LIMITATION OF ACTIONS—NEGLIGENCE—DISCOVERY RULE HELD INAPPLICABLE IN NEGLIGENCE ACTION FOR ECONOMIC DAMAGES ARISING IN A COMMERCIAL SETTING—*Gates Rubber Co. v. USM Corp.*, 508 F.2d 603 (7th Cir. 1975)

In 1964, USM Corporation's predecessor in interest, Farrell-Birmingham Company, Inc., delivered and installed a lead extrusion press at the Galesburg, Illinois plant of the Gates Rubber Company (Gates).[1] The machine had been manufactured by and purchased from Farrell pursuant to an oral agreement consummated in May of 1963.[2] Subsequently, in July of 1968, the press became inoperable due to the failure of one of its integral parts.[3] After three years of fruitless negotiations with USM and insurance adjusters, Gates instituted an action in federal district court[4] in March of 1971 to recover consequential and property damages in excess of $700,000.[5] In its complaint the plaintiff alleged that the negligent design, manufacture and installation of the machine had proximately caused its failure.[6]

The defendant moved for summary judgment[7] on the ground

[1] Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 330 (S.D. Ill. 1972), *rev'd on other grounds*, 508 F.2d 603 (7th Cir. 1975).

[2] Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 330, 333 (S.D. Ill. 1972), *rev'd on other grounds*, 508 F.2d 603 (7th Cir. 1975).

[3] Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 330 (S.D. Ill. 1972), *rev'd on other grounds*, 508 F.2d 603 (7th Cir. 1975).

[4] Gates Rubber Co. v. USM Corp., 508 F.2d 603, 605 (7th Cir. 1975). The suit was brought in federal court pursuant to 28 U.S.C. § 1332(a) (1970), which provides for federal jurisdiction in civil actions where the amount in controversy exceeds $10,000 and where there is diversity of citizenship between the parties. Corporations are deemed to be citizens of their state of incorporation. *Id.* § 1332(c).

[5] *See* Gates Rubber Co. v. USM Corp., 508 F.2d 603, 605 (7th Cir. 1975). The alleged damages consisted of $67,000 in actual property damage, and $650,000 because of interruption of production. *Id.*

[6] Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 330 (S.D. Ill. 1972), *rev'd on other grounds*, 508 F.2d 603 (7th Cir. 1975). Plaintiff's original complaint also stated a cause of action in strict liability in tort but this count was subsequently dropped by plaintiff. 351 F. Supp. at 330-31. Plaintiff also amended its complaint to allege that defendant had fraudulently misrepresented facts pertaining to the design of the press, and thereby fraudulently concealed the cause of action. *Id.* at 330, 337. The court found that no fraudulent concealment was present since defendant had not undertaken any affirmative acts or made any misrepresentations sufficient to constitute fraudulent concealment. *Id.* at 338. Thus, the plaintiff was unable to avail itself of ILL. ANN. STAT. ch. 83, § 23 (Smith-Hurd 1966), which provides that the statute of limitations is tolled until discovery of the concealment. *See* 351 F. Supp. at 338.

[7] Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 331 (S.D. Ill. 1972), *rev'd on other grounds*, 508 F.2d 603 (7th Cir. 1975). The motion pertained not only to a defense on the basis of the statute of limitations, but also to the theory that plaintiff's recovery on the negligence count was limited only to actual and not consequential damage. 351 F. Supp. at

that plaintiff's action, which was governed by Illinois law, was barred by the controlling five-year statute of limitations.[8] The plaintiff, however, urged the court to apply the discovery rule, the effect of which would be to hold that the action did not accrue until the negligence could have been discovered with reasonable diligence.[9]

The trial court granted defendant's motion, rejecting plaintiff's contention that the discovery rule should be applicable in all actions grounded in negligence.[10] Rather, the court held that under Illinois law the cause of action accrued at the time of installation of the machine and was thus barred by the limitations statute.[11] In arriving at its conclusion, the court relied heavily upon a

---

331. The court considered a provision in the contractual agreement, which disclaimed any liability on defendant's part for consequential damage, as effectively limiting defendant's liability. *Id.* at 333-35. The court laid great emphasis upon section 2-719(3) of the UNIFORM COMMERCIAL CODE (codified at ILL. ANN. STAT. ch. 26, § 2-719(3) (Smith-Hurd 1963)), which provides in part that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." *See* 351 F. Supp. at 334-35. Furthermore, in areas not controlled by the Code, Illinois law similarly allowed for limitation of consequential damages. *Id.* at 334.

[8] Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 335 (S.D. Ill. 1972), *rev'd on other grounds,* 508 F.2d 603 (7th Cir. 1975). The applicable limitations statute in Illinois provides that

> actions . . . to recover damages for an injury done to property, real or personal . . . shall be commenced within 5 years next after the cause of action accrued.

ILL. ANN. STAT. ch. 83, § 16 (Smith-Hurd 1966). Vital to resolution of statute of limitations problems, therefore, is a determination of when an action is deemed to have "accrued" under Illinois law. For further analysis see note 11 *infra.*

[9] *See* Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 336-37 (S.D. Ill. 1972), *rev'd on other grounds,* 508 F.2d 603 (7th Cir. 1975). Ordinarily there is no need to employ the discovery rule "because act, injury, and discovery, are simultaneous events." Davis, *Tort Liability and the Statutes of Limitation,* 33 MO. L. REV. 171, 188 (1968). Under those circumstances the time of accrual is obvious. However, where the injury is endured over a period of time or is discoverable but not easily discernible, a defendant's potential liability may be substantially limited. *Id.* at 188-89.

[10] Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 337, 339 (S.D. Ill. 1972), *rev'd on other grounds,* 508 F.2d 603 (7th Cir. 1975).

[11] Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 336-37, 339 (S.D. Ill. 1972), *rev'd on other grounds,* 508 F.2d 603 (7th Cir. 1975). Determining when a cause of action "accrues" in a negligence action has caused much litigation and different judicial treatment. The general rule is that a cause of action accrues at the time the plaintiff may first institute suit. *See, e.g.,* Nelson v. Browning, 391 S.W.2d 881, 884 (Mo. 1965). In order to maintain a suit in negligence four elements are necessary:

> 1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct . . . .
> 2. A failure on his part to conform to the standard required. . . .
> 3. A reasonable close causal connection between the conduct and the resulting injury. . . .
> 4. Actual loss or damage resulting to the interests of another.

