St. John's Law Review

Volume 58, Spring 1984, Number 3 Article 10

CPLR 214(5): Cause of Action for Injuries Suffered Due to Defective Prosthetic or Contraceptive Device Accrues Upon the Date of the Injury-Producing Malfunction

Vincent W. Crowe

In the area of civil litigation, the Court of Appeals, in *Martin v. Edwards Labs*, determined that under CPLR 214(5), the statute of limitations for personal injury actions involving the malfunctioning of prosthetic or contraceptive devices accrues at the time of actual injury. In so holding, the Court rejected the argument that accrual should commence at the time of the plaintiff's discovery of the injury. In *Kelly v. State Insurance Fund*, the Court, balancing the equities in the apportionment of workers' compensation litigation costs, held that an employer or compensation carrier's contribution toward an employee's cost of effectuating a recovery against a third party should be assessed in accordance with the total benefit inuring to the employee.

In the only Appellate Division case discussed in this issue, the Second Department, in *Conner v. Conner*, concluded that a professional degree received by a spouse during the life of a marriage is not marital property as defined by section 236(B) of the DRL. In turn, the court reasoned, such degree is not subject to apportionment during a divorce proceeding.

It is our hope that the discussion of the cases contained in *The Survey* will be of interest and value to the New York bench and bar.

CIVIL PRACTICE LAW AND RULES

CPLR 214(5): Cause of action for injuries suffered due to defective prosthetic or contraceptive device accrues upon the date of the injury-producing malfunction

Section 214 of the CPLR provides that a personal injury action must be commenced within three years.[1] In applying this gen-

---

[1] CPLR 214(5) (McKinney Supp. 1983-1984). Prior to the enactment of the CPLR, the Civil Procedure Act contained a 3-year statute of limitations if the injury resulted from negligence and a 6-year statute for all other personal injury actions. *See* Blessington v. McCrory Stores Corp., 198 Misc. 291, 301, 95 N.Y.S.2d 414, 423-24 (Sup. Ct. Queens County 1950), *aff'd*, 279 App. Div. 807, 110 N.Y.S.2d 456 (2d Dep't 1952), *aff'd*, 305 N.Y. 140, 111 N.E.2d 421 (1953). *Compare* CPA § 49(6) (repealed 1963) *with id.* § 48(3) (repealed 1963). Consolidation of the sections was motivated by a desire to avoid uncertainty. *See* Izquiesdo v. Cities Service Oil Co., 244 F. Supp. 758, 761 (S.D.N.Y. 1965); SECOND REP., 71, 533-37 1 WK&M ¶ 214.12.

In general, statutes of limitation are designed to ensure fairness to defendants. *See Developments in the Law — Statute of Limitations*, 63 HARV. L. REV. 1177, 1178 (1950). Delineating specific limitation periods protects defendants from difficulties arising from stale claims such as lost evidence, faded memories, and unavailable witnesses. *Id.* at 1185; *see, e.g.*, Meyer v. Frank, 550 F.2d 726, 730 (2d Cir.), *cert. denied*, 434 U.S. 830 (1977); Lee v.

eral provision, however, courts often have had difficulty determining when the cause of action actually accrued, especially when some significant amount of time has elapsed between the plaintiff's initial contact with a defective product and the subsequent manifestation of harm.[2] Depending on the facts, accrual is said to result either when some injury to the plaintiff has occurred,[3] or when the plaintiff has discovered the harm.[4] Arguably, it is inequitable to fix

---

United States, 485 F. Supp. 883, 885 (E.D.N.Y. 1980); Connel v. Hayden, 83 App. Div. 2d 30, 40-44, 443 N.Y.S.2d 383, 392 (2d Dep't 1981).

[2] *See* McLaren, *The Impact of Limitation Periods on Actionability in Negligence*, 7 ALBERTA L. REV. 247, 247 (1969); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200-07 (1950). The problem of determining an accrual date when the manifestation of injury occurs some time after contact with the harmful substance was first addressed by New York courts in Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936). In *Schmidt*, the plaintiff contracted a lung disease many years after inhaling dust particles while in the defendant's employ. *Id.* at 297, 200 N.E. at 827. The Court, noting that "[t]he injury occurs when there is a wrongful invasion of personal or property rights," held the cause of action had accrued at the moment the plaintiff inhaled the dust. *Id.*

