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NO ADEQUATE RECOMPENSE FOR DESTRUCTION: THE CONSTITUTIONALITY OF THE NEW YORK MEDICAL MALPRACTICE STATUTE OF LIMITATIONS AS APPLIED TO MISDIAGNOSIS OF LATENT DISEASE

Lillian M. Spiess[*]

This Article focuses on the language and purpose of Article I, Section 16 of the New York State Constitution's Bill of Rights ("Section 16") and its applicability to New York's statute of limitations for medical malpractice ("New York statute"), which seemingly results in an unconstitutional bar to such actions in the context of the misdiagnosis of latent disease. The New York statute forecloses an action beyond two-and-one-half years after injury, except in cases of misplaced foreign objects and continuous treatment. In the case of latent disease, the statute may bar any action before the victim knows, or has reason to know, an injury occurred. Under Section 16, no existing right of action to recover damages for wrongful death will be abrogated and the amount recoverable will not be subject to any statutory limitation, thereby setting the stage for a challenge to the New York statute on state constitutional grounds.

This Article begins with a discussion of dual federalism, then traces the historical and theoretical development of Section 16, its enactment, and its leading judicial interpretations and challenges. Finally, this Article discusses how Section 16 can be used as a basis for striking down the New York statute.

The implications of a successful challenge to the New York statute are considerable, as it would provide a constitutional solution for the medical malpractice victim's family members and survivors to finally have their day in court.

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"The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."[1]

"[H]uman life cannot be replaced, and therefore there can be no adequate recompense made for its destruction . . . ."[2]

INTRODUCTION

This Article focuses on the language and purpose of Article I, Section 16 of the New York State Constitution's Bill of Rights and its applicability to N.Y. C.P.L.R. 214-a ("Rule 214-a"), which results in an unconstitutional bar to actions in the context of the misdiagnosis of latent disease.[3]

First, this Article begins with a review of dual federalism.[4]

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[1] N.Y. CONST. art. I, § 16. Section 16 was initially enacted as section 18 of article I. To eliminate any confusion , reference to this section will only be as Section 16.

[2] 3 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 64 (photo. reprint 1994) (1906) (quoting Louis McKinstry, Delegate to New York's Fourth Constitutional Convention, 1894).

[3] *See* Webster v. Nupuf, 730 N.Y.S.2d 906 (App. Div. 4th Dep't 2001); Bonanza v. Raj, 721 N.Y.S.2d 204 (App. Div. 4th Dep't 2001).

[4] Federalism is

> [a] way of organizing a nation so that two levels of government have formal authority over the same area and people. [Under this system], each level of government must have some domain in which its policies are dominant and have some genuine political or constitutional guarantee of its authority.

Next, this Article discusses the historical and theoretical contexts surrounding the enactment of Section 16, as well as judicial challenges to, and interpretations of this section. Finally, this Article demonstrates how Section 16 can be used as the basis for striking down Rule 214-a.

I. DUAL FEDERALISM

Historically, state constitutions were enacted prior to the Federal Constitution.[5] Therefore, it was initially believed the ratification of the Bill of Rights into the Federal Constitution was duplicative and unnecessary, partly because state constitutions already contained these protections.[6]

However, when the Bill of Rights was finally ratified, there was no thought state constitutions were subordinated, or their provisions rendered redundant.[7] The idea was that each state would remain the primary guarantor of individual liberties, and the "immediate and visible guardian of life and property" for its citizens.[8]

ROBERT L. LINEBERRY, GOVERNMENT IN AMERICA: PEOPLE, POLITICS, AND POLICY 664 (2d ed. 1983).

[5] *See generally* Hon. Judith S. Kaye, Chief Judge of the State of New York, Dual Constitutionalism in Practice and Principle, Address Before the Ass'n of the Bar of the City of New York (Feb. 26, 1987), http://www.courts.state.ny.us/history/pdf/Library/Juidges/Dual_Constitutionalism.pdf. The New York State Constitution was adopted on April 20, 1777, a full decade prior to the ratification of the Federal Constitution.

[6] *Id.*

[7] *Id.*

[8] *Id.* (citing THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

> The separate governments in a confederacy may aptly be compared with the feudal baronies; with this advantage in their favor . . . they will generally possess the confidence and good-will of the people, and with so important a support, will be able effectually to oppose all encroachments of the national government.

This theoretical precept was upheld by the Supreme Court in *Barron v. Mayor and City Council of Baltimore*.[9] *Barron* involved a suit against the City of Baltimore under the Takings Clause of the Fifth Amendment. The city had enacted several ordinances which diverted streams into the vicinity of Barron's wharf. The streams, carrying and depositing silt and other debris, made the harbor so shallow that Barron's pier became unusable.[10] The Supreme Court dismissed the case for lack of jurisdiction and viewed the Fifth Amendment, and inferentially the entire Bill of Rights, as "intended solely as a limitation on the exercise of power by the government of the United States, and . . . not applicable to the legislation of the states."[11] Chief Justice John Marshall, writing for the Court, stated:

> Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated.
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> . . . In their several constitutions, [the states] have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively . . . .[12]

"The state courts . . . understood that they were the arbiters of

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THE FEDERALIST NO. 17, at 122 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[9] 32 U.S. 243 (1833).

[10] Kaye, *supra* note 5.

[11] *Barron*, 32 U.S. at 250-51.

