Denial of a Remedy: Former Residents of Hazardous Waste Sites and New York's Statute of Limitations

I. INTRODUCTION

The shock of Love Canal brought the existence of toxic chemical waste sites to the public's attention. On August 2, 1978, the New York State Commissioner of Health declared a health emergency in portions of Love Canal in the city of Niagara Falls.[1] The toxicity resulted from Hooker Chemical Company's dumping of hazardous chemical wastes between 1942 and 1952 on land which was later developed as a residential community. Preliminary studies by the New York State Department of Health indicate that dissemination of these chemicals via underground channels and the air into the homes and neighborhood areas of Love Canal have caused abnormal liver functions, increased rates of miscarriages, increased rates of low-weight births and increased rates of congenital defects in newborns.[2] The Love Canal phenomenon is not unique. According to recent Environmental Protection Agency estimates, there are 10,000-12,000 possible hazardous waste sites nationwide, 800 of which are in New York.[3]

The victims of the chemical seepage from Love Canal have brought over 600 lawsuits to recover for their injuries.[4] Under a theory of continuing nuisance, those Love Canal residents still living in the area can sue Hooker Chemical Company ("Hooker") for their personal injuries because the statute of limitations begins to

1. The Love Canal Chemical Waste Landfill Site Located in the City of Niagara Falls, Niagara County, Order of the Commissioner of Health [hereinafter cited as Order], *reprinted in* New York State Dep't of Health, Love Canal, Public Health Time Bomb (Sept. 1978).

2. *Id.*; The Love Canal Chemical Waste Landfill Site Located in the City of Niagara Falls, Niagara County, Supplemental Order of the Commissioner of Health (Feb. 8, 1979) [hereinafter cited as Supplemental Order].

3. Telephonic interview with John Czapor, Toxic Waste Division, Region II, U.S. Envt'l Protection Agency (Nov. 9, 1981).

4. Coordinated Discovery Order at app. A, In re Love Canal Actions (Niagara County Supreme Court, Spec. Term Aug. 7, 1981).

run only from the date of last exposure.[5] However, there are many former residents of the Love Canal who are or will be suffering from serious medical problems as a result of their exposure to the toxic chemical seepage. These former residents may find that under New York law they are precluded from bringing suit to recover damages for their injuries because the statute of limitations period will have expired before their site-related injuries will have become manifest.[6] This note examines the constitutional and policy implications of New York's statute of limitations for personal injury suits in relation to these former residents.

II. THE PROBLEM

Hooker buried more than eighty chemicals[7] in the Love Canal between 1942 and 1952.[8] Many of these chemicals are toxic and/or carcinogenic.[9] For example, an estimated 6,900 tons of benzene hexachloride were dumped in the Love Canal.[10] This chemical is acutely toxic and carcinogenic.[11] It has also been implicated in

5. Kearney v. Atlantic Cement Co., 33 A.D.2d 848, 306 N.Y.S.2d 45 (1969); Bloss v. Village of Canastota, 35 Misc. 2d 829, 232 N.Y.S.2d 166 (1962).

6. Judge Fuchsberg made this argument in his dissent in Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 783-84, 391 N.E.2d 1002, 1004, 417 N.Y.S.2d 920, 923 (1979) ("Good sense and good law . . . require . . . that the injured user not be foreclosed from having his day in court before he even has knowledge of any injury and certainly not before any injury has occurred.").

7. Order, *supra* note 1, at 28.

8. Supplemental Order, *supra* note 2, at app. A, at 4.

9. Among the toxic and/or carcinogenic chemicals found at the Love Canal site were:

Acid Chlorides	400 tons
Thionyl Chloride	500 tons
Miscellaneous Chlorinations	1,000 tons
Dodecylmercaptans	2,400 tons
Trichlorophenol	200 tons
Benzoyl Chloride	800 tons
Metal Chlorides	400 tons
Liquid Disulfides/Monochlorotoluene	700 tons
Benzene Hexachloride	6,900 tons
Chlorobenzenes	2,000 tons
Benzyl Chloride	2,400 tons
Sulfides	2,100 tons
Miscellaneous quantities of above	2,000 tons

Id.

