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Torts—Applicability Of Statute Of Limitations In Breach Of Warranty And Negligence Actions

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necessarily rejected the statutory constructions approved by the Appellate Division in the present case, and meant as to an occupational disease claim that the employee's right to compensation and the employer's corresponding liability accrue no later than the date when the illness requires medical attention."[14] Moreover, the Court recently held that where a true "accident" situation is present, the requirement of medical care is indicative of a disability in itself regardless of a financial impairment.[15]

The opinion of the Court of Appeals, relying on section 42, takes cognizance of the flexibility granted the board by that section, as a basis for circumventing the loss-of-wage-test where medical evidence has shown a disability prior to a diminution in earning power. If, on the other hand, the construction emphasized by the Appellate Division were adopted, the employer's payroll record would necessarily dictate the date of disablement, thereby leaving section 42 a meaningless appendage. Moreover, the Appellate Division construction, if adopted, would be against the public interest, as it compels the sufferer of an occupational disease who might desire to continue working to quit work in order to get his medical bills paid. In fact, it was the Appellate Division which, in an earlier case reviewing the legislative history of sections 37 and 42 pointed out, that the legislature in 1922, left section 37 as it was, but rewrote the present section 42 such that the board "may determine" the date of disablement. This is indicative of the legislature's intent to allow the board some latitude in settling a controversey. The Court's decision in the instant case, enlarging the scope of workman's compensation is in line with the liberal trend of the majority of the New York decisions.[16]

Ronald L. Fancher

APPLICABILITY OF STATUTE OF LIMITATIONS IN BREACH OF WARRANTY AND NEGLIGENCE ACTIONS

In 1944 plaintiff was injected with a radiopaque chemical. Some of the substance allegedly remained in his body causing a cascinoma to develop which required an eye to be removed in 1957. Two years later plaintiff commenced an action for breach of warranty and negligence against the manufacturer. From a dismissal of the action by the Supreme Court, Special Term as time barred,[1] and a unanimous affirmance by the Appellate Division,[2] plaintiff ap-

14. *Ibid.*
15. Mastrodonato v. Pfaudler Co., 307 N.Y. 592, 597, 123 N.E.2d 83, 86 (1954).
16. See, *e.g.*, Masse v. James H. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56 (1950); Kilmas v. Trans Caribbean Airways, 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961) (heart attack victim); for a case decided since the instant case, *cf.*, Hooper v. Bethlehem Steel Co., 12 N.Y.2d 767, 186 N.E.2d 565, 234 N.Y.S.2d 717 (1962).

1. Schwartz v. Heyden Newport Chem. Corp., 30 Misc. 2d 663, 219 N.Y.S.2d 98 (Sup. Ct. 1961).
2. Schwartz v. Heyden Newport Chem. Corp., 15 A.D.2d 650, 224 N.Y.S.2d 270 (1st Dep't 1962).

pealed by permission to the Court of Appeals, *held*, affirmed, two judges dissenting. The action is time barred under the six year statute of limitations for breach of warranty of fitness for use since this action accrues from the date of sale and under the three year statute of limitations for a negligent act resulting in personal injuries since this action accrues at the point at which the forces wrongfully put in motion produce injury. *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

When a plaintiff suffers personal injuries from a defective product he may often elect to sue in negligence or breach of warranty. The latter may not only be preferable but necessary due to its more extensive period of limitation.[3] A number of jurisdictions have held however, that the shorter limitation period is controlling where there are personal injuries regardless of whether the action sounds in tort or contract.[4] The period of limitation is measured from the point at which "the cause of action accrued to the time the claim is interposed."[5] In breach of warranty cases involving products liability the cause of action accrues at the time of sale.[6] A minority view however, holds that where a product is latently defective in that its harmful propensities are not ascertainable at the time of sale, the cause of action will accrue when the deleterious effects are discovered or in the exercise of reasonable care, should have been discovered.[7] While New York in following the former view has not distinguished between express or implied warranties, other jurisdictions have avoided the harshness of the "time of sale" theory by declaring a particular warranty to be express and therefore, prospective in nature thereby declaring the cause of action to accrue at the point of reasonable or actual discovery.[8] In cases of this type based on a theory of negligence, the cause of action accrues at the time of injury to the plaintiff.[9] It would seem to follow therefore, that where a latently defective product does not manifest its harmful effects until years later, the cause of action should not accrue until the said effects

3. N.Y. CPLR § 213 (2).

4. See, *e.g.*, Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 226 P.2d 266 (Dist. Ct. App. 1954); Zellmer v. Acme Brewing Co., 184 F.2d 940 (9th Cir. 1950); Seymour v. Union News Co., 349 Ill. App. 197, 110 N.E.2d 475 (1953); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953).

5. N.Y. CPLR § 203 (a).

6. Peterson v. Brown, 216 Ark. 709, 227 S.W.2d 142 (1950); Ricciuti v. Voltarc Tubes Inc., 277 F.2d 809 (2d Cir. 1960); W. S. Rockwell Co. v. Lindquist Hardware Co., 143 Conn. 684, 125 A.2d 173 (1956); Krueger v. V. P. Christianson Silo Co., 206 Wis. 460, 240 N.W. 145 (1932); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953); Liberty Mutual Ins. Co. v. Sheila Lynn Inc., 185 Misc. 689, 57 N.Y.S.2d 707 (Sup. Ct. 1945), *aff'd*, 270 App. Div. 835, 61 N.Y.S.2d 373 (1st Dep't 1946); Kakargo v. Grange Silo Co., 11 A.D.2d 796, 204 N.Y.S.2d 1010 (2d Dep't 1960).