Upon considering the applicable statute of limitations for an action based on strict products liability, the New York Court of Appeals in Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), held that it commences at the time of injury. *Id.* at 399, 335 N.E.2d at 276, 373 N.Y.S.2d at 40. *Victorson* explicitly overruled Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), in which the Court held that such an action was based on a warranty theory and, therefore, the limitations period began to run on the date of the sale. *Id.* at 344, 253 N.E.2d at 210, 305 N.Y.S.2d at 493; *see Victorson*, 37 N.Y.2d at 404, 335 N.E.2d at 279, 373 N.Y.S.2d at 44. In addition, the problem has arisen in the context of medical malpractice actions, and in limited contexts, a discovery rule has been adopted. *See, e.g.*, Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 428, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 23, *cert. denied*, 396 U.S. 837 (1969). In *Flanagan*, the plaintiff's claim was not time-barred despite the fact that surgical clamps were found in his abdomen 8 years after an operation had been performed in the defendant's hospital. *Id.*

[3] *See* Thorton v. Roosevelt Hosp., 47 N.Y.2d 780, 781, 391 N.E.2d 1002, 1003, 417 N.Y.S.2d 920, 921 (1979). When injury results from the "inhalation, ingestion or injection" of harmful substances, the statute of limitations has been held to run "from the last exposure to the substance." *Id.* Courts have commonly held that initial contact exists when some actual injury has occurred. *See, e.g.*, Steinhardt v. Johns-Mannville Corp., 54 N.Y.2d 1008, 1010, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (cause of action accrues upon inhalation of asbestos particles), *cert. denied*, 456 U.S. 967 (1981); Reis v. Pfizer, Inc., 48 N.Y.2d 664, 664, 397 N.E.2d 390, 390, 421 N.Y.S.2d 879, 879 (1979) (limitations period runs from ingestion of oral polio vaccine); Manno v. Levi, 94 App. Div. 2d 556, 573, 465 N.Y.S.2d 219, 229 (2d Dep't 1983) (action accrues at ingestion of DES).

[4] *See* CPLR 214-b (McKinney Supp. 1983-1984). Personal injury suits by Vietnam veterans based on contact with Agent Orange may be brought within 2 years after the injury is discovered. *Id.*; Farrel, *Civil Practice*, 1981 *Survey of New York Law*, 33 SYRACUSE L. REV. 31, 33 (1981). In addition, when a foreign object is left in the body or where a plaintiff has undergone "continuous treatment," an action may be brought within 1 year after the foreign object is discovered, despite the strict 2 year and 6 month limitation period on medical malpractice actions provided by CPLR 214-a(6). *See* CPLR 214-a(6) (McKinney Supp.

an accrual date at a time prior to possible realization of the injury.[5] Recently, in *Martin v. Edwards Labs.*,[6] the Court of Appeals held that the statute of limitations accrues at the time of the actual injury in cases involving malfunctioning devices that are designed to perform a continuing function once inserted or implanted in the plaintiff's body.[7]

In *Martin*, an artificial aortic valve manufactured by the defendant was implanted in the decedent on June 7, 1976.[8] He died on May 15, 1979, allegedly as a result of the disintegration of the valve and the subsequent accumulation of its component material, teflon, in his brain.[9] A personal injury action was commenced on June 1, 1981.[10] Initially, the action was dismissed as time-barred,[11] but was reinstated by the Supreme Court, which held that the action did not accrue until the valve began to break down.[12] The Appellate Division dismissed the complaint, however, reasoning that

---

1983-1984). Actions involving a "chemical compound, fixation device or prosthetic aid or device," however, are excluded. *See* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 430, 428 N.E.2d 23, 23, *cert. denied*, 396 U.S. 837 (1969); *supra* note 2.

[5] *See The Survey*, 54 ST. JOHN'S L. REV. 137, 145 (1979); *see also* Birnbaum, *"First Breath's" Law Gasp: The Discovery Rule in Products Liability Cases*, 13 FORUM 279, 279-90 (1979) (suggesting that the first breath rule is an anachronism). Holding that accrual of a cause of action occurs at initial contact with a harmful substance has been criticized as obsolete in an era when environmental and chemical hazards pose long range health threats. *See, e.g.*, Birnbaum, *supra*, at 285; Note, *Statute of Limitations and Pollutant Injuries; The Need for a Contemporary Legal Response to Contemporary Technological Failure*, 9 HOFSTRA L. REV. 1525, 1538 (1981). *See generally* Note, *Statute of Limitations on Strict Products Liability Actions in New York*, 40 ALB. L. REV. 869, 882 (1976) (discussion of Victorson v. Bock Laundry Machine Co.).

