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Malpractice Statute of Limitations in New York: Conflict and Confusion

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Traditionally, the period within which medical malpractice actions had to be commenced was computed from the time of the negligent act. In 1962 and 1969, the New York State Court of Appeals added new rules to avoid the harsh results of a strict application of that “time of the act” standard. These “continuous treatment” and “foreign object discovery” rules were adopted to give the plaintiff more time to discover that he had been treated negligently and, thus, to commence his action.

The traditional time of the act rule was court-made. In the absence of restrictive legislative mandates, the Court of Appeals plainly had the power to change it. However, when the court added the continuous treatment rule in 1962, it clung to the language and concepts of the time of the act rule. This combination of modern theory and old language created new problems. Furthermore, although the court clearly broke with the past when it adopted the foreign object discovery rule in 1969, this rule was both contrary to existing statutes and unnecessarily restricted to foreign objects.

This comment will consider the policy behind the adoption of these new rules, their inherent theoretical failings and their subsequent application by the lower courts.

I. BACKGROUND

In New York, an action to recover damages for medical malpractice must be commenced within three years1 after the cause of action accrues.2 Determining when a cause of action accrues, however, has caused much difficulty. Many courts have stated the proposition that a cause of action accrues when a plaintiff may first maintain an action.3 This is mere tautology because it does not tell a particular plaintiff when he may first go into court to make his demand for relief. Consequently, most courts have traditionally applied a more precise test.

Professor Lillich has summarized this tests as follows: “the New

1. N.Y. CIVIL PRACTICE LAW AND RULES § 214(9) (McKinney 1972) [hereinafter CPLR].
2. CPLR § 203(a) (McKinney 1962).
York courts have consistently held that the action accrues at the time of the acts of the physician which constitute the malpractice. His conclusion is theoretically incorrect: the Court of Appeals has subsequently explained that the traditional rule in New York has been that the cause of action accrues when the act first produces injury. In practice, however, most courts have held that the first injury, though often imperceptible, is produced at the time of the act, and thus it can be said that the cause of action does generally accrue at the time of the act.

The physician-patient relationship is one of unilateral trust; the patient is generally ignorant of the particulars of his ailment and the proper course of treatment. Blind reliance on the doctor's advice often precludes the patient's quick determination that he has been negligently injured. Further, the difficulty of discovering malpractice in many cases is compounded by the internal and invisible nature of the injury. Under a strict application of the time of the act rule, therefore, a plaintiff may not have knowledge of his cause of action until long after it has accrued; the statute of limitations would be running from the time of the act. If the patient could not discover the malpractice within three years, he would be permanently barred from maintaining an action. Thus, while providing a practical standard for determining the moment of accrual, the strict application of the time of the act rule led to injustice for plaintiffs.

5. The opinion of Judge Lehman [in Schmidt v. Merchants Desp. Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936)] recognizes the classic principle that "in actions of negligence damage is of the very gist and essence of the plaintiff's cause." (Comstock v. Wilson, 297 N.Y. 231, 285.) The opinion goes on to say: "Through lack of care a person may set in motion forces which touch the person or property of another only after a long interval of time (Cf. Ehret v. Village of Scarsdale, 269 N.Y. 198); and then only through new, fortuitous conditions. There can be no doubt that a cause of action accrues only when the forces wrongfully put in motion produce injury. ..." All of the text writers and relevant cases so hold. ... [The opinion notes 1 Cooley, Torts (4th ed.), § 46].

... They would indicate, however, that the action accrues only when there is some actual deterioration of the plaintiff's bodily structure. ... Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 216-17, 237 N.Y.S.2d 714, 717 (1963).

"Judge Lehman's view in the Schmidt case is right as we must assume that the dust immediately acted upon Schmidt's lung tissue." (Schmidt was an action against a former employer to recover for pneumoconiosis, caused by inhalation of dust negligently allowed to accumulate in the air.) Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 217, 237 N.Y.S.2d 714, 717 (1963). Cf. Lillich, supra note 4, at 340-343.
In light of this problem, the Court of Appeals took two steps to give plaintiff more time to discover the existence of his cause of action by adopting the continuous treatment and foreign object discovery rules.

II. THE CONTINUOUS TREATMENT RULE

The first case in which the continuous treatment rule was applied was *Gillette v. Tucker,*\(^7\) decided by the Supreme Court of Ohio in 1902. The defendant physician left a cheesecloth sponge in the plaintiff patient's abdomen during an appendectomy. The plaintiff continued under the defendant's care for one year following surgery, during which time she complained to the physician that the incision was not healing properly. Eight months after the doctor had discharged her from his care, she discovered the cause of her discomfort. Her action should have been barred by the one year Ohio statute of limitations. If the traditional rule were applied, the limitations period would have begun to run at the time the sponge was left inside her. To allow her to maintain her action, however, the court formulated the continuous treatment rule,\(^8\) holding that her cause of action did not accrue until the termination of the physician-patient relationship.