[12] *Id.* at 247-48.

their own constitutions."[13] For example, the New York Court of Appeals, in *Wynehamer v. People*,[14] struck down a statute found to be in violation of the due process clause of the state constitution.[15] The court noted that it was

> not insensible to the delicacy and importance of the duty [it assumed] in overruling an act of the legislature, believed by so many intelligent and good men to afford the best remedy for great and admitted evils in society; but we cannot forget that the highest function intrusted to us is that of maintaining inflexibly the fundamental law. And believing . . . that the prohibitory act transcends the constitutional limits of the legislative power, it must be adjudged to be void.[16]

Although the ratification of the Fourteenth Amendment[17] changed the jurisprudential applicability of the Federal Constitution to the states, state constitutions continue to "function independently of the [F]ederal Constitution."[18] This backdrop of dual federalism shifts the focus of the discussion to the historical and theoretical contexts of Section 16.

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[13] Kaye, *supra* note 5.

[14] 13 N.Y. 378 (1856).

[15] *Wynehamer*, 13 N.Y. at 405-06.

[16] *Id.*

[17] U.S. CONST. amend. XIV, § 1, states, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[18] Kaye, *supra* note 5. In 1911, the New York Court of Appeals stated that Supreme Court interpretations of the Fourteenth Amendment are simply not "controlling of our construction of our own Constitution." Ives v. S. Buffalo Ry. Co., 94 N.E. 431, 448 (N.Y. 1911).

II. SECTION 16

The historical context of the theoretical underpinnings of Section 16 is paramount to support for the unconstitutionality of Rule 214-a, as it applies to the misdiagnosis of latent disease.

In English jurisprudence, the notion of preserving the right to a cause of action for wrongful death was codified in 1846. This effectively abrogated the inflexibility of the common law rule, which denied such a right. In New York, the guarantee of this protection was unequivocally championed by the legislature in 1847. However, the statute was later amended and its underlying purpose compromised. As a result, Section 16 was passed at the New York Constitutional Convention of 1894 because the legislature knew nothing less than a constitutional amendment would give practical effect to preservation of this right.

A. Historical and Theoretical Contexts

It has been suggested that a constitution reflects those values the populace does not wish to risk to the more fleeting and capricious nature of our political system. James Madison noted these are the values that "counteract the impulses of interest and passion."[19] The implementation into the New York Constitution of a guaranteed right to a cause of action for wrongful death, a protection not guaranteed by the Federal Constitution, placed that right beyond repeal of the legislature, only subject to revision by the electorate. From that pro-

[19] Kaye, *supra* note 5 (citing Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 273 (Gaillard Hunt ed. 1904)).

spective, the origins and enactment of Section 16 are unremarkable.

The history of Section 16 had its beginnings in England. In 1846, the English Parliament abrogated the common law rule denying a cause of action for wrongful death resulting from negligence, and enacted a statute which expressly provided for such an action.[20]

The act was introduced by Lord Campbell (later known as "Lord Campbell's Act"), approved by Parliament, and provided:

> [W]hensoever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony . . . .
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> That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the jury may give such damages as they think proportionate to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the beforementioned parties in such shares as the jury, by their verdict, shall find and direct.[21]

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[20] 3 LINCOLN, *supra* note 2, at 58.

[21] *Id.* at 59.

The next year, the New York State Legislature enacted the English statute practically verbatim, including the provision for unlimited damages recoverable.[22] Opposition to the law was evident almost immediately.[23] The statute was amended in 1848 to limit recovery to $3,000, and subsequently increased to $5,000.[24] While both statutes allowed recovery for the widow and next of kin, the New York statute initially omitted the widower.[25] To clarify any judicial confusion, the New York Legislature amended the statute again in 1870, authorizing a cause of action for a husband in the event of his wife's death.[26] A decade later, these provisions were included in Sections 1902-1905 of the Code of Civil Procedure. Furthermore, these sections were in force in 1894, the year Section 16 was ratified as part of the state constitution.[27]

The introduction of the amendment was brought to the Constitutional Convention of 1894 to ensure "no statutory limitation . . . be placed upon the amount of damages recoverable by civil action for the loss of human life."[28] At first, the majority of delegates considering the amendment believed it was a matter for the legislature.[29]

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[22] *Id.*

[23] *Id.* at 60 ("At the next session . . . [of the legislature], the Syracuse & Utica Railroad Company presented a petition to the assembly for a repeal of the law, and a like memorial was presented by the Ontario Steam & Canal Company.").

[24] *Id.*

[25] 3 LINCOLN, *supra* note 2, at 60.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 62 (noting the implementation of a cause of action for wrongful death claims was not appropriate for a written constitution).

However, the majority acknowledged the legislature improperly placed a cap on the damages for which one could recover.[30] Supporters of the amendment believed it was imperative to place a limitation on the legislature to avoid any interference with the jury, which should be the final arbiter on the award of damages in a cause of action for wrongful death.[31] The amendment was among a sizable class of provisions that may have been unnecessary because the legislature could have adopted statutory provisions in their stead. However, it was noted:

> the people have learned that legislative power is not always properly exercised, and that it needs restraint and limitation; therefore, numerous provisions have been included in all our Constitutions, which are not strictly the expression of essential principles of government, but are intended to prescribe legislative duties and impose legislative restrictions.[32]

Additionally, proponents reasoned the amount recoverable should be circumstantial to each case, thus an arbitrary maximum was unreasonable. Further, they noted this was the purpose of the original statute.[33] By placing a $5,000 limitation on the amount recoverable, the legislature "reduced the value of all lives, and the influences, benefits, and relationships dependent on those lives to a uniform valuation."[34]

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[30] 3 LINCOLN, *supra* note 2, at 62.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 63.
[34] *Id.*