[6] 60 N.Y.2d 417, 457 N.E.2d 1150, 469 N.Y.S.2d 923 (1983).

[7] *Id.* at 422, 457 N.E.2d at 1152, 469 N.Y.S.2d at 925.

[8] *Id.*

[9] *Id.* at 423, 457 N.E.2d at 1152, 469 N.Y.S.2d at 925-26. The pathologist who performed the autopsy testified during pretrial examination that he had found teflon in the decedent's brain identical to that used in the artificial valve. *Id.* In the doctor's opinion, the valve had begun to deteriorate, causing the teflon to accumulate in the decedent's brain within months before his death. *Id.*

[10] *Id.* at 422, 457 N.E.2d at 1152, 469 N.Y.S.2d at 925. Plaintiff asserted personal injury and wrongful death claims based on products liability, breach of implied warranty, and negligence. *Id.* The wrongful death claim was dismissed because it was not brought within 2 years of death, as required by the statute. *Id.*; *see* CPLR 208 (1972).

[11] 60 N.Y.2d at 422, 457 N.E.2d at 1152, 469 N.Y.S.2d at 925.

[12] *Id.* at 423, 457 N.E.2d at 1152, 469 N.Y.S.2d at 926. On reargument, plaintiff's evidence included testimony by the pathologist who had performed the decedent's autopsy. *Id. See supra* note 9. The supreme court reinstated the complaint since disintegration of the valve allegedly occurred less than 3 years prior to commencement of the action. 60 N.Y.2d at 423, 457 N.E.2d at 1152, 469 N.Y.S.2d at 926.

the limitations period had commenced upon implantation.[13]

In a companion case, *Lindsey v. A.H. Robins Co.*,[14] a similar issue arose under facts that involved the insertion of an intrauterine contraceptive device known as a Dalkon Shield.[15] The device caused a pelvic infection that ultimately resulted in the plaintiff's inability to bear children.[16] Special term granted the defendant-manufacturer's motion to dismiss the complaint as time-barred.[17] The Appellate Division reversed the trial court, stating that unlike ingested, inhaled, or injected substances which assimilate into the body, an intrauterine device is not inherently harmful, and, thus, the statute of limitations does not begin to run until the injury has occurred.[18]

On appeal, the Court of Appeals held that the statute of limitations began to run on the date of initial injury.[19] Writing for the Court,[20] Judge Meyer examined the policy considerations that had led to the adoption of the various accrual rules currently used in different contexts in New York.[21] The Court rejected a discovery

---

[13] Martin v. Edwards Labs., 90 App. Div. 2d 1172, 1173, 459 N.Y.S.2d 142, 143 (4th Dep't 1983).

[14] 60 N.Y.2d 417, 457 N.E.2d 1150, 469 N.Y.S.2d 923.

[15] *Id.* at 423, 457 N.E.2d at 1153, 469 N.Y.S.2d at 926. A Dalkon Shield is a circular plastic device inserted in the uterus to which a braided string is attached. *Id.*

[16] *Id.* Approximately 2 years after the Dalkon Shield was inserted, a pelvic infection permanently damaged the plaintiff's ovaries and fallopian tubes. *Id.*

[17] *Id.* Originally, plaintiff brought suit in a federal court against both the manufacturer and the treating physician. *Id.* The suit was discontinued on consent of the parties. *Id.* In a subsequent action a motion to dismiss the complaint against the manufacturer was granted, notwithstanding a physician's affidavit stating that the plaintiff's injury had occured a few days or weeks prior to diagnosis of the infection. *Id.* at 424, 457 N.E.2d at 1153, 469 N.Y.S.2d at 926. The defendant physician's motion to dismiss was granted with respect to events occurring more than 3 years prior to service of the original complaint. *Id.* In addition, plaintiff's cross-motion to serve an amended complaint asserting fraud against the manufacturer for withholding information regarding the hazardous nature of the shield was denied as time-barred. *Id.*

[18] Lindsey v. A.H. Robins Co., 91 App. Div. 2d 150, 158, 458 N.Y.S.2d 602, 606 (2d Dep't 1983).

[19] Martin v. Edwards Labs., 60 N.Y.2d 417, 422, 457 N.E.2d 1150, 1153, 469 N.Y.S.2d 923, 925 (1983).

[20] Chief Judge Cooke and Judges Jasen, Jones, Wachtler, and Kaye concurred in the opinion authored by Judge Meyer. Judge Simons took no part in consideration of the case.