10. *See* note 4 *supra*.

11. Reuber, *Carcinogenicity of Lindane*, 19 ENVT'L RESEARCH 460 (1979). Lindane is the gamma isomer of benzene hexachloride.

causing liver damage,[12] and impairing reproductive capacity.[13]

Many of the disorders caused by toxic chemicals do not take effect immediately. Instead, they often develop imperceptibly for many years before they are expressed.[14] There is a twenty- to thirty-year latency period between initial exposure to a carcinogen and the appearance of most types of cancer.[15] Experience with vinyl chloride, a material used extensively in the plastics industry, provides a prime example. Large scale production of the chemical began in the 1950s and production increased by fifteen percent each year until four billion pounds had been produced in the United States.[16] However, more than half of the vinyl chloride workers who were diagnosed as having liver cancer by June, 1974, had been exposed prior to the 1950s.[17] The cancer effect from exposure since then has not yet fully registered.

As a result of these long latency periods,[18] many residents of hazardous waste sites will not develop the disorders resulting from their exposure to the toxic chemicals until after they have moved away. Under New York law, however, these former residents are time-barred from bringing suit against the creators of the hazardous waste sites. New York allows a three-year limitations period for

12. M. GLEASON, R. GOSSELIN, H. HODGE & R. SMITH, CLINICAL TOXICOLOGY OF COMMERCIAL PRODUCTS 45 (3d ed. 1969); Fitzhugh, Nelson & Frawley, *The Chronic Toxicities of Technical Benzene Hexachloride and Its Alpha, Beta and Gamma Isomers*, 100 J. PHARMACOLOGY & EXPERIMENTAL THERAPEUTICS 59 (1950).

13. Nigam, Lakkad, Karnik, Thakore, Bhatt, Aravinda Babu & Kashyap, *Effect of Hexachlorocyclohexane Feeding on Testicular Tissue of Pure Inbred Swiss Mice*, 23 BULL. ENVT'L CONTAMINATION & TOXICOLOGY 431 (1979); Espir, Hall, Shirreffs & Stevens, *Impotence in Farm Workers Using Toxic Chemicals*, 1 BRIT. MED. J. 423 (1970).

14. J. STELLMAN & S. DAUM, WORK IS DANGEROUS TO YOUR HEALTH 345 (1973).

15. Ames, *Identifying Environmental Chemicals Causing Mutations and Cancer*, 204 SCI. 587 (1979); Cairns, *The Cancer Problem*, SCIENTIFIC AM., Nov., 1975, at 64, 67.

16. R. WINTER, CANCER CAUSING AGENTS: A PREVENTIVE GUIDE 4 (1979).

17. *Id.*

18. A long latency period between the date of exposure to a carcinogen and the appearance of cancer has been identified in many other cases. "Short exposure to benzidine has caused tumors in workers 30 years later. Brief exposure to asbestos has caused cancer in humans decades later." *Id.* at 9. A number of carcinogens have been found to persist in body tissues for long periods. Vinyl chloride was found in the tissue of workers five years after their last exposure. *Id.* Dieldrin, DDT, PCBs, ethylene dichloride, ethylene dibromide and beryllium also persist for long periods. *Id.*

personal injury suits[19] which is computed from the time the action accrues.[20] In *Schmidt v. Merchants Dispatch Transportation Co.*,[21] the New York Court of Appeals interpreted the time of accrual to be the date of last exposure rather than the date plaintiffs discover or should reasonably be expected to discover their injuries.[22] Under the premise of *Schmidt*, "exposure" in this instance would likely be equated with residence at the toxic waste site.

When originally conceived, New York's statute of limitations for personal injury actions posed no significant problems, because cause and effect were viewed as virtually synonymous events. The trauma suffered by a plaintiff was manifested either immediately by an open wound or broken limb or shortly thereafter as the after-effect of a head injury, internal hemorrhage or whiplash. However, with the advancement of chemical technology, and the resultant exposure to a multitude of toxic and carcinogenic chemicals with long latency periods between date of exposure and ultimate manifestation of any injury, the statute of limitations has become outmoded.