W. PROSSER, THE LAW OF TORTS § 30, at 143 (4th ed. 1971) (footnotes omitted). For an

line of Illinois appellate court decisions holding that the discovery rule was inapplicable in actions for economic damage arising from commercial transactions.[12] The court was unpersuaded that the Illinois supreme court, which had narrowly applied the discovery rule in three different contexts,[13] had evinced a willingness to apply the rule in all negligence actions.[14]

The Seventh Circuit, in *Gates Rubber Co. v. USM Corp.*[15] also refused to apply the discovery rule and held that the negligence action accrued when the defective press was installed at the plaintiff's plant.[16] The court was cognizant that it was faced with the "almost equally unacceptable alternatives" of construing the statute of limitations in a manner that would "either result in manifest injustice to a particular litigant, or else make the limitations bar virtually nonexistent to other litigants and potential litigants."[17] To

example of the application of this standard see Sides v. Richard Mach. Works, Inc., 406 F.2d 445, 446 (4th Cir. 1969). *See also* Wolfswinkel v. Gesink, 180 N.W.2d 452, 456 (Iowa 1970).

Other courts, however, have held actions to accrue when the breach of legal duty has occurred. *See, e.g.,* Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93, 98 (Tex. Civ. App. 1971). *See also* notes 26-33 *infra* and accompanying text.

Courts have also held that an action accrues when the last act creating liability has occurred. *See, e.g.,* Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890, 892-93 (N.D. Ill. 1971), wherein the defendant was being sued for the negligent manufacture of a helicopter sold to the plaintiff. The court held that the last act creating liability was the crash, and consequently, the action accrued at that time. *Id.* at 893. *But see* Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975), in which the court decided that *Klondike* properly stated the Illinois law but improperly applied it. *Id.* at 607 n.8. The court elaborated:

> We believe the correct conclusion under Illinois law should have been that the plaintiff was injured, for purposes of this property damage action, when he took possession of the defectively manufactured helicopter.

Id.

[12] Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 336 (S.D. Ill. 1972), *rev'd on other grounds,* 508 F.2d 603 (7th Cir. 1975). *See* Board of Educ. v. Perkins & Will Partnership, 119 Ill. App. 2d 196, 197, 203, 255 N.E.2d 496, 497, 499 (1970); Wilson v. White Motor Corp., 118 Ill. App. 2d 436, 438, 440, 254 N.E.2d 277, 278-79 (1969); Sabath v. Morris Handler Co., 102 Ill. App. 2d 218, 222, 228-29, 243 N.E.2d 723, 725, 729 (1968); Board of Educ. v. Joseph J. Duffy Co., 97 Ill. App. 2d 158, 160-61, 240 N.E.2d 5, 6-7 (1968); Simoniz Co. v. J. Emil Anderson & Sons, 81 Ill. App. 2d 428, 430, 438, 225 N.E.2d 161, 162, 166 (1967).

[13] *See* Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 40, 262 N.E.2d 450, 455 (1970) (medical malpractice); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 432, 261 N.E.2d 305, 313 (1970) (strict products liability); Rozny v. Marnul, 43 Ill. 2d 54, 72-73, 250 N.E.2d 656, 665-66 (1969) (negligent surveyor).

[14] *See* Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 336-37 (S.D. Ill. 1972), *rev'd on other grounds,* 508 F.2d 603 (7th Cir. 1975).

[15] 508 F.2d 603 (7th Cir. 1975).

[16] *Id.* at 615. The court reversed the lower court's holding with respect to the fraudulent concealment issue. *Id.* at 615-16. The court did not reach the merits, but merely determined that material differences of fact existed and, therefore, a dismissal on summary judgment was improper. *Id.* at 616.

[17] *Id.* at 612.

determine how the competing policies should be balanced, the court, restricted to applying Illinois law and called upon to predict how the Illinois supreme court would decide the novel issue,[18] evaluated the underlying implications of both the decisional and statutory law of the state. From this analysis, the Seventh Circuit concluded that the highest court of Illinois would attach greater significance to achieving finality in commercial transactions than to sustaining a plaintiff's action for economic injury, and thus would refuse to apply the discovery rule in a commercial setting where the parties were of equal bargaining strength.[19]

The decision to apply the discovery rule is essentially one of policy,[20] and entails a consideration of the traditional functions served by statutes of limitations.[21] As articulated by Justice Jackson, the underlying policy of these statutes of repose is

> to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.[22]

Statutes of limitations, representing a legislative determination that it is sound policy to preclude adjudication of stale claims,[23] are

---

[18] *Id.* at 605. The court lamented:

> We regret that Illinois has not established a procedure, as has Indiana, which would enable us to obtain definitive answers to the questions of Illinois law from the tribunal with final authority to answer those questions.

Id. at 605 n.3.

[19] *Id.* at 613-14.

[20] *See, e.g.*, Coumoulas v. Service Gas, Inc., 10 Ill. App. 3d 273, 293 N.E.2d 187 (1973), where the court stated:

> The question . . . [is] one of policy: whether, to avoid injustice, the applicable limitations statute should begin to run when the plaintiff had in fact discovered that he had suffered the injury or by the exercise of reasonable care should have discovered it.

Id. at 275, 293 N.E.2d at 189. *Coumoulas* was decided subsequent to the *Gates* district court opinion and was among the Illinois appellate court cases considered by the Seventh Circuit. *See* 508 F.2d at 606 n.7.

[21] The limitations statutes "represent a public policy about the privilege to litigate." Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). Their most basic function is

> to produce speedy settlements . . . and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them.

Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828). *See also Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950) [hereinafter cited as *Developments*].

[22] Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

[23] The avoidance of stale claims is primarily a consideration of fairness to the defendant. *Developments*, *supra* note 21, at 1185. Indeed, as one court has noted: "[I]t is better for the public that some rights be lost than that stale litigation be permitted." Thomas v. Richter, 88 Wash. 451, 456, 153 P. 333, 336 (1915). However, since statutes of limitations are capable of producing great hardships,

firmly entrenched in our system of jurisprudence.[24] Nevertheless, they have generated a wide divergence of judicial opinion as to when the limitation period should commence in an action predicated upon negligence.[25]

One established view in negligence actions has been that the limitation period begins to run as soon as some legal right of the plaintiff has been invaded. Illustrative of this approach is *M. T. Reed Construction Co. v. Jackson Plating Co.*,[26] in which the Supreme Court of Mississippi applied the "legal injury" test.[27] In *Reed,* the plaintiff sought to recover for the defendant's negligent construction of plaintiff's building when, more than six years after its completion, the roof began to sag permitting water seepage.[28] The court held that the action was barred by the six-year statute of limitations on the theory that the limitation period ran from the date of the original negligent construction[29] regardless of the amount of damages then recoverable. Even though there was no discernible damage within the statutory period, the plaintiff's suit was time-barred.[30] The effect of this approach is, in essence, that the breach of

---

> they should always be construed with reasonable strictness, and in favor of the rights sought to be defeated thereby, so far as is consistent with their letter and spirit.

