2d at 219, 188 N.E.2d at 146, 237 N.Y.S.2d at 719 (Desmond, C.J., dissenting). *See also* Urie v. Thompson, 337 U.S. 163, 170 (1949) (legislature did not intend plaintiff's "blameless ignorance" to deprive him of a cause of action); Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809 (2d Cir. 1960) (for statute to begin to run before plaintiff could ascertain injuries would be unreasonable).

[22] *See, e.g., Fleishman*, 62 N.Y.2d at 890, 467 N.E.2d at 518, 478 N.Y.S.2d at 854 (developing new polices is role of legislature); *Thornton*, 47 N.Y.2d at 781-82, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922 (extending discovery rule is for legislature, not courts).

[23] *See supra* note 7.

[24] *See* N.Y. Civ. Prac. L. & R. § 213(8) (McKinney 1978). This section was enacted in 1965. *Id.*

[25] *See id.* When the discovery rule is utilized in an action for fraud, two alternative measurements are used to compute the applicable statute of limitations. *See id.* § 203(f) (McKinney 1978). Plaintiff has either six years from the time the fraud was committed, *see*

applied to actions based on a breach of warranty of authority.[26] After the legislature had consistently refused to act,[27] the initial judicial application of the discovery rule to personal injury actions was in the medical malpractice area.[28] In *Flanagan v. Mount Eden General Hospital*,[29] foreign objects left inside the plaintiff's body during surgery were discovered and removed eight years later.[30] The *Flanagan* court held that the statute of limitations did not begin to run until plaintiff could have discovered the malpractice.[31]

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id. § 213(8), or two years from discovery of the fraud, whichever is longer, *see id.* § 203(f). *See also* D. SIEGEL, *supra* note 1, § 43, at 45 & Supp. 1987, at 16 (discussing discovery accruals).

[26] *See* N.Y. CIV. PRAC. L. & R. § 206(b) (McKinney 1978). The period for such an action is six years from the misrepresentation, *see id.* § 213(2), or two years from its discovery, *see id.* § 203(f). *See also* D. SIEGEL, *supra* note 1, § 43, at 46 (discussing accrual of breach of warranty of authority).

[27] *See* D. SIEGEL, *supra* note 1, § 42, at 44.

[28] *See* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969).

[29] *Id.*

[30] *Id.* at 428, 248 N.E.2d at 871, 301 N.Y.S.2d at 24.

[31] *Id.* at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27. The court discussed and distinguished its decision in Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963). *See also Flanagan*, 24 N.Y.2d at 430, 248 N.E.2d at 872-73, 301 N.Y.S.2d at 26. In *Flanagan*, the court concluded that the difference between negligent medical treatment cases and cases involving negligent malpractice in which a foreign object is left inside the patient's body is that "[i]n the latter no claim can be made that the patient's action may be feigned or frivolous." *Id.*, 248 N.E.2d at 872, 301 N.Y.S.2d at 26. Recognizing the "unsoundness of the traditional rule," the *Flanagan* court stated that:

> It simply places an undue strain upon common sense, reality, logic and simple justice to say that a cause of action had "accrued" to the plaintiff until the X-ray examination disclosed a foreign object within her abdomen and until she had a reasonable basis for believing or reasonable means of ascertaining that the foreign object was within her abdomen as a consequence of the negligent performance of the [operation].

Id. at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 26 (quoting Morgan v. Grace Hosp., 149 W. Va. 783, 792, 144 S.E.2d 156, 161 (1965)).

Prior to the *Flanagan* decision, the New York Court of Appeals had affirmed, without opinion, a decision which held that in a foreign object malpractice case, the statute of limitations ran from the commission of the act. Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1st Dep't), *aff'd*, 254 N.Y. 620, 175 N.E. 892 (1930). The *Flanagan* court noted that when *Conklin* was decided, no other jurisdiction had a contrary rule. *Flanagan*, 24 N.Y.2d at 430, 248 N.E.2d at 872, 301 N.Y.S.2d at 26. At the time of *Flanagan*, however, there was a split on this issue in the country. *Id.* at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27. Nine jurisdictions limited the discovery rule to foreign object medical malpractice cases, *see id.* at 431 & n.1, 248 N.E.2d at 873 & n.1, 301 N.Y.S.2d at 27 & n.1; eleven had adopted the rule for all malpractice cases, *see id.* at 432-33 & n.2, 248 N.E.2d at 873 & n.2, 301 N.Y.S.2d at 27 & n.2; two had adopted the discovery rule by statute, *see id.* at 432 & n.3, 248 N.E.2d at 873 & n.3, 301 N.Y.S.2d at 27 & n.3; and twenty-one states did not apply a