III. CONSTITUTIONALITY

A statute of repose must be reasonable and give adequate opportunity for plaintiffs to recover for their injuries as a matter of due process. In *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway*,[23] the United States Supreme Court stated that "[a] right of action to recover damages for an injury is property," which a legis-

19. N.Y. CIV. PRAC. LAW § 214.5 (McKinney 1972).

20. "The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed." N.Y. CIV. PRAC. LAW § 203(a) (McKinney 1972).

21. 270 N.Y. 287, 200 N.E. 824 (1936). The plaintiff developed pneuconiosis as a result of inhaling dust during employment. He sued his employer for negligence. The court held the suit time-barred because the action accrued upon inhalation, not at the time the disease was expressed.

22. Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 347 U.S. 808 (1963), rejected a challenge to *Schmidt*, as did the more recent case of Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979). In *Schwartz*, the plaintiff's sinuses were injected with a deleterious chemical in a medical procedure while serving in the Navy in World War II. Thirteen years later he allegedly developed cancer as a result of the injection. The court barred the plaintiff's suit against the manufacturer of the chemical, holding that the statute of limitations began to run from the date of the injection. In *Thornton*, the plaintiff brought suit 20 years after receiving an injection of a thorium dioxide substance for an alleged resulting cancer. The Thornton court also declined to adopt a date of discovery rule. Both courts stated that it was for the legislature, not the courts, to change the rule.

23. 151 U.S. 1 (1893).

lature has no power to destroy.[24] A state must set a statute of limitations period "reasonably sufficient to enable an ordinarily diligent man to institute proceedings for [the protection of his rights]."[25] The Supreme Court has reiterated this requirement in other cases,[26] and a similar requirement has been expressed by New York courts.[27]

Current New York law denies the ordinarily diligent person who contracts a toxic disease with long latency this constitutionally mandated period. In *Wilson v. Iseminger*,[28] the Supreme Court stated that:

> [i]t may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily . . . . [The time provided to bring suit may not be] manifestly so insufficient that the statute becomes a denial of justice.[29]

New York's *Schmidt* rule deprives former hazardous waste site residents of a reasonable time in which to bring suit. Because the injury would be held to occur upon the date of last residence, years before the disease is manifested, many former residents will be deprived of a constitutionally protected period to seek redress.

IV. Policy Considerations

A. *Theory Behind Statutes of Limitations*

The arguments for adopting a date of discovery rule for injuries related to hazardous waste become particularly convincing upon

24. *Id.* at 19.

25. Canadian N. Ry. v. Eggen, 252 U.S. 553, 562 (1920).

26. Atchafalaya Land Co. v. F.B. Williams Cypress Co., 258 U.S. 190 (1922); Wilson v. Iseminger, 185 U.S. 55 (1902); Wheeler v. Jackson, 137 U.S. 245 (1890); Jackson v. Lampshire, 28 U.S. (3 Pet.) 280 (1830).

27. The right possessed by a person enforcing his claim against another is property and if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law.

Gilbert v. Ackerman, 159 N.Y. 118, 124, 53 N.E. 753, 754 (1899). Caffaro v. Trayna, 35 N.Y.2d 245, 319 N.E.2d 174, 360 N.Y.S.2d 847 (1974); People v. Turner, 117 N.Y. 227, 22 N.E. 1022 (1889), *aff'd*, 168 U.S. 90 (1897); Bloch v. Schwartz, 266 A.D. 188, 41 N.Y.S.2d 837 (1943).

28. 185 U.S. 55 (1902).

29. *Id.* at 62-63.

analysis of the theory behind statutes of limitation.[30] Such statutes aim to resolve the competing interests of plaintiff and defendant. On one hand, the wrongfully injured party must be given a reasonable opportunity to obtain a remedy. On the other, the defendant, after a period of vulnerability, is entitled to an assurance of repose. Equally important is the judicial consideration that the chances of arriving at a just and reliable verdict decrease significantly the longer the suit is delayed, since "evidence has been lost, memories have faded, and witnesses have disappeared"[31] as time passed.