1 H. WOOD, LIMITATION OF ACTIONS § 4, at 10 (4th ed. 1916).

[24] The first statute of limitations on personal actions in the common law was the Limitation Act of 1623, 21 Jac. 1, c. 16 (1623). *Developments, supra* note 21, at 1178. At present, each of the fifty states has adopted limitations statutes in one form or another. *See* Littell, *A Comparison of the Statutes of Limitations,* 21 IND. L.J. 23, 25 (1945). *See, e.g.,* N.J. STAT. ANN. § 2A:14-1 *et seq.* (1952). Statutes of limitations "are found and approved in all systems of enlightened jurisprudence." Wood v. Carpenter, 101 U.S. 135, 139 (1879). *Cf.* Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457, 466 (1831) (upholding the constitutionality of limitations statutes).

[25] Commentators have not found a common ground for discussing the accrual problem. *Compare* Davis, *supra* note 9, at 187-88 *with* Recent Statutes, *The Unique Negligence Limitations Statute of Connecticut,* 28 CONN. B.J. 346, 348-54 (1954). For a general discussion of the various approaches taken in determining when a cause of action accrues see note 11 *supra.*

[26] 222 So. 2d 838 (Miss. 1969).

[27] *Id.* at 840-41. *Accord, e.g.,* Hooper v. Carr Lumber Co., 215 N.C. 308, 311, 1 S.E.2d 818, 820 (1939); Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93, 98 (Tex. Civ. App. 1971). The application of this test has been necessitated in some states by specific statutes. *See, e.g.,* MICH. COMP. LAWS ANN. § 600.5827 (1968). Under this statute "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id. See* Cree Coaches, Inc. v. Panel Suppliers, Inc., 23 Mich. App. 67, 70-71, 178 N.W.2d 101, 102-03 (1970).

[28] 222 So. 2d at 839.

[29] *Id.* at 840-41.

[30] *Id.* at 839, 841. It is interesting that *Reed* specifically rejected the discovery rule because its adoption "is solely within the province of the legislature" as a determination of public policy. *Id.* at 840. *But see* note 69 *infra.*

duty and damage elements vital to the maintenance of a negligence suit are no longer perceived as two distinct elements but rather are merged into one.[31] Accordingly, even if recoverable damages are only nominal,[32] the action must be commenced within the prescribed time of the initial negligent act.[33]

To avoid having an action deemed accrued at the time of the initial legal injury, the plaintiff contended in Hargraves v. Brackett Stripping Mach. Co., 317 F. Supp. 676, 680 (E.D. Tenn. 1970), that he was deprived "of his rights in violation of due process" when the statute of limitations was "construed as running from the date of the sale or the wrongful act of the defendant." The court found, however, that no constitutional attack could be sustained unless the selection of the date when the action would begin to run could be shown to be arbitrary or capricious. *Id.* at 682-83. The court further asserted that

> the availability of proof . . . would not be an unreasonable concern for a legislative body to have in mind in the enactment of a statute of limitations.

Id. at 683. The court concluded that "the date of the wrongful act" or sale "as the inception date for the running of a statute of limitations" was not sufficiently arbitrary to violate the due process clause. *Id. Cf.* Ford Motor Credit Co. v. Minges, 473 F.2d 918, 922 (4th Cir. 1973).

[31] *See* Jackson v. General Motors Corp., Oldsmobile Div., 223 Tenn. 12, 441 S.W.2d 482, *cert. denied,* 396 U.S. 942 (1969), where the plaintiff was injured when her parked car rolled down her driveway due to a defective parking gear and handbrake. 223 Tenn. at 13, 441 S.W.2d at 482. The Tennessee supreme court found that the cause of action accrued on the date of the original breach of contract, that is, the date of sale. *Id.* at 17, 441 S.W.2d at 484. The Sixth Circuit in Hodge v. Service Mach. Co., 438 F.2d 347 (6th Cir. 1971), interpreted *Jackson* as holding that the breach of legal duty was that plaintiff received a defective automobile and the damage was that "the plaintiff got less than he paid for." *Id.* at 349. Thus, the two necessary elements merged on the date of sale and the cause of action accrued on that date. *Id.* The view "that contract damages supply the essential 'damnum' of a negligence action" to trigger the limitation period is unique. Recent Statutes, *supra* note 25, at 351.

[32] This seems to contradict the accepted view that nominal damages are insufficient to maintain a negligence action. W. PROSSER, THE LAW OF TORTS § 30, at 143 (4th ed. 1971). As Dean Prosser points out:

> Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred. The threat of future harm, not yet realized, is not enough.

Id. (footnotes omitted). *See also* C. MCCORMICK, THE LAW OF DAMAGES § 22, at 88-91 (1935), where the author indicates that negligence without actual loss or damages is not actionable.

[33] Where there is no breach of any contractual duty owed to the plaintiff, and his suit is for consequential damages only, even the courts applying the "legal injury" test have held that the cause of action does not accrue until damage occurs. *See, e.g.,* Power v. Munger, 52 F. 705, 710-11 (8th Cir. 1892).

This approach is clearly demonstrated by contrasting two recent Georgia cases. In Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966), the plaintiff was suing a contractor for negligent design and construction of its building. *Id.* at 425, 151 S.E.2d at 481-82. The court held the action to have accrued from the date the negligent acts constituting the legal injury were committed. *Id.* at 426, 151 S.E.2d at 482. In Hunt v. Star Photo Finishing Co., 115 Ga. App. 1, 153 S.E.2d 602 (1967), the court evaluated an almost identical fact pattern, except that the plaintiff was not a party to the building contract. *Id.* at 1-2, 153 S.E.2d at 603. Rather, the plaintiff moved into the building as a subsequent lessee and was injured when the roof collapsed after the statute of limitations would have run if measured from the date of the negligent construction. *Id.* at 5-6, 153

The more reasonable approach, exemplified by *Rosenau v. City of New Brunswick*,[34] is that actual damage is essential to a negligence action, and that the statute does not commence running until such damage occurs, regardless of any legal injury.[35] In *Rosenau*, plaintiffs, having sustained damage to their home when a water meter installed fourteen years earlier broke, initiated suit against the manufacturer for its negligence in manufacturing the meter, and against the city for negligent maintenance.[36] The trial court granted the manufacturer's motion for summary judgment, concluding that the action was precluded by the statute of limitations.[37] The appellate division reversed, and ultimately the New Jersey supreme court determined that the manufacturer should be exposed to liability, notwithstanding the fact that the damage occurred twenty-two years after the defective meter left its hands.[38] Underlying the court's holding was a recognition that New Jersey courts have steadfastly held that a cause of action in negligence "accrue[s] not when the negligence itself took place but when the

---

S.E.2d at 605. The court distinguished *Wellston* because in that case a legal injury occurred long before the plaintiff was actually damaged. *Id.* at 5, 153 S.E.2d at 605. In *Hunt*, since the plaintiff was a stranger to the contract, his cause of action did not accrue until he actually sustained damages. *Id. Accord,* Welding Prods. v. S.D. Mullins Co., 127 Ga. App. 474, 476, 478, 193 S.E.2d 881, 883-84 (1972). This approach may have evolved out of the early distinction between trespass and case. *See* Roberts v. Read, 104 Eng. Rep. 1070 (K.B. 1812).