In reaching this result, the Ohio Supreme Court declared that the plaintiff's inability to discover the cause of her injury was irrelevant.\(^9\) While taking this position, the court implicitly acknowledged the difficulty a patient would encounter in discovering the source of an injury while still under treatment by her doctor:

Indeed, it would be inconsistent to say, that the plaintiff might sue for her injuries while the surgeon was still in charge of the case and advising and assuring her that proper patience would witness a complete recovery. It would be trifling with the law and the courts to exact compliance with such a rule, in order to have a standing in court for the vindication of her rights. It would impose upon her an improper burden to hold, that in order to prevent the statute from running against her right of action, she must sue while she was

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7. 67 Ohio St. 106, 65 N.E. 865 (1902).
8. The jury returned a verdict for the defendant on the ground that the plaintiff's case was barred by the statute of limitations. The circuit court reversed. The Supreme Court of Ohio affirmed the circuit court opinion in what is acknowledged to be the first reported continuous treatment decision.
9. “[It is wholly immaterial whether the patient knew of the true source of her trouble or not.” 67 Ohio St. at 127, 65 N.E. at 870.
following the advice of the surgeon and upon which she all the time relied.¹⁰

In justifying the new rule, the court joined these policy considerations with traditional accrual concepts. First, it viewed the case as a tort action founded upon breach of a continuing contractual duty to exercise a proper degree of skill, care, and diligence during surgery and “in the subsequent necessary treatment following such operation. . . .”¹¹ So long as the physician-patient relationship subsisted, a continuous obligation rested upon the doctor to remove the sponge; failure to do so gave rise to a single cause of action accruing at the time the doctor abandoned the case.

The court’s second justification for the continuous treatment rule was its theory that damages had accrued to the plaintiff throughout the entire period the physician was in charge of the case. Injury is the heart of a tort action. “[H]er cause of action accrues when her injuries occurred; and if these injuries blended and extended during the entire period the surgeon was in charge of the case, her right of action became complete when the surgeon gave up the case without performing his duty.”¹²

Thus, in a case involving both a continuous obligation and the progressive accrual of damages, the cause of action does not accrue, and the statute of limitations will not run, until the termination of the physician-patient relationship.

The first application of the continuous treatment rule by the New York Court of Appeals occurred in 1962 in Borgia v. City of New York.¹³ The infant plaintiff was admitted to the defendant hospital for treatment for burns. Shortly thereafter, he lapsed into “irreversible shock” because of the hospital’s improper care. On three later occasions inattentive care caused the infant to convulse. The burns healed, but as a result of the malpractice the plaintiff suffered permanent brain damage despite subsequent corrective efforts by the hospital, including physiotherapy and rehabilitation.

A notice of claim was required as a condition precedent to commencement of the action because the defendant was a municipal

¹⁰ Id. at 129, 65 N.E. at 871.
¹¹ Id. at 122, 65 N.E. at 869.
¹² Id. at 129, 65 N.E. at 871.
¹³ 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962). The continuous treatment rule was first applied in New York in Sly v. Van Lengen, 120 Misc. 420, 198 N.Y.S. 608 (Sup. Ct. Onondaga County 1923). As in Gillette, the doctor in Sly failed to remove sponges from the patient’s body during surgery. The court held that “the limitation did not begin to run against plaintiff’s right to maintain the action until the case had been abandoned by the defendant, or the professional relationship terminated.” Id. at 422, 198 N.Y.S. at 610.
corporation. Section 50-e of the General Municipal Law requires that the notice of claim must be filed within ninety days after the claim arises. The notice was served within ninety days after discharge, but some four and a half months after the last act of malpractice.\footnote{14} The Supreme Court held that the plaintiff's claim was timely filed.\footnote{15} The Appellate Division, holding that the claim arose upon the last act of malpractice, reversed.\footnote{16} The Court of Appeals expressly rejected this "last act of malpractice" test, affirming the Supreme Court. It held that "at least when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the 'accrual' comes only at the end of treatment."\footnote{17}

As in Gillette, policy was a major factor in the Borgia decision.\footnote{18}

It would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent or by filing a notice of claim in the case of a city hospital. . . . Acceptance by us of the city's argument that the 90 days ran from the last malpractice would mean that, if the child had remained in the hospital a few days longer than he did, the 90-day period would have expired while he was still a patient receiving care and treatment related to the conditions produced by the earlier wrongful acts and omissions of defendant's employees.

Inasmuch as the time of the act rule and last act of malpractice test were founded not on statutory but on case law,\footnote{19} the Court of Appeals had the power to revise its own rules to accord with its current understanding of the practicalities involved.

Nevertheless, an uneasy Borgia majority felt obliged to legitimate its reform by attempting to reconcile it with prior holdings. The court stated that it "was making no rash or sudden break with precedent."\footnote{20} It noted, as had the trial court, a trend of decisions, in

New York and other jurisdictions, which foreshadowed its holding.\textsuperscript{21} However, this trend did not justify the means.

The cases cited by the majority\textsuperscript{22} relied upon the legal theories enunciated in \textit{Gillette v. Tucker}. However, neither of the theories used in \textit{Gillette} to reconcile the continuous treatment rule with traditional time of the act concepts, were applicable in \textit{Borgia}. There was no continuous obligation, but rather, a series of isolated negligent acts. The damages had not accrued progressively, but, rather, the “permanent damage had already been done.”\textsuperscript{23}

As the \textit{Borgia} minority noted, the court could not afford “relief without overturning the established distinctions between cases involving a \textit{continuous course of improper treatment} and those presenting merely an isolated act or acts.”\textsuperscript{24} There was no breach of a continuing duty up until the discharge from the hospital; the defendant did not fail to remove a foreign object, nor did it misdiagnose the case, nor did it direct an improper course of treatment.

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\textsuperscript{21} The majority cited five cases to support its proposition “that where there has been continuing treatment time limitation does not start until treatment ends.” \textit{Id.} at 156, 187 N.E.2d at 778, 237 N.Y.S.2d at 921. However, in contradistinction to \textit{Borgia}, these cases involved continuing courses of improper treatment, and not a series of isolated negligent acts.