The presumption that claims which are valid do not go neglected also underlies statutes of limitations. "The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity or that it has ceased to subsist."[32]

Standard considerations favoring short statutory periods do not apply to the hazardous waste site situation. The existence and nature of the disease-causing chemicals are clearly established by a state or federal agency before a health emergency is declared. Problems of lost records or faded memories are minimized, because evidence of the chemical seepage remains on site and on file. Similarly, documentation of the period of exposure of the former residents is available through municipal records. This thorough study and documentation, along with the ongoing nature of the public nuisance as the chemicals continue to leach through the waste site, vitiates the need for a date of exposure rule.

Similarly, the aforementioned presumption does not apply to suits brought by former residents of hazardous waste sites. This is not a case of a known cause of action going stale. It is one of allowing the cause of action to be brought when it arises and of not denying a remedy to injured parties who cannot possibly know of their injury in time to bring suit within the statutory period. A person cannot be said to be sleeping on his claim when he does not know, and reasonably cannot know, that he has such a claim.

30. *See Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

31. Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944).

32. Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868) (holding that a condition in a fire insurance policy requiring that all actions brought to recover for loss must be commenced within twelve months after the loss was not against policy of the statute of limitations).

B. *The Continuing Liability of the Creator of a Public Nuisance*

An additional factor peculiar to hazardous waste site cases forces the balance to swing in favor of the plaintiffs. By applying a date of discovery rule courts would not deprive Hooker of its repose, because under New York law the creator of a public nuisance is continually liable during the life of the nuisance for ensuing injury.[33] This liability remains even if the nuisance has passed into the hands of a new owner[34] because the creator of a nuisance is considered to be the proximate cause of subsequent injuries.[35]

New York courts have consistently ruled that it would be inequitable to allow the creator of a nuisance to evade responsibility for injuries resulting from his activities merely by selling or giving it to an unsuspecting party. The purchasers or grantees of the nuisance would be subject to great injustice if they were made responsible for consequences of which they were ignorant and for damages they had no way of knowing would accrue.[36]

In *Wenzel v. Duncan*,[37] the Village of Freeport erected a traffic signal stanchion which became a public nuisance. The Supreme Court of Nassau County held the Village liable even though it no longer owned or operated the nuisance, stating that, "[t]he creator of a nuisance is liable in damages to those injured by reason of its existence . . . and even transfer to another, before injury is sustained . . . will not relieve the creator of such responsibility."[38]

Thus, despite the fact that Hooker sold its toxic waste dump, it is still liable for personal injury and property damage resulting from its past activities and can enjoy no repose. Allowing former

33. State v. Ole Olson, Ltd., 76 Misc. 2d 796, 352 N.Y.S.2d 97 (1973). In this case, the developers of a vacation home community whose sewage disposal system constituted a public nuisance were still liable for damage even after the homes had been sold to innocent purchasers.

34. "An action in nuisance lies both against the person who originally committed it and the person in the occupation or possession of the premises who suffers it to continue." Knoechel v. Inzirillo, 16 N.Y.S.2d 680, 683-84 (1940).

35. "The damage is the proximate result of the original wrong" perpetrated by the creator of the public nuisance. Wilks v. New York Tel. Co., 243 N.Y. 351, 362, 153 N.E. 444, 447 (1926). The court held that liability for faulty electric wires which fell during a windstorm rested on the original erector of the wires and on the present owner who was aware of the nuisance, but not on the defendant who was an unknowing past owner.

36. Ahern v. Steele, 115 N.Y. 203, 22 N.E. 193 (1889); Cohocton Stone Road v. Buffalo, N.Y. & E. R.R., 51 N.Y. 573 (1873).

37. 32 N.Y.S.2d 223 (1941).

38. *Id.* at 224-25.

residents of Love Canal to sue upon date of discovery, therefore, would not unjustly interfere with expectations of immunity from suit.