[34] 51 N.J. 130, 238 A.2d 169 (1968).

[35] *Id.* at 137-40, 238 A.2d at 172-74. This perception seems more justifiable than the "legal injury" test because of the damage requirement in a negligence action. *See* Fields v. Napa Milling Co., 164 Cal. App. 2d 442, 447-48, 330 P.2d 459, 462 (Dist. Ct. App. 1958). *Cf.* White v. Schnoebelen, 91 N.H. 273, 275-76, 18 A.2d 185, 186-87 (1941) (negligent installation of lightning rod); Theurer v. Condon, 34 Wash. 2d 448, 454-55, 209 P.2d 311, 315 (1949) (negligent installation of stove and oil tank). *See also* note 11 *supra*.

Some cases appear to be applying an actual damages rule, yet on closer inspection they reveal an implication that might suggest otherwise. In Kitchener v. Williams, 171 Kan. 540, 236 P.2d 64 (1951), plaintiff was suing for personal injuries sustained as a result of a gas explosion caused by a defective hot water heater. *Id.* at 540, 236 P.2d at 66. Although apparently adopting an actual damages approach, the precise language of the court might intimate a different conclusion:

> We place the decision in this action on the ground and on the sole ground that had the plaintiff brought the action any time before the explosion . . . he would have met the defense that he had suffered no personal injury on account of negligence.

Id. at 553, 236 P.2d at 74. Thus, in a case where only property damage is present, the action might be held to accrue at the time of the "legal injury." *Cf.* Barnes v. Sears, Roebuck & Co., 406 F.2d 859, 862 (4th Cir. 1969), where the court held that a plaintiff who had sustained injuries as a result of a fall from a defectively manufactured bicycle, had two causes of action, one for property damage and one for personal injuries. Consequently, plaintiff's cause of action for property damage accrued at the time of sale; his suit for personal injuries, however, did not accrue until he was injured. *Id.*

[36] 51 N.J. at 134, 238 A.2d at 171.

[37] *Id.* at 135, 238 A.2d at 171.

[38] *Id.* at 140, 238 A.2d at 174.

consequential injury or damage occurred."[39] Furthermore, the court emphasized that to bar plaintiffs from suit before they had a right to initiate it, "would offend common sense and justice."[40]

Although *Rosenau* represents a more liberal approach to the accrual problem than does the "legal injury" test, harshness may nonetheless ensue from the application of statutes of limitations under either approach.[41] Many jurisdictions, therefore, have fashioned equitable devices to toll the statute[42]—a principal tool being the discovery rule. Heretofore, courts have primarily utilized the discovery rule in the areas of fraudulent concealment,[43] subsurface land injury,[44] and professional malpractice,[45] but have been cautious to limit its scope to the particular facts of the case before it.[46]

---

[39] *Id.* at 137, 238 A.2d at 172. *Rosenau* "[did] not rest upon the 'discovery' rule, since the cause of action itself did not arise until the moment of injury." Rosenberg v. Town of N. Bergen, 61 N.J. 190, 195-96, 293 A.2d 662, 665 (1972).

[40] 51 N.J. at 140, 238 A.2d at 174.

[41] There are many instances where the plaintiff has sustained actual damage and is unaware of it. Some courts have applied the discovery rule under such circumstances to alleviate the hardship to the plaintiff who would otherwise be barred from maintaining an action. *See, e.g.*, Smith v. Bell Tel. Co., 397 Pa. 134, 136, 153 A.2d 477, 478-79 (1959); Ruth v. Dight, 75 Wash. 2d 660, 661, 453 P.2d 631, 632 (1969).

[42] One such device has been the doctrine of "continuing tort." In a case where the defendant has been exposed to risk over a period of time, courts have not found it easy to pinpoint the time when the cause of action developed. *See* Recent Statutes, *supra* note 25, at 353-54. Courts have sought to alleviate the hardship of commencing the period at the date of the initial injury by holding that the statute will be tolled until either the occurrence of harm, the cessation of the wrong, or the discovery of the damage. *Id. See, e.g.*, Dalrymple v. Brunswick Coca-Cola Bottling Co., 51 Ga. App. 754, 754, 181 S.E. 597, 598 (1935); Hughes v. Eureka Flint & Spar Co., 20 N.J. Misc. 314, 316, 26 A.2d 567, 568-69 (Mercer County Cir. Ct. 1939).

The discovery rule has sometimes been applied in cases where the tort is a continuing one. *See, e.g.*, Urie v. Thompson, 337 U.S. 163, 170-71 (1949). However, some jurisdictions have refused to apply the discovery rule in this type of situation, and have adhered to the continuing tort analysis. *See* Borgia v. City of N.Y., 12 N.Y.2d 151, 155-56, 187 N.E.2d 777, 778, 237 N.Y.S.2d 319, 321 (1962).

[43] *See* notes 47-50 *infra* and accompanying text.

[44] *See* notes 51-57 *infra* and accompanying text.

[45] *See* notes 58-62 *infra* and accompanying text.

[46] *See, e.g.*, Layton v. Allen, 246 A.2d 794, 799 (Del. 1968); Diamond v. New Jersey Bell Tel. Co., 51 N.J. 594, 601, 242 A.2d 622, 626 (1968), where the court asserted:

> We prefer to postpone discussion of the ultimate bounds of the discovery rule until appropriate cases arise. The problem cannot yet be handled in purely abstract terms.

But see Rosenberg v. Town of N. Bergen, 61 N.J. 190, 196, 293 A.2d 662, 665 (1972), indicating that the *Diamond* opinion, as well as New Market Poultry Farms, Inc. v. Fellows, 51 N.J. 419, 241 A.2d 633 (1968), another New Jersey discovery rule case, "clearly accept[ed] the 'discovery' rule as having, if not universal, at least very wide application." *See also* Prince v. Trustees of Univ. of Pa., 282 F. Supp. 832, 842-43 (E.D. Pa. 1968); Nielson v. Arizona Title Ins. & Trust Co., 15 Ariz. App. 29, 30, 485 P.2d 853, 854 (1971); Basque v. Yuk Lin Liau, 50 Hawaii 397, 398-99, 441 P.2d 636, 637 (1968); Chrischilles v. Griswold, 260 Iowa 453, 462-63, 150 N.W.2d 94, 100 (1967).

