Touro Law Review

Volume 15 | Number 2 Article 16

1999

Product Liability Issues In Mass Torts - View From the Bench

Hon. Helen E. Freedman

PRODUCT LIABILITY ISSUES IN MASS TORTS - VIEW FROM THE BENCH

*Hon. Helen E. Freedman**

Introduction

This paper is designed to give a brief overview of some of the product liability issues relevant to mass torts, from a judge's perspective. What is a mass tort and how does a judge identify one?[1] When a summary judgment motion in a tort action brings hundreds of lawyers into the courtroom, a judge should suspect that a mass tort has arrived.

Traditionally, a mass disaster such as a plane or train crash, an explosion, a water main break, a site contamination or an oil spill produces a large number of lawsuits, thus becoming a mass tort.[2] Events of this nature usually take place in a confined area, and a single judge who sits in a court near where the disaster occurred easily manages cases. The claims in these cases are usually grounded in negligence, although strict liability claims (based on inherently dangerous object or design defect) are sometimes included.[3]

During the last twenty-five years, a new type of mass tort, often national in scope, has emerged. In these cases, plaintiffs have

---

* Justice Freedman is an Associate Justice of the New York State Supreme Court, Appellate Term, First Department.

[1] *See generally* Roger C. Cramton, *Individualized Justice, Mass Torts and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995); *see also* William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995).

[2] *See, e.g.*, Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 1031 (1995) (listing as possible mass torts the Pan Am Lockerbie air crash litigation, the World Trade Center bombing litigation, the Union Carbide Bhopal gas disaster litigation, the Agent Orange litigation, the repetitive stress injury litigation, the Bjork-Shiley heart valve litigation, the tobacco litigation, and the Sioux City air crash litigation).

[3] *See generally* Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845-73 (1987).

claimed that toxic substances, toxic pharmaceuticals or defective devices have been put into the stream of commerce causing harm either in the short or long run to individuals who either ingest the drug, are exposed to the substance, or are implanted with the device.

Examples of allegedly toxic pharmaceuticals, are DES (diethylstilbestrol), DPT vaccine, and fen-phen.[4] Toxic substances include dioxins (agent orange), polyclorinated biphenyls (PCBs), asbestos, lead or contaminated albuterol.[5] Devices and implants include silicone breast and penile implants, Norplant, the Shiley heart valve, and the Dalkon Shield intrauterine device (IUD).[6] Additionally, repetitive stress injuries caused by allegedly improperly designed keyboards or ergonomically deficient products have been cast as a mass tort.[7] Most, but not all, of the cases involving toxic substances are brought on a failure to warn or its subset, failure to properly test, theory.

I. AGGREGATION AND COORDINATION

Aggregation of mass tort cases for pretrial handling has become the norm in many jurisdictions. Cases in the federal judicial system are usually consolidated before a single judge pursuant to an order of the Judicial Panel on Multi-district Litigation.

---

[4] *See, e.g.,* Hymowitz v. Eli Lilly and Company, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989); Sindell v. Abbott Laboratories, 26 Cal. 3d. 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); Enright v. Eli Lilly and Company, 77 N.Y.2d 377, 570 N.E.2d 198, 568 N.Y.S.2d 550 (1991).

[5] *See, e.g., In re* "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985); General Electric v. Joiner, 522 U.S. 136 (1997); White v. Celotex Corporation, 907 F.2d 104 (9th Cir. 1990); Georgine v. Amchem, 83 F.3d 610 (3d Cir. 1996) *aff'd sub nom.* Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997).

[6] *See, e.g., In re* New York State Silicone Breast Implant Litigation, 166 Misc. 2d 85, 631 N.Y.S.2d 491 (Sup. Ct. New York County 1995); Lee v. Baxter Health Care Corporation, 898 F.2d 146 (4th Cir. 1990).