Although later cases applying this rule did not insist on the presence of a foreign object,[32] the legislature codified the discovery rule in 1975 under CPLR section 214-a, but expressly limited it to actions involving foreign objects[33] and explicitly excluded from its coverage actions based on exposure to chemicals.[34]

Through the enactment of CPLR section 214-b in 1981, New York extended the discovery rule to actions arising out of exposure to a toxic substance by creating a cause of action for Vietnam War veterans exposed to Agent Orange.[35] Although CPLR 214-b is very limited in scope,[36] its adoption signaled a growing acceptance of the discovery rule. In addition, the New York Legislature amended section 28 of the Workers' Compensation Law in 1984, to include a broad discovery rule for occupational disease claims.[37] Section 28 applies this rule to diseases caused by exposure to any chemical compound,[38] and provides that the afflicted employee may bring his claim within two years after the time he knew or should have known that his disease was caused by the nature of his employment.[39]

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discovery rule, holding instead that the action accrued on the commission of the malpractice, *see id.* at 432 & n.4, 248 N.E.2d at 873 & n.4, 301 N.Y.S.2d at 27 & n.4. *See generally* Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339 (1962) (discussing medical malpractice statutes of limitations and urging adoption of discovery rule); Comment, *Medical Malpractice Statutes of Limitation: Uniform Extension of the Discovery Rule*, 55 IOWA L. REV. 486 (1969) (discussing application of discovery rule in malpractice actions and urging states to accept discovery rule).

[32] *See, e.g.*, Dobbins v. Clifford, 39 App. Div. 2d 1, 3, 330 N.Y.S.2d 743, 746 (4th Dep't 1972) (damage done to internal organ during surgery—no foreign object left inside). The *Dobbins* court noted that "professional diagnostic judgment is not involved," so false claims were minimized and the *Flanagan* standards met. *Id.* at 4, 330 N.Y.S.2d at 747.

[33] N.Y. CIV. PRAC. L. & R. § 214-a (McKinney 1975). This section provides that:

> [W]here 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.

Id. (emphasis added).

[34] *See id.* The section states that "the term 'foreign object' shall not include a chemical compound, fixation device or prosthetic aid or device." *Id.*

[35] N.Y. CIV. PRAC. L. & R. § 214-b (McKinney Supp. 1987).

[36] *See id.* The statute applies only to personal injury actions based on exposure to Agent Orange while serving as a member of the United States Army in Indo-China from 1962 through 1975. *Id.* CPLR 214-b provides that such actions may be commenced within two years from the date the injury was or should have been discovered. *Id.*

[37] *See* N.Y. WORK. COMP. LAW § 28 (McKinney Supp. 1987).

[38] *See id.*

[39] *See id.* This approach is known as the causal connection formulation of the discovery rule. *See supra* note 6; *infra* notes 71-74 and accompanying text. At least thirteen states

CPLR 214-c: Provisions and Problems

The first breath rule was finally laid to rest in July 1986, when CPLR section 214-c became law in New York.[40] A broad discovery rule, applicable to actions arising out of exposure to any substance, appears in CPLR 214-c(2), which provides that the statute of limitations is computed from the "discovery of the injury,"[41] a term left to be defined by the courts.[42] A wide range of definitions is possible for this term, as indicated by the varying formulations developed in construing the discovery rule.[43] A narrow interpretation of this term provides that the statute of limitations starts to run at the injured party's first sign or symptom of disease.[44] It is submit-

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have adopted this form of the discovery rule. *See* J. Trauberman, *supra* note 5, at 173 n.94 (citing Injuries and Damages, *supra* note 5, at 28-29).

[40] *See* N.Y. Civ. Prac. L. & R. § 214-c (McKinney Supp. 1987). The statute became effective on July 30, 1986. *See id.* "This bill . . . repeals that archaic rule and replaces it with a fair and simple rule which permits a person to discover his or her injury before the statutory time period for suit begins to run." Governor's Memorandum on Approval of ch. 682, N.Y. Laws (July 30, 1986), *reprinted in* [1986] N.Y. Laws 3182 (McKinney) [hereinafter Memorandum].