For example, in *Schmucking v. Mayo*[47] the Minnesota supreme court invoked the equitable discovery principle to permit the plaintiff to maintain a suit to recover for defendant's negligence in the performance of a throat operation.[48] In allowing the suit predicated on the theory of fraudulent concealment, the court acknowledged that in actions based on fraud, the statute of limitations is tolled until discovery of the fraud, and that this exception encompasses cases in which the defendant has fraudulently concealed the existence of a cause of action.[49] The rationale for applying the discovery rule was twofold. First, the court determined that the statute of limitations was not intended to bar an action when the plaintiff had been purposefully prevented from ascertaining the existence of a valid claim, and second, that a defendant should not be able to insulate himself from liability by concealing his own wrongdoing.[50]

The discovery rule has also been utilized in cases where the plaintiff is unaware of damage to his property because the injury is concealed beneath the surface of the ground.[51] In *Diamond v. New Jersey Bell Telephone Co.*,[52] for example, the plaintiff instituted suit against the telephone company for its negligent installation of an underground conduit.[53] The carelessly performed installation had

[47] 183 Minn. 37, 235 N.W. 633 (1931).

[48] *Id.* at 38, 41, 235 N.W. at 633-34.

[49] *Id.* at 39-41, 235 N.W. at 633-34. Many jurisdictions have statutory exceptions for fraud which will toll the statute of limitations. *See, e.g.*, N.Y. CIV. PRAC. LAW § 213:9 (McKinney 1972). Some statutes have extended this exception to include fraudulent concealment. *See, e.g.*, ILL. ANN. STAT. ch. 83, § 23 (Smith-Hurd 1966). In jurisdictions where there is no specific statutory exception, case law has evolved to the same effect. *See, e.g.*, Kohler v. Barnes, 123 N.J. Super. 69, 79, 301 A.2d 474, 479 (L. Div. 1973).

For an interesting example of judicial extension of a statutory exception for fraud to include fraudulent concealment see De Vito v. New York Cent. Sys., 22 App. Div. 2d 600, 603, 257 N.Y.S.2d 895, 898-99 (1965), *noted in* 41 N.Y.U.L. REV. 433 (1966). For general discussions of fraud and fraudulent concealment in statute of limitations law see Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875 (1933); Dawson, *Undiscovered Fraud and Statutes of Limitation*, 31 MICH. L. REV. 591 (1933).

[50] 183 Minn. at 40-41, 235 N.W. at 634. *See also* Partrick v. Groves, 115 N.J. Eq. 208, 211, 169 A. 701, 702 (Ct. Err. & App. 1934).

[51] *See, e.g.*, Smith v. Bell Tel. Co., 397 Pa. 134, 153 A.2d 477 (1959). Such cases often deal with subterranean trespass. *See, e.g.*, Lewey v. H. C. Fricke Coke Co., 166 Pa. 536, 542, 31 A. 261, 261 (1895), where the defendant had wrongfully removed coal from the plaintiff's land through an underground mine. Since "[n]o amount of vigilance" by the plaintiff would have enabled him to detect the defendant's wrongdoing, the court applied the discovery rule. *Id.* at 547, 31 A. at 264. The court arrived at its conclusion by analogizing the situation to one of fraud, where the discovery rule was the established theory. *Id.* at 543-45, 31 A. at 262-63. *See also* Cole v. Eastern Gas & Fuel Associates, 322 F.2d 506, 510-11 (4th Cir. 1963).

[52] 51 N.J. 594, 242 A.2d 622 (1968).

[53] *Id.* at 596, 242 A.2d at 622-23.

damaged a sewer line which ultimately caused flooding on the plaintiff's premises nine years after the installation.[54] In determining whether the plaintiff's action should be time-barred or whether equitable considerations warranted application of the discovery rule, the Supreme Court of New Jersey weighed the defendant's problem of defending a suit brought many years after its negligence against the harshness of barring a plaintiff who could not have known of his cause of action. In striking the balance, the court noted that "considerations of repose and fairness to defendants [should not] be ignored."[55] Nonetheless, fairness to the plaintiff under the circumstances "outweigh[ed] whatever dangers of imposition exist[ed] in application of a discovery rule."[56] Furthermore, the court reasoned that the lapse of time could be as debilitating to a plaintiff in proving his case as it was to a defendant in defending his.[57]

The greatest impact of the discovery rule has been in the field of medical malpractice.[58] Initially, the rule was applied in cases where a foreign object had mistakenly been left inside the patient, the effect of which was to toll the statute of limitations until the object was discovered.[59] The modern trend, however, has been to extend the utilization of this rule to encompass actions arising out of misdiagnosis and mistreatment.[60] Motivating the courts to employ the rule in this area has been a sensitivity to the plight of innocent patients who have been physically harmed, since "the very relationship of physician-patient, with its attributes of trust and

---

[54] *Id.* at 596, 242 A.2d at 623. The plaintiff was suing for the damage to the sewer pipes, not to the land from flooding. *Id.* at 597, 242 A.2d at 623. Therefore, the actual damage occurred at the time of the initial installation.

[55] *Id.* at 600, 242 A.2d at 625.

[56] *Id.*

[57] *Id.* at 601, 242 A.2d at 625. *See also* Owens v. White, 342 F.2d 817, 819 (9th Cir. 1965).

[58] This area has produced much litigation and commentary. *See, e.g.*, Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339 (1962); Comment, *Malpractice Statute of Limitations in New York: Conflict and Confusion*, 1 HOFSTRA L. REV. 276 (1973); Note, *Medical Malpractice: A Survey of Statutes of Limitation*, 3 SUFFOLK U.L. REV. 597 (1969).

[59] *See, e.g.*, Spath v. Morrow, 174 Neb. 38, 43, 115 N.W.2d 581, 585 (1962); Fernandi v. Strully, 35 N.J. 434, 450, 173 A.2d 277, 286 (1961); Ayers v. Morgan, 397 Pa. 282, 292, 294, 154 A.2d 788, 793-94 (1959).

[60] *See, e.g.*, Yoshizaki v. Hilo Hosp., 50 Hawaii 150, 154-55, 433 P.2d 220, 223 (1967); Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 34-35, 40-41, 262 N.E.2d 450, 452, 455 (1970); Frohs v. Greene, 253 Ore. 1, 3-4, 452 P.2d 564, 565 (1969). The discovery rule has been adopted statutorily in many states to apply in medical malpractice situations. For a listing of state statutes and cases adopting the discovery rule see Comment, *supra* note 58, at 292-94 & n.73.

confidence, often prevents [the injury's] prompt discovery."[61] The professional relationship concept has also served as one basis for extending the discovery rule to apply in legal malpractice situations.[62]

The discovery rule, like any other equitable device, is not applied mechanically. Courts have generally been cognizant of the need to evaluate the competing policies before invoking the rule, for it can be equally as harsh to subject a defendant to liability for an indefinite time as it is to bar a plaintiff before he is aware that he has been injured.[63] The *Gates* court, appreciative of the necessity of weighing the conflicting interests, attempted to discern how the balance would be struck by the Illinois supreme court. To do so, it endeavored to resolve the apparent dichotomy between the Illinois appellate court decisions and those supreme court decisions in which the discovery rule had been applied.