C. *New York Precedent for a Date of Discovery Rule*

In only a few instances have New York courts held that negligence actions accrue as of the date plaintiffs discovered their injuries. Under the rule established in *Flanagan v. Mount Eden General Hospital*,[39] if a foreign object is negligently left in a body during an operation, the statute of limitations begins to run from the date the patient discovers the cause of action. The *Flanagan* court reasoned that in such situations there is no danger of false or frivolous claims and the injury is not due to professional diagnostic judgment or discretion.[40]

The *Flanagan* rule was extended to a non-foreign object case in *Dobbins v. Clifford*.[41] In *Dobbins*, a doctor negligently injured the plaintiff's pancreas while removing his spleen, but the plaintiff did not discover the injury until four years after the operation. The court found the case analogous to *Flanagan*, because both suits presented the same fundamental factors: an act of malpractice committed internally so that discovery was difficult; real evidence in the form of hospital records available at the time of the suit; no involvement of professional diagnostic judgment; and no danger of false claims.[42]

The date of discovery rule was extended to an ordinary negligence case in *LeVine v. Isoserve, Inc.*[43] The plaintiff had worked with a radioactive isotope in 1963. Seven years later he discovered he had been seriously injured by alpha radiation. An investigation by the United States Atomic Energy Commission disclosed that the source of the radiation was the defective isotope which the defendant had delivered years earlier. The court applied the *Flanagan*

39. 24 N.Y. 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969). The court stated:

> Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. Our Court said long ago, that it not only had the right but the duty to re-examine a question where justice demands it.

Id. at 434, 248 N.E.2d at 875, 301 N.Y.S.2d at 29 (citing Rumsey v. New York & N.E. R.R. Co., 133 N.Y. 79, 85-86, 30 N.E. 654, 655 (1892).

40. The *Flanagan* rule was codified in N.Y. CIV. PRAC. LAW § 214-a (McKinney Supp. 1975).

41. 39 A.D.2d 1, 330 N.Y.S.2d 743 (1970).

42. *Id.* at 4, 330 N.Y.S.2d at 746-47.

43. 70 Misc. 2d 747, 334 N.Y.S.2d 796 (1972).

date of discovery rule inasmuch as the possibility of a fraudulent claim based on alpha radiation was minimal and the case was clearly not one involving diagnostic misjudgment.

There is a strong similarity between the *Dobbins* and *LeVine* actions and hazardous waste site personal injury suits. Applying the *Dobbins* standards, discovery is at times difficult if not impossible within a three-year period. Furthermore, evidence of which chemicals were dumped can be found in the New York State Health Department's documentation of seepage and Hooker's records. Moreover, applying a date of discovery rule here would not impinge upon the diagnostic discretion the New York legislature grants physicians. Finally, the chances of a plaintiff bringing a fraudulent claim are minimized by the requirement of proving residence at the waste site. The similarity with *LeVine* is also compelling since in both cases a government agency substantiated the hazard which had been created years earlier. The uncertainty present in a hazardous waste site case stems from whether a particular plaintiff's injuries resulted from his past residence at the waste site area and this is a question of fact appropriately left for a jury's determination.

D. *Federal and State Applications of Date of Discovery Rules*

Over the past ten years, there has been a general trend toward a more realistic application of statutes of limitation in personal injury cases. New York became committed to vigorous protection of those injured by dangerous products through judicial adoption in 1973 of strict product liability.[44] In *Victorson v. Bock Laundry Machine Co.*,[45] the court of appeals applied a date of discovery rule in such a case. In *Victorson*, separate suits were brought by three plaintiffs who had been injured eight, ten and twenty-one years, respectively, after the sale of defective machines. The court held that the causes of action accrued upon injury rather than upon sale, reasoning that "to hold that it [the cause of action] somehow came into being prior . . . [to injury] would defy both logic and experience."[46]

Date of discovery rules are also being applied by the federal government. The Supreme Court, for example, has adopted such a rule for Employer Liability Act[47] claims. In *Urie v. Thompson*,[48]

44. Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461.
45. 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1973).
46. *Id.* at 403, 335 N.E.2d at 279, 373 N.Y.S.2d at 43.
47. 45 U.S.C. §§ 51-60 (1976).
48. 337 U.S. 163 (1949).

the plaintiff developed silicosis through occupational exposure. The Court decided that the date of exposure rule afforded him only a "delusive remedy"[49] and announced that a humane legislative plan could not deny plaintiff a remedy because of his "blameless ignorance."[50]

Federal courts also apply a date of discovery rule to actions brought under the Federal Tort Claims Act.[51] In *Quinton v. United States*,[52] plaintiff's pregnant wife was given Rh positive blood transfusions at an Air Force hospital although she was Rh negative. Her child was stillborn and she could not safely bear other children. The court said that the date of exposure rule "had almost uniformly been condemned as an unnecessarily harsh and unjust rule of law."[53] In adopting a date of discovery rule the court stated that "[w]e can see no sound reason for permitting the Government to escape liability here because its alleged negligence was such as to remain undiscovered and, practically speaking undiscoverable, for many years thereafter."[54]

Despite the example set by numerous state[55] and federal rulings,

49. *Id.* at 169.