Concern among the delegates also focused on preserving the right of action created by the statute; language that failed to address this issue was rejected.[35] Finally, the two sides agreed that if the right of action was not constitutionally protected, there would be no practical effect given to the prohibition on the amount recoverable. The amendment was adopted by a vote of 107-40.[36] The amendment states, "[t]he right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."[37]

The ratification of this amendment into the New York Bill of Rights preserved the inflexibility of the common law, which had been abrogated by statute. Subsequently, the legislature amended the Code of Civil Procedure to reflect this guarantee by striking the limitation of damages recoverable for wrongful death.[38]

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[35] 3 LINCOLN, *supra* note 2, at 60. For example, one particular amendment, the Tucker Amendment, stated, "no statutory limitation shall be placed upon the amount of damages recoverable by civil action for the loss of human life." *Id.*

[36] *Id.* at 65. In consideration of this amendment, statistics were reported which indicated 5,295 deaths had occurred in the state in 1893 as a result of accidents or violence, but it was unclear how many would have resulted in a cause of action. *Id.* at 64. In addition, a report from the railroad commission noted 742 persons died in railroad accidents, but only thirty of these persons were passengers on trains, and only ten were killed under circumstances which may have given rise to a cause of action. *Id.* One dissenter noted, "This is a purely artificial cause of action, not founded in reason, not founded in right, but simply a creature of legislative action; and in my judgment ought to be always subject to the control of the state which created it." *Id.* at 65.

[37] N.Y. CONST. art. I, § 16.

[38] 3 LINCOLN, *supra* note 2, at 65. The cause of action for wrongful death is currently found in N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 2007). The statute provides, in pertinent part:

> (1) The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if

B. Judicial Challenges and Interpretation

With the cause of action for wrongful death being protected as a constitutional guarantee, courts have been left with the task of assessing the implications in matters to be adjudicated. In *Medinger v. Brooklyn Heights Railroad Co.*,[39] one of the earliest cases following ratification of the amendment, the appellate court was asked to review a jury verdict of $7,500. The plaintiff-administrator argued the purpose and intent of the framers of Section 16 supported unlimited jury determinations based upon the factual considerations of the case, and may award beyond actual monetary loss.[40] Nevertheless, the court found the verdict excessive and reduced it.[41] The court relied on statutory interpretations of the wrongful death act prior to the enactment of the amendment and held the damages contemplated were exclusively pecuniary and based its decision on the proceedings of the Constitutional Convention of 1894.[42] The court focused on the language used during the debates, specifically the following pas-

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> death had not ensued. Such an action must be commenced within two years after the decedent's death . . . .

Limitations on recovery are found in N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 2007), which provides, in pertinent part:

> (a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought.

[39] 39 N.Y.S. 613 (App. Div. 2d Dep't 1896). The defendant, Brooklyn Heights Railroad Company, appealed a $7,500 jury verdict in favor of the decedent's estate. The decedent was killed by the defendant's electric car. She was a sixty-three-year-old woman who did general housework for her family, which consisted of a husband, who was sixty-five-years-old, and five grown sons. *Medinger*, 39 N.Y.S. at 617.

[40] *Id.* at 614.

[41] *Id.* at 618.

[42] *Id.* at 615.

sages:

> The right of action which now exists is well defined in the statute. We all know what that is. It has been the subject of adjudication in this state for the last forty years. There is no doubt as to the meaning of this language, and therefore, by reference to the cause of action now existing, and declaring that the right of action shall further continue, it avoids any circumlocution which has been suggested by some of the amendments. [43]
>
> . . . .
>
> The courts, as in all other cases, have the right, and it is their duty, to set aside verdicts which are excessive in amount. They are to be just, fair, honest verdicts, and if they are excessive the courts must exercise their jurisdiction in this case, as in all others.[44]

Obviously, the court was intent on preserving the right of action which was bolstered by the constitutional guarantee. The court determined the amendment did not limit the statute's initial purpose and operation, but required that awards were "measured by the actual loss sustained."[45] "It was never the purpose to remove the limitation, and authorize a recovery of damages, in every case where death was a result, without regard to the measure of loss, except as it should be, practically, arbitrarily measured by a jury."[46] The court did concede, however, "The ingenuity of the human mind has not yet been able to

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[43] *Id.* (citing II REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, MAY 8, 1894, TO SEPTEMBER 29, 1894 961 (William H. Steele rev. 1900)).

[44] *Medinger*, 39 N.Y.S. at 617 (citing V REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, MAY 8, 1894, TO SEPTEMBER 29, 1894 2189-2195 (William H. Steele rev. 1900)).

[45] *Medinger*, 39 N.Y.S. at 616.

[46] *Id.*

compass and formulate a rule by which an exact measurement of damages may be reached in these cases."[47]

Sharrow v. Inland Lines, Ltd.[48] is an example of an expansive interpretation of this constitutional guarantee. The Court of Appeals was willing to use Section 16 to save a cause of action, that was barred by the statute of limitations due to the plaintiff's failure to prove the action was commenced within two years after the death of the decedent. The lower courts refused to sustain such an action because failing to allege so was fatal on demurrer.[49] The Court of Appeals reviewed the history of the wrongful death statute and the preservation of the right to the action in the constitutional amendment.[50] The court focused on the original language governing the time limitation for bringing a wrongful death action, which "provided that every such action shall be commenced within two years after the death of such deceased person."[51] However, the statutory language applicable in this case had omitted the phrase "provided that" and stated simply, "Such action must be commenced within two years after the decedent's death."[52] The court did not view this omission as unintentional or ineffectual, and so long as the time limitation remained, it related to the right rather than the remedy.[53] The court reasoned,

The right of action to recover damages for wrongfully

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[47] *Id.* at 618.
[48] 108 N.E. 217 (N.Y. 1915).
[49] *Sharrow*, 108 N.E. at 217.
[50] *Id.* at 218.
[51] *Id.*
[52] *Id.*
[53] *Id.*

> causing death which has since been made a constitutional right by the action of the people, was thereafter to be provided for and regulated, not in a separate statute, but in a general statute designed to be a permanent part of our system of jurisprudence. . . . No good reason existed why the benefit of the general exceptions given by law to the parties against whom the bar of the Statute of Limitations is invoked should not be given to plaintiffs in this class of cases.[54]

As a result, the court held the language placed a limitation on the remedy, but did not preclude the right.[55] It appears the court actively seized the judicial opportunity to use the new amendment to preserve the cause of action on scant, technical grounds.