The most influential of the appellate court opinions, *Simoniz Co. v. J. Emil Anderson & Sons,*[64] was the starting point in the

[61] Lillich, *supra* note 58, at 365 (footnote omitted). The author also points out that in order for a patient to discover his physician's negligence, he usually must see another doctor, "an occurrence the physician-patient relationship tends to discourage." *Id.* (footnote omitted).

[62] "Because of the unique ethical standards adopted by, or imposed upon the legal profession," attorneys are susceptible to malpractice suits based on breach of a fiduciary duty to their clients. Haughey, *Lawyers' Malpractice: A Comparative Appraisal,* 48 NOTRE DAME LAW. 888, 891 (1973). Consequently, where an attorney has breached this duty, the discovery rule has sometimes been applied to alleviate harshness to the plaintiff. *See, e.g.,* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 189, 491 P.2d 421, 429, 98 Cal. Rptr. 837, 845 (1971), *noted in* 24 HASTINGS L.J. 795 (1973); Edwards v. Ford, 279 So. 2d 851, 853 (Fla. 1973); Mumford v. Staton, Whaley & Price, 254 Md. 697, 714, 255 A.2d 359, 367 (1969). *See also* Note, *The Commencement of the Statute of Limitations in Legal Malpractice Actions—The Need for Re-evaluation: Eckert v. Schaal,* 15 U.C.L.A.L. REV. 230 (1967). Some jurisdictions have adopted the discovery rule statutorily for legal malpractice. *See, e.g.,* FLA. STAT. ANN. § 95.11(4)(a) (Supp. 1975-76) (all professional malpractice).

The discovery rule has also been applied in other professional malpractice areas, including accountants, stockbrokers, insurance agents, title companies and escrow holders. *See* Note, 18 N.Y.L.F. 482, 485 n.15 (1972). *See also* cases cited in *Gates,* 508 F.2d at 610-11 n.16. Many jurisdictions have also adopted statutes which set an outside date for bringing an action against architects, engineers, building contractors and designers. Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action,* 18 CATH. U.L. REV. 361, 361 & n.1 (1969).

[63] *Cf.* Note, 14 WAYNE L. REV. 652, 657 (1968). The Ninth Circuit has suggested several criteria which "would temper application of the discovery doctrine by hedging it with equitable considerations." Owens v. White, 342 F.2d 817, 820 (9th Cir. 1965). The factors that might be considered are

> the nature of the alleged injury, the relative difficulty of proving the wrong as contrasted with rebutting that proof, the availability of witnesses and records . . . and the inherent difficulty of discovering certain wrongs.

Id. (footnotes omitted). *Accord,* Grey v. Silver Bow County, 149 Mont. 213, 216-18, 425 P.2d 819, 821 (1967).

[64] 81 Ill. App. 2d 428, 225 N.E.2d 161 (1967).

court's analysis. In *Simoniz,* a landowner sought to recover for the negligent construction of a building whose roof had collapsed nine years after its completion.[65] Determining that the cause of action accrued at the time of defendant's negligence, the court barred the plaintiff's claim, expressly refusing to apply the "know or ought to know" rule, as the discovery rule is sometimes called.[66] Underlying the court's decision was an awareness that after it had previously refused to apply the rule in *Mosby v. Michael Reese Hospital,*[67] a medical malpractice action, the legislature reacted by enacting a discovery rule to control such actions.[68] The *Simoniz* court reasoned that the determination to apply the rule in cases dealing with property damage should similarly be left to the legislature.[69]

The *Gates* court found that the reasoning advanced in *Simoniz* had been rejected by subsequent Illinois supreme court decisions,

[65] *Id.* at 430, 225 N.E.2d at 162.

[66] *Id.* at 438, 225 N.E.2d at 166.

[67] 49 Ill. App. 2d 336, 342, 199 N.E.2d 633, 636 (1964). In *Mosby,* a surgical needle was left in a patient's body during an operation, and remained there undiscovered for four years. *Id.* at 337, 199 N.E.2d at 634. Upon discovery, the patient brought suit, but the court held the action barred by the two-year limitation period on personal injuries. *Id.* at 337, 342, 199 N.E.2d at 634, 636.

[68] 81 Ill. App. 2d at 435-36, 225 N.E.2d at 165. *Mosby* has been criticized as "fathering" inequitable results such as *Simoniz.* Petersen, *The Undiscovered Cause of Action and the Statute of Limitations: A Right Without a Remedy in Illinois,* 58 ILL. B.J. 644, 646 (1970).

[69] 81 Ill. App. 2d at 438, 225 N.E.2d at 166. All of the appellate court decisions considered by *Gates* solidly upheld this view. *See* 508 F.2d at 606 & n.7. However, the more enlightened view has been that the application of the discovery rule is a matter for the courts. *See* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 433-34, 248 N.E.2d 871, 874-75, 301 N.Y.S.2d 23, 28-29 (1969); Berry v. Branner, 245 Ore. 307, 313, 421 P.2d 996, 999 (1966). In Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965), the court admitted that changing the length of the limitation period was purely a legislative decision. *Id.* at 790, 144 S.E.2d at 160. However, the court asserted its own function—to construe the meaning of the term accrual—a "function [that] is . . . peculiarly for the judicial branch of government." *Id.*

Courts, on occasion, have attempted to circumvent the clear legislative intent by construing a statute in such a manner as to reach a desired result. *See, e.g.,* Allison v. Missouri Power & Light Co., 59 S.W.2d 771 (Mo. Ct. App. 1933) (construing MO. REV. STAT. § 860 (1929), *as amended,* MO. ANN. STAT. § 516.100 (1952)). *See also* Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting), in which Judge Frank urged that the court should alleviate the harshness of the plain language of CONN. GEN. STAT. REV. § 8324 (1949), *as amended,* CONN. GEN. STAT. ANN. § 52-584 (1960), which provided that a cause of action in "negligence . . . shall be brought but within one year from the date of the act or omission complained of." Judge Frank animatedly asserted that

> [e]xcept in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad.