50. *Id.* at 170.

51. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401(b), 2402, 2411, 2412(b), 2671-2680 (1976 & Supp. III 1979).

52. 304 F.2d 234 (5th Cir. 1962).

53. *Id.* at 240.

54. *Id.* at 241.

55. Thirty-six jurisdictions have adopted date of discovery rules either by statute or judicial determination. The following jurisdictions have adopted the rule by statute. Connecticut, CONN. GEN. STAT. ANN. § 52-584 (West 1960) (personal injury actions, discovery must occur within three years after the date of the act or omission complained of). Kansas, KAN. STAT. ANN. § 60-513 (1976) (personal injury suits; discovery must occur within two years after the act or omission complained of). Missouri, MO. ANN. STAT. § 516.100 (Vernon 1952) (personal injury actions; § 516.120(4) sets a limit of five years from the date of the act or omission). Montana, MONT. REV. CODES ANN. §§ 27-2-25, 27-3-30 (1979) (medical and legal malpractice). Nebraska, NEB. REV. STAT. §§ 25-222, 25-223 (1979) (one-year extension of limitations period for medical malpractice and two-year extension for real property defects, respectively). North Carolina, N.C. GEN. STAT. § 1-52(16) (Supp. 1979) (personal injury actions, up to ten years from the date of the act or omission). Puerto Rico, P.R. LAWS ANN. tit. 31, § 5298(2) (1968) (personal injury actions). South Carolina, S.C. CODE §§ 15-3-530(5), 15-3-535 (Supp. 1980) (personal injury actions). Vermont, VT. STAT. ANN. tit. 12, §§ 512(4), 518(a) (1973 & Supp. 1981) (personal injury actions, injuries caused by ionizing radiation or other noxious agents).

The following jurisdictions have adopted the rule by judicial determination. Arizona, Sato v. Van Denburgh, 123 Ariz. 225, 599 P.2d 181 (1979) (accounting malpractice). Arkansas, Schenebeck v. Sterling Drug, Inc., 423 F.2d 919 (8th Cir. 1970) *cited with approval in* Midwest Mutual Ins. Co. v. Arkansas Nat. Co., 260 Ark. 352, 357, 538 S.W.2d 574, 577 (1976) (negligently manufactured and distributed drug). California, Warrinton v. Charles Pfizer & Co., 274 Cal. App. 2d 564, 80 Cal. Rptr. 130