[41] N.Y. Civ. Prac. L. & R. § 214-c (McKinney Supp. 1987). CPLR 214-c(2) provides that:

> [T]he three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance . . . must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

Id.

[42] *See* Rheingold, *The New Statute of Limitations in Tort Actions in New York*, N.Y.L.J., July 29, 1986, at 1, col. 4, at 3, col. 1. It is submitted that the legislature should have expressly defined the term "discovery of injury" in the statute rather than pass this burden on to the courts. In contrast, another important term in the statute, "exposure," is expressly defined, *see* N.Y. Civ. Prac. L. & R. § 214-c(1) (McKinney Supp. 1987).

[43] *See supra* note 6; *infra* notes 44-75 and accompanying text.

[44] *See* Rheingold, *supra* note 42, at 1, col. 4. The first sign of the disease, however, would not necessarily put an injured party on notice as to what he is suffering from and, consequently, he may not be cognizant of the fact that he has a claim, or of the identity of a potential defendant. *See* Young v. Clinchfield R.R., 288 F.2d 499 (4th Cir. 1961). In *Young*, the plaintiff was a former railroad employee who had been exposed to silica dust from 1945 through 1954. *Id.* at 501. Plaintiff left defendant's employ in 1954 because of shortness of breath. *Id.* at 503. Plaintiff's condition was diagnosed as silicosis in 1956, less than three years (the statute of limitations for this action) before the suit was filed. *Id.* Defendant argued that the action accrued, at the latest, on plaintiff's last day of employment. *Id.* Since plaintiff came from a mining region where silicosis was common, it was contended that he should be charged with the knowledge that shortness of breath is a symptom of silicosis. *Id.* Therefore, the plaintiff had reason to know as early as 1954 that he had contracted the disease. *Id.* Plaintiff, however, had complained of other ailments before leaving his job, including kidney trouble, and he had recently undergone surgery. *Id.* In holding that the ac-

ted that such an interpretation defeats the purpose of the statute and could result in as much injustice as did the first breath rule.[45] A more liberal interpretation of the discovery rule would not start the clock until plaintiff's condition had been diagnosed by a licensed physician.[46] It is submitted that this is a more equitable definition because, unlike a first symptom test, the diagnosis would put plaintiff on notice that he has a claim against someone. As CPLR 214-c(2) includes within the statute of limitations the time that the plaintiff should have discovered his injury, a broad interpretation of time of discovery would not be subject to abuse by those who deliberately avoid medical treatment in order to toll the limitations period.[47] It is suggested that a formulation which postpones plaintiff's time to sue until the condition is diagnosed is the best reading of CPLR 214-c(2) that can be supported by its language.[48]

Notwithstanding a liberal formulation of the discovery rule, plaintiffs who become aware of their injury but have not discovered its cause are afforded a limited measure of relief under CPLR 214-c(4).[49] This section provides that if the cause of the injury is

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tion did not accrue with the appearance of shortness of breath, the *Young* court stated that:

> With a complex of symptoms this ignorant layman could not in fairness be charged with a recognition of his silicosis because one of his symptoms was shortness of breath. This is not a specific symptom of silicosis; it is commonly indicative of many other diseases as well. Failure to associate it with silicosis at this early date cannot be treated as fault or neglect or a circumstance sufficient to create a factual issue. Residence in mining country . . . does not invest one with the expert knowledge or diagnostic skill sought to be attributed to the plaintiff.

Id.

[45] The underlying purpose of the statute was to remedy the injustice of the *Schmidt* rule. *See* Memorandum, *supra* note 40. In approving the bill, Governor Cuomo stated:

> [The Bill] remedies a fundamental injustice in the laws of our State which has deprived persons suffering from exposure to toxic or harmful substances from having an opportunity to present their case in court. That injustice results from an archaic rule which commences the three year time period for suit on the date that an exposure occurs. The rule fails to recognize that the adverse effects of many of these toxic substances do not manifest themselves until many years after the exposure takes place. In such cases, a person is barred from court before he or she is aware of any injury.

Id.

[46] *See* Rheingold, *supra* note 42, at 1, col. 4. *See also* Young v. Clinchfield R.R., 288 F.2d 499, 503 (4th Cir. 1961) (time when plaintiff knows he is injured generally when diagnosed).

[47] *See* N.Y. CIV. PRAC. L. & R. § 214-c(2) (McKinney Supp. 1987).