198 F.2d at 823 (footnotes omitted). Indeed, in Judge Frank's view "'*it is inconceivable that [plaintiff] should be barred by lapse of time before the time when she could have instituted [her] suit.*'" *Id.* at 826 (emphasis by the court) (footnote omitted) (quoting from Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 38, 68 A.2d 517, 535 (1949)).

particularly *Lipsey v. Michael Reese Hospital,*[70] a medical malpractice action in which the court applied the discovery rule.[71] The effect of *Lipsey,* in determining that it was not solely within the ambit of legislative power to apply the rule,[72] was to undermine the precedential value of both *Simoniz* and *Mosby.* As such, the court in *Gates* concluded that the line of appellate court decisions which had all substantially relied on *Simoniz* should not be dispositive of the issue presented in *Gates.*[73] Nevertheless, the court observed that

> [t]he fact that the reasoning of *Simoniz* and its progeny is unacceptable does not, however, lead inexorably to the conclusion that the [Illinois] Supreme Court would have reached a different result in those cases.[74]

The basis for this view was that Illinois' highest court had not adopted a "discovery rule of general applicability" in any of the cases that did employ the rule[75]—*Rozny v. Marnul,*[76] *Williams v. Brown Manufacturing Co.,*[77] or *Lipsey v. Michael Reese Hospital.*[78]

In *Rozny,* the first case in which the Illinois supreme court utilized the discovery rule, the plaintiffs, as homeowners, sought to recover damages from a surveyor who had negligently prepared the plat commissioned by the building contractor.[79] A jury verdict rendered for the plaintiffs was appealed by the defendant, who contended that he should incur no liability for two reasons. First, he asserted that the plaintiffs' suit should have been barred by the statute of limitations and, second, that the plaintiffs had not stated a ground for relief for tortious misrepresentation because they were not in privity with the surveyor.[80] The court determined that lack of privity would not operate as a defense to the suit, but more importantly, that plaintiffs' cause of action should be considered as accruing on the date they discovered defendant's negligence.[81] The

---

[70] 46 Ill. 2d 32, 262 N.E.2d 450 (1970).

[71] 508 F.2d at 608.

[72] 46 Ill. 2d at 38-40, 262 N.E.2d at 454-55.

[73] 508 F.2d at 608.

[74] *Id.*

[75] *Id.* North Carolina has statutorily adopted the discovery rule with a ten year outside limit for all personal injury and property damage claims. *See* N.C. GEN. STAT. § 1-15(b) (Supp. 1974).

[76] 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

[77] 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

[78] 46 Ill. 2d 32, 262 N.E.2d 450 (1970).

[79] 43 Ill. 2d at 56-57, 250 N.E.2d at 657.

[80] *See id.* at 62, 68, 250 N.E.2d at 660, 663.

[81] *Id.* at 60-62, 72-73, 250 N.E.2d at 659-60, 665-66. The discovery rule has been extended to include surveyors in other jurisdictions. *See, e.g.,* Mattingly v. Hopkins, 254 Md.

court viewed the resolution of the limitation accrual problem as a balance between the surveyor's difficulty in defending this type of suit and the plaintiffs' blameless ignorance in not knowing of the defect in the survey—a balance ultimately resolved in favor of the plaintiffs.[82] The primary significance of *Rozny,* however, rests in the test articulated by the court to govern the rule's application:

> [W]here the passage of time does little to increase the problems of proof, the ends of justice are served by permitting plaintiff to sue within the statutory period computed from the time at which he knew or should have known of the existence of the right to sue.[83]

Judge Stevens, speaking for the *Gates* court, did not apply these prescribed guidelines. Rather, he placed reliance on the fact that *Rozny* was vitally concerned with avoiding " 'potential "liability in an indeterminate amount for an indeterminate time to an indeterminate class." ' "[84] He concluded, therefore, that the *Rozny* court would be reluctant to apply the discovery rule in the arms length commercial circumstances of the *Gates* case.[85] This appears to be a misreading of *Rozny.* Although the Illinois supreme court was concerned in *Rozny* with overextending potential liability, it was only in the context of whether a third party could collect for economic losses arising from defendant's tortious misrepresentations.[86] Thus, *Gates* never really addressed the essence of the considerations suggested in *Rozny,* for it failed to ask and answer the vital question: Is the burden upon the defendant so onerous, because of the passage of time, that it is inequitable to apply the discovery rule, despite the fact that the plaintiff could not know of his right to sue until long after the negligent act occurred?[87] Rather, the court merely determined that nothing in *Rozny* suggested that the Illinois supreme court would extend application of the discovery rule to a commercial transaction such as *Gates.*[88]

88, 96, 253 A.2d 904, 908 (1969); New Market Poultry Farms, Inc. v. Fellows, 51 N.J. 419, 425-26, 241 A.2d 633, 637 (1968); Kundahl v. Barnett, 5 Wash. App. 227, 231, 486 P.2d 1164, 1167 (1971). Some states have enacted special statutes applying the discovery rule to surveyors. *See, e.g.,* ILL. ANN. STAT. ch. 83, § 24g (Smith-Hurd Supp. 1974).

[82] 43 Ill. 2d at 70, 72-73, 250 N.E.2d at 664-66.

[83] *Id.* at 70, 250 N.E.2d at 664.

[84] 508 F.2d at 615 (quoting from Rozny v. Marnul, 43 Ill. 2d 54, 63, 250 N.E.2d 656, 661 (1969) (quoting from Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931)).

[85] 508 F.2d at 615.

[86] *See* 43 Ill. 2d at 62-68, 250 N.E.2d at 660-63.

[87] *Cf.* text accompanying note 84 *supra.*

[88] 508 F.2d at 615.

The court also concluded that neither *Lipsey* nor *Williams,* an action grounded in strict liability in tort,[89] was persuasive authority for utilizing the rule in *Gates.*[90] The *Gates* court distinguished both cases, perceiving that the supreme court had limited its holdings to the narrow issues confronting it, primarily because the cases had both involved personal, rather than economic injuries.[91] Additionally, in *Williams,* a primary justification for employing the discovery rule was to avoid " *'emasculat[ing] much of the consumer protection afforded by'* " the Illinois courts to injured parties.[92] Accordingly, the *Gates* court reasoned that an action based on common law negligence did not present as compelling a reason for employing the discovery rule as did *Williams.*[93] Furthermore, *Gates* gave little consideration to *Williams'* balancing of the evidentiary problems of the defendant against the harshness to the plaintiff.[94]

Having analyzed the relevant Illinois case law, the *Gates* court attempted to balance some of the factors it felt the Illinois supreme court would deem important. It recognized that a shorter statute of limitations would militate in favor of the discovery rule because of the increased possibility that a plaintiff would be barred before he could possibly know of his damage.[95] The court also noted that it would be anomalous to extend potential liability in property dam-

---

[89] In strict products liability actions the statute of limitations in most cases will run from the time of the injury. *See, e.g.,* Rivera v. Berkeley Super Wash, Inc., 44 App. Div. 2d 316, 325, 354 N.Y.S.2d 654, 663 (1974); Holifield v. Setco Indus., Inc., 42 Wis. 2d 750, 754-55, 168 N.W.2d 177, 179-80 (1969). *See also* TENN. CODE ANN. § 28-304 (Supp. 1974). Where inequity to the plaintiff might ensue in a strict products liability action, the discovery rule has sometimes been applied. *See, e.g.,* Alabama Great S.R.R. v. Allied Chem. Corp., 467 F.2d 679, 684 (5th Cir. 1972) (applying Mississippi law); Hornung v. Richardson-Merrill, Inc., 317 F. Supp. 183, 185 (D. Mont. 1970).

[90] 508 F.2d at 614.