[21] *See* 60 N.Y.2d at 425-27, 457 N.E.2d at 1154-55, 469 N.Y.S.2d at 927-28. Judge Meyer initially postulated that determining a limitation period "depends on a nice balancing of policy considerations." *Id.* at 425, 457 N.E.2d at 1154, 469 N.Y.S.2d at 927. The manufacturer's interest in defending a claim before it becomes stale must be balanced against the injured party's interest in bringing the action before it is time-barred. *Id.*

rule,[22] suggesting that it is warranted only when the plaintiff is unaware of the presence of a foreign object in his body.[23] The initial-contact rule applied in assimilated substances cases was also rejected.[24] Judge Meyer noted that in cases involving "inhalations, ingestions or injections," harm begins as soon as the substance enters the body,[25] whereas under the facts in the cases at bar, no harm had occurred until the product malfunctioned.[26]

The Court adopted the date-of-injury rule applied in strict products liability and most negligence actions.[27] Judge Meyer likened inserted but nonassimilated devices to products used outside the body.[28] The Court reasoned that the primary policy consideration for upholding the date-of-injury rule in strict products liability cases—the possibility of time-barring valid actions prior to the

---

[22] *See id.* at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928-29; *see also* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 431-32, 248 N.E.2d 871, 873-74, 301 N.Y.S.2d 23, 26-27 (discussion of foreign object rule), *cert. denied*, 396 U.S. 837 (1969).

[23] *See* 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928. The Court distinguished cases based on the foreign object rule by noting that plaintiffs in such cases are not aware of the presence of the object. *Id.* at 426, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928. The Court also noted that in foreign object cases, there is no causal break between the negligence and the resulting injury. *Id.*; *see* Flanagan v. Mount Eden Gen. Hosp. 24 N.Y.2d 427, 430, 248 N.E.2d 871, 872-73, 301 N.Y.S.2d 23 26-27, *cert. denied*, 396 U.S. 837 (1969).

[24] 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928.

[25] *Id.*; *see, e.g.*, Schwartz v. Heyden Chem. Corp. 12 N.Y.2d 212, 218-19, 188 N.E.2d 142, 144-45, 237 N.Y.S.2d 714, 718-19, *modified on other grounds*, 12 N.Y.2d 1073, 190 N.E.2d 153, 239 N.Y.S.2d 896, *cert. denied*, 374 U.S. 808 (1963); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 301, 200 N.E. 824, 827 (1936); *see supra* note 3.

[26] 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928. The *Martin* Court noted that underlying the initial contact rule is the recognition that a cause of action arises only when the injury-producing forces commence. *Id.* at 425, 457 N.E.2d at 1154, 469 N.Y.S.2d at 928. These forces, the Court reasoned, "are inexorably set in motion when the [harmful] substance enters and is assimilated into the body." *Id.* at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928; *see supra* note 3. According to the Court, in cases where devices have been inserted or implanted, the forces of harm are not set in motion until the product malfunctions. 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928.

[27] 60 N.Y.2d at 426-27, 457 N.E.2d at 1155, 409 N.Y.S.2d at 928. The *Martin* Court suggested that an implanted or inserted device causes no injury prior to malfunctioning, and held therefore that the recipient of such a device stands in the same position as the product user in Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 355 N.E.2d 275, 373 N.Y.S.2d 39 (1975). 60 N.Y.2d at 426-27, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928; *see supra* note 2. The primary consideration leading to the *Victorson* decision was that prior to the malfunctioning of the product, no injury had occurred and, thus, there was no cause of action. 60 N.Y.2d at 426-27, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928.

[28] 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928; *see supra* note 27. Judge Meyer also observed that since inserted or implanted devices can be removed and physically inspected, a degree of protection is afforded to defendant manufacturers faced with the prospect of confronting stale claims. 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928.

occurrence of any injury—applied to actions involving devices that are implanted or inserted in the body.[29] In both situations, stated the Court, plaintiffs have no cause of action until the manifestation of a product defect.[30]

As was noted by the *Martin* Court, determining the accrual date for limitations on personal injury actions involves a balancing of policy considerations.[31] It is suggested that adopting a discovery rule in cases involving inserted or implanted devices would better serve to minimize preclusion of valid claims while imposing no unfair burden on defending parties.[32] Factors that supported the adoption of a discovery rule in certain malpractice actions[33] include the actual presence of a foreign object,[34] the clear causal relationship between the product and the injury,[35] a minimization of diagnostic guesswork,[36] and the patient's ignorance of the presence

---

[29] 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928. Addressing the issue of barring valid claims prior to accrual, the *Martin* Court concurred with the rationale in *Victorson*, stating that " '[t]o hold that [the statute of limitations] somehow came into being prior [to the injury] would defy both logic and experience.' " *Id.* at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928 (citing Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d at 403, 335 N.E.2d at 275, 373 N.Y.S.2d at 43).