[48] *See id.* § 214-c (McKinney Supp. 1987).

[49] *See id.* § 214-c(4) (McKinney Supp. 1987). This section provides that:

> [w]here the discovery of the cause of the injury is alleged to have occurred less

discovered less than five years after the injury was or should have been discovered, the plaintiff may commence an action within one year after the date the cause of the injury is discovered.[50] However, the plaintiff must plead and prove a lack of existing information that might have uncovered the cause of the injury within the initial statutory period.[51] This section, criticized as overly complex and less than artfully drafted, will create many issues of interpretation for New York courts to resolve.[52] The conceivable judicial constructions may range from requiring an objective, individual lack of knowledge concerning the cause of the plaintiff's illness,[53] to mandating proof that no one, not even the defendant, could have known the cause.[54] While the language of the statute seems to suggest that the latter meaning is correct, it is suggested that such a reading is unduly burdensome to the plaintiff and would be virtually impossible to satisfy considering the present state of medical knowledge.

The specific discovery provision of CPLR 214-c(4) precludes the use of the liberal causal connection formulation of the discovery rule which is gaining acceptance in many jurisdictions.[55] The

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than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury; provided . . . the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized.

Id.

[50] *See id.*

[51] *See id.*

[52] *See* Rheingold, *supra* note 42, at 3, col. 1; N.Y. CIV. PRAC. L. & R. § 214-c, commentary at 303 (McKinney Supp. 1987). "It need not be said that this is a complicated statute. It reeks of the midnight oil of political compromise. And the draftsmanship cannot be described as commendable." *Id.*

[53] *See* Rheingold, *supra* note 42, at 3, col. 1. "The term 'cause of the injury' should be given a meaning consistent with the thrust of the statute and should imply that the plaintiff has sufficient knowledge to bring an action." N.Y. CIV. PRAC. L. & R. § 214-c, commentary at 303 (McKinney Supp. 1987).

[54] *See* Rheingold, *supra* note 42, at 3, col. 1. If this meaning is correct, the result would be absurd, "since the almost universal situation is that the defendant knows what his product is doing but isn't talking about it (and may indeed be actively concealing it)." *Id.* at 3, col. 2.

[55] The causal connection formulation is becoming more widely accepted as thirteen states have adopted this rule. *See supra* note 6 (describing this approach); note 40. A causal connection approach cannot be taken under CPLR 214-c(2) because of the very specific discovery of the cause language in CPLR 214-c(4). *See* N.Y. CIV. PRAC. L. & R. § 214-c(4)

distinction between this rule and that adopted by CPLR 214-c is significant because there are many cases in which a person is aware of his illness but does not know of the causal connection between the disease and the substance to which he was exposed.[56] It is submitted that the provisions of CPLR 214-c(2) and CPLR 214-c(4) should have been combined to form a broad discovery rule which would start the statutory clock when the plaintiff discovered his injury and the fact that it was caused by the defendant's conduct.

DEFINING "EXPOSURE TO ANY SUBSTANCE"

The discovery rule of CPLR 214-c applies to actions for personal injury or property damage caused by the latent effects of "exposure to any substance."[57] Although the term "exposure" is defined in some detail in the statute,[58] the meaning and scope of

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(McKinney Supp. 1987).

[56] *See* Marlin & Levy, *supra* note 18, at 30, col. 1. *See also* Ward v. Desachem Co., 771 F.2d 663 (2d Cir. 1985). In *Ward*, plaintiff was exposed to various chemicals in connection with his employment. *Id.* at 665. Plaintiff complained of irritability, fatigue, and sensations in his chest and visited a physician in 1978. *Id.* The doctor concluded that plaintiff was physically sound, but was suffering from depression and fatigue. *Id.* Relying on this misdiagnosis, plaintiff returned to work and was again exposed to the toxic chemicals. *Id.* The symptoms continued, and plaintiff was later diagnosed, in 1980, as having "asthma produced by exposure to noxious fumes." *Id.* Plaintiff commenced the action in 1981, more than three years after the symptoms were discovered. *Id.* The district court granted summary judgment in favor of defendant, holding that the three years, measured from the time Ward discovered his injury, had expired. *Id.* at 666. The circuit court, however, reversed, holding that the time is computed from the date of the last exposure, not from discovery, under the traditional New York rule. *Id.* at 666-67. As a result, plaintiff had a longer time to sue than he would have under the discovery rule since the last exposure occurred after the discovery of the injury. *Accord* Harrell v. Koppers Co., 118 App. Div. 2d 682, 499 N.Y.S.2d 968 (2d Dep't 1986) (statute of limitations accrues on date of last exposure). *See also* N.Y. CIV. PRAC. L. & R. § 214-c, commentary at 301-02 (McKinney Supp. 1987) (discussing distinction between discovery of injury and discovery of cause). "[T]he *Ward* case dramatically illustrates the distinction between the discovery of the injury and discovery of its cause, [and] it also flushes out a central weakness in the new statute, . . . the term 'discovery of the injury.' " *Id.* at 302.