the date of discovery rule remains the minority position in New

(1969) (personal injury). Colorado, Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1970) (medical malpractice). Delaware, Oakes v. Gilday, 351 A.2d 85 (Del. 1976) (medical malpractice). District of Columbia, Burns v. Bell, 409 A.2d 614 (D.C. 1979) (medical practice). Florida, City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954) (medical malpractice). Georgia, Everhardt v. Rich's, Inc., 229 Ga. 798, 194 S.E.2d 425 (1972) (continuing tort liability); Fongay v. Tucker, 128 Ga. App. 497, 197 S.E.2d 492 (1973) (medical malpractice). Hawaii, Yoshizaki v. Hilo Hosp., 50 Hawaii 150, 433 P.2d 220 (1967) (medical malpractice). Illinois, Witherell v. Weimer, 77 Ill. App. 3d 582, 396 N.E.2d 268 (1979) (latent injuries resulting from ingestion of birth control pills). Indiana, Essex Wire Corp. v. M.H. Hilt Co., 263 F.2d 599 (7th Cir. 1959) (property damage); Withers v. Sterling Drug Co., 319 F. Supp. 878 (S.D. Ind. 1970) (personal injury). Iowa, Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967) (defect in home design). Kentucky, Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d 497 (Ky. 1979) (latent disease caused by exposure to harmful substances). Louisiana, Corsey v. State Dep't of Corrections, 375 So. 2d 1319 (La. 1979) (personal injury). Maine, Williams v. Ford Motor Co., 342 A.2d 712 (Me. 1975) (personal injury). Maryland, Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A.2d 299 (1978) (development of disease). Massachusetts, Cannon v. Sears, Roebuck & Co., 374 Mass. 739, 374 N.E.2d 582 (1978) (products liability). Michigan, Connelly v. Paul Ruddy's Co., 388 Mich. 146, 200 N.W.2d 70 (1972) (personal injury). Minnesota, Dalton v. Dow Chem. Co., 280 Minn. 147, 158 N.W.2d 580 (1968) (personal injury). Montana, Hansen v. Kiernan, 159 Mont. 448, 499 P.2d 787 (1972) (breach of agreement); Interstate Mfg. Co. v. Interstate Prods. Co., 146 Mont. 449, 408 P.2d 478 (1965). Nebraska, Sylvania Elec. Prods. v. Barker, 228 F.2d 842 (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956) (occupational exposure); Grand Island School Dist. v. Celotex Corp., 203 Neb. 559, 279 N.W.2d 603 (1979) (defects in real property improvements). New Hampshire, Raymond v. Eli Lilly & Co., 177 N.H. 164, 371 A.2d 170 (1977) (products liability); Shillady v. Elliot Community Hosp., 114 N.H. 321, 320 A.2d 637 (1974) (medical malpractice). New Jersey, Burd v. New Jersey Tel. Co., 76 N.J. 284, 386 A.2d 1310 (1978) (product liability); New Market Poultry Farms, Inc. v. Fellow, 51 N.J. 419, 241 A.2d 633 (1968) (engineering malpractice); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961) (medical malpractice). Oklahoma, Williams v. Borden, Inc., 637 F.2d 731 (10th Cir. 1980) (occupational disease); Smith v. Johnston, 591 P.2d 1260 (Okla. 1978) (negligent installation of wiring); Seitz v. Jones, 370 P.2d 300 (Okla. 1960) (medical malpractice); Continental Oil Co. v. Williams, 207 Okla. 501, 250 P.2d 439 (1952) (trespass to real property). Oregon, Adams v. Oregon State Police, 289 Or. 233, 611 P.2d 1153 (1980) (state tort claims act); Schiele v. Hobart Corp., 284 Or. 483, 587 P.2d 1010 (1978) (product liability); United States Nat'l Bank of Oregon v. Davies, 274 Or. 663, 548 P.2d 966 (1976) (legal malpractice); White v. Gurnsey, 618 P.2d 975 (Or. App. 1980) (defamation). Pennsylvania, Schaffer v. Larzelere, 410 Pa. 402, 189 A.2d 267 (1963) (wrongful death); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959) (medical malpractice); Smith v. Bell Tel. Co. of Pennsylvania, 397 Pa. 134, 153 A.2d 477 (1959) (trespass). Tennessee, Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974) (medical malpractice). Texas, Thrift v. Tenneco Chem., Inc., 381 F. Supp. 543 (N.D. Tex. 1974) (product liability); Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309 (Tex. Civ. App. 1974) (pollution damage). Washington, Ohler v. Tacoma Gen. Hosp., 92 Wash. 2d 507, 598 P.2d 1358 (1979) (product liability, medical malpractice); Peters v. Simmons, 87 Wash. 2d 400, 552 P.2d 1053 (1976) (legal malpractice). West Virginia, Hill v. Clarke, 241 S.E.2d 572 (W. Va. 1978) (medical malpractice); Family Sav. & Loan, Inc. v. Ciccarello, 207 S.E.2d 157 (W. Va. 1974) (legal malpractice). Wyoming, Banner v. Town of Dayton, 474 P.2d 300 (Wyo. 1970) (engineering malpractice).