In \textit{Schanil v. Branton}, 181 Minn. 381, 232 N.W. 708 (1930), the defendants apparently improperly treated the plaintiff’s leg injuries. It was the claim of the plaintiff “that defendants did not exercise reasonable care in the treatment of the fracture while it was healing, particularly in that they failed to keep the leg stretched out in proper alignment . . . .” (trial court’s jury instructions, \textit{id.} at 383-4, 232 N.W. at 710.) The opinion noted that the operation of the statute of limitations was controlled by \textit{Schmit v. Esser}, 178 Minn. 82, 226 N.W. 196 (1929). Schmit acknowledged that “if there be but a single act of malpractice subsequent time and effort merely to remedy or cure that act could not toll the running of the statute.” \textit{Id.} at 84, 226 N.W. at 197. Thus, because the court affirmed the jury verdict for plaintiff, it can be presumed that the defendants engaged in a continuous course of improper treatment.

\textit{De Haan v. Winter}, 258 Mich. 293, 241 N.W. 928 (1931), involved the “[f]ailure to give needed continued care and treatment, under opportunity and obligation to do so . . . .” \textit{Id.} at 296, 241 N.W. at 924. This court also cited \textit{Schmit v. Esser}, 183 Minn. 854, 236 N.W. 622 (1931), which was an appeal of an order overruling the physician’s demurrer to the complaint.

In \textit{Williams v. Elias}, 140 Neb. 656, 1 N.W.2d 121 (1941), defendant misdiagnosed a back injury and consequently failed to treat plaintiff’s injuries. In \textit{Peteler v. Robinson}, 81 Utah 535, 17 P.2d 244 (1932), there was an unnecessary tonsillectomy negligently performed. \textit{Sly v. Van Lengen}, 120 Misc. 420, 198 N.Y.S. 608 (1925), involved the failure to remove a surgically inserted foreign object.

Thus, each of these cases involves some improper course of treatment and each is not analogous to the facts in \textit{Borgia}.


\textsuperscript{23} 12 N.W.2d at 160, 187 N.E.2d at 781, 237 N.Y.S.2d at 925, (dissenting opinion of Froessel, J.).

\textsuperscript{24} \textit{Id.} at 161, 187 N.E.2d at 781, 782, 237 N.Y.S.2d at 325.
Needless clinging to the language and concepts of the old rules created new difficulties. First, the court used plural nouns, "acts or omissions," in both its statement of policy and its formulation of the rule. Thus, in upholding the plaintiff's contention that "since there were repeated acts of malpractice and negligence during the course of treatment of the infant, the limitation period does not commence to run until the termination of treatment . . . ", the plural form in the opinion apparently requires multiple acts in order to render the entire treatment improper. The treatment, thus deemed improper, would give rise to a single cause of action, accruing at its termination.

The policy considerations, which alone could justify the rule, do not bespeak acts or omissions as necessary to the invocation of the continuous treatment rule. A plaintiff who has been treated subsequent to a single negligent act might still have to interrupt the corrective efforts of his physician in order to commence his action before the statute of limitations had run.

Lower court cases after Borgia have resolved this apparent conflict between language and policy in support of the latter. In Richmond v. Capers, the Appellate Division held that "[t]he defendant physician having treated the plaintiff wife for an injury allegedly caused during surgery performed by him, a cause of action based on the injury did not accrue until the termination of the treatment." In O'Laughlin v. Salamanca Hospital District Authority, the plaintiff fell from her hospital bed because of defective restraints and lack of attention. The hospital subsequently treated her for the injury sustained in that fall. The court held that treatment subsequent to that single incident of negligence was covered by the continuous treatment rule and that her cause of action accrued upon discharge from the hospital.

The language of the Borgia opinion has apparently created another problem. Use of the word "accrual" in quotation marks, another unnecessary attempt to link the new rule to old concepts,

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25. "Care and treatment related to the conditions produced by the earlier wrongful acts and omissions of the defendant's employees." Id. at 156, 187 N.E.2d at 779, 237 N.Y.S.2d at 321.
26. "At least when the course of treatment which included the wrongful acts or omissions . . . ." Id. at 159, 187 N.E.2d at 780, 237 N.Y.S.2d at 323 (dissenting opinion).
27. Id. at 976, 294 N.Y.S.2d 651 (2d Dept. 1968).
29. Id. at 976, 294 N.Y.S.2d 652.
31. "Whether in the case of continuous treatment 'accrual' is postponed until treatment ends," and "the 'accrual' comes only at the end of treatment." 12 N.Y.2d at 155, 187 N.E.2d at 778, 237 N.Y.S.2d at 321.
is evidence that the majority viewed the operation of the rule as tolling the statute of limitations pending the end of continuous treatment and did not intend a new definition of accrual. To state this unequivocally, however, would be contrary to New York Civil Practice Law and Rules [hereinafter CPLR] § 201 (McKinney 1972) which mandates that no court extend the time permitted for the commencement of an action.\textsuperscript{32} Thus, the court could not toll the statute of limitations \textit{de jure}, but could \textit{de facto} achieve that result by redefining when the cause of action accrues. The quotation marks indicate its hesitancy to do this.