[30] 60 N.Y.2d at 426-27, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928; *see supra* note 27.

[31] 60 N.Y.2d at 425, 457 N.E.2d at 1154, 469 N.Y.S.2d at 927; *see supra* note 21. A factor to be considered in fixing a time of accrual is the interest of society in repose and administrative expediency. *See Developments in the Law—Statute of Limitations*, *supra* note 1, at 1204. Yet, this interest pales when compared with an injured person's interest in an action when it is time-barred before his injury becomes manifest. *Id.*

[32] *Cf.* CPLR 214-a (1972) (providing for discovery in certain malpractice actions). While the discovery provision provided in 214-a of the CPLR excludes a "chemical compound, fixation device or prosthetic aid or device," this section applies only to medical malpractice actions. CPLR 214-a (McKinney Supp. 1983-1984). The legislature has expressed its intention that "an exception to the general period of limitation is required when the pathological effect of an injury occurs without perceptible trauma and the victim is blamelessly ignorant of the cause of the injury." *Id. But see* Beary v. City of Rye, 44 N.Y.2d 398, 414-15, 377 N.E.2d 453, 459, 406 N.Y.S.2d 9, 15 (1978) (enactment of CPLR 214-a evidenced legislative unwillingness to broaden foreign object discovery rule).

[33] *See, e.g.*, *supra* note 4.

[34] *See* 60 N.Y.2d at 426, 457 N.E.2d at 1154, 469 N.Y.S.2d at 928. The ability to remove the device and examine it for possible malfunctions was said to increase the possibility of uncovering unfounded claims. *Id.*; *see supra* note 28. The discovery rule also has been extended to malpractice suits where a different type of real evidence, hospital records, are available for inspection. *E.g.*, Dobbins v. Clifford, 39 App. Div. 2d 1, 4, 330 N.Y.S.2d 743, 746-47 (4th Dep't 1972).

[35] *See* 60 N.Y.2d at 426, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928; Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 430, 248 N.E.2d 871, 871, 301 N.Y.S.2d 23, 26, *cert. denied*, 396 U.S. 837 (1969).

[36] *See* 60 N.Y.2d at 426, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928; Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 431, 248 N.E.2d 871, 871, 301 N.Y.S.2d 23, 26, *cert. denied*, 396 U.S. 837 (1969). According to the *Flanagan* Court a claim based on the presence

of the object inside his body.[37] These factors are equally persuasive in cases of inserted or implanted devices. Since a prosthetic or contraceptive device is not assimilated by the body, feigned injuries can be detected through inspection of the device.[38] Retention of the inserted or implanted device, moreover, allows a causal connection to be established from empirical data rather than from educated supposition,[39] and such evidence is not subject to the problems that arise after a lapse of time.[40] In addition, knowledge of the presence of a device in the body does not necessarily impute knowledge of the symptoms created by possible defects,[41] and, thus,

---

of a foreign object in the body will not raise issues of professional judgment or discretion. 24 N.Y.2d at 431, 248 N.E.2d at 871, 301 N.Y.S.2d at 26. The advantage of avoiding difficult diagnostic judgments in the determination of the proper date of accrual has led one court to designate the date of discovery as the appropriate time for injuries suffered due to excessive radiation. *See* LeVine v. Isoserve, Inc., 70 Misc. 2d 747, 751-52, 334 N.Y.S.2d 796, 801 (Sup. Ct. Albany County 1972).

[37] *See* 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928; Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 431, 248 N.E.2d 871, 871, 301 N.Y.S. 2d 23, 26, *cert. denied*, 396 U.S. 837 (1969). The notion of having a cause of action accrue before the plaintiff has a basis for discovering the existence of a foreign object was said to place "an undue strain upon common sense, reality, logic, and simple justice." *Flanagan*, 24 N.Y.2d at 431, 248 N.E.2d at 871, 301 N.Y.S.2d at 26.

[38] 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928. An important similarity between the *Martin* case and suits based on foreign objects is that in neither are the devices assimilated into the body. *Id.* Consequently, it is possible to remove the device or object, inspect it for possible malfunctions, and thereby determine the cause of any injury. *Id.*; *see supra* note 28.