In *In re Meng*,[56] Section 16 was challenged by the decedent's grandchildren, who were denied distribution of his estate. They argued that an amendment to the Code of Civil Procedure (Section 1903, adopted in 1911) allowed for the decedent's spouse alone, in the absence of children, to receive damages, as opposed to both the spouse and next of kin.[57] The grandchildren also argued that this abrogated the right of action existing on December 31, 1894, and there-

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[54] *Sharrow*, 108 N.E. at 218..

[55] The court reasoned that

> [t]o affirm the judgment under review would be to require that, in every suit brought to recover damages for negligently or wrongfully causing death, the complaint must allege that the action had been brought within two years after the decedent's death. It would plainly be impossible to comply with this requirement unless the summons was served before the complaint was prepared; as otherwise it would be impossible to allege truthfully in the complaint that the action had been commenced.

Id. at 220.

[56] 125 N.E. 508 (N.Y. 1919).

[57] *In re Meng*, 125 N.E. at 510.

fore was unconstitutional.[58] The court determined the amendment to the statute did not abrogate the right of action, because at the time the constitutional amendment was adopted, the right was vested exclusively in the representative of the decedent.[59] This is distinguishable from the right to damages which was statutorily vested in the spouse and next of kin.[60]

The court held, "A right of action existing at any time is not abrogated so long as" the circumstances leading to it remain unaltered.[61] The court then articulated the facts from which the right of action arises, which include:

> (a) the death of a human being, (b) caused by the wrongful act, neglect, or default of another, (c) who or which would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued, (d) a husband, wife or next of kin of the decedent surviving the decedent and, (e) a personal representative of the decedent having been appointed, constituted a right of action to the personal representative.[62]

The court concluded the 1911 amendments to the wrongful death statute did not alter the facts from which the right of action had arisen, and that right of action existing on December 31, 1894 had not been abrogated or affected.[63] The court stated,

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[58] *Id.*
[59] *Id.*
[60] *Id.* at 512.
[61] *Id.* at 510-11.
[62] *In re Meng*, 125 N.E. at 511.
[63] *Id.* at 512.

> A right of action belongs to or is vested in the person or persons who has or have the lawful right to prosecute it. When a statute creates a liability and prescribes the person who shall have the right to enforce it, the latter is as component a part of the statutory right of action as is the former.[64]

Finally, the court held the rights of the grandchildren were subject to the force of the 1911 statutory change, precluding them from a share in the estate's recovery.[65]

The development of jurisprudence regarding Section 16 continued when the *Meng* rationale was upheld in *Sutherland v. New York*.[66] The *Sutherland* court stated, a "right of action existing at any time is not abrogated so long as the facts which give rise to it and must be proven to maintain it are unchanged."[67] The New York Court of Claims concluded that its jurisdictional grant, the Court of Claims Act, did not abrogate the cause of action guaranteed by the Constitution.[68] The Act states, "if a claim which bears interest, is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the expiration of six months from the

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[64] *Id.*

[65] *Id.*

[66] 68 N.Y.S.2d 553 (N.Y. Ct. Cl. 1947).

[67] *Sutherland*, 68 N.Y.S.2d at 571 (citing *Meng*, 125 N.E. at 510-11).

[68] *Sutherland*, 68 N.Y.S.2d at 572. Since, under the Decedent Estate Law, the action could only be brought by a duly appointed personal representative of the decedent, the cause of action for the purposes of the Court of Claims Act accrued when the claimant was appointed administrator on April 24, 1943. Since no claim had been filed until January 18, 1945, more than six months had expired since the accrual of the claim. Therefore, interest was to be paid from the date of death until six months after the accrual of the cause of action and from January 18, 1945, the date when the claim was duly filed to the date of entry of the judgment. *Id.* at 570.

time of such accrual and the time of the filing of such claim."[69] Although the court cited *Meng*, it narrowly construed the constitutional provision, focused on the amount of recovery rather than the right of action, and reasoned that the provision

> has been in the New York State Constitution since the adoption of the New York State Constitution of 1894, at which time there was a statutory limitation of $5,000 upon the amount of recovery in actions of this kind. It was to prevent the re-enactment of a statute containing such or similar limitations on the amount recoverable that this section was then embodied in our State Constitution . . . .[70]

An arguably activist Court of Claims hinted to the possibility of an alternative interpretation of Section 16 in *Horton v. New York.*[71] The court invoked Section 16 to warrant the payment of $60,000 in damages for a wrongful death claim resulting from a traffic accident involving a Volvo automobile and a Trojan tractor shovel owned by the New York State. The court relied on the constitutional provision as well as *Meng*[72] and *Sutherland.*[73] Additionally, the court ad-

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[69] N.Y. CT. CL. ACT § 19(1) (McKinney 2007).