York.[56] Yet, other states have abandoned long-standing precedents and adopted date of discovery rules. In *Fernandi v. Strully*,[57] the New Jersey Supreme Court rejected three decades of precedent and applied a date of discovery rule for medical malpractice cases. Similarly, in *Louisville Trust Co. v. Johns-Manville Products Corp.*,[58] Kentucky overturned a 1954 precedent when it adopted a date of discovery rule for drug products liability cases. These courts recognized that justice to plaintiffs demanded updating the rulings to conform to new scientific understanding of disease causation.

V. PROPOSAL FOR LEGISLATIVE CHANGE

In order to provide a constitutionally acceptable period for former hazardous waste site residents to recover for their personal injuries, the New York Legislature should enact a date of discovery rule for the running of the statute of limitations. For former residents whose injuries have already manifested themselves, the statutory period should begin to run on the date the Department of Health announces that a health emergency exists. Only after the official declaration could these injured parties know of the causal connection between their injuries and the chemicals which contaminated their former homes. For those former residents whose injuries have not yet been manifested by the date of the declaration of the health emergency, the statutory period should commence on the date they discover, or reasonably could have discovered, their site-related injuries.

While the New York courts could adopt a date of discovery rule, given their reluctance to break with precedent it is unlikely they will do so.[59] Failing action by the courts, the Legislature should remedy the existing injustice and allow recovery by the many former waste site residents who suffer from site-related injuries.

VI. Summary

Under current New York law, many former residents of hazardous waste sites will be time-barred from recovering for personal injuries resulting from their exposure to chemical waste sites. By requiring an injured party to bring suit within three years from the

56. *See* note 22 *supra*.
57. 35 N.J. 434, 173 A.2d 277 (1961).
58. 580 S.W.2d 497 (1979).
59. Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 782, 391 N.E.2d 1002, 1004, 417 N.Y.S.2d 920, 922 (1969).

date of last exposure, the existing legislation, as interpreted by the New York courts, effectively abolishes all remedy for former residents who contracted diseases with long latency periods from their exposure to the toxic chemicals which contaminated the waste site.

Adherence to the date of exposure rule enunciated in *Schmidt* becomes unconscionable when it is understood that many injuries resulting from toxic substances cannot reasonably be discovered within three years from the last date of exposure. By adhering to this outmoded precedent, New York denies former residents of hazardous waste sites their property right to recover for their injuries. New York's current rule does not reflect a reasonable cut-off period. Rather, it constitutes an arbitrary denial of a remedy and therefore violates due process.

Such a result is not mandated by the policy considerations underlying statutes of limitation. Under New York law, the creator of a public nuisance is continually liable for injuries caused by the nuisance and can enjoy no repose as long as the nuisance exists. The difficulty in reconstructing events which occurred years earlier presents no significant obstacle when harmful substances from hazardous waste sites are involved.[60] The parties need not depend on the memories of witnesses because the evidence is primarily documentary: the industry's records of chemicals dumped, the State Health Department's investigation and report on the extent of chemical seepage, municipal residency records, and medical records attesting to disease. Cases involving toxic chemicals present the unusual situation of evidence becoming increasingly available as time passes and more information regarding the effects of toxic chemicals is discovered.

Schmidt was decided long before the full nature and extent of diseases with long latency periods were understood. Since *Schmidt*, legal protection of parties injured by hazardous materials has greatly expanded. Strict product liability laws have been adopted as have date of discovery rules for occupational diseases. Social policy considerations increasingly favor consumer and environmental protection legislation[61] as the number of hazardous ma-

60. *See* Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977).

61. *See, e.g.*, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (to be codified at 42 U.S.C. §§ 9601-9657); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976 & Supp. II 1978); the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-2629 (1976); N.Y. PUB. HEALTH LAW §§ 1385-1389 (McKinney Supp. 1980).

terials and the severity of injuries they cause comes to light. The extensive damage caused by toxic chemicals and the number of people affected have resulted in a shifting of the risk onto parties who are better able to bear the cost and prevent the injury. The federal government and many states have progressively responded to the causal connection between specific diseases and injuries and dangerous materials with appropriate legislation. New York should follow this trend and adopt legislation providing for a date of discovery rule for the running of the statute of limitations for personal injury cases resulting from exposure to hazardous waste sites.

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