[39] 60 N.Y.2d at 426, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928; *see supra* note 36 and accompanying text. It is submitted that the *Martin* Court's decision to find accrual at the time of injury runs counter to the goal of eliminating uncertainty in determining accrual dates. *See supra* note 1. In determining when actual injury has occurred, "complicated medical questions . . . and professional diagnostic judgments [are] implicated," 60 N.Y.2d at 426, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928, which will serve needlessly to protract litigation and hamper judicial efficiency.

[40] 60 N.Y.2d at 427, 457 N.E.2d at 1155, 469 N.Y.S.2d at 928. A problem associated with a lapse of time is that "[m]ost actions for personal injuries depend to a great extent upon the testimony of witnesses, and the recollection of such witnesses inevitably becomes less credible." Williams, *Limitation Periods on Personal Injury Claims*, 48 NOTRE DAME LAW. 881, 881 (1973); *see supra* note 1. Evidence such as an actual prosthetic or contraceptive device will negate the need to call defendants where "memories have faded, and witnesses have disappeared." Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944). Indeed, a defendant's contention that he will be prejudiced by the "staleness of evidence" is generally inapplicable in products liability litigation. *See* Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 676 (1978).

[41] *See, e.g.*, Murphy v. Saint Charles Hosp., 35 App. Div. 2d 64, 67, 312 N.Y.S.2d 978, 980 (2d Dep't 1970). Accrual at the time of discovery has been extended to situations where insertion of a device was made with the plaintiff's knowledge. *Id.* In *Murphy*, a pin known as a Moore prosthesis was inserted into the plaintiff's hip in 1963. *Id.* at 65, 312 N.Y.S.2d at

it is submitted that a plaintiff's awareness of the mere presence of the device should not bar application of the discovery rule.

The *Martin* decision, while not the best solution, does provide some certainty to an area plagued with uncertainties.[42] Nevertheless, the equities support adoption of the more progressive discovery rule in cases of implanted or inserted devices as forcefully as in cases where foreign objects are negligently left in the body.

Vincent W. Crowe

CRIMINAL PROCEDURE LAW

CPL § 170.30: The power to dismiss criminal charges for want of prosecution does not inhere in the judiciary

Fundamental to every court is the power to regulate its activities in the interests of judicial efficiency and the preservation of

---

979. Almost 4 years later, the pin broke. *Id.* The pin was labeled "akin" to a foreign object and the plaintiff's knowledge of its insertion was deemed insufficient to prevent extension of the discovery rule. *Id.* at 67, 312 N.Y.S.2d at 980. Alternatively, the court held that the action was timely because there was no injury until the prosthesis broke. *Id.* Whereas the plaintiff in *Lindsey* may have been expected to recognize a cause and effect relationship between discomfort in her pelvic area and the Dalkon Shield, it is submitted that the plaintiff in *Martin* was not equally apprised of a causal link between the implanted valve and the head pains he suffered. As has been stated, "insidious diseases are no respecters of jurisdictional boundaries." McLaren, *supra* note 2 at 268.

It has been noted, in fact, that judicial enactment of a discovery rule in situations of implanted or inserted devices would be "entirely appropriate . . . in the absence of legislative mandate." Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 435, 248 N.E.2d 871, 876, 301 N.Y.S.2d 23, 29, *cert. denied*, 396 U.S. 837 (1969); *see also* Hamilton v. Turner, 377 A.2d 363, 364 (Del. Super. Ct. 1977). In *Hamilton*, a discovery rule was applied in a case involving a defective intrauterine device where although plaintiff experienced discomfort, plaintiff did not connect discomfort to presence of the device. 377 A.2d at 364.

[42] *See supra* note 2 and accompanying text. The *Martin* court rightfully preserved the plaintiff's cause of action, and several courts have reached the same result. *See, e.g.*, Klein v. Dow Corning Corp., 661 F.2d 998, 999 (2d Cir. 1981). In *Klein*, a woman sued for injuries suffered when a prosthesis burst in her breast. *Id.* The fact that the suit was brought 14 years after surgical implantation did not bar the suit, since the court held that the action accrued at the moment the prosthesis burst. *Id.*; *see also* Kristeller v. A.H. Robins, Inc., 560 F. Supp. 831, 833 (N.D.N.Y. 1983) (noting inequity of running statute before injury); Bailey v. A.H. Robins, Inc., 560 F. Supp. 833, 834 (N.D.N.Y. 1983) (accrual at onset of pelvic inflammation allegedly caused by Dalkon Shield).