[7] *See* Blanco v. AT&T Co., 90 N.Y.2d 757, 689 N.E.2d 506, 666 N.Y.S.2d. 536 (1997); Edmond v. IBM Corp., 91 N.Y.2d. 949, 694 N.E.2d 438, 671 N.Y.S.2d 437 (1998).

Asbestos cases are before Honorable Charles Weiner of the Eastern District of Pennsylvania, silicone gel breast implant cases are before Honorable Sam Pointer of Alabama, Norplant cases are before Honorable Richard Schell of Texas, and fen-phen cases are before Honorable Louis Bechtle of the Eastern District of Pennsylvania.

Many state courts have also consolidated cases for pretrial management either locally or on a statewide basis. All New York City asbestos personal injury cases and all New York State breast implant and fen-phen cases are currently consolidated and have been assigned to me for pre-trial management. There are approximate 13,000 asbestos cases and 800 breast implants cases pending. I have already resolved about 8,000 asbestos and a substantial number of breast implant cases through trial or settlement.[8]

There are numerous advantages to consolidation. First, the judge who handles the cases develops expertise so that each time a motion or application comes, he or she does not have to reinvent the wheel. Rulings are also far more likely to be consistent. Second, management is more efficient. Usually, the parties and judge develop a case management order (CMO) that provides among other things for uniform pleadings, interrogatories, and approaches to discovery. The judge usually appoints lead or liaison counsel and/or steering committees, representatives of each or all sides, to present arguments, distribute orders, establish schedules and coordinate discovery. If document depositories are established or legal-medical records services are utilized or new technologies are otherwise applied, liaison counsel are usually responsible for insuring access to all

[8] *In re* New York City Asbestos Litigation (Brooklyn Navy Shipyard Cases), 151 Misc. 2d 1, 572 N.Y.S.2d 1006 (Sup. Ct. New York County 1991), *modified*, 188 A.D.2d 214, 593 N.Y.S.2d 43, (1st Dept.), *aff'd*, 82 N.Y.2d 821, 625 N.E.2d 588, 605 N.Y.S.2d 263 (1993); Campo v. Asbestospray Corporation, 139 Misc. 2d 353, 527 N.Y.S.2d 683 (Sup. Ct. New York County 1988); Weitzman v. Eagle-Picher Industries, et. al., 144 Misc. 2d 42, 542 N.Y.S.2d 118 (Sup. Ct. New York County 1989); Fusaro v. Porter-Hayden Company, 145 Misc. 2d 911, 548 N.Y.S.2d 856 (Sup. Ct. New York County 1989), *aff'd*, 170 A.D.2d 239, 565 N.Y.S.2d 357 (1st Dept. 1991).

parties. Consolidation also facilitates exploration of ADR alternatives including the use of special masters for discovery, docket management, global settlements, and distribution of settlement proceeds. Special masters have been extremely effective in resolving both asbestos and breast implant cases.

Finally, consolidation allows the judge in charge to coordinate with both federal judges and state judges from other jurisdictions who have similar cases in order to maximize efficient disposition of cases. Depositions of experts may be attended by litigants in federal and state courts, and, where provided for in the case management order, state procedures may be modified; for example, depositions from other jurisdictions may be used either in pre-trial Daubert[9] or Frye Hearings[10] or at trial, thus substantially reducing transaction costs. Major state-federal coordination through class action certification has been attempted, but thus far, with limited success in mass torts.[11]

There is a down side to consolidation. Increased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases. To some extent, this is inevitable, particularly where a limited number of plaintiff's lawyers monopolize a particular tort. The cost of prosecuting weak cases is minimal when volume is high. Courts have developed various mechanisms for handling such cases by deferring weak cases or cases that are not ripe for adjudication because scientific causation has not been established. For example, in New York, both the state and federal courts have put the silicone gel breast implant cases in which the injuries claimed are systemic, on a deferred docket pending the report concerning scientific validity by the Panel convened pursuant to FRE 706 by Judge Pointer. In other jurisdictions, like Illinois, asbestos victims who have no functional impairment are placed on a "Pleural Registry." This

---

[9] *See infra* note 15.