In his commentary, Professor McLaughlin notes the following problems of interpretation:

> How much must be known before it can reasonably be said that the plaintiff knows "of the cause of the injury"? In the *Ward* case, for example, would it be sufficient if the plaintiff learned that his injury was caused by something he had breathed, but did not know whether it was asbestos or chlorine? Must he be able to identify the correct defendant? And must he also have arrived at a theory of liability, e.g., a design defect as distinct from a manufacturing defect?

Id. at 303.

[57] *See* N.Y. CIV. PRAC. L. & R. § 214-c(2) (McKinney Supp. 1987).

[58] *See id.* § 214-c(1). Exposure is defined as "direct or indirect exposure by absorption,

the term "substance" has been left for the courts to resolve.[59] With several definitions available, it is conceivable that the word "substance" could be narrowly interpreted to mean "chemical,"[60] or be given a broader "material" definition.[61] A "material" definition would encompass actions involving solid substances as well as chemicals, such as the suits against the manufacturers of Dalkon Shield IUD's[62] and artificial heart valves.[63] In contrast, the discovery rule of CPLR 214-a, applicable to medical malpractice actions, defines its operative term "foreign objects" as expressly excluding chemical compounds, fixation devices and prosthetic aids and devices.[64] It is suggested that the discovery rule as adopted under CPLR 214-c must be extended to include all substances which had previously been excluded under CPLR 214-a in order to fulfill legislative intent.[65]

Approaches to Accrual in Exposure Cases

While a majority of jurisdictions apply a "discovery rule" in name,[66] the approaches used by these jurisdictions are by no means uniform in practice.[67] One formulation of the discovery rule holds that the statute of limitations begins to run when the plaintiff's disease manifests itself.[68] The question of when a disease has

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contact, ingestion, inhalation or injection." *Id.*

[59] *See id.* § 214-c.

[60] *See* Webster's Third New International Dictionary 2279 (14th ed. 1963).

[61] *See id.*

[62] *See, e.g.*, Lindsey v. A.H. Robins Co., Inc., 60 N.Y.2d 417, 457 N.E.2d 1150, 469 N.Y.S.2d 923 (1983) (IUD caused injury discovered years later—*Schmidt* rule applied by court).

[63] *See, e.g.*, Martin v. Edwards Laboratories, 60 N.Y.2d 417, 457 N.E.2d 1150, 469 N.Y.S.2d 635 (1983) (artificial heart valve caused injury after several years—court applied *Schmidt* rule).

[64] N.Y. Civ. Prac. L. & R. § 214-a (McKinney Supp. 1987); *see supra* note 34.

[65] The legislative history supports a broad definition of "substance." *See* Memorandum of Sen. Stafford introducing S-9391 (1986). The purposes and justification of the Act speak in terms of exposure to "toxic or harmful substances." *Id.* It is suggested that the use of the words toxic and harmful indicate and intent to define substance in broad terms, and not limit it to chemicals. In addition, the title "An Act to amend the [Civil Practice] law and rules . . . in relation to statute of limitations and liability for damages caused by the latent effects of exposure to certain substances or materials," supports a broad definition of substance. *See* N.Y. Civ. Prac. L. & R. § 9391 (McKinney 1986).

[66] *See supra* note 5.

[67] *Compare* Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973) (action accrues when causal connection with defendant's conduct discovered) *with* Urie v. Thompson, 337 U.S. 163 (1949) (action accrues when injury manifests itself). *See supra* note 6; *infra* notes 68-75.