Unfortunately, a necessary corollary to redefining accrual as occurring “only at the end of treatment” is that a plaintiff cannot maintain his action until termination of the treatment.\textsuperscript{33} Despite a patient’s ability to prove that he has been treated negligently, and consequently injured, a wronged patient cannot be allowed to sue until the end of the physician-patient relationship; until then, his cause of action has not accrued. It is only then that a plaintiff is first entitled to maintain his action.\textsuperscript{34} A plaintiff is allotted three years after the end of treatment in which to commence his action. Allowing him into court before the end of treatment would give him more than three years, violating CPLR § 201 by extending the statutory period.

Nevertheless, this has occurred and gone unnoticed. In \textit{O’Laughlin},\textsuperscript{35} the plaintiff was required to serve a notice of claim as a condition precedent to the commencement of the action.\textsuperscript{36} Ms. O’Laughlin filed her notice of claim on June 2, 1969 but was not discharged from

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\item \textsuperscript{32} CPLR § 201 (McKinney 1962).
\item \textsuperscript{33} A 1950 \textit{Harv. L. Rev.} Comment notes that the courts have not always literally carried out the directive that the period begins when the cause of action accrues. The commencement of the statutory period has occasionally been delayed, despite the existence of a theoretical right to recovery, until the occurrence of some later event the absence of which made suit impossible or improbable: for example, until plaintiff learned of the wrong or until substantial damage occurred.
\item Comment, \textit{Developments in the Law—Statutes of Limitations}, 63 \textit{Harv. L. Rev.} 1177, 1200 (1950). In \textit{Borgia} the court carried out the literal directive that the period begins when the cause of action accrues by expressly redefining accrual as occurring only at the end of treatment. Thus there was no delay of the statutory period. However, no theoretical right to recovery remained because the cause of action had not accrued before the end of treatment.
\item Cases cited note 3 supra.
\item N.Y. Pub. Auth. Law § 1777(2) (McKinney 1970) provides that in an action against the Salamanca Hospital District “founded upon a tort, a notice of claim shall be required as a condition precedent to the commencement of an action . . . and the provisions of section fifty-e of the general municipal law shall govern the giving of such notice . . . .”
\end{itemize}
the hospital until June 20, 1969. According to Borgia, the claim arises only at the end of treatment.\textsuperscript{37} If Ms. O’Laughlin’s claim first arose on June 20, she served notice of her claim before it existed. Her action should have been dismissed. However, this issue was never placed before or considered by the court.\textsuperscript{38}

A third problem of the continuous treatment rule has been the term “continuous treatment” itself. What does it include? What is required? When does it end? A recent case has brought all these issues to the fore. In Olsen \textit{v. County of Nassau},\textsuperscript{39} the plaintiff was admitted to the defendant county hospital for treatment for severe injuries sustained in an automobile crash. A radiologist negligently omitted to take one X-ray view of the plaintiff’s foot. A leg cast (to treat the injuries to her femur) impeded discovery of the injury to her foot for eight months of her ten month stay. After discharge, she returned four times during the next six months for continued treatment of the foot injury.\textsuperscript{40} Lower court decisions, after Borgia, have held that treatment need not be on a daily basis but may consist of a series of visits over an extended period of time\textsuperscript{41} as long as the treatment is

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37. “[W]e note that the same rule must be applied whether we are passing on a true Statute of Limitations problem . . . or a section 50-e dispute. The question is the same: when did the claim or cause of action ‘accrue?’” 12 N.Y.2d at 155, 187 N.E.2d at 778, 287 N.Y.S. at 320.


40. \textit{N.B.}: The Notice of Claim was filed on July 15, 1969, prior to the last three visits.

\end{quote}
related to the same original condition or complaint which gave rise to the cause of action.\textsuperscript{42} Did the hospital's care during each of Mrs. Olsen's five visits therefore constitute continuous treatment? According to the court, it did not.

Another factor in this case was that the plaintiff was first admitted to the defendant hospital as a public patient. The hospital was responsible for the direction and control of her course of treatment. At about the time the foot injury was discovered, Mrs. Olsen engaged a staff physician as her private doctor. That physician was required, by hospital procedures, to get the express permission of the hospital in order to assume control of the treatment. This was done. The hospital abandoned the case and a new private physician-patient relationship was created. For the two months after this change in relationships, the hospital provided merely ministerial services. Continuity of the professional relationship is essential to the application of the continuous treatment rule.\textsuperscript{43} Did this change in relationships mark the end of the defendant's continuous treatment? According to the court, it did not.

When continuous treatment ends is a question of fact.\textsuperscript{44} Nevertheless, the judge did not submit the issue to the jury. Rather, he decided that the hospital's continuous treatment ended upon the plaintiff's discharge after her original ten-month stay. Admittedly, this was by far her longest sojourn, but its length is no justification for terming its end the end of treatment.

The goal of the continuous treatment rule has been to give the patient more time to discover his cause of action. However, the rule has proved awkward in theory and difficult in practice. Reform is invited. Many of the problems with the continuous treatment rule could be eliminated by the adoption of a universal discovery rule in which the cause of action accrues upon discovery. This would re-


quire a clear break from traditional concepts. Just that was attempted in the 1969 addition of a discovery rule in foreign object medical malpractice.

III. THE FOREIGN OBJECT DISCOVERY RULE

The Court of Appeals' behavior in adopting the foreign object discovery rule affords a refreshing contrast to its previous behavior in embracing the continuous treatment rule. Instead of strained attempts to justify the new rule by means of old precedent, the court broke with the past to produce the new rule in Flanagan v. Mount Eden General Hospital:

"[W]here a foreign object has been negligently left in the patient's body, the statute of limitations will not begin to run until the patient could have reasonably discovered the malpractice."