[10] *Id.*

[11] *See* GEORGINE VAIRO, *AMCHEM PRODUCTS, INC. V. WINDSOR*: WHERE WILL THE MASS TORT CLASS ACTIONS GO?, New York Litigator 4:1 (May 1998); HELEN FREEDMAN, CLASS ACTIONS FOR MASS TORTS IN STATE COURTS: A STATE COURT JUDGE'S RESPONSE TO PROFESSOR VAIRO, New York Litigator, 4:1 (May 1998).

means that the claimant who has markers of asbestos exposure, i.e., pleural thickening or plaques, but no manifest disease at the present time must wait until such cognizable disease develops. The statute of limitations is tolled during this time.

A mass tort judge's perspective may differ from a judge viewing cases individually. A judge who has many cases is more likely to consider the ramifications of particular rulings on the entire litigation. This may even include the potential for bankruptcy and or the likelihood of increased insurance coverage. On the other hand, appellate courts, faced with appeals on individual cases, tend to look at the individual case without considering the impact of a particular ruling on the litigation as a whole.

II. CHOICE OF LAW AND THEORY OF LIABILITY

One of the issues encountered in any consolidation that crosses state lines is that choice of law may determine the outcome. Some states like New Jersey have applied strict liability to asbestos cases,[12] on the theory that asbestos containing products were inherently dangerous or defective. The focus is on the product and not on the conduct. Most states, like New York, rely solely on a failure to warn theory. Failure to warn is much closer to negligence and, like negligence, is subject to defenses. The focus is on conduct rather than on the product. If it was neither known nor knowable that the product could cause injury when used in the expected manner, the state of the art defense is available in a failure to warn case. Culpable conduct may also be pled as an affirmative defense.

However, although state of the art is a defense in New York, reverse bifurcation has virtually eliminated trial of that defense.

[12] Beshada v. Johns Manville Products Corp., 447 A.2d 539 (N.J. 1982). In applying a strict liability standard and not failure to warn, the court claimed "we are saying that the defendant's products were not reasonably safe because they did not have a warning." *Id.* at 549. New Jersey's reasoning in applying strict liability is that it is "unfair for distributors of a defective product not to compensate its victims." *Id.*

CPLR 4011[13] permits the trial judge in his or her discretion to try any issue in any order that will facilitate resolution of the case. In the case of a mature tort such as asbestos, where liability based on failure to warn has been established over and over again in cases throughout the country, particularly when the exposure post-dated 1964, i.e. when the dangers of asbestos were unequivocally known because of widely published studies, the only liability issue of any value to a defendant is lack of product identification. Therefore, summary judgment motions eliminate most non-players, defendants whose products cannot be identified, and damages are then tried first. By the time the damage phase is over, just about every defendant has settled rendering unnecessary tedious repetitive liability trials. By trying damages first, choice of laws issues are also avoided. In a national litigation, some plaintiffs have little or no nexus to the state in which the action is tried. The plaintiff neither lived nor was injured in the state, and the only link to the forum is the residence of one or two of the defendants. In such situations, the law of the state where the tort occurred must be applied. Reverse bifurcation often, but not always, obviates the need to determine which state law governs, although there may still be damage issues that depend upon the law of the jurisdiction.

III. CAUSATION

In the "immature tort,"[14] scientific causation must be established before triable issues exist. The Supreme Court, interpreting FRE 702, has determined that the trial judge acts as a

---

[13] N.Y. C.P.L.R. 4011 (McKinney 1992). This section provides "the court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at a issue in a setting of proper decorum." *Id.*

[14] Francis McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989). Professor McGovern distinguishes between the mature tort, like asbestos or Dalkon Shield, where causation and liability have been established and the immature tort, where the science is still speculative. *Id.* at 659.