[70] *Sutherland*, 68 N.Y.S.2d at 571.

[71] 272 N.Y.S.2d 312 (N.Y. Ct. Cl. 1966). The decedent was a forty-nine year old woman survived by a fifty-five year old husband, who depended on her for partial support due to his physical condition, and a seventeen year old daughter. The decedent had been employed as both a cleaning woman in the school system and school bus driver. The court noted that

> [f]or many years, our courts and juries have placed what seems in retrospect to be a small or minimum value on the damages sustained to the next of kin on the death of a wife and mother. It has only been in the last two decades that our courts have come to recognize the true value of a housewife and the services she performs.

Horton, 272 N.Y.S.2d at 320.

[72] *See supra* notes 58-64 and accompanying text.

dressed concerns regarding the right of action being abrogated by legislative enactment, and the possibility of abrogation by judicial fiat.

> There is no doubt that this provision was placed in the Constitution to restrain any action by the Legislature to abrogate such actions, or to impose a ceiling on the amount recoverable as was the $5,000 limit under the former law. Although the judiciary has the power to modify verdicts in such actions, it would appear reasonable to conclude that this provision might also cause the judiciary to hesitate taking a course of action which would reduce or abrogate such a cause of action and the damages recoverable therein. If the courts are to take a position that the affluent who have funds to provide such care can be reimbursed for such damages, but that those less fortunately situated who have no funds available are not entitled to the services of a substitute wife-mother, it would appear that such a holding would be unconstitutional.[74]

More recently, the Court of Appeals tolled a statute of limitations where the sole distributee was an infant, and allowed the cause of action to continue after a complaint had been served subsequent to the expiration of the one-year-and-ninety-days statute of limitations had run.[75]

The case concerned the confluence of statutes for wrongful death, estate administration, and disability relating to infancy.[76] Although the personal representative was granted procedural authority

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[73] *See supra* notes 67-70 and accompanying text.

[74] *Horton*, 272 N.Y.S.2d at 320.

[75] Hernandez v. N.Y. City Health & Hosp. Corp., 585 N.E.2d 822 (N.Y. 1991).

[76] *Id.* at 825. *See* N.Y. EST. POWERS & TRUSTS § 5-4.1. *See also* N.Y. SURR. CT. PROC. ACT §§ 707, 1001 (McKinney 2006); N.Y. C.P.L.R. 208 (McKinney 2003).

to bring the wrongful death claim, surrogate court procedures made it impossible for anyone to receive letters of administration until a guardian was appointed for the infant/sole distributee.[77] The court determined the tolling provision could be applied when the person was under a disability.[78] However, since the wrongful death action accrued upon death, strict adherence to the tolling provision was impossible unless the position of the infant was ignored.[79]

The court refused to reach "that unnecessarily harsh result, and instead . . . construe[d] the toll . . . to apply until the earliest moment there is a personal representative or potential personal representative who can bring the action, whether by appointment of a guardian or majority of the distributee, whichever occurs first."[80] In its analysis, the court cited *Meng*[81] and *Sharrow*, and reiterated the two-year limitation is a limitation on the remedy, not the right.[82] Furthermore, the court reasoned that while the statute itself placed a time limit for bringing suit, this should be "treated as an ordinary Statute of Limitations—subject to any relevant tolling provision—rather than a condition precedent to suit."[83] The court relied on the statutory scheme for the wrongful death cause of action and cited Section 16.[84]

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[77] *Hernandez*, 585 N.E.2d at 825.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 824 (" '[The] right of action belongs to or is vested in the person or persons who has or have the lawful right to prosecute it.' " (quoting *Meng*, 125 N.E. at 512)). *See also supra* notes 58-64 and accompanying text.

[82] *Hernandez*, 585 N.E.2d at 824 n.3 (citing *Sharrow*, 108 N.E. at 218).

[83] *Hernandez*, 585 N.E.2d at 824 n.3 (citing Carrick v. Cent. Gen. Hosp., 414 N.E.2d 632, 638 (N.Y. 1980)).

[84] *Hernandez*, 585 N.E.2d at 825.

It appears the court was intent on preserving the statutorily-created and constitutionally-guaranteed right of action for wrongful death, and finessed the statute of limitations to accomplish its goal.[85]

These cases are illustrative of the care New York courts have taken to protect and, if necessary, expand the right to a wrongful death cause of action. So powerful is this protection that when choice of law questions have arisen, the Court of Appeals has consistently refused to apply out-of-state wrongful death statutes which have statutory limitations, noting that such limitations are "absurd and unjust."[86] Yet the question remains, can such a protection and the existing jurisprudence construe Rule 214-a as an abrogation to the wrongful death cause of action in the context of misdiagnosis of latent disease?

III. THE CONSTITUTIONALITY OF N.Y. C.P.L.R. 214-A

The New York State Constitution requires that every twenty years, and whenever the legislature provides, the people are asked at a general election, "Shall there be a convention to revise the constitu-

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[85] *See, e.g., id.* at 826-27 (Alexander, J., dissenting).

> While conceding that E.P.T.L. 5-4.1 vests the right of action for wrongful death exclusively and solely in the personal representative of a decedent's estate, the majority nonetheless concludes that because such an action is for the benefit of the decedent's distributees, where the sole distributee is an infant, the saving provision of C.P.L.R. 208 should be applied to toll the Statute of Limitations. This conclusion has absolutely no basis in the language of E.P.T.L. 5-4.1 or C.P.L.R. 208 and is inconsistent with long standing precedent of this Court.