Despite the court's frank departure from the past and its clear statement of the new rule, at least three legal problems were created by the Flanagan holding. First, New York's continual rejection of proposed discovery rule legislation lends support to the dissent's argument that the court was required to continue to hold that time of discovery was irrelevant to when a cause of action accrued. Second, CPLR § 203(f) makes it clear that a cause of action cannot accrue upon discovery. This was a barrier apparently unnoticed by the court. Third, the restricted application of the new rule to foreign object malpractice was unwarranted and unsupportable. Fortunately, lower court decisions, either in defiance or ignorance, have so manipulated the foreign object restriction as to practically abandon it.

In Flanagan, the plaintiff underwent surgery for a gall bladder ailment. Clamps had been inserted during the surgical procedures but never removed. Eight years later, upon experiencing severe abdominal pain, she discovered the clamps. Clearly, if the plaintiff's cause of action accrued at the time of the negligent act, the statute of limitations had already run. The court found the result untenable, placing "‘an undue strain upon common sense, reality, logic, and simple justice.'"

The dissenting judge in Flanagan provided a "sketchy" history of legislative action to demonstrate the Legislature's repeated resistance to the adoption of a discovery rule. In 1942 and 1962 the

46. Id. at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27.
48. 24 N.Y.2d at 439, 440, 248 N.E.2d at 877, 878, 301 N.Y.S.2d at 33, 34.
Law Revision Commission had proposed discovery legislation which was not passed.\textsuperscript{49} A 1968 bill was passed by the Assembly, but not reported out of Senate committee.\textsuperscript{50} The only positive response of the Legislature was to change the old two-year statutory period to three years in 1962.\textsuperscript{51} Consequently, Judge Breitel concluded that:\textsuperscript{52}

the only ground on which the courts, at this time, could purport to overrule or avoid the statute and its impact must be to exercise some super-legislative power of statutory revision. To characterize such a change of the law as merely interpretation or reinterpretation of a statute, in light of its judicial and legislative history, is disingenuous.

Judge Keating, speaking for the majority, believed that the court's decision

[did] not encroach upon any legislative prerogatives. The Legislature did not provide that the Statute of Limitations should run from the time of the medical malpractice. This court did. Therefore, a determination that the \textit{time of accrual is the time of discovery} is no more judicial legislation than was the original determination [emphasis added]. Granted, the Legislature could have acted to change our rule; however, we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the Legislature has not seen fit to act.\textsuperscript{53}

Certainly, Judge Breitel's objection cannot be summarily dismissed. Further, neither the majority nor the dissent considered the im-

\textsuperscript{49} An action to recover damages for malpractice. The cause of action in such a case is not deemed to have accrued until the discovery by the injured person of the facts constituting the malpractice, but this provision shall not permit commencement of such an action after six years from the occurrence of such malpractice. . . .


[A] cause of action for malpractice is deemed to have accrued upon the discovery by the plaintiff or the person under whom he claims of the facts constituting the malpractice, but this provision shall not permit commencement of such an action after six years from the occurrence of the malpractice. . . .


50. 1968 N.Y. Leg. Record & Index, at A.64, S.416.


1 Weinstein, Korn & Miller, N.Y. Civil Practice § 211.21.

52. 24 N.Y.2d at 420, 248 N.E.2d at 879, 301 N.Y.S.2d at 24.

53. Id. at 494, 248 N.E.2d at 875, 301 N.Y.S.2d at 29.
pact of CPLR § 203(f) although it is the strongest argument against the court's new rule. Section 203(f) provides

where the time within which an action must be commenced is computed from the time when the facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer. 54

The reasoning of this argument is as follows:

1. § 203(f) provides that the statute of limitations shall be 2 years from discovery or X years from the accrual of the cause of action, depending on the period specified in the applicable statute of limitations. In malpractice actions, X would be 3 years.

2. The purpose of 203(f) was to shorten the statutory period to 2 years in actions in which the facts were discovered long after the occurrence giving rise to the action.

3. The Flanagan court held that the cause of action accrued upon discovery. This was the only way in which the court could have adopted the discovery rule because it was prevented from extending the statute of limitations by CPLR § 201.

4. When 203(f) is applied to malpractice cases in which the cause of action accrues upon discovery, the result is a statute of limitations which shall be 2 years from discovery or 3 years from discovery whichever is longer.

5. This result is absurd and defeats the purpose of 203(f).

6. § 203(f), therefore, cannot be applied to cases in which the cause of action accrues upon discovery.

7. But, 203(f) on its face and according to its stated purpose applies to all cases in which the statute of limitations is computed from discovery.

8. Therefore, the Court of Appeals could not have and should not have adopted a discovery rule.

A discussion of each proposition follows:

1. Section 203(f) provides a simple formula: the statute of limitations shall be the later of (a) two years from discovery or (b) the period otherwise provided. The period otherwise provided is to be computed from the time "the cause of action accrued." 55 For example:

54. CPLR § 203(f).
55. 1 Weinsteiri, Korn & Miller, supra note 51, ¶ 203.35 at 2-103.
In a fraud case, if the defendant commits the fraud in 1960, and the plaintiff discovers the fraud in 1961, the statute of limitations would expire in 1966 (six years from commission).