"gatekeeper,"[15] deciding, according to flexible criteria, whether there is sufficient scientific validity to allow the jury to even hear the expert evidence. The science must be both relevant and reliable. The focus is on methodology rather than conclusions, and the trial court will be reversed only if it abuses its discretion.[16] New York, like a number of other states, adheres to the *Frye*[17] standard, namely, that the scientific method, possibly even the conclusion, must be generally accepted in the scientific community. Whether the claim is asserted in a *Daubert* or a *Frye* jurisdiction, it has become increasingly common to hold preliminary hearings to determine admissibility of scientific evidence and/or qualification of particular experts to give that evidence in new tort actions. Even in mature torts, such hearings may be appropriate. For example, while the epidemiological basis for causation of many asbestos related diseases is well established, hearings have been held to determine the relationship between asbestos and colon or laryngeal cancer, as it is not clear to what extent, if any, asbestos contributes to development of these diseases. In other types of cases, scientific evidence based

---

[15] *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, (1993). In *Daubert*, the Court ended conflict in the lower courts and held that the *Frye* "general acceptance" standard was superseded by the adoption of the Federal Rules of Evidence. *Id.* at 587. Under the Federal Rules of Evidence "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable." *Id.* at 589. *See also* FED. R. EVID. 702 (1984).

[16] General Electric Co. v. Joiner, 118 S. Ct. 512 (1997). In *Joiner*, a case of first impression, the Court decided that abuse of discretion was the correct standard of review for expert testimony. *Id.* at 519. "[W]hile the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the 'gatekeeper' role for the trial judge in screening such evidence." *Id.*

[17] Frye v. United States, 293 F. 1013, (D.C. Cir. 1923). In *Frye*, the Court of Appeals of the District of Columbia held that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014.

on animal studies or toxicology has been held to be insufficient to be admissible or to sustain jury verdicts.[18]

IV. PRODUCT IDENTIFICATION

Where there is a long period of time between exposure ingestion of a toxic substance and manifestation of injury or disease, i.e. a long latency period, product identification often presents the most difficult hurdle for plaintiffs to overcome. Several states have adopted a market share theory for DES cases because each company's product is identical or the product is fungible.[19] Market share was developed as a means of avoiding a finding of concerted action or alternative liability,[20] the older theories on which plaintiffs relied. However, many states have not accepted market share even in DES cases. Plaintiffs have been unsuccessful in persuading courts to adopt market share for asbestos,[21] at least in part because the asbestos containing

[18] *Joiner,* 118 S. Ct. at 519. *See also* Brock v. Merrell Dow Pharmaceuticals, 874 F.2d 307, *modified,* 884 F.2d 166 (5th Cir. 1989); *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y. 1985); Sterling v. Velsicol Chem. Corp., 855 F.2d 187 (6th Cir. 1988).

[19] Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989). In *Hymowitz,* the court adopted a market share theory using a national market. *Id.* The theory apportioned liability so as to conform to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public at large. *Id.* The court reasoned that this was a fair method to provide plaintiffs with the equitable relief that they deserve, while also reasonably distributing the responsibility for the plaintiffs' injuries among defendants. *Id.* at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949. *See also* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980).

[20] Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776, (1982). Concerted action liability rests upon the principle that "[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for his benefit, are equally liable to him." (quoting PROSSER, TORTS § 46, at 292 4th ed. 1971).