7. See, *e.g.*, Poole v. Functional Const. Co., 7 Cal. Rptr. 391 (2d Dist. Ct. App. 1960); Southern Cal. Enterprises v. D.N. & E. Walter & Co., 78 Cal. App. 2d 750, 178 P.2d 785 (2d Dist. Ct. App. 1947); Sheehy v. Eastern Importing & Mfg. Co., 44 App. D.C. 107 (1915).

8. See, *e.g.*, Southern Cal. Enterprises v. D.N. & E. Walter & Co., *supra* note 7; Felt v. Reynold's Fruit Evaporating Co., 52 Mich. 602, 18 N.W. 378 (1884).

9. Schmidt v. Merchant's Dispatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936).

are known or knowable to the plaintiff.[10] New York, in *Schmidt v. Merchant's Dispatch Transp. Co.*, holds however that the cause of action accrues when the initial tortious act inflicts the malady whether the said injury is discovered or discoverable.[11] It was held in New York, that where lung disease is contracted as a result of breathing silica dust, the cause of action accrues from the last point at which the plaintiff inhaled the dust, rather than at the point or recognition of the disease.[12] The Supreme Court on the other hand, has held under a similar set of facts, that the cause of action would accrue only upon discovery of the disease, since an employee could only be held to be injured when the cumulative effects of the latently defective product were manifested.[13]

The majority in the instant case perfunctorily dismissed the theory of warranty by holding steadfast to the "time of sale" doctrine. The negligence theory followed the pattern set by the *Schmidt* case in assuming that the harm was done by the injection itself and therefore, the negligent act was completed with injury to the plaintiff sufficient for accrual of the cause of action. The dissent felt that if the carcinogenic qualities were not discoverable until seven years later, it would be both unreasonable and perhaps unconstitutional to bar the action.

The Statute speaks of computing the limitation from the time the cause of action accrues until the claim is interposed. The courts are left with the task of delineating the accrual period. *Schmidt* was decided in 1936, over twenty-seven years ago, while the utilization of chemo-therapy in the field of medicine is of a recent origin. The appearance of a vast array of organic and inorganic compounds has resulted in a tremendous increase of injections and oral consumption of drugs. This has had the effect of greatly expanding the field of applied chemistry and creating a multi-billion dollar pharmaceutical complex. Today we are faced not only with broad spectra anti-biotics, but also the use of drugs to affect. behavior patterns. Drugs having the latter qualities may often produce injuries not ascertainable for years. Witness the following account:

> DRUG LSD IS DECLARED DANGEROUS
>
> The American Medical Assn. Journal warned Thursday that the drug LSD-25 and similar drugs that alter sensory perception have the power to cripple the mind permanently.
>
> An editorial in the current Journal said accumulating evidence "demonstrates that these drugs have the power to damage the individual psyche, indeed cripple it for life."

10. Sylvania Elec. Products v. Barker 228 F.2d 842 (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960).
11. Schmidt v. Merchant's Dispatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936).
12. *Ibid.*
13. Urie v. Thompson, 337 U.S. 163 (1949).

> The editorial, signed by Dr. Dana L. Farnsworth, Cambridge, Mass., challenged the claim that these drugs "free" the mind for creative work. Farnsworth said a dangerous situation is developing because public interest in these drugs is on the increase in many sections of the United States. "Many men and women who should not do so, especially college students, are experimenting with these drugs," he said.[14]

A majority report of the Senate subcommittee on Antitrust and Monopoly concluded that, with respect to deleterious side effects, the pharmaceutical houses:

> in their advertisements have tended to handle the matter in either of two ways: Ignore side effects entirely or note and then dismiss the subject with some sort or reassuring phrase.[15]

Testimony elicited shows that side effects of certain drugs may not become apparent until used by "thousands and thousands of patients."[16] In certain instances drugs are rushed on the market with a view to meeting and beating competition rather than to insure the maximum in controlled testing.[17] Although a contrary result in the instant case, *i.e.*, computing the accrual of the cause of action from the time of reasonable discovery of the side effects, may not prevent the release of latently dangerous drugs on an unwary public, it would place the risk upon the drug industry which could then chalk up the misery it has inflicted as an item in the cost of goods sold.

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ZONING

ZONING ORDINANCE—CONSTITUTIONALITY OF PRIVATELY OR PUBLICLY ESTABLISHED SET-BACK LINES

A town zoning ordinance passed in 1961 required proposed dwellings to be set back from the road edge an amount equal to a set-back line which was determined by averaging the set-backs of existing homes within 300 feet on either side. This repealed a 1945 ordinance which contained an identical provision. Petitioner-plaintiff, Sierra Construction Company, after having previously laid a foundation for a home with a 61 1/2 foot set-back, was refused a building permit because the home was within 300 feet of four homes built in 1958, each having an eighty-two foot set-back. The Board of Zoning Appeals affirmed this action. In an Article 78 proceeding, Monroe County's Supreme

14. Buffalo Courier Express, Sept. 13, 1963, p.1, col. 5.

15. *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. Report no. 448, at 198 (1961).

16. *Id.* at 201.

17. *Id.* at 187.