If the plaintiff discovered the wrong in 1962, 1963, or 1964 the result would be the same. If, however, the wrong is discovered in 1965, then the statute of limitations would expire in 1967 (two years from discovery). Any discovery after 1965 would trigger the two-year provision. It can be seen therefore, that, the statute of limitations in a fraud action is two years from discovery, but, in no event, is it less than six years from commission.\(^6\)

2. Section 203(f) is designed "to shorten the period of limitations in those cases where discovery of the wrong occurs long after its commission."\(^57\) "The philosophy behind this statute is simple: A plaintiff . . . who discovers the cause of action long after it has accrued, should not have the same length of time in which to sue as a plaintiff who discovers his cause of action promptly."\(^68\)

The statute of limitations has traditionally been considered a "device for repose."\(^69\) With the adoption of a discovery rule, however, there will never come a time when a defendant can be "'secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.'"\(^70\) To a certain extent, § 203(f) was intended to balance the interests of a plaintiff who has not discovered his cause of action and a defendant who wishes to "clean his slate" as soon as possible. While no outside limit is placed (a plaintiff will never be barred from court because he did not discover his cause of action within a certain period of time), § 203(f) requires him to commence his action within a shorter period of time than if he had discovered his cause of action promptly.

3. § 203(a) of the CPLR states that "[t]he time within which an action must be commenced . . . shall be computed from the time the cause of action accrued . . . ."\(^61\) § 201 states that "[n]o court shall ex-

\(^56\) McLaughlin, PRACTICE COMMENTARY CPLR § 203(f) at 125 cited in McCabe v. Gelfand, 57 Misc. 2d 12, 15, 291 N.Y.S.2d 261, 264 (Sup. Ct. Kings County 1968), vacated, 58 Misc. 2d 497, 295 N.Y.S.2d 583 (Sup. Ct. Kings County 1968). See also 1 WEINSTEIN, KORN & MILLER, supra note 51, ¶ 203.35.

\(^57\) 1965 N.Y. LEG. DOC. NO. 90, 10 REPORT OF THE JUDICIAL CONF. 96, 104.

\(^58\) McLaughlin, supra note 56. N.B.: Dean McLaughlin seems to be of the opinion that the foreign object discovery rule tolls the statute of limitations pending discovery, the cause of action still accruing at the time of the act. See also note 67 infra.


\(^60\) Comment, supra note 53, at 1177, 1185, as cited in Flanagan, 24 N.Y.2d at 429, 248 N.E.2d at 872, 301 N.Y.S.2d at 25.

\(^61\) CPLR § 203(a).
tend the time limited by law for the commencement of an action."\textsuperscript{62}

Therefore, a court must consider the statute of limitations as running upon the accrual of the cause of action and may not postpone, toll, or extend its operation. Hence, for a court to adopt a discovery rule without violating § 201 it must hold that the cause of action accrued upon discovery. This is exactly what the \textit{Flanagan} court did: "the time of accrual is the time of discovery."\textsuperscript{63}

4. & 5. Dean McLaughlin, in an annual report of the Judicial Conference, recognized the absurdity of applying § 203(f) to cases in which the "cause of action ‘shall not be deemed to have accrued’ until discovery." It cannot be applied "for the obvious reason that the first segment of the alternate formula presently runs from discovery."\textsuperscript{64}

If, for example, it were not to be provided that a cause of action for fraud shall not be deemed to have accrued until discovery, the application of the alternate formula of CPLR 203 (f) would lead to the following absurd conclusion: the statute of limitations shall be six years from discovery or two years from discovery, whichever is longer\textsuperscript{65}

Similarly, if the malpractice cause of action accrues upon discovery, the application of 203(f) would lead to the conclusion that the statute of limitations shall be three years from discovery or two years from discovery, whichever is longer. As the three-year period will always terminate one year later than the two-year period, the purpose of § 203(f), to shorten the statute of limitations, would be totally frustrated.

6. Therefore, if § 203(f) is to be at all effective, it cannot be applied to cases in which the cause of action accrues upon discovery.

7. Yet, § 203(f) applies, on its face, to cases "where the time within which an action must be commenced is computed from the time the facts were discovered."\textsuperscript{66} The language and legislative history of the statute indicates that it was meant to and does apply to all causes of action in which a discovery rule is applied.

The policy considerations behind 203(f) are as valid when applied to malpractice actions as any other types of action. Neither the statute itself, nor its legislative history, indicates an intended

\textsuperscript{62} CPLR § 201.
\textsuperscript{63} 24 N.Y.2d at 434, 248 N.E.2d at 875, 301 N.Y.S.2d at 29.
\textsuperscript{64} 1965 N.Y. Leg. Doc. No. 90, supra note 57 at 106.
\textsuperscript{65} Id. to the same effect, see 1 WEINSTEIN, KORN & MILLER, ¶ 203.35 (1972).
\textsuperscript{66} CPLR § 203(f) (McKinney 1972).
nonapplicability to malpractice. In fact, its applicability to malpractice has been assumed. As Dean McLaughlin pointed out: 67

Since section 203(f) appears to be of general applicability, there is no reason why it should not serve as a further limitation upon the new malpractice rule, so that, in foreign object cases, the statute of limitations will henceforth be three years from the commission of the malpractice or two years from discovery (actual or constructive), whichever is longer.

8. The court knew that it was clearly not empowered to adopt a rule extending the statute of limitations. It apparently did not know that it was similarly barred from adopting a rule stating that a malpractice action accrues upon discovery. And so it blindly did!