[21] Robertson v. Allied Signal, Inc., 914 F.2d 360 (3d Cir. 1990). In *Robertson,* the court held that the plaintiff in a products liability action bears the burden of demonstrating that a specific defendant is responsible for the

products are so varied. The only nationally reported exception involves denial of summary judgment in a brake lining case where discreet but fungible asbestos containing products were allegedly involved.[22] Market share has been rejected in breast implant cases on the ground that the products are different and the manufacturer is usually identifiable.[23]

Product identification is the single most challenging aspect of the asbestos litigation. How can a plaintiff who has been exposed to asbestos containing products twenty to forty years later prove that a particular product manufactured by a particular defendant caused his injuries? In my court, trial ready cases are currently clustered in groups of eighty per month, with two months, November and May devoted to *in extremis* (dying plaintiffs) cases. Before each cluster comes up for trial, defendants claiming lack of product identification inundate me with summary judgment motions. The appellate courts have not always been consistent in their determination of what constitutes sufficient circumstantial evidence of exposure to a particular product.[24] So far, no court in New York has gone as far as an Ohio Court[25] in rejecting the need to show either close proximity or a substantial length of time of exposure. The Ohio court in *Horton v. Harwick*

---

harm alleged. *Id* at 366. Since the proof of causation requires two elements; proof of cause in fact and proximate cause, where the relevant facts show either that the defendant was not responsible for the injury, or that the causal connection between the defendant's negligence and the plaintiff's injury is remote, the question of causation is decided by the court. *Id.* at 366. *See also* White v. Celotex, 907 F.2d 104 (9th Cir. 1990).

[22] Wheeler v. Raybestos-Manhattan, 8 Cal. App. 4th 1152, 11 Cal. Rptr. 2d 109 (1992).

[23] Lee v. Baxter Healthcare Corp., 898 F.2d 146 (4th Cir. 1990); *In re* New York State Silicone Breast Implant Litigation, 166 Misc. 2d 85, 631 N.Y.S.2d 491 (Sup. Ct. New York County 1995).

[24] *Compare* Diel v. Flintkote, 204 A.D.2d 53, 611 N.Y.S.2d 519 (1st Dep't. 1994) *and* Cawein v. Flintkote, 203 A.D.2d 105, 610 N.Y.S.2d 487 (1st Dep't. 1994) *with* Dollas v. W.R. Grace & Co., 224 A.D.2d 319, 639 N.Y.S.2d 323 (1st Dep't. 1996).

[25] Horton v. Harwick Chemical Corp., 653 N.E.2d 1196 (Ohio 1995).

Chemical Corporation accepted a fiber drift theory, i.e., that asbestos fibers could drift a substantial distance to cause injury.[26]

V. LOOKING BACKWARD AND FORWARD IN PRODUCT LIABILITY CASES

Some of the other important product liability issues that affect mass torts include the liability of successor corporations for the wrongs of predecessors, the extent to which a bulk seller of raw materials may be held liable, and the extent of the duty owed. In effect, how far back and how far forward can liability extend? Oftentimes, there have been changes in corporate ownership of defendants by the time a product liability case is brought. In mass torts, particularly those involving long latency periods, the issue of successor liability is often key to prosecution of the action. The New York rule is that an acquiring corporation is not liable for the tort obligations of its predecessor unless it expressly or impliedly assumes the predecessor's liabilities; however, successor liability may be imposed if there was a consolidation or merger of seller and purchaser, the purchasing corporation was a mere continuation of the selling corporation, or the transaction was entered into fraudulently to escape such obligations.[27] In the seminal case *Schumacher v. Richards Shear, Inc.*, a successor corporation was held not liable for an allegedly defective piece of machinery that caused an employee to become blind in one eye where the original manufacturer survived as a distinct entity. [28] Although *Schumacher* seemingly rejected it, a recent decision of the Appellate Division Third Department has apparently adopted the product line exception. In *Hart v. Bruno Machinery Corp.*, the court affirmed an order by the Supreme Court denying defendants' motion for summary judgment in an action based on successor corporation theory where the original manufacturer no

---

[26] *Id.*

[27] *See generally* Schumacher v Richards Shear Co., Inc., 59 N.Y.2d 239, 451 N.E.2d 195, 464 N.Y.S.2d 437 (1983); New York City Asbestos Litigation, 144 Misc. 2d 42 (Sup. Ct. New York County 1989).