[91] *Id.*

[92] *Id.* at 610 (emphasis by the court) (quoting from Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 432, 261 N.E.2d 305, 313 (1970)).

[93] *See* 508 F.2d at 614.

[94] The *Williams* court asserted that since the

> defendant is in the better position to know the condition of his product when it left his control, adequate safeguards exist against injustices arising from the passage of . . . time.

45 Ill. 2d at 432, 261 N.E.2d at 313. *Gates* recognized that the discovery rule may be applied where "evidence relating to the critical issue on which plaintiff has the burden of proof is generally in defendant's control." 508 F.2d at 610. Yet, it gave little consideration to this perception in the context of commercial transactions.

[95] 508 F.2d at 612-13. The court noted, however, that "the probability of injustice resulting from the failure to discover meritorious claims unquestionably diminishes as the statutory period increases." *Id.*

age actions for a period greater than the legislature had provided for medical malpractice actions.[96]

Gates additionally analogized the limitation accrual problem in negligence cases to breach of contract situations. Under the Uniform Commercial Code[97] the period of limitation runs from the time of the breach, whether or not the complainant had any knowledge thereof, the rationale being " 'that commercial interests are best served by quickly bringing finality to commercial transactions.' "[98] The court found that under Illinois decisions not covered by the Code there existed a societal "interest in having definite rules which enable businessmen to allocate foreseeable risks of loss."[99]

The Seventh Circuit was thus persuaded that the supreme court's opinions in favor of providing an injured party with a remedy was outweighed by the policy of providing certainty and finality in commercial transactions.[100] Indeed, the possibility that negligence might occur was regarded as a foreseeable commercial risk that could be provided for by contract provisions or insurance where the parties are of equal bargaining strength.[101]

---

[96] *See id.* at 613. The court reasoned that until a claim is at least five years old there is no need for a discovery rule. Since the rule would allow an action to be brought for five years subsequent to discovery, potential liability would be extended for over ten years. *Id.* Therefore, application of the discovery rule in this situation would provide greater protection than in medical malpractice. *Id. See* ILL. ANN. STAT. ch. 83, § 22.1 (Smith-Hurd 1966), which provides for a discovery rule with an outside cutoff date of ten years after the date of the operation or treatment.

[97] UNIFORM COMMERCIAL CODE § 2-725 (codified at ILL. ANN. STAT. ch. 26, § 2-725 (Smith-Hurd 1963)). For a unique example of application of the discovery rule to a breach of implied warranty case see Puretex Lemon Juice, Inc. v. S. Riekes & Sons, 351 S.W.2d 119 (Tex. Civ. App. 1961), *noted in* 41 TEXAS L. REV. 321 (1962).

[98] ILL. ANN. STAT. ch. 26, § 2-725, Comment (2) (Smith-Hurd 1963) (quoting from W. HAWKLAND, SALES AND BULK SALES 40 (1958)).

[99] 508 F.2d at 613. The court relied on Cerny-Pickas & Co. v. C. R. Jahn Co., 7 Ill. 2d 393, 131 N.E.2d 100 (1955). In *Cerny-Pickas,* the court interpreted a lease provision to exempt a lessee from liability for a fire caused by his negligence. *Id.* at 396-98, 131 N.E.2d at 103. The court asserted that

> [t]here are areas of the law in which the distinctions between liability in contract and liability in tort may be significant, despite their remote and accidental origin. We are not satisfied, however, that such distinctions are relevant in determining the meaning to be given to words used by laymen in defining their rights and obligations.

Id. at 397, 131 N.E.2d at 103. The *Gates* court used this language as justification for concluding that the Illinois supreme court would consider the underlying commercial transaction as more significant than whether the suit was predicated upon a tort or contract theory. 508 F.2d at 614. However, in *Cerny-Pickas,* the statute of limitations was not even in issue. Consequently, it is not valid precedent for determining whether a distinction between tort and contract is significant in assessing when an action accrues for statute of limitations purposes. *See also* note 104 *infra.*

[100] 508 F.2d at 613.

[101] *Id.*

Thus, the *Gates* court decided that

> the Illinois Supreme Court would regard the theoretical basis for the claim, whether advanced in tort or contract, as less significant than the nature of the transaction which gave rise to it.[102]

This led the court to conclude that there was not "a sufficient difference between the two theoretical bases of recovery to justify the discovery rule in one situation but not the other."[103] This reasoning is questionable because it fails to take into account that tort and contract are two distinct causes of action, and should be treated accordingly in the context of statute of limitations accrual problems.[104] The major shortcoming of *Gates*, however, is that it did not effectively deal with the underlying rationale behind statutes of limitations—protection of the defendant from having to defend a suit where the passage of time has made the problems of proof too onerous. *Gates* fails to balance the hardship to the defendant with the adversity to the plaintiff created by barring him before he has any knowledge of his cause of action—the approach suggested by *Rozny*.[105]

The responsibility ultimately rests with the legislatures to formulate rules which properly balance the equities. In the interim, courts will have to deal with the problems of extending potential liability to a broad range of commercial interests. Many factors may influence their decisions, including the difficulty in discovering the negligence, whether personal injuries are involved, and the useful life of the product.[106] But justice is best served by utilizing the

---

[102] *Id.* at 614.

[103] *Id.*

[104] It has long been recognized that tort and contract are separate theories of recovery and should be treated as such. W. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 410-11 (1953). As Dean Prosser notes:

> "Where the duty has its roots in contract, the undertaking to observe due care may be implied from the relationship, and should it be the fact that a breach of the agreement also constitutes such a failure to exercise care as amounts to a tort, the plaintiff may elect, as the common-law authorities have it, to sue in case or in assumpsit."

Id. at 410 (quoting from Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 498, 79 N.E. 503, 505 (1906)). There is some authority that the Code statute of limitations applies in personal injury actions arising out of breach of contract. *See* Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 419, 197 A.2d 612, 614 (1964). *But cf.* Matlack, Inc. v. Butler Mfg. Co., 253 F. Supp. 972, 976 (E.D. Pa. 1966).

In strict products liability actions it has been held that the Code statute of limitations does not apply. *See* Heavner v. Uniroyal, Inc., 63 N.J. 130, 157, 305 A.2d 412, 427 (1973). *Cf.* Nelson v. Volkswagen of America, Inc., 315 F. Supp. 1120, 1123 (D.N.H. 1970) (breach of warranty and strict liability distinguished).

[105] *See* text accompanying note 83 *supra*.

[106] The useful life of the product concept has been criticized as being "exceptionally

discovery rule to prevent barring a blamelessly ignorant plaintiff where the defendant's ability to defend against his own negligent conduct is not impaired by the hiatus between the negligent act and its discovery.

Ira E. Weiner

---

vague and probably unworkable." Peterson, *Civil Procedure, 1969 Annual Survey of Michigan Law*, 16 WAYNE L. REV. 501, 510 (1970).