The court's restriction of the operation of the discovery rule to foreign object medical malpractice raises other problems. The majority noted a "fundamental difference," for the purpose of the statute of limitations, between foreign object and other types of malpractice actions. In the former, "no claim can be made that the patient's action may be feigned or frivolous. In addition, there is no possible causal break between the negligence of the doctor or the hospital and the patient's injury." 68

These evidentiary considerations alone cannot justify the restriction. From a plaintiff patient's view, there is little difference between foreign object malpractice and any other sort; neither does the type of malpractice change the defendant's situation. The discovery rule should, therefore, have been applied by the court to all such actions.

Luckily, subsequent cases have so distorted the foreign object restriction as to practically abandon it. While lower court decisions, which approach a universal discovery rule, may be theoretically more logical, they clearly do not follow the mandates of the Court of Appeals. In Murphy v. St. Charles Hospital, 69 the rule was applied to

67. McLaughlin, New York Practice, 21 Syr. L. Rev. 709, 716 (1970). McLaughlin's misconception that the Flanagan decision had tolled the statute of limitations pending discovery is evidenced by his statement that: "Probably because it was unnecessary to the decision, the majority opinion in Flanagan contains no reference to CPLR Section 203(f) which provides an alternate formula of two years from discovery in cases where the statute of limitations is tolled pending discovery of the wrong." His apparent misunderstanding did not diminish his knowledge of the legislative intent of the section. The language of the statute itself does not reveal an intent to limit application to cases where the statute of limitations is tolled pending discovery, but rather the statute is to apply to all cases in which the statute of limitations is computed from discovery. However, the result is that one can compute from discovery only when the statutory period is tolled.

68. 24 N.Y.2d at 430, 248 N.E.2d at 872, 310 N.Y.S.2d at 26.

a situation in which the plaintiff was injured when a prosthetic device broke. In spite of the evidentiary similarities, i.e., the presence of an injury-producing object within the body, the application of the foreign discovery rule to this case is contrary to the guidelines of \textit{Flanagan}. There was no object "negligently left in the patient's body." Further, there was a question of causation: what caused the prosthesis to break? The \textit{Flanagan} restriction avoided this issue by limiting the application of the discovery rule to cases in which a foreign object was negligently left within a patient.

The Appellate Division, in \textit{Dobbins v. Clifford},\textsuperscript{70} entirely ignored these distinctions and applied the foreign object rule to a case in which no object was involved at all. The plaintiff, four years after his operation, discovered severe damage to his pancreas. The court decided that the case fell within the \textit{Flanagan} guidelines because "an act of malpractice [had been] committed internally so that discovery [was] difficult; real evidence of the malpractice in the form of the hospital record is available...; professional diagnostic judgment is not involved, and there is no danger of false claims."\textsuperscript{71}

In \textit{Murphy} there was a more plausible theory upon which to grant the plaintiff relief from the statutory bar;\textsuperscript{72} in \textit{Dobbins} there was not. Neither excuses the improper, if not capricious, manipulation of \textit{Flanagan}. These decisions, however, show that the \textit{Flanagan} restriction is too confining. The holdings in these cases are more in accord with the realities of medical malpractice and more sympathetic to the difficulties a patient has in discovering that he has a cause of action.

\section*{IV. Conclusion}

The New York law surrounding statutes of limitation is in a state of conflict and confusion. The continuous treatment rule needs case-by-case redefinition. The foreign object discovery rule is at odds with the CPLR and lower courts are unwilling to abide by its boundaries.