[68] *See, e.g.*, Urie v. Thompson, 337 U.S. 163 (1949) (silicosis—action accrued when ef-

manifested itself is often a medical question.[69] While it has been generally held that this occurs upon diagnosis, a disease can be considered manifested before it is diagnosed if the plaintiff should have been aware of the disease at an earlier date.[70] It is submitted that this approach is too narrow and could result in the statute of limitations commencing with the appearance of the first symptom of the plaintiff's illness.

Another formulation of the discovery rule holds that the action accrues, and the statute of limitations begins to run, when the plaintiff's condition is diagnosed.[71] Unlike the manifestation theory, this approach would not start the statutory clock until the plaintiff had notice of a claim against another party.[72] It is submitted that any potential abuses of the diagnostic formulation could be avoided by computing the statute of limitations from the time the disease was or should have been discovered, thereby preventing a potential plaintiff from unreasonably refusing to seek medical attention.

A formulation of the discovery rule which is finding increasing acceptance states that the statute of limitations runs from the time the plaintiff discovers both the injury and its causal connection to the defendant's conduct.[73] This interpretation is premised on the

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fects manifested themselves); Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975) (action accrues when harm or impairment manifests itself). In *Urie*, the "Court clearly adopted the view that where an injury does not manifest itself immediately, the cause of action should accrue not when the injury was initially inflicted, but when the plaintiff had reason to know he had been injured." Birnbaum, *supra* note 3, at 286.

[69] *See* Birnbaum, *supra* note 3, at 281.

[70] *See* Urie v. Thompson, 337 U.S. 163, 170 (1949). "Generally, the cause of action would accrue when plaintiff's condition was diagnosed, unless there was evidence that plaintiff should have known at an earlier date that he was injured." Birnbaum, *supra* note 3, at 286. *But see* Young v. Clinchfield R.R., 288 F.2d 499 (4th Cir. 1961) (plaintiff should not have known he was sick even though symptoms had manifested themselves). *See also supra* note 44 (discussing *Young*).

[71] *See, e.g.*, Young v. Clinchfield R.R., 288 F.2d 499, 503 (4th Cir. 1961) (plaintiff knows he is injured on diagnosis). *See also* Birnbaum, *supra* note 3, at 281 (discussion of time of injury for statute of limitations purposes in products liability actions).

[72] *See supra* notes 46-48 and accompanying text.

[73] *See, e.g.*, R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963) (plaintiff must have knowledge of relationship between offense and damages sustained to start clock); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977) (action accrues when plaintiff discovers causal relationship between harm and defendant's conduct); Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973) (action will not accrue until plaintiff knows he has basis for actionable claim). Thirteen states have recently adopted this formulation. *See* J. TRAUBERMAN, *supra* note 5, at 173 n.94 (citing INJURIES AND DAMAGES, *supra* note 5, at 28-29).

theory that a cause of action cannot be maintained until the plaintiff has discovered that the defendant's conduct caused the injury.[74] This causal connection approach applies where a plaintiff knows there is an injury but is not aware that it may be attributable to the fault of another.[75] It is submitted that this formulation provides for the most equitable results. Moreover, it is asserted that the New York legislature should have expressly adopted this formulation of the discovery rule rather than the narrow provisions of CPLR 214-c.

CONCLUSION

The New York Legislature took a long overdue step in July, 1986 by adopting the discovery rule in CPLR 214-c. This statute will provide a remedy for thousands of exposure victims who had heretofore been kept out of court. Although a step in the right direction, CPLR 214-c is not free from shortcomings which could result in the continuance of the many inequities encountered under the traditional first breath rule. The next step belongs to the courts, and it is hoped that they will further the intent of the legislature rather than wait for future legislative action as they have done in the past. The courts must now take the initiative and liberally and justly interpret and apply the rules of CPLR 214-c.

Andrew L. Margulis

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[74] *See* R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963). The *Reynolds* court stated that:

> Knowledge of the date of the occurrence of the offense, knowledge of some injury resulting from the act causing the damage, and the objective manifestation of the injury are not enough. . . . Hudson's cause of action did not accrue until Hudson knew or should have known that his acute respiratory distress and diseased larynx were caused by smoking.

Id. at 783. The *Reynolds* court further stated that blackletter authority holds "that pain and suffering and the physical manifestation of injury may not be sufficient to start prescription running, if the plaintiff has good cause for not having knowledge of the connection between the offense and the damages sustained." *Id.*

[75] *See* Lopez v. Swyer, 62 N.J. 267, 274, 300 A.2d 563, 567 (1973).