Id. at 827. Furthermore, the dissent noted that while the Court of Appeals has had the opportunity to extend the tolling provisions in wrongful death actions in the past, it has declined to do so. *Id.*

[86] *Medinger*, 39 N.Y.S. at 616. *See also, e.g.*, Miller v. Miller, 237 N.E.2d 877, 880 (N.Y. 1968); Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 528 (N.Y. 1961).

tion and amend the same?"[87] The constitutional provision barring the abrogation of a cause of action for wrongful death has not been changed since its ratification in 1894. Thus enacting the wrongful death amendment arguably implies that the New York State citizenry venerates those values. Incorporated into this value system was the relationship between doctor and patient, which ultimately gave rise to the medical malpractice cause of action.

Although suits for medical malpractice were rare during the late 1700s and early 1800s, and determined within the bounds of the common law of contract, the scope and limits of New York's medical malpractice jurisprudence shifted to the law of torts.[88] Initially, the American populace was willing to treat medical practice as a purely commercial enterprise. The courts, as well as the medical profession, began to incorporate contractual principles into medical liability doctrines. During the mid-1800s, however, the relationship between doctor and patient eroded, along with the medical community's self-image, thus displacing the contractual basis of the relationship and relegating medical liability to tort.[89]

Along with the shift in doctrinal approaches came a maelstrom of increased medical malpractice litigation, which had its origins in Western New York. During the 1830s, new Christian sects emerged that glorified the individual will and expressed an optimistic

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[87] N.Y. CONST. art. XIX, § 2.

[88] KENNETH ALLEN DE VILLE, MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA 1 (1990). Generally, individuals only sued physicians when severe injury or death occurred. *Id.* at 7, 157.

[89] *Id. See also infra* notes 93-96 and accompanying text.

belief in human progress without direct divine intervention. It was believed that humans "could achieve sanctification on earth; they could become morally perfect. . . . [And thus,] [m]oral and physical perfectionism made it much easier and more acceptable to assign human responsibility to earthly ills."[90] By the 1840s, the entire state became a "hotbed" for malpractice as the new religious dogma took hold and combined with the social and political elements of Jacksonian democracy.[91] It was estimated that by 1853, nine out of ten physicians in Western New York had been forced to defend themselves against medical malpractice charges.[92] "Irregular practitioners were numerous and popular . . . and they eroded the status and political power of regular physicians."[93]

As one commentator noted,

> Once instituted, malpractice litigation exposed and exacerbated the fundamental weaknesses of contemporary medical professionalism . . . . Individual physicians, professional journals, and local medical societies were faced with dilemmas they could not solve. No matter how they reacted to the crisis, they contributed to either public distrust, professional competition, or physicians' incompetence. In turn, this suspicion, divisiveness, and medical ineptitude aggravated what seemed to be an ever-increasing wave of malpractice prosecutions.[94]

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[90] DE VILLE, *supra* note 88, at 126.

[91] *Id.* at 127.

[92] *Id.* at 138.

[93] *Id.*

[94] DE VILLE, *supra* note 88, at 139. However, it was not until 1920 when the legislature enacted its first malpractice statute which required suits to be brought within two years of accrual.

> The following actions must be commenced within two years after the

As suits against the medical profession increased, the standard for medical malpractice, although "simple and well settled,"[95] was not always easy to apply. This is best exemplified in *Pike*, where the Court of Appeals discussed a doctor's duty of care in the majority opinion.

> A physician and surgeon, by taking charge of a case, impliedly represents that he possesses . . . that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. . . . The law holds him liable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment. . . . [It] does not require the surgeon to possess that extraordinary learning and skill . . . [but only what is] possessed by the average member of the medical profession in good standing. . . . [T]o render a physician and surgeon liable, it is not enough that there has been a less degree of care than some other medical man might have shown, or less than even he himself might have bestowed, but there must be a want of ordinary and reasonable care, leading to a bad result. . . . [A] mere error in judgment, provided he does what he thinks is best after careful examination [is sufficient]. His implied engagement with his patient does not

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cause of action has accrued:

1. An action to recover damages for libel, slander, assault, battery, seduction, criminal conversation, false imprisonment, malicious prosecution or *malpractice*.

N.Y. CIV. PRACTICE ACT § 50 (1920) (emphasis added).

[95] Pike v. Honsinger, 49 N.E. 760, 762 (N.Y. 1898).

> guaranty a good result, but *he promises by implication to use the skill and learning of the average physician, to exercise reasonable care and to exert his best judgment in the effort to bring about a good result.*[96]

Despite the increase of medical malpractice claims, there was a notable absence of a cause of action specifically *for* medical malpractice.[97] However, for cases resulting in death from alleged medical malpractice, the wrongful death statute was employed.[98] Wrongful death claims of patients were different than other types of malpractice litigation and often "undermined attempts to sue physicians in fatal cases through the first two-thirds of the century. Consequently, death suits did not play a significant role in the initial increase of suits against physicians, and many of the worst cases of medical incompetence probably went unpunished."[99] When malpractice suits were successful, especially in cases of gross ineptitude and

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[96] *Id.* (emphasis added).

[97] *See* Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice,* 1992 WIS. L. REV. 1193, 1211 ("[E]arly nineteenth century law held the physician to the standard that was destined to become the foundation of negligence. The courts of that day did not consider that it should be otherwise, nor was there any reason they should have."). At the time, the statute of limitations for personal injury resulting from negligence was three years. 1848 N.Y. LAWS ch. 379, § 385, *amended by* 1876 N.Y. LAWS ch. 31, § 385.

[98] *See, e.g.*, Harris v. Woman's Hosp., 14 N.Y.S. 881 (N.Y. Gen. Term 1891).

> This [was] an action to recover damages for the death of Jennie Harris . . . under [a] statute which gives a right of action for the wrongful act, negligence, or default causing the death of a person who would have had a cause of action for such wrongful act, neglect, or default if death had not ensued.

Id. at 882. Harris was a patient who had submitted to a successful surgical procedure. *Id.* Four days later, Harris committed suicide by hurling herself out of a fourth-floor hospital window. *Id.* The court affirmed dismissal of the case because there was no negligence on the part of the surgeons who had performed the operation. *Id.* at 885.

[99] DE VILLE, *supra* note 88, at 41.

carelessness, it was often because trial judges and juries incorporating an outraged sense of justice.[100] From a jurisdictional perspective, this is noteworthy because New York not only had a wrongful death statute, but it it preserved the right to bring such an action in its constitution.[101]

The doctrinal and historical contexts in which Section 16 was enacted are compelling. Despite a significant increase in medical malpractice claims in the state, which had arguably reached crisis proportions, the wrongful death statute was promulgated and applied to medical malpractice. More importantly, however, the right of action was constitutionally protected, and early jurisprudence held the wrongful death cause of action would be abrogated if any facts which subverted the right to pursue this course were changed. It appears Rule 214-a, when cast in this historical light, is constitutionally problematic.

Rule 214-a, enacted in 1986, was an attempt to curtail a perceived medical dilemma: the medical malpractice insurance "crisis."[102] The "crisis" has been defined as "a threatened decrease in the availability of health care services provided by competent, insured physicians due to the decreased availability of affordable malpractice

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[100] *Id.* at 39.

[101] Arizona is the only other state that preserves a similar right in its constitution. ARIZ. CONST. art. II, § 31, states: "No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person."

[102] Betsy A. Rosen, Note, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive Reform*, 52 BROOK. L. REV. 135, 139 (1986). It is believed this "crisis" began in the early 1970s. *Id.*

insurance."[103] Primary reasons cited for the crisis were the increased number of suits being filed, the record number of large settlements and damage awards, and the inefficiency of the existing tort litigation structure.[104] Legislation enacted in the 1970s mitigated the crisis to some extent, but failed to remedy the situation completely.[105] More stringent measures were demanded, and led to the passage of the 1985 Medical Malpractice Reform Act and Rule 214-a. The statute, making the cause of action specifically for medical malpractice and limiting the statute of limitations to two-and-one-half years, was enacted to curtail the insurance problem, the effect of which was claimed to be caused by discovery-based statutes that "forced insurance companies to impose artificially high . . . premiums to protect against increased future damage awards and failed to foreclose the prosecution of stale or frivolous claims."[106]

In applying the early rulings of *Medinger* and *Meng* to Rule 214-a, a constitutional challenge seems inevitable. *Medinger* stood for the proposition that the purpose of the amendment was not to change or limit the wrongful death cause of action originally created

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[103] *Id.* at 137. For a thorough discussion of this issue, see Peter Zablotsky, *From A Whimper To A Bang: The Trend Toward Finding Occurrence Based Statutes of Limitations Governing Negligent Misdiagnosis of Diseases With Long Latency Periods Unconstitutional*, 103 DICK. L. REV. 455 (1999). *See also* Thomas A. Moore & Matthew Gaier, *The Constitutionality of the Statute of Limitations*, 221 N.Y. L.J. 3 (1999).

[104] Rosen, *supra* note 102, at 137-38. There has been considerable debate as to the source and extent of the medical malpractice insurance crisis. In 1975, at the height of the crisis, fewer than five claims were filed for every 100 doctors. Mark Monaco, Note, *New York's Medical Malpractice Insurance Crisis—A New Direction for Reform*, 14 FORDHAM URB. L.J. 773, 773 n.2 (1986).

[105] Rosen, *supra* note 102, at 140. In 1974, the New York Judiciary Law was amended to require the establishment of medical malpractice panels. *See* Act of May 30, 1974, ch. 657, [1974] N.Y. Laws 1010 (McKinney).

[106] Zablotsky, *supra* note 103, at 460-61.

by statute. In *Meng,* the court held that abrogation did not occur if the facts for pursuing and proving the cause of action, which were articulated in the statute, remained the same.[107]

These facts were part of the cause of action ("right of action . . . now existing") at the time the constitutional provision was ratified,[108] and one would conclude they were to be subsumed as the means for the cause of action to proceed.[109] Therefore, any change to these conditions could provoke a constitutional challenge.[110]

In a case for wrongful death resulting from the misdiagnosis of a latent disease, the *Meng* facts are handily met: death of a human being; caused by the wrongful act, neglect, or default of another; who or which would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued; a husband, wife or next of kin of the decedent surviving the decedent; and a personal representative of the decedent having been appointed—constituted a right of action to the personal representative.[111]

The medical malpractice statute of limitations, which forecloses an action from being brought beyond two-and-one-half years, except in the cases of misplaced foreign objects and continuous treatment, may in the case of latent disease, bar any action before the victim knows or has reason to know that an injury has occurred.[112]

Although challenges to Rule 214-a have been brought on

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[107] *Meng*, 125 N.E. at 510-11.
[108] *See supra* notes 23-28 and accompanying text.
[109] *See Sharrow*, 108 N.E. at 217; *Medinger*, 39 N.Y.S. at 615.
[110] *Meng*, 125 N.E. at 510-511.
[111] *Id.* at 511.
[112] N.Y. C.P.L.R. 214-a (McKinney 2003); Zablotsky, *supra* note 103, at 477.

equal protection and due process grounds, there has not yet been a challenge under the constitutional guarantee of Section 16.[113]

If such a challenge focuses on the third prong of *Meng*'s facts ("who or which would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued"[114]) it would appear a defendant, by invoking the statutory bar in this context, would impinge on the constitutional right of the personal representative to bring a cause of action on behalf of the decedent's survivors. A statute of limitations is a conditional limitation on the remedy that leaves the right itself unaffected, and therefore, such a provision impedes the right of action and seems to go beyond constitutional limits.[115]

Although it can be argued that the amendment was ratified during a time when large jury awards, calculation of interest, discount rates, inflation factors, and spiraling medical and insurance costs were not considered in today's terms, the Nineteenth Century medical profession was still confronted with significant challenges in this area. Jury awards between 1870 and 1900 averaged $2,492.[116] Legal expenses averaged between $800 and $1,000.[117] Physicians during this time were not protected by any form of malpractice insurance. Malpractice insurance and group defense practices did not originate until the late 1890s and were not an established feature of medical practice until the early twentieth century. Prior to this phenomenon,

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[113] *See, e.g.*, Helgans v. Plurad, 680 N.Y.S.2d 648, 650 (App. Div. 2d Dep't 1998).

[114] *Meng*, 125 N.E. at 511.

[115] *Sharrow*, 108 N.E.2d at 220. *See also Hernandez*, 585 N.E.2d at 824 n.3.

[116] Giampino v. Ricci, 609 N.Y.S.2d 134, 137 (Putnam County Sup. Ct. 1994); DE VILLE, *supra* note 88, at 190.

[117] *Id.* at 204.

the physicians had to fend and pay for themselves.[118] Physicians' average annual income during this period ranged between $1,000 and $1,500. Interestingly, judgments during this period represented a larger portion of physicians' income than the typical award during the late Twentieth Century. For example, in 1971, when the average income of physicians was approximately $100,000, fifty-nine percent of all malpractice awards were less than $3,000.[119] Thus, it appears this argument has little merit when stacked against the theoretical and historical underpinnings of Section 16.

Today's diagnostic and technological advances arguably could not have been envisioned by the legal, political, and medical professionals of the late 1800s, and therefore, the legal basis for bringing a constitutional challenge to Rule 214-a under Section 16 is outdated. Although diagnostic tools and procedures would be considered primitive by today's standards, a New York court in 1889, reviewing the substantive basis for a medical malpractice suit resulting from a misdiagnosis, stated,

> the rule is laid down with great distinctness . . . . To entitle the plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as to amount to a reasonable certainty that they will result from the original injury. . . . In order to entitle the plaintiff to recover for the permanent injury which it was proven that he had sustained, it was necessary to prove that this permanent injury would not have been present had not the defendant been guilty of negligence or want of

[118] *Id.*
[119] *Id.* at 190.

skill.[120]

In applying this rationale to the context of latent diseases today, with the diagnostic procedures so advanced—enabling the preservation of the original misdiagnosis—it appears bringing a challenge under Section 16 is more timely and jurisprudentially appropriate than it was a hundred years ago.

Many believe the legislature must correct Rule 214-a to eliminate the harshness imposed on those who suffer and ultimately die because of the misdiagnosis of latent disease.[121] However, New York courts have departed from the status quo; in the area of personal injury, the rules are deemed out of step with the demands and needs of society.[122] In *Bing*, the Court of Appeals abandoned the long-standing precedent that liability of hospitals for injuries suffered by patients through negligence of its employees was dependent on

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[120] Smith v. Dumond, 6 N.Y.S. 242, 244 (N.Y. Gen. Term 1st Dep't 1889).

[121] Helgans v. Plurad, 680 N.Y.S.2d 648, 650 (App. Div. 2d Dep't 1997).

[122] *See* Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957). *See also* Battalla v. New York, 176 N.E.2d 729, 730 (N.Y. 1961) (holding severe emotional and neurological disturbances with residual physical manifestations states a cause of action).

> We act in the finest common-law tradition when we adopt and alter decisional law to produce common-sense justice. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule. . . .
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> . . . .
>
> It is fundamental to our common-law system that one may seek redress for every substantial wrong.

Id. at 730. (citations and internal quotations omitted). *See also* People v. Hobson, 348 N.E.2d 894, 901 (N.Y. 1976) ("Tort cases, but especially personal injury cases, offer another example where courts will, if necessary, more readily re-examine established precedent to achieve the ends of justice in a more modern context."); Gallagher v. St. Raymond's Roman Catholic Church, 236 N.E.2d 632, 634 (N.Y. 1968) (holding as invalid a common law rule which no longer expresses a standard which accords with the mores of society).

whether the act was "administrative" or "medical," and relied instead on a theory of respondeat superior.[123]

> The rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded. To the suggestion that *stare decisis* compels us to perpetuate it until the legislature acts, a ready answer is at hand. It was intended, not to effect a "petrifying rigidity," but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it.[124]

IV. CONCLUSION

As the courts continue to shut down equal protection and due process challenges to Rule 214-a brought on behalf of victims who have succumbed to latent diseases due to misdiagnosis by health care professionals, it appears the stage may be set for an alternative theory of recovery.

Invoking the constitutional provision that protects the wrongful death cause of action from abrogation by either legislative expediency or judicial fiat may finally provide these plaintiff-victims with the justice that has thus far proved elusive. It is hoped that if such a challenge is brought, the judiciary will abandon the protracted rationale that has subverted the pursuit of a cause of action that, in other contexts, has been so fiercely protected.

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[123] *Bing*, 143 N.E.2d. at 8.
[124] *Id.* at 9.