By now 24 jurisdictions have a general discovery rule.\textsuperscript{73} Only

\begin{footnotesize}
\textsuperscript{71} Id. at 4, 330 N.Y.S.2d at 746.
\textsuperscript{72} In \textit{Murphy} the court noted that the plaintiff's action is timely for reasons apart from the \textit{Flanagan} case... [T]he plaintiff's cause of action could not have accrued before the prosthesis broke because a necessary element of the cause of action—injury—had not yet occurred... [T]t is only where the negligent act creates damage or injury, that a cause of action comes into being (citation).
\textsuperscript{73} \textit{Ala. Code} tit. 7, § 25(1) (1960), 2 yrs. from act or 6 mos. from discovery, but
\end{footnotesize}
16 operate under the time of the act rule.74 Five more apply a
time of the act, see Acker v. Sorensen, 246 N.W.2d 775 (1972), 6 yrs.
from discovery, whichever is earlier; CAL. CIV. PROC. CODE § 340.5 (Supp.
1972). 4 yrs. from injury or 1 yr. from discovery; COLO. REV. STAT. ANN.
§ 87-1-6 (1964), 2 yrs. from discovery but not more than 3 yrs. from act; D.C.
CODE ANN. § 12-301 (1967), 3 yrs. from injury, see Jones v. Rogers
Mem. Hosp., 42 F.2d 775, 143 U.S. APP. D.C. 51 (1971); FLA. STAT. § 95-11(6)
(Supp. 1972), 2 yrs. from discovery; HAWAII REV. STAT. § 677-7 (1957), 2 yrs.
from accrual of cause of action, see Yoshizaki v. Hilo Hosp., 50 Haw. 150, 438
F.2d 220 (1967); ILL. ANN. STAT. ch. 83, §§ 15, 221 (Smith-Hurd 1966), 2 yrs.
from accrual of cause of action, but from discovery with 10 yr. limit in foreign
object cases. See Lipsey v. Michael Reese Hosp., 46 Ill. 2d 144, 225 S.W.2d
450 (1950); IOWA CODE ANN. § 614.1(2) (Supp. 1969), 2 yrs. from accrual of
cause of action, see Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94
(1967); KANS. ANN. STAT. § 60-513 (Supp. 1971), 2 yrs. from substantial
or reasonably ascertainable injury but not more than 10 yrs. from act; KY.
REV. STAT. ANN. § 413.140 (Supp. 1972), 1 yr. from discovery, but not more than
5 yrs. from injury; LA. CIV. CODE ANN. art. 3536 (West 1953), 1 yr., see
Springer v. Aetna Casualty and Surety Co., 169 So. 2d 171 (La. App. 1966);
MD. ANN. CODE art. 57, § 1 (1972 Repl. Vol.), 3 yrs. from accrual of cause of
action, see Leonhart v. Atkinson, 265 Md. 219, 289 A.2d 1 (1972), explaining
Waldman v. Rohraugh, 241 Md. 137, 215 A.2d 825 (1966); MONT. REV.
CODES ANN. § 93-2824 (Supp. 1971), 3 yrs. from injury or discovery
but not more than 5 yrs. from injury; NEB. REV. STAT. § 25-208 (1964), 2 yrs.
from accrual of cause of action, see Acker v. Sorensen, 183 Neb. 886, 165
N.W.2d 74 (1969); N.J. STAT. ANN. § 2A:14-2 (1952), 2 yrs. from accrual of
cause of action, see Lopez v. Swyer, 115 N.J. Super. 237, 279 A.2d 116
(1971); N.D. CENT. CODE § 28-01-18(9) (Supp. 1971), 2 yrs. from accrual of
cause of action, see Iverson v. Lancaster, 155 N.W.2d 507 (1968); OKLA.
STAT. ANN. tit. 12, § 55(6d) (Supp. 1972), 2 yrs. from accrual of cause
of action, see Lewis v. Owen, 395 F.2d 837 (10th Cir. 1968); OR. REV. STAT.
§ 12.110(4) (1971), 2 yrs. from discovery but not more than 5 yrs. from treatment,
operation, etc., upon which the action is based; PA. STAT. ANN. tit. 12, § 54 (1953), 2 yrs.
from injury, see Schaffer v. LaRizzere, 410 Pa. 402, 189 A.2d 267
(1963); R.I. GEN. LAWS ANN. § 9-1-14 (Supp. 1972), 3 yrs. from accrual of
cause of action, see Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745
(1968); WASH. REV. CODE ANN. § 4.16 (Supp. 1971), 3 yrs.
from act or 1 yr. from discovery, whichever is later; W. VA. CODE ANN. § 55-2-12(b)
(1966), 2 yrs. from accrual of right of action, see Bishop v. Byrne, 265 F. Supp.
783, 144 S.E.2d 156 (1965).

74. ALASKA STAT. § 09.10.070 (1962), 2 yrs. from accrual of cause of action; ARK.
STAT. ANN. § 57-205 (1962 Repl.), 2 yrs. from act, see Crossett Health Center v.
Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953); ME. REV. STAT. ANN. tit. 14,
§ 755 (1964), 2 yrs. from accrual of cause of action, see Tantht v. Szendry, 158 Me.
from accrual of cause of action, see Pasquale v. Chandler, 250 Mass. 450, 215
N.E.2d 319 (1956); MINN. CODE ANN. § 15-1-19 (1972), 6 yrs. from accrual of
cause of action, see Wilder v. St. Joseph's Hosp., 225 Miss. 42, 82 So. 2d 651
(1955); MO. ANN. STAT. § 516.140 (1952), 2 yrs. from act, see Keaton v. Crayton,
326 F. Supp. 1155 (W.D. Mo. 1969); NEV. REV. STAT. CH. 11.190 (de)
(1967), 2 yrs. from accrual of cause of action; N.H. REV. STAT. ANN. § 508:4
(1972), 6 yrs. from accrual of cause of action, see Cloutier v. Kasheta, 105 N.H.
262, 197 A.2d 667 (1964); N.M. STAT. ANN. § 28-1-8 (1954), 3 yrs. from accrual of
cause of action, see Royal v. White, 72 N.M. 285, 385 P.2d 250 (1963); N.C. GEN.
STAT. § 1-52(5) (Supp. 1971), 3 yrs. from accrual of cause of action, see Shearin v.
(1962); S.D. COMP. LAWS ANN. § 15-2-15(3) (1967), 2 yrs. from accrual of
cause of action, cf. Hinkle v. Hargens, 76 S.D. 320, 81 N.W.2d 888 (1957); TENN.
CODE ANN. § 28-394 (Supp. 1971), 1 yr. from accrual of the cause of action, see
Clinaid v. Pennington, 438 S.W.2d 748 (Tenn. App. 1969); WIS. STAT. ANN. tit. 12,
§ 512 (Supp. 1972), 3 yrs. from accrual of cause of action, see
Murray v. Allen, 103 Wn. 373, 154 A. 678 (1931); VT. CODE ANN. § 8-24 (1967 Repl.),
continuous treatment rule and five a foreign object discovery rule.

Were New York to add itself to the 24, most of the present practical and theoretical problems would disappear. To accomplish this end, legislation is needed. Enactment of a universal discovery rule is long overdue. If the legislature fails to act, the Court of Appeals, taking the bull by the horns, should apply its illegitimate discovery rule to all malpractice cases.


75. Ind. Ann. Stat. § 2-627 (1967 Repl.), 2 yrs. from act, see Ostojic v. Brueckmann, 405 F.2d 302 (7th Cir. 1968); Mich. Comp. Laws Ann. § 600.5838 (1968), 2 yrs., "A claim... accrues at the time that person discontinues treating or otherwise serving plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose."