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Preface

What, after all, is tort law? It is social legislation, whether derived from the common law or statute. Dean Prosser with his typical felicity of expression commented: "Perhaps more than any other branch of the law, the law of torts is a battleground of social theory."[1] Public policy plays a prominent role in the solution of private disputes, the civil wrongs which constitute the substance of tort cases. "There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for the future."[2]

This goal is particularly meaningful in the light of recent developments in the law of New York. During the 1960's, much of the state's law was recodified; foremost among these modernizations was the New York Civil Practice Law and Rules.[3] The difficult task of recasting notions of civil accountability in the context of liberalized adjective law fell to the judges of this period. Thus, a survey of precedential decisions in the torts field cannot be artificially isolated from their restructured procedural framework.

This, however, is not a novel observation. A century ago, Sir Henry Maine detected that "substantive law has at first the look

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1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 14-15 (4th ed. 1971).

2. *Id.* at 15.

3. The New York Civil Practice Law and Rules, repealing and replacing the Civil Practice Act and the Rules of Civil Practice, became effective September 1, 1963. N.Y. CIV. PRAC. LAW & R. (McKinney).

of being gradually secreted in the interstices of procedure."[4] Today, that fact must still be acknowledged. Accordingly, in examining Judge Hopkins' contributions in tort law, one must appreciate the fact that he concurrently confronted revision of long established rules of practice which had suspended or frozen the substantive law in a rigid mold.

A review of selected decisions in the field of tort law yields an imperfect and inadequate representation of Judge Hopkins' contributions over the past two decades. But the selection has been consciously directed to illustrate solutions to issues of practical importance to lawyers and judges. These are not the simplest of cases demanding a minimum of judicial ability; rather, they challenge the adjudicator to draw fully upon his skills of statutory construction and interpretation, his knowledge of the law past and present, his powers of reasoning and his ability to clarify and refine the law.

Part I of this commentary confirms the focus on difficult areas of the law by addressing the nettlesome issues of joint tortfeasors and apportionment. Part II explores the confluence of two currents of change, *Dole* apportionment and intrafamily immunity, which do not course at the same velocity. Part III confronts the enigmas of statutes of limitation and the substantive issue of accrual of claims. The conclusion, that Judge Hopkins has advanced the integrity and the responsiveness of the law in all of these areas, necessarily follows.

I. Apportionment and Joint Tortfeasors

A. *Approach of the Common Law*

The dispensation of justice in consonance with the accepted mission of modern tort adjudication necessitates a fine balancing of rights, obligations and relationships of individuals. In centuries past, the historic approach to personal injury was to "let the loss lie where it falls." When the law recognized just compensation of the innocent victim as a legitimate objective it exhibited no concern with degrees of fault; it did not measure the comparative negligence of a plaintiff and a defendant, or the proportionate contribution of each of several defendants to the injury

4. H. MAINE, EARLY LAW AND CUSTOM 389 (1886).

inflicted upon a plaintiff. The simplistic solution of the common law was to bar recovery if the plaintiff was contributorily negligent. Where multiple tortfeasors caused the injury, the plaintiff could select one and sue him for full compensation. If he sued two or all tortfeasors, he could enforce his judgment against any one of them. The choice in framing the tort action and in the strategy of final recovery was plaintiff's.

The predicament of the hapless defendant selected by the plaintiff from among two or more tortfeasors implicated in the wrong can be traced to a departure from the original concept of substantively joint (concerted) tortfeasors. The joint and several liability[5] which had previously attached to conspiratorial wrongdoers[6] was now transposed to independent actors whose conduct converged to produce plaintiff's injury. Thus, the plaintiff could bring an action against one, some or all of "several" tortfeasors and execute a judgment in full against any one of those he sued.

Augmenting the joined tortfeasor's misfortune was application of the common law rule against contribution between or among tortfeasors.[7] Contribution where allowed was usually determined by dividing the total recovery by the number of tortfeasors against whom the plaintiff obtained judgment.[8] Although the rule originated in a case involving intentional concerted wrongdoing, it was subsequently extended by American courts to bar contribution among independent actors whose negligence concurred in a single harm.[9] Thus one of several procedurally-joined tortfeasors was not entitled to a sharing of the damages assessed.

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5. "Joint" tortfeasors originally denoted persons engaged in concerted action or a common enterprise causing a single injury; all were responsible for the same tort giving rise to one cause of action. "Several" tortfeasors acted independently but concurrently to cause a single harm; each could be the object of a separate cause of action. *See* J. FLEMING, THE LAW OF TORTS 237-39 (5th ed. 1977); PROSSER, *supra* note 1, at 291-97.

6. Professors Fleming and Prosser refer to Sir John Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613) for the rule of joint liability: "all coming [together] to do an unlawful act, and of one party, the act of one is the act of all of the same party being present." FLEMING, *supra* note 5, at 237; PROSSER, *supra* note 1, at 291.

7. The rule is traced to Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799). *See* PROSSER, *supra* note 1, at 305-06.

8. *See generally* Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728 (1968) (analysis of traditional loss allocation alternatives).

9. *See generally* Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1936-37) (discussion of ramifications of joinder of defendants in tort actions).

Neither could the defendant seek indemnification by impleading a person not a party who might be liable to him for all or part of plaintiff's claim, despite the language of the impleader statute.[10] Indemnification, in contrast to contribution, represented a shifting of liability. New York followed the common law rule that recognized a right of indemnity only when a party could shift the *entire* loss to another.[11] In tort actions, a defendant might be permitted to implead a third party only if the defendant's negligence was passive or secondary and the third party's negligence was active or primary. So far as tortfeasors were concerned, the law, in effect, declared "a pox on all of you."

B. *Recent Evolution of New York Law*

From this posture of indifference to equities among wrongdoers to the present approach of comparative fault and apportionment, three developments in New York law marked the transition. First, the Civil Practice Law and Rules permitted contribution among tortfeasors against whom plaintiff obtained a joint money judgment.[12] In 1974, the legislature modified the rule to allow a claim of contribution "whether or not an action has been brought or a judgment has been rendered."[13] Second,

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10. N.Y. CIV. PRAC. LAW § 1007 (McKinney 1976). *See* Fox v. Western New York Motor Lines, 257 N.Y. 305, 308, 178 N.E. 289, 290 (1931). This restriction was modified in Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 180, 15 N.E.2d 567, 568-69 (1938) and McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 327-28, 107 N.E.2d 463, 470-71 (1952).

11. Indemnity is "not dependent upon the legislative will. It springs from a contract, express or implied, and full, not partial, reimbursement is sought." McFall v. Compagnie Maritime Belge, 304 N.Y. at 328, 107 N.E.2d at 471. *See also* Insurance Co. of North Am. v. Dayton Tool and Die Works, Inc., 57 N.Y.2d 489, 497-98, 443 N.E.2d 457, 460-61, 457 N.Y.S.2d 209, 212-13 (1982); Green Bus Lines, Inc. v. Consolidated Mut. Ins. Co., 74 A.D.2d 136, 149, 426 N.Y.S.2d 981, 990 (2d Dep't 1980).

12. *See* former N.Y. CIV. PRAC. LAW § 1401 (McKinney); 1964 N.Y. Laws, ch. 388, § 5 (McKinney).

13. 1974 N.Y. Laws, ch. 742, § 1, codified in N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976). The current provision reads:

> § 1401. Claim for contribution
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> Except as provided in section 15-108 of the general obligations law, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

Id. The language of § 1401 parallels the text of the Uniform Contribution Among

the legislature of New York in 1975 enacted a comparative negligence statute eliminating contributory negligence as a total bar to plaintiff's recovery.[14] Third, the New York Court of Appeals in 1972 formulated a theory of apportionment of damages in *Dole v. Dow Chemical Co.*,[15] which the legislature reflected in amending the Civil Practice Law and Rules:

> § 1402. Amount of contribution
> The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.[16]

In the aggregate, these three developments formalized by statute within the space of a mere decade, overturned some of the basic, time-honored rules governing accountability for tortious conduct. The comparative negligence statute, although not a focus of this article, must be acknowledged as a fundamental change in the substantive law of New York, distinctively advantaging plaintiffs. By contrast, the *Dole* decision and sections 1401 and 1402 speak to the equities among defendants.[17] Be-

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Tortfeasors Act § 1(a).

14. 1975 N.Y. Laws, ch. 69, § 1, codified in N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976):

> § 1411. Damages recoverable when contributory negligence or assumption of risk is established
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> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

Id.

15. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

16. 1974 N.Y. Laws, ch. 742, § 1, codified in N.Y. CIV. PRAC. LAW § 1402 (McKinney 1976).

17. That *Dole* apportionment adjusts rights and obligations of contribution *among defendants* and does not aid the plaintiff is exemplified in the complex factual and pleading patterns of Klinger v. Dudley, 41 N.Y.2d 362, 361 N.E.2d 974, 393 N.Y.S.2d 323 (1977). Plaintiffs sued several defendants who in turn impleaded a number of persons as third party defendants. After obtaining a judgment prescribing the proportionate share of liability for each prime and impleaded defendant, plaintiffs recovered only a small

cause of its complexity and penchant for infiltrating a great diversity of tort claims, the apportionment doctrine and its supporting rationale command special attention.

But it would deceptively shade the truth to depict the *Dole* decision as bolting upon the scene without warning and justification. The rational evolution of the law does not work its way in that manner. Precursory reasoning in analytic opinions pre-dating *Dole* supplied the transition. Foremost of the decisions, not surprisingly, was Judge Hopkins' application of the law in *Musco v. Conte*.[18]

C. Musco v. Conte

The pertinent facts of this case reveal that defendant Conte, while attempting to park his car in a lot maintained by a diner, overshot a wooden log backstop demarcating the parking area. Musco, responding to defendant's request for assistance to extricate the automobile, sustained injury to his hand by virtue of Conte's negligence. He was taken to Yonkers General Hospital where surgery was performed. The negligent administration of anesthesia resulted in Musco's death.[19]

Musco's administratrix brought a wrongful death action against Conte and the owner and operator of the parking lot, alleging negligence of the defendants. Approximately seven years after the accident and five years subsequent to the initiation of the wrongful death action, defendant Conte impleaded Yonkers Hospital and an individual associated with the procedures at the hospital. The third party complaints were dismissed for "patent

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fraction of the award — the insurance coverage of the paying prime defendants. The latter, not having paid more than their equitable shares (N.Y. CIV. PRAC. LAW § 1402 (McKinney 1976)), were barred from exacting monies from the third party defendants. Plaintiffs, not having sued the third party defendants originally and not having amended their complaints to claim against the third party defendants (N.Y. CIV. PRAC. LAW § 1009 (McKinney 1976)), were precluded from directly or indirectly recovering from the impleaded parties. "To permit a further recovery to these plaintiffs by means of allowing the respective main defendants to recover from third-party defendants amounts such main defendants had not yet paid would be, in effect, the casting aside of established principles codified in the pleading statutes. . . ." Klinger v. Dudley, 41 N.Y.2d at 370, 361 N.E.2d at 980, 393 N.Y.S.2d at 329.

18. 22 A.D.2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964).

19. *Id.* at 122-23, 254 N.Y.S.2d at 592.

insufficiency."[20]

On appeal, Judge Hopkins commenced his analysis by summarizing the common law rules: joint and several liability of tortfeasors meant that any one of the joint tortfeasors was answerable for the entire damage; and one tortfeasor-defendant could not implead a tortfeasor not sued by the plaintiff.[21] Apportionment of damages and indemnity, however, were recognized in certain circumstances.[22]

He perceived the facts in *Conte* as distinguishable from "the classic type of joint torts when the injury occurred as a product of the acts of several wrongdoers in concert, or flowing from concurrent acts of several wrongdoers happening at the same time . . . ."[23] Here there were two separate stages of conduct, the original injury to the deceased's hand, and the negligent treatment which occasioned Musco's death. These acts constituted successive and independent, not concurrent, tortious conduct of different degrees of culpability.[24] "Hence, the rule that the impleader of a third party will not lie at the instance of a tortfeasor *in pari delicto* fails of application . . . ."[25] By this reasoning, Judge Hopkins justified impleader in cases where tortfeasors acted independently and at different stages and times, and set the stage for adoption by the New York Court of Appeals of the doctrine of apportionment.

D. Dole v. Dow Chemical Co.

In *Dole*, plaintiff charged Dow Chemical with negligence in causing the death of her husband from exposure to a poisonous chemical used to fumigate grain storage bins of decedent's employer. Plaintiff alleged failure by the manufacturer to label

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20. *Id.* at 123, 254 N.Y.S.2d at 592. The reasons advanced by the third party defendants in seeking affirmance of the dismissal were: an active tortfeasor may not implead another alleged tortfeasor; the statute of limitations had run; and defendant Conte's complaint was barred by laches. *Id.*

21. *Id.* at 123, 254 N.Y.S.2d at 593.

22. Judge Hopkins referred to cases involving concurrent, separate conduct producing injury to land, and unequal fault. *Id.* at 124, 254 N.Y.S.2d at 593.

23. *Id.*

24. Conte, Judge Hopkins observed, could be held liable for the entire damage but his act was less culpable than that of the third party defendants. *Id.* at 124, 254 N.Y.S.2d at 593-94.

25. *Id.* at 124, 254 N.Y.S.2d at 594.

properly and warn users of the dangers. Dow denied any negligence and impleaded George Urban Milling Company, decedent's employer, on the theory that Urban's active and primary negligence caused decedent's death and, consequently, Dow was entitled to indemnification.[26]

Dow's pleading and Urban's motion to dismiss the third party complaint followed the established doctrine that impleader was permitted only where primary or active negligence could be charged to the third party defendant. A successful impleader would result in indemnification of the third party plaintiff by shifting the entire loss to the third party defendant.[27] The difficulty for a defendant in pursuing such "self help" arose from the vagaries of fixing the meanings of active-passive, and primary-secondary negligence.

The court of appeals acknowledged that the active-passive concept represented "an abandonment of the rigorous common-law policy . . ."[28] requiring a "measure of degree of differential culpability, although the degree was a large one."[29] In re-examining "the basic fairness of the uncertain and largely unpredictable nature of the measure of redress . . . by indemnity,"[30] the court resolved that "an apportionment of responsibility in negligence"[31] achieved a more equitable result.

The court recognized that action by the third party plaintiff (Dow) against the employer (Urban) was a different claim from that asserted by the plaintiff representing the estate of the deceased employee.[32] Dow's claim sought a determination of the relative responsibility of the chemical manufacturer and the employer based upon the independent duty of the latter to Dow.[33]

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26. Dow alleged that Urban failed to follow instructions on the label, failed to test and aerate the fumigated premises and used untrained personnel. Dole v. Dow Chem. Co., 30 N.Y.2d at 145-46, 282 N.E.2d at 290, 331 N.Y.S.2d at 384-85.

27. *See* Rock v. Reed-Prentice Div. of Package Mach. Co., 39 N.Y.2d 34, 39, 346 N.E.2d 520, 522-23, 382 N.Y.S.2d 720, 722 (1976).

28. 30 N.Y.2d at 148, 282 N.E.2d at 291, 331 N.Y.S.2d at 387.

29. *Id.* at 292, 282 N.E.2d at 291, 331 N.Y.S.2d at 387.

30. *Id.*

31. *Id.* at 149, 282 N.E.2d at 292, 33 N.Y.S.2d at 387.

32. *Id.* at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390. Under former N.Y. WORK. COMP. LAW § 11 (McKinney 1965), the plaintiff would have no right of recovery against her husband's employer.

33. Dole v. Dow Chem. Co., 30 N.Y.2d at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390. *See* Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y.

Consequently, the "[r]ight to apportionment of liability or to full indemnity . . . as among parties involved together in causing damage by negligence, should rest on relative responsibility and [is] to be determined on the facts."[34] Henceforth, labels such as active-passive or primary-secondary negligence were not the criteria for impleader; rather, the procedural bars were dismantled to permit equitable sharing among defendants of damages due the plaintiff.

The legacy of *Dow* engaged the courts in measuring accountability by a much more finely calibrated scale. No longer were 50/50 sharing by contribution or total shifting of loss by indemnity the only alternatives.[35] Henceforth, equitable apportionment among originally joined or impleaded tortfeasors would be the task of judges and juries.[36]

E. Williams v. Mobil Oil Corp.

A recent personal injury action against two corporate defendants provided the occasion for revisiting the problem of "correlative rights of the defendants between themselves,"[37] as Judge Hopkins expressed it. In *Williams v. Mobil Oil Corp.*,[38] one of the defendants, Pace Oldsmobile, leased a building in New Rochelle where it sold and serviced automobiles. Incident

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175, 180, 15 N.E.2d 567, 568-69 (1938).

34. Dole v. Dow Chem. Co., 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92.

35. A recent analysis of the contribution versus indemnification problem is presented in Insurance Co. of North Am. v. Dayton Tool & Die Works, Inc., 57 N.Y.2d 489, 443 N.E.2d 457, 457 N.Y.S.2d 209 (1982). In that case, workers injured while operating machinery sued the manufacturers of the equipment. The latter brought third party actions for contribution or indemnification against the employers.

The liability carriers of the employers disclaimed coverage pursuant to a clause in the insurance contracts exempting the carriers from any obligation to *indemnify* an employer for damages arising out of personal injury to an employee. The carriers argued that the indemnification clause insulated them from liability for *Dole* apportionment. The court, however, emphasized that *Dole* apportionment has "no application to a claim for indemnity." *Id.* at 497, 443 N.E.2d at 460-61, 457 N.Y.S.2d at 212-13. Instead, it was codified by the legislature to expand the right to contribution. Thus, the indemnity clause in the insurance contract did not immunize the carriers from *Dole* apportionment.

36. *See* Wilner & Farrell, *Dole v. Dow Chemical Co.: The Kaleidoscopic Impact of a Leading Case*, 42 BROOKLYN L. REV. 457 (1976).

37. Williams v. Mobil Oil Corp., 83 A.D.2d 434, 435, 445 N.Y.S.2d 172, 173 (2d Dep't 1981).

38. 83 A.D.2d 434, 455 N.Y.S.2d 172 (2d Dep't 1981).

to its business, Pace maintained on the premises gasoline pumps and tanks supplied by the second defendant, Mobil Oil. A Pace employee detected a strange odor in the basement. Mobil investigated the possibility of leakage from its gasoline tanks; its engineer found fumes, presumably nonflammable, and arranged for a contractor to come the following morning to test the gasoline tanks. Shortly before the anticipated inspection, a Pace employee activated a sump pump in the basement and a fire erupted.[39]

Firemen injured in fighting the fire sued Pace and Mobil charging both with negligence. Pace crossclaimed against Mobil for property damage asserting that Mobil had breached its equipment loan contract with Pace. Mobil countered with an affirmative defense, the twelve month time limitation on claims prescribed in its retail dealer contract with Pace, and crossclaimed for indemnity.[40] Both parties moved for summary judgment.[41]

Although Judge Hopkins' analysis of the various contract issues posed is deft and instructive, his treatment of the indemnity question is here of particular relevance. By this time (1981), he observed that "the familiar doctrine of *Dole* . . . sanctioned by statute (CPLR 1401) . . . [authorizes that] contributions may be sought by one tort-feasor against another, whether the tort-feasors are joint, concurrent, or successive . . . ."[42] He concluded that the "all embracing language [of the contracts] manifests as a *matter of law* an intent to include indemnity of losses occasioned even by Mobil's own negligence."[43]

The decision in *Williams* reveals the result of the interaction of the judge in the common law tradition and the legislature. The *Dole* doctrine, evolved by the court, embodied in statute and then worked through numerous, specific factual

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39. *Id.* at 435-36, 445 N.Y.S.2d 173-74.

40. *Id.* at 436-37, 445 N.Y.S.2d at 174. Both of the contracts between the parties included an indemnity provision whereby Pace would indemnify Mobil for claims based upon personal injury and property damage arising out of the use or condition of the equipment and the storage or handling of the products on the premises. *Id.* at 438, 445 N.Y.S.2d at 174-75.

41. *Id.* at 437, 445 N.Y.S.2d at 174.

42. *Id.* at 441, 445 N.Y.S.2d at 176.

43. *Id.* at 442, 445 N.Y.S.2d at 177 (emphasis added).

configurations, has become settled law, and so it is applied by a judge who is adroit at integrating a new approach in evaluating accountability for tortious conduct.

II. The *Dole* Doctrine and Parental Accountability

A. *Parental Immunity*

The preceding discussion has traced the demise of rigid precepts restricting joinder, contribution and indemnity. While facially appearing to be of a procedural nature, the liberalization of the rules has produced important, substantive consequences. The tortfeasor who escaped liability because the plaintiff did not join him as a defendant or because he was immune from impleader, the employer whose exposure was limited to worker's compensation insurance — these, among others, may now be accountable for a proportionate share of the damages assessed.

The usefulness of the *Dole* doctrine invites attempts to apply it in a variety of situations where it can be asserted that more than one individual's negligence contributed to cause the injury. Application to the ordinary tort case involving concurrent or successive tortfeasors is no longer a novelty. But what happens when the liberated procedure of *Dole* clashes head-on with the vestiges of an ancient immunity which insulates negligent conduct from liability in tort?

The doctrine of intrafamily immunity shielded spouses, parents and children from legal accountability to each other, at least for intentional infliction of personal injury. Interspousal immunity is no longer a part of New York law,[44] but a significant residuum of parental immunity persists. It can be traced to the present.

In *Sorrentino v. Sorrentino*,[45] the court of appeals held that an action for personal injury which resulted from the negligent operation of an automobile could not be maintained against a parent by an unemancipated minor child. The court of appeals thereafter twice affirmed the doctrine.

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44. *See* N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1978). For a criticism of the interspousal immunity rule see Mertz v. Mertz, 271 N.Y. 466, 474-77, 3 N.E.2d 597, 600-01 (1936) (Crouch, J., dissenting).

45. 248 N.Y. 626, 162 N.E.2d 551 (1928) (overruled in Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969)).

Cannon v. Cannon involved an action by an eleven-year-old child against his parents for personal injuries caused by the mother's negligent operation of an automobile.[46] The court of appeals refused to countenance the claim on the ground that such an action would be disruptive to family harmony.[47] *Badigian v. Badigian*[48] rejected the right of a mother, on behalf of her three-year-old child, to sue the father for injuries resulting to the child from the father's negligence in leaving his car unlocked. But Judge Fuld, dissenting, voiced strong criticism of a "rule which so incongruously shields conceded wrongdoing . . . ."[49] He exposed the fallacy of the family harmony justification by citing exceptions to the immunity doctrine which "swallowed the rule."[50]

B. Gelbman v. Gelbman

A reexamination of intrafamily accountability emerged in *Gelbman v. Gelbman*.[51] In that case, the mother-passenger brought negligence actions against her unemancipated sixteen-year-old son, driver of her car, and the driver of the second car involved in the collision. The trial court and the appellate division rejected the claim against the son.[52] But the court of appeals reversed. It rejected the traditional rationale that the immunity was essential to family harmony. On the contrary, observed the court: "[i]t seems obvious that family unity can only be preserved . . . by permitting the present action."[53] The court noted four anomalous features of the doctrine advanced in Judge Fuld's *Badigian* dissent as support for its conclusion: the doctrine was inapplicable if the child had attained majority, the

46. 287 N.Y. 425, 40 N.E.2d 236 (1942) (overruled in Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969)).

47. Cannon v. Cannon, 287 N.Y. at 428-29, 40 N.E.2d at 237-38.

48. 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961) (overruled in Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969)).

49. Badigian v. Badigian, 9 N.Y.2d at 475, 174 N.E.2d at 721, 215 N.Y.S.2d at 38 (Fuld, J., dissenting).

50. *Id.* at 478, 174 N.E.2d at 722, 215 N.Y.S.2d at 40 (Fuld, J., dissenting).

51. 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

52. Gelbman v. Gelbman, 52 Misc. 2d 412, 275 N.Y.S.2d 712 (Sup. Ct. Westchester County 1966), *aff'd*, 28 A.D.2d 826, 282 N.Y.S.2d 670 (2d Dep't 1967), *rev'd*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

53. Gelbman v. Gelbman, 23 N.Y.2d at 437, 245 N.E.2d at 193, 297 N.Y.S.2d at 530.

suit was for property damage, the action was for an intentional tort, or the suit arose as a result of an automobile accident which occurred in the course of employment.[54] The court realistically acknowledged that New York's compulsory automobile insurance law[55] would protect the family unit from economic hardship should the plaintiff recover damages; in fact, a successful outcome would supply funds to provide for the care of the injured family member. Although renouncing "the defense of intrafamily tort immunity for nonwillful torts,"[56] the court disclaimed "creating liability where none previously existed."[57] The immunity had simply operated to shield a liability which, but for the family relationship, would have attached to the negligent conduct.

Gelbman thus stripped negligent conduct in the operation of a vehicle from its former legal protection when the operator and the injured party were members of the same family. The presence of liability insurance was a persuasive consideration in reaching this result. Far more sensitive and disturbing, socially and economically, was the issue of accountability of a parent for injuries sustained by a child when negligence in guarding the safety of the child appeared to be a contributing cause.

Following the *Gelbman* decision, three judicial departments of the appellate division had occasion to consider parental accountability for negligent supervision of a child. The result was uniform: a cause of action based on a theory of parental negligence would not be entertained.

C. Holodook, Graney *and* Ryan *Decisions*

The third department, in 1973, decided two cases: *Holodook v. Spencer*[58] and *Graney v. Graney*.[59] In *Holodook*, the father sued the owner and operator of the vehicle which struck and injured his four-year-old child. The defendant, in turn, impleaded

54. *Id.* at 438, 245 N.E.2d at 193, 297 N.Y.S.2d at 531.

55. N.Y. INS. LAW §§ 670-78 (McKinney Supp. 1982).

56. Gelbman v. Gelbman, 23 N.Y.2d at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.

57. *Id.*

58. 43 A.D.2d 129, 250 N.Y.S.2d 199 (3d Dep't 1973), *aff'd*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

59. 43 A.D.2d 207, 350 N.Y.S.2d 207 (3d Dep't 1973), *aff'd sub nom.* Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

the mother and counterclaimed against the father on the theory that their negligence in failing to watch over the child was a contributing cause of the injury.[60] Defendant invoked the *Dole* apportionment doctrine to impose a share of the damages upon the parents.[61] The appellate division rejected defendant's attempt to hold the parents accountable stating that:

> The duty to supervise a child in his daily activities has as its objective the fostering of physical, emotional and intellectual development, and is one whose enforcement can depend only on love. . . . Surely there can be no place in such a natural scheme for second-guessing by a jury whose members' views on the subject will be unavoidably influenced by their own unique and inimitable experiences, both as children and parents.[62]

Similarly, in *Graney*, the third department refused to recognize the legal responsibility of a father for injuries to his young son sustained in a fall while under the father's care.[63] However, Justice Staley, in dissent, asserted that a parent's duty to exercise reasonable care to protect his infant had long been recognized in the law. He would have sustained a cause of action for negligent supervision, holding a parent to the standard of the "ordinarily reasonable and prudent parent."[64]

The fourth judicial department, in *Ryan v. Fahey*,[65] considered the action by a father against the mother of his three-year-old son who was injured while under her supervision.[66] In accord with the previous third department rulings, it dismissed the complaint.[67]

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60. Holodook v. Spencer, 43 A.D.2d at 130-31, 350 N.Y.S.2d at 200.

61. *Id.* at 131, 350 N.Y.S.2d at 201.

62. *Id.* at 135, 350 N.Y.S.2d at 204-05.

63. Graney v. Graney, 43 A.D.2d at 208, 350 N.Y.S.2d at 208.

64. *Id.* at 210, 350 N.Y.S.2d at 210 (Staley, J., dissenting).

65. 43 A.D.2d 429, 352 N.Y.S.2d 283 (4th Dep't), *aff'd sub nom.* Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

66. *Id.* at 430, 350 N.Y.S.2d at 284.

67. In dismissing the complaint, the majority adopted the Wisconsin approach of permitting negligence suits by children against their parents in non-parental authority or discretion cases, such as automobile cases. *Id.* at 435-36, 350 N.Y.S.2d at 289. *See* Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). *See generally* Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 512-16 (1980) (discussion of the Wisconsin *Goller* approach and its application in other jurisdictions).

D. Lastowski v. Norge Coin-O-Matic, Inc.

It finally devolved upon the second department to consider the issue: "Does lack of supervision of an unemancipated child by his parents, as a result of which he is injured, constitute an actionable tort?"[68] The facts in *Lastowski* revealed that a four-year-old child was struck and injured on a public highway by a motor vehicle owned by Norge. The infant's father sued the driver and Norge to recover for his son's injuries and for medical expenses and loss of companionship. Defendants counterclaimed, seeking a *Dole* apportionment of damages on the theory that the father's failure to safeguard his son was culpable conduct. Plaintiffs asserted that such a counterclaim was insufficient as a matter of law.[69] A majority of the appellate division bench agreed.[70]

Justice Shapiro, writing for the court, confirmed the position taken by the other departments, that a cause of action in tort against a parent for negligent supervision of a child did not exist.[71] He drew upon the language in *Cannon* which elaborated the view that the law accords parents wide discretion in providing for the support, education, recreation and health of a child:

> In the exercise of that discretion and the performance of duties imposed by law through no choice by the parents, they are held to no higher standard of care than the measure of their own physical, mental and financial abilities to provide for the well-being of their child. Lack of means, physical weakness or mental incapac-

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68. Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d 127, 355 N.Y.S.2d 432 (2d Dep't 1974).

69. *Id.* at 127-28, 355 N.Y.S.2d at 433.

70. The court divided 3-2 in *Lastowski*, Gulotta, P.J. and Hopkins, J. dissenting in separate opinions. *Id.* at 151, 355 N.Y.S.2d at 432.

71. It should be noted that the second department rendered its decision in *Lastowski* before the court of appeals issued its opinion affirming *Holodook*, *Graney* and *Ryan*. Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). The court of appeals confined *Gelbman* to the types of claims which would be actionable if no family relationship existed, e.g., injured passenger versus negligent driver. If claims for negligent supervision were recognized, the court cautioned that only an insured parent would sue on behalf of his injured child because he would be the object of a counterclaim by the non-parent defendant. *Id.* at 44-51, 324 N.E.2d at 342-46, 364 N.Y.S.2d at 866-72. But this ignores the fact that under *Dole*, a parent could be impleaded for apportionment purposes. Judge Jasen, dissenting, advocated application of a standard of reasonable care and assessment of comparative fault. *Id.* at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 872 (Jasen, J., dissenting).

> ity may cause parents to tolerate conditions in the family home which are unsafe and which might afford a basis for liability to one coming to the premises as an invitee or licensee.[72]

Justice Shapiro then reviewed the dissenting opinion of Judge Fuld in *Badigian*[73] and the majority opinion of Judge Burke in *Gelbman*[74] emphasizing the insurance factor in both of these automobile injury cases. He concluded that "*Gelbman*, in erasing the ban against intrafamily suits, *did not create a cause of action* based upon lack of parental supervision."[75] Neither was the majority in *Lastowski* disposed to create such a cause of action.

The reasons supporting the court's refusal recalled the familiar family unity theme; litigation, costs and the burden of a judgment against a parent would dissipate family financial resources and create strife. Differences in children, in the capacity of parents, in the conditions of the home, in cultural backgrounds and economic environments would make it impossible to construct a standard of care for parental supervision. To recognize such a cause of action would pervert the purposes of *Gelbman* and *Dole* and would have an "*in terrorem effect*" on parents.[76]

Judge Hopkins dissented; in departing from what had been demonstrated to be the conventional wisdom of appellate courts in New York,[77] he explored the precedents and offered several possible formulations of parental accountability.[78] Although the theory of imputed negligence has been proscribed in New York in actions on behalf of an injured child,[79] its prior use evidenced

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72. Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d at 129-30, 355 N.Y.S.2d at 435 (quoting Cannon v. Cannon, 287 N.Y. at 428-29, 40 N.E.2d at 237-38).

73. 9 N.Y.2d at 479, 174 N.E.2d at 722-23, 215 N.Y.S.2d at 41 (Fuld, J., dissenting).

74. 23 N.Y.2d at 438, 245 N.E.2d at 193-94, 297 N.Y.S.2d at 531.

75. Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d at 131, 355 N.Y.S.2d at 437 (emphasis added).

76. *Id.* at 136-37, 355 N.Y.S.2d at 442.

77. The *Holodook*, *Graney* and *Ryan* appellate division decisions were affirmed by the New York Court of Appeals, see *supra* note 71.

78. He noted that the counterclaim could have been sustained at this (the pleading) stage since the parent had not denied all legal responsibility for supervision but had challenged the counterclaim because it did not allege that that the infant required "unusual supervision." In Judge Hopkins' view, a four-year-old child, by implication, requires unusual supervision. Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d at 137, 355 N.Y.S.2d at 443 (Hopkins, J., dissenting).

79. N.Y. GEN. OBLIG. LAW § 3-11 (McKinney 1978), provides that the negligence of a

recognition of a legal duty of parental care owing to a child.[80] *Gelbman* removed the defense of intrafamily immunity and the *Dole* decision supplied the rationale justifying parental accountability:

> [I]t is not just to burden the defendant, even though negligent, with all the burden of the damages, if the parent's negligence contributed to the injury. The child is not punished for the parent's sins by the adoption of this rule, for the child will receive the benefit of the whole recovery. If the parent is punished by the apportionment of the recovery, it is because of his own conduct and the inequity of allowing him to escape scot-free at the expense of the joint tortfeasor. . . . Once the parent's duty to care for and supervise the child is established as part of the parent's general responsibility, then it must follow that the negligent discharge of that duty —as it follows in the instance of any other legal duty — results in liability for the damages ensuing.[81]

Abrogation of parental immunity in itself does not provide the appropriate standard for judging whether or not a parent has been negligent. Judge Hopkins examined the liability rule in two states which had abolished the immunity. The Wisconsin rule, he observed, exempts from liability negligent acts associated with reasonable exercise of parental authority and ordinary discretion in providing food, housing, medical and other care.[82] He concluded that these exceptions, "phrased in vague and abstract terms," had proven difficult to interpret and created uncertainty in the law.[83]

California, on the other hand, adopted the standard of a reasonable parent in *Gibson v. Gibson*.[84] Cutting through the

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parent or custodian may not be imputed to an infant in an infant's action seeking damages for personal injury.

80. Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d at 139, 355 N.Y.S.2d at 445 (Hopkins, J., dissenting).

81. *Id.* at 140-41, 355 N.Y.S.2d at 446 (Hopkins, J., dissenting).

82. *Id.* at 141-42, 355 N.Y.S.2d at 446-48. *See* Goller v. White, 20 Wis. 2d 402, 413, 122 N.W.2d 193 (1963); *accord* Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 201 N.W.2d 745 (1972).

83. Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d at 141, 355 N.Y.S.2d at 447 (Hopkins, J., dissenting).

84. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). Justice Sullivan first laid to rest, in unequivocal terms, the doctrine of parental immunity: "We have concluded that parental immunity has become a legal anachronism. . . . Lacking the support of authority and reason, the rule must fall." *Id.*

outworn barriers to liability, the California court prescribed as "the proper test of a parent's conduct . . . : what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?"[85]

Such a formulation of parental responsibility, in Judge Hopkins' opinion, could take special circumstances into account: age, incapacity, handicaps. The trier of fact could enforce community standards and could reflect "the reluctance to overtax the parent with a duty that cannot easily be met."[86] It would, finally, "accord with the spirit of fairness which *Dole v. Dow Chem.* embraces."[87] For all of these reasons, Judge Hopkins advocated a fresh evaluation of an artificial limitation on accountability for tortious conduct.

He is not alone in refusing to be bound by precepts of the past. The rule of parental immunity, as Justice Sullivan surveyed its history in *Gibson*, is only eighty years old and "an invention of American courts"[88]; it bears reassessment if for no other reasons than that the exceptions engrafted on the rule have emasculated it. Interspousal immunity, a doctrine to which it is compared, traces its roots much deeper into the early common law, yet modern courts and legislatures, including those of New York, have found its rationale no longer persuasive. In supporting a similar demise for parental immunity, Judge Hopkins aligns himself with the great tort scholars, Professors Prosser and James,[89] an enviable alliance, but, after all, a reflection on his superior insight and appreciation of the office of a judge in moving the law foward.

III. The Enigmas of Statutes of Limitations

The treatment of statute of limitations perplexities is an example par excellence of Judge Hopkins' deftness in parsing the law. The Civil Practice Law and Rules devotes Article 2 to the subject "Limitations of Time." Here, one finds not only various

85. Id. at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.

86. Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d at 143, 355 N.Y.S.2d at 448.

87. *Id.* (citation omitted).

88. Gibson v. Gibson, 3 Cal. 3d at 916, 479 P.2d at 649, 92 Cal. Rptr. at 289.

89. PROSSER, *supra* note 1, at 865; James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 553 (1948).

stays, tolls and other special provisions but also classifications of causes of action governed by specific time periods.[90] So much is (relatively) clear. But when does the time limitation begin to run? When does one activate the stop watch?

Section 203(a), "Accrual of cause of action and interposition of claim", announces, delphically, "The time within which an action must be commenced, . . . shall be computed from the time the cause of action accrued to the time the claim is interposed." Although the section obliges with particulars of when a claim is interposed,[91] it does not illuminate the term "accrual." A sampling of Judge Hopkins' decisions in statute of limitations cases illustrates his skill in supplying the judicial gloss essential to interpreting the accrual of a cause of action.[92]

A. Siegel v. Kranis

The precedential case of *Siegel v. Kranis*[93] involved an automobile accident on February 15, 1960 in which three family members in the Siegel car were injured as a result of the alleged negligence of the driver of the other car. The attorney engaged by plaintiffs filed a claim with the Motor Vehicle Accident Indemnification Corporation for uninsured motorist coverage on August 11, 1960, well beyond the statutory 90 day period measured from the time of the accident.[94] Following various mesne proceedings, a jury decided on September 23, 1965 that the claim filed by the attorney was untimely.[95]

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90. *See, e.g.*, N.Y. CIV. PRAC. LAW § 211 (McKinney 1976) (twenty-year limitation on money judgments); *id.* § 213 (six-year limitation on certain contract actions); *id.* § 214 (three-year limitation for injury to person or property, etc.).

91. *See, e.g.*, N.Y. CIV. PRAC. LAW § 203(b), (c) & (e) (McKinney 1976).

92. *See, e.g.*, Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (2d Dep't 1968).

93. *Id.* The second car was not registered, and presumably not insured, by its owner. Hence plaintiffs' claim would be filed with the Motor Vehicle Accident Indemnification Corporation. *Id.* at 478, 288 N.Y.S.2d at 833.

94. Siegel v. Kranis, 52 Misc. 2d 78, 274 N.Y.S.2d 968 (Sup. Ct. Kings County 1966).

95. Siegel v. Kranis, 29 A.D.2d at 479, 288 N.Y.S.2d at 833. The standard of care required of an attorney is set forth in Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954) (the professional must possess the requisite learning and skill and exert his best judgment), and is consistent with the standard for physicians, Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 (1898). Wilful malfeasance (deceit, collusion, delaying suit or receiving money for personal gain) is a crime exposing an attorney to liability for treble damages in a civil suit. N.Y. JUD. LAW § 487(1)-(2) (McKinney 1983). The dissatisfied client suing his attorney for malpractice shoulders a heavy burden: the plaintiff in a legal

Plaintiffs commenced a suit against their attorney on June 17, 1966 for malpractice.[96] The issue was whether plaintiffs' cause of action accrued on May 15, 1960, the date by which the claim against MVAIC should have been filed, or September 23, 1965, the date of the jury's decision adverse to plaintiffs. If the former interpretation prevailed, even the six year contract limitation would have run. If the 1965 date governed accrual, plaintiffs' suit against the attorney in 1966 was timely.

Judge Hopkins embarked upon his analysis by noting that in medical malpractice cases the date of the act or omission no longer constituted an inflexible rule for commencement of the applicable limitation period. The continuous treatment exception formulated by the court of appeals in *Borgia v. City of New York* appeared "equally applicable in the context of litigation by attorneys."[97]

The client, like the patient, must depend on the professional's knowledge, skill and judgment. In the course of pursuing a claim through procedural stages, the client could not reasonably be expected to interrupt the litigation and sue his attorney. In the instant case, the conclusive rejection of plaintiffs' claim because of late filing did not occur until September 1965, and it was then that the issue of attorney negligence, for failure to initiate his client's action within the governing time limitation, could logically be raised. That date served as a terminus to the preceding five year period when a client-attorney relationship had persisted with reference to plaintiffs' personal injury claims. Consequently, the malpractice action accrued when a jury definitively found that the claim was not filed within the mandatory 90 day period.

Judge Hopkins reasoned:

> [A] contrary rule . . . might well lead to procrastination by the

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malpractice action for failure to prosecute properly a cause of action, must first show that the "action which has been neglected would probably have been successful, and, therefore that its neglect has directly resulted in damages measured by the value or amount of the rights which were lost by the default." McAleenan v. Massachusetts Bonding & Ins. Co., 232 N.Y. 199, 204-05, 133 N.E. 444, 446 (1921).

96. Siegel v. Kranis, 52 Misc. 2d at 79, 274 N.Y.S.2d at 969.

97. Borgia v. City of New York, 12 N.Y.2d 151, 155, 187 N.E.2d 777, 778, 237 N.Y.S.2d 319, 321 (1962). For application of the continuous treatment theory in a recent case, see Lomber v. Farrow, 91 A.D.2d 727, 457 N.Y.S.2d 638 (3d Dep't 1982).

> attorney to postpone the inevitable event of defeat. The author of the disaster should not be enabled to chart the strategy to avoid the liability for his own negligence. Otherwise, negligence could be disguised by the device of delay, and an attorney rewarded by immunity from the consequence of his negligence.[98]

By such convincing parallelism, the continuous treatment doctrine was extended in New York to attorneys.[99] Could the doctrine logically encompass accountability of other professionals as well?

B. Cubito v. Kreisberg

The conceptual foundation for determining the appropriate statute of limitations applicable to a malpractice action by a third party against an *architect* received careful scrutiny in *Cubito v. Kreisberg*.[100] Plaintiff was injured in a fall on October 30, 1974 in the laundry room of her apartment house. She charged defendant architect with negligence in design, resulting in accumulation of water on the floor of the room. The architect planning the construction had issued his certificate of completion on May 7, 1973 to the owners of the building. Plaintiff's action was commenced on October 6, 1977, more than three years from the certification of the architect's work.[101] Defendant moved to dismiss on the ground that the three year malpractice statute of limitations had run.[102] The issue, therefore, centered on the determination of when plaintiff's cause of action accrued.

Judge Hopkins, in affirming the denial of defendant's motion to dismiss, focused his analysis on the nature and accrual of the cause of action to reach his conclusion as to the applicable statute of limitations. He noted a basic distinction between statutory malpractice and ordinary negligence claims. The former "describes the negligence of a professional toward the person for whom he rendered a service, and . . . springs from the correlative rights and duties assumed by the parties through the rela-

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98. Siegel v. Kranis, 29 A.D.2d at 480, 288 N.Y.S.2d at 835.

99. For a recent application of Judge Hopkins' decisions, see Glamm v. Allen, 57 N.Y.2d 87, 439 N.E.2d 390, 453 N.Y.S.2d 674 (1982).

100. 69 A.D.2d 738, 419 N.Y.S.2d 578 (2d Dep't 1979).

101. *Id.* at 738, 419 N.Y.S.2d at 579.

102. N.Y. CIV. PRAC. LAW § 214(6) (McKinney 1976).

tionship."[103] By contrast, "simple negligence" relates to "the wrongful conduct of the professional in rendering services to his client resulting in injury to a party outside the relationship . . . ."[104] Since the injured plaintiff in *Cubito* had the status of a third party and not a client of the architect, her claim constituted an action for simple negligence.

This crucial distinction served as the predicate for determining the point at which the action accrued for purposes of the statute of limitations. In a negligence action, the three year period commences when "the wrongful invasion of personal rights occurred . . . ."[105] Accordingly, plaintiff's action accrued when she fell and was injured, and her suit was timely commenced within the three year period provided for personal injury actions.[106] By this reasoning, plaintiff's claim did not suffer defeat by application of the accepted principle that a cause of action by a *client* against an architect for faulty design or construction accrues when the construction is completed.[107]

Hypothetically, had *Cubito* involved an architect-client relationship, the client's action for any professional negligence occurring during the entire period of the architect's services on a particular project could await the completion of the architect's association with the project; thus the *client* would have the benefit of the continuous treatment rule adapted from *Borgia* to other professionals by Judge Hopkins' decision in *Siegel*.

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103. Cubito v. Kreisberg, 69 A.D.2d at 742, 419 N.Y.S.2d at 580.

104. *Id. Cf.* Victor v. Goldman, 74 Misc. 2d 685, 344 N.Y.S.2d 672 (Sup. Ct. Rockland County 1973), *aff'd*, 43 A.D.2d 1021, 351 N.Y.S.2d 954 (2d Dep't 1974) (a third party who would have benefitted had an attorney carried out his client's wishes does not have a claim against the attorney); *but cf.* Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

105. Cubito v. Kreisberg, 69 A.D.2d at 743, 419 N.Y.S.2d at 581 (citing Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 300, 200 N.E. 824, 831 (1936)).

106. N.Y. CIV. PRAC. LAW § 214 (McKinney 1976).

107. Cubito v. Kreisberg, 69 A.D.2d at 744, 419 N.Y.S.2d at 581 (citing Sosnow v. Paul, 43 A.D.2d 978, 352 N.Y.S.2d 502 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 780, 330 N.E.2d 643, 369 N.Y.S.2d 693 (1975)); *In re* Paver & Wildfoerster [Catholic High School Ass'n], 38 N.Y.2d 669, 345 N.E.2d 565, 382 N.Y.S.2d 22 (1976); Sears, Roebuck & Co. v. Enco Ass'n, 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977)). For the rule applicable to accountants, see Chemical Bank v. Louis Sternbach & Co., 91 A.D.2d 518, 456 N.Y.S.2d 392 (1st Dep't 1982) (plaintiff's action was not timely having been commenced more than three years after the accountant's certified statements had been received and relied upon).

The continuous treatment, or more appropriately "the continuous professional service to a client in the same matter of consultation," rule may logically be applied to architects; however the facts of the *Cubito* case did not provide the occasion. The introduction of a third party, not the client of the professional, cast the circumstances in a different mold. What is significant as a result of Judge Hopkins' decision is that third parties injured as a result of a professional's breach of duty have a claim for negligence accruing at the time that the injury is incurred.

C. Schiffman v. Hospital for Joint Diseases

The continuous treatment rule is one of two major exceptions to the principle that a malpractice action accrues when the negligent act occurs. The other is the foreign objects rule developed in *Flanagan v. Mount Eden General Hospital*:[108] a cause of action for medical malpractice accrues when the patient discovers the presence of a foreign object negligently left at the site of an operation. Forgotten surgical instruments or other material associated with an invasive procedure may be totally concealed; the negligent failure to remove them will not usually be known to the patient unless he is x-rayed or undergoes subsequent surgery. The object is real evidence of the neglience and "there is no possible causal break between the negligence of the doctor or hospital and the patient's injury."[109] For those reasons, the patient's claim for damages accrues when the object is discovered or could have been reasonably discovered. A fair rule — but how far may it be expanded to encompass discovery of errors not involving foreign objects?

Schiffman v. Hospital for Joint Diseases[110] presents an attempt to stretch the rule. During plaintiff's hospitalization for surgery in 1959, a specimen of tissue was submitted to defendant's department of pathology for examination. The diagnosis

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108. 24 N.Y.2d 427, 431, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 27 (1969). Surgical clamps were left in the plaintiff's abdomen during surgery in 1958. Eight years later, when plaintiff was x-rayed in an effort to diagnose the cause of abdominal pains, the presence of the clamps were discovered. *Id.* at 428, 248 N.E.2d at 871, 301 N.Y.S.2d at 24.

109. *Id.* at 430, 248 N.E.2d at 872-73, 301 N.Y.S.2d at 26.

110. 36 A.D.2d 31, 319 N.Y.S.2d 674 (2d Dep't 1971), *leave to appeal denied*, 29 N.Y.2d 483, 273 N.E.2d 577, 324 N.Y.S.2d 1028 (1971).

indicated malignancy. Plaintiff allegedly received radiation therapy thereafter. In 1967, the biopsy slides were reviewed and plaintiff was informed that no malignancy had been present. In 1969, almost two years after the discovery, Schiffman sued the hospital for damages.[111]

The hospital's motion to dismiss was granted on the ground that the action was untimely, not commenced within three years from the accrual date of 1959. Plaintiff relied on the *Flanagan* holding and on *Murphy v. St. Charles Hospital*[112] with its purported extension of *Flanagan*.[113] The *Murphy* case concerned a prosthesis inserted in the patient's hip in 1963; the prosthesis broke four years later. The patient's malpractice suit brought in 1968 was not barred by the statute of limitations. The court observed that the prosthesis (presumably negligently implanted) was similar to a foreign object in that it was preserved as evidence in the body and negated the opportunity for false claims; plaintiff's claim accrued in 1967 when the prosthesis broke and she sustained injury.[114]

Judge Hopkins concluded that neither the *Flanagan* nor the *Murphy* decision supported application of the foreign objects exception to the *Schiffman* case. No foreign object was left in the body; the existence of the biopsy slides was known to the patient, hence there was no unfairness due to concealment. "The claim of negligence relates to a misdiagnosis of ailment, an area of the physician-patient relationship not touched by the *Flanagan* holding."[115] The lapse of ten years since the diagnosis would dim defendants' recollection; in addition, such an extension of time might force defendants to meet claims based upon advanced technology, unavailable at the time of the treatment. These considerations assessed against the fact pattern in *Schiffman* convinced Judge Hopkins to refuse enlargement of the foreign objects exception and to follow the general rule that the period of limitations runs from the commission of the negligent

111. *Id.* at 31-32, 319 N.Y.S.2d at 675.

112. 35 A.D.2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970).

113. Schiffman v. Hospital for Joint Diseases, 36 A.D.2d at 32-34, 319 N.Y.S.2d at 675-78.

114. Murphy v. St. Charles Hosp., 35 A.D.2d at 65-66, 312 N.Y.S.2d at 979-80.

115. Schiffman v. Hospital for Joint Diseases, 36 A.D.2d at 33, 319 N.Y.S.2d at 676.

act and not from the discovery of the wrong.[116]

A line had to be drawn, and in Judge Hopkins' view, stretching the exception beyond *Flanagan* and *Murphy* raised delicate issues touching the respective roles of courts and legislatures in changing an established rule of law.[117]

D. Musco v. Conte

Where the statute of limitations is silent or abstruse, judges must fill the void, by analogy and ingenuity. A case in point (and discussed more fully in Part II) is *Musco v. Conte*[118] which, among other issues, involved a question of when a cause of action for indemnity accrued. Defendant Conte had served a third party complaint nearly five years after the action against him was commenced and while it was still pending. The third party defendants argued that defendant was barred by the three-year malpractice limitation, running from the time of the plaintiff's injury.[119] If this contention were valid, a defendant who did not quickly implead other possible tortfeasors would forfeit indemnification, even if his culpability, compared to the others, were slight. A decision which would clarify and settle the law on this issue was obviously necessary.

Judge Hopkins' analysis and resolution of the question in *Musco* injected certainty and guidance into an area left indeterminate by the Practice Act. He explained:

> [a]n action for indemnity need not take the form of third-party relief; it may be brought as an independent action subsequent to the rendition of judgment against a tort-feasor . . . . The general rule is established that the action accrues not at the time of the commission of the tort for which indemnity is sought, but at the time of the payment of the judgment . . .; and this rule applies as well to third-party complaints . . . .[120]

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116. *Id.* at 33-34, 319 N.Y.S.2d at 676-77. "We do not think we should further contract the general rule applicable to diagnostic negligence by marking the beginning of time permitted for the commencement of an action for malpractice by the date of the the patient's discovery of the physician's negligence." *Id.* at 33, 319 N.Y.S.2d at 676.

117. *See* conclusions *infra* note 137 and accompanying text.

118. 22 A.D.2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964).

119. *Id.* at 123, 254 N.Y.S.2d at 592. For discussion of the substantive implications of this position, see *supra* note 24 and accompanying text.

120. Musco v. Conte, 22 A.D.2d at 125-26, 254 N.Y.S.2d at 595.

It is possible that an indemnity action, whether brought independently or by a third party complaint, may be initiated long after the tortious act causing plaintiff's harm and prove inconvenient and difficult to defend.[121] This problem is less likely to arise now that the *Dole* apportionment doctrine[122] has become so firmly entrenched in New York law, and a defendant's attorney will, presumably, exhaust every possible avenue for sharing his client's liability with others. But where a genuine action for indemnity is interposed, Judge Hopkins' determination in *Musco* survives as a sound precedent.

E. *Safeco Insurance Co. of America v. Jamaica Water Supply Co.*

A precise statutory analysis yielding an eminently logical and intelligent result characterizes one of Judge Hopkins' most recent decisions. *Safeco Insurance Co. of America v. Jamaica Water Supply Co.*[123] raised the question of the time limitation governing a no-fault insurer's claim to recover first party benefits paid to its insured, a covered person.[124]

The automobile operator insured by Safeco for first party, no-fault benefits was injured in March, 1977 when his car struck a metal plate in a street where the Jamaica Water Supply Company was working. No-fault reparations of $50,000 were paid to him by Safeco. Plaintiff commenced an action against Jamaica

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121. Judge Hopkins noted that a court has discretion to determine whether a third party action will prejudice any party or delay plaintiff's claim. *Id.* at 126, 254 N.Y.S.2d at 595 (referring to N.Y. CIV. PRAC. LAW § 1010 (McKinney 1976)).

122. *See supra* note 34 and accompanying text.

123. 83 A.D.2d 427, 444 N.Y.S.2d 925 (2d Dep't 1981), *aff'd*, 57 N.Y.2d 994, 443 N.E.2d 493, 457 N.Y.S.2d 245 (1982).

124. *Id.* at 427, 444 N.Y.S.2d at 926. Under New York's Compulsory Automobile Insurance Reparations Act, N.Y. INS. LAW §§ 670-78 (McKinney Supp. 1982), the owner of a properly insured motor vehicle is a "covered person," (*id.* § 671(10)), entitled to a maximum of $50,000 per person in benefits from his own insurer for basic economic loss resulting from an accident. *Id.* § 671(1). A covered person also enjoys immunity from tort liability for $50,000 of basic economic loss; his immunity may extend to economic losses in excess of $50,000 as well as to psychic (noneconomic) damages *if* plaintiff does not meet the requirements of a serious injury (*id.* § 671(4)) threshold. *Id.* § 673(1). When a covered person's injury is caused by a noncovered person or entity, the latter is not protected by any tort immunity and is subject to a traditional negligence action by the injured party for economic and noneconomic loss. *Id.* § 673(2).

for personal injuries.[125] Safeco, in turn, notified Jamaica's insurer that it claimed a lien on any monies recovered by the motorist in his suit against Jamaica.[126]

To resolve the issue of whether Safeco could impose a lien on any award he obtained in his personal injury action, the injured motorist demanded arbitration in November, 1978. The arbitrator's decision, confirmed by the supreme court in September, 1979, denied Safeco's asserted lien on the ground that the motorist's suit was not to recover basic economic loss, that is, not to duplicate the loss paid by Safeco under its no-fault reparations obligation.[127]

Nonetheless, in October, 1980, Safeco instituted this action against Jamaica to recover first party benefits it had paid to the motorist. Jamaica moved to dismiss on the ground that the action was barred by the three year statute of limitations.[128] Special term held the action timely on the ground that the statute provided a two year toll for a subrogee-insurer.[129] On appeal to the appellate division, Judge Hopkins agreed that Safeco was not barred by the statute of limitations, but his reasoning rested upon a different and intricate interpretation of the controlling law.[130]

The operative provisions of New York's no-fault law on which the timeliness of Safeco's assertion of a lien turned[131] prescribe:

> In any action by . . . a covered person, against a noncovered person . . . an insurer which paid or is liable for first party benefits . . . shall have a lien against any recovery to the extent of benefits paid or payable by it to the covered person . . . . The failure of such person to commence such action within two years after

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125. To be entitled to sue Jamaica in tort, after receiving the limit for economic loss reparations under New York's no-fault law, the motorist must have sustained a qualifying serious injury, or Jamaica was a noncovered person. Safeco Ins. Co. of Am. v. Jamaica Water Supply Co., 83 A.D.2d at 429-30, 444 N.Y.S.2d at 926-27.

126. *Id.* at 428, 444 N.Y.S.2d at 926. Plaintiff also sued the City of New York, but that defendant was not involved in the present case. *Id.*

127. *Id.* at 428-29, 444 N.Y.S.2d at 926. *See supra* note 124.

128. N.Y. CIV. PRAC. LAW § 214 (McKinney 1976).

129. N.Y. INS. LAW § 673(2) (McKinney Supp. 1982).

130. Safeco Ins. Co. of Am. v. Jamaica Water Supply Co., 83 A.D.2d at 429, 444 N.Y.S.2d at 926.

131. N.Y. INS. LAW § 673(2) (McKinney Supp. 1982).

> the accrual thereof shall operate to give the insurer a cause of action for the amount of first party benefits . . . against any person . . . for his personal injuries, which cause of action shall be in addition to the cause of action of the covered person . . . .[132]

Judge Hopkins examined the purposes of the statute, the nature of the insurer's cause of action and the question of accrual. In granting an insurer a lien for first party benefits "paid or payable," the legislature sought to preclude a double recovery of such benefits by the insured and to preserve the insurer's right to sue if the insured failed to pursue his claim within two years.[133]

The statute, furthermore, created an independent cause of action on behalf of the insurer, rather than a derivative claim in the nature of subrogation.[134] Judge Hopkins perceived that Safeco in asserting its lien was not in the position of a subrogee, but suing in its own right based upon the cause of action established by the statute.[135] Accordingly, Safeco's rights were not bound by the insured motorist's rights, including the time limitation which would have governed interposition of a claim by the motorist.[136]

Unraveling the nature of the insurer's claim, however, did not resolve whether or not his suit was timely. What removed the case from the ordinary pattern was not only that a relatively new statute and its interpretation were involved, but also that this statute created a cause of action and simultaneously prescribed a specific time period - two years - of abeyance for that action. But, when did the insurer's claim accrue? Judge Hopkins

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132. Safeco Ins. Co. of Am. v. Jamaica Water Supply Co., 83 A.D.2d at 431, 444 N.Y.S.2d at 928.

133. *Id.* at 432, 444 N.Y.S.2d at 928. Special Term had viewed Safeco's action as predicated on a theory of subrogation which would subject the claim to all defenses, including the statute of limitations, which might be raised against the motorist. *Id.* at 429, 444 N.Y.S.2d at 926.

134. Judge Hopkins pointed to the provision "that the insurer may sue for first-party benefits 'paid or payable.' At common law, a right of subrogation does not come into existence until the insurer has actually paid the debt owing . . . and liability to pay alone did not permit the insurer to sue . . . ." *Id.* at 432, 444 N.Y.S.2d at 928.

135. *Id.* at 433, 444 N.Y.S.2d at 929. At the point in time when Safeco sued on its lien (October, 1980), the three-year limitation would have barred a negligence action by the motorist, since the injury had occurred in March, 1977.

136. *Id.*

reasoned that two requirements had to be met before the insurer might sue: (a) two years must have elapsed since the date of the insured's injury, and (b) during that period, the insured must not have brought an action for first party benefits. Once these conditions were satisfied, the insurer could sue within the usual time limitation - in this case, three years. The insurer's action, commenced more than two years and less than five years from the date of the injury was, therefore, timely.

The *Safeco* decision contributes another example of skilled technique in application of a relatively new statutory provision. Section 673 of the New York Comprehensive Automobile Insurance Reparations Act creates a cause of action and at the same time supplies a specifically tailored statute of limitations; it thus adds another dimension to the analysis of the issue of timeliness. The central and most difficult problem remains that of accrual. Here it is that after parsing the statute, the judge must become a glossator.

Safeco and the other cases discussed above, illustrate the degree of intellect and patience demanded of a judge exploring the labyrinthine passages of the statute of limitations. But the light ultimately revealed is essential for the guidance of lawyers. And when that revelation, as in *Safeco*, is the product of impeccable logic, what more can a reviewing court do than declare: "Order affirmed . . . for reasons stated in the opinion by former Justice James D. Hopkins . . . ."[137]

Conclusion

Whether construing a recently enacted statute as a matter of first impression (*Safeco*), or extending or declining to extend a rule enlarging the period of accountability for negligence (*Siegel, Schiffman*), whether reevaluating a common law immunity (*Lastowski*), or interpreting and applying a concept of equitable apportionment of liability among tortfeasors (*Musco*) - in all of these pursuits, Judge Hopkins was keenly aware of the interpretive and revisionist role of the courts. He appreciated the separation of governmental powers and the need to maintain a

137. Safeco Ins. Co. of Am. v. Jamaica Water Supply Co., 57 N.Y.2d 994, 996, 443 N.E.2d 493, 493, 457 N.Y.S.2d 245, 245 (1982).

delicate balance between legislatures and courts in modifying established rules of law.[138]

A judge must decide the case before him, how much to redress the plaintiff's injury, how far to shield the defendant from limitless liability. "We draw an uncertain and wavering line, but draw it we must as best we can."[139] Judge Hopkins seems to have been able always to draw the line, on legal grounds, on pragmatic grounds and on policy grounds. Doubtless, many have lauded Judge Hopkins as a judge's judge and a lawyer's lawyer; let it also be said, he is a scholar's delight.

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138. A paragraph of his opinion in *Schiffman* illustrates Judge Hopkins' perception:

> We reach this determination apart from our role as an intermediate appellate court which must take its guidelines from the court of last resort. It is extremely doubtful whether that role would allow us to depart further from the traditional view of the Statute of Limitations than *Flanagan* sanctions; a question of public policy in the interpretation of the statute and the balance between the Legislature and the courts in changing a rule of law is plainly raised, which the close division of the votes of the members of the court in *Flanagan* demonstrates.

Schiffman v. Hospital for Joint Diseases, 36 A.D.2d at 33, 319 N.Y.S.2d at 676.

139. Palsgraf v. Long Island R.R., 248 N.Y. 339, 354, 162 N.E. 99, 104 (1928) (Andrews, J., dissenting).