[28] *Shumacher*, 59 N.Y.2d at 245, 451 N.E.2d at 198, 464 N.Y.S.2d at 440.

longer existed.[29] The court found there was a material issue of fact as to whether the defendants should be held liable for continuation of a leather embossing press product line, and signaled that it was receptive to expanding the exceptions to successor liability to insure that a responsible manufacturer will be available to compensate injured plaintiffs.[30]

New York has also rejected a look back to the bulk seller of raw materials, where the end product not the substance itself was in fact the culprit. In the silicone gel breast implant cases, Dow Chemical Corporation, the bulk supplier of a silicone compound was found not liable to ultimate consumers based on the absence of a duty to an end user to test for toxicity of the compound, even where it may have been known what the end use would be.[31] The same court went further in another case,[32] holding that the sophisticated user or learned intermediary doctrine served as a bar to lawsuits against the bulk seller of raw materials.

New York has determined with respect to DES cases that there is a generational limit concerning to whom the duty exists. Ingestion by a mother of DES during pregnancy may cause uterine malformation in female offspring. When such a daughter herself becomes pregnant, that malformation may cause a premature birth with concomitant neurological impairment in the newborn. The Court of Appeals majority, with a strong dissent by Judge Stewart Hancock, found that the drug manufacturer's

---

[29] Hart v. Bruno Machinery Corp., 679 N.Y.S.2d 740 (3d Dep't 1998). In *Hart,* the original manufacturer T.W. & C.B. Sheridan Company sold its entire business – good will and all – to defendant Harris-Intertype Corporation, becoming a wholly owned subsidiary thereof, and was subsequently merged into the parent company. *Id.* at 741-42. *See also* Rothstein v. Tennessee Gas Pipeline Co., 174 Misc. 2d 437, 664 N.Y.S.2d 213 (Sup. Ct. Kings County 1997) (holding that corporate defendant could be liable under "product line" exception to general rule against holding corporate successor liable for predecessor's torts).

[30] *Hart*, 679 N.Y.S.2d at 743.

[31] New York State Silicone Breast Implant Litigation, 166 Misc.2d 299, 632 N.Y.S.2d 953 (Sup Ct. New York County 1995), *aff'd,* 227 A.D.2d 310, 642 N.Y.S.2d 68 (1st Dep't. 1996).

[32] Banks v. Dow Corning Corp. published at 6 MEALEY'S LITIGATION REPORTER # 12, BREAST IMPLANTS, Index No. 111133/94 (1998).

duty did not extend to the third generation, the premature, neurologically impaired infant.[33]

VI. STATUTES OF LIMITATIONS

New York was the 41st state in the United States to abandon date of exposure or ingestion as the starting date for the running of the statute of limitations. In 1986, the enactment of CPLR 214-c abrogated the date of exposure rule enunciated in 1936,[34] that had effectively barred most of these claims. Under CPLR 214-c the statute runs from date of manifestation of injury or disease, with a possible one-year extension where cause of the injury or disease was neither known nor knowable. Additionally, Ch. 682 N.Y.-Laws of 1986, revived previously time barred claims for five toxic substances, including asbestos and DES, for a period of one year. Dioxins (Agent Orange) claims had been previously revived pursuant to CPLR 214-b. A subsequent amendment to 214-c provided for revival of silicone gel breast implant claims. The Court of Appeals, found the revival statute constitutional,[35] and held that an individual exposed prior to the statute's inception but whose disease manifested itself subsequent to the enactment was covered by CPLR 214-c.[36] At the same time it refused to apply CPLR 214-c to loss of consortium claims for spouses who were not married at the time of the exposure, but were married at the time that the injuries manifested themselves.[37]

The Court of Appeals also found that CPLR 214-c did not apply to repetitive stress injury cases, as keyboards were not toxic substances, but fashioned a compromise. The Court

---

[33] Enright v. Eli Lilly Co., 77 N.Y.2d 377, 570 N.E.2d 198, 568 N.Y.S.2d 550 (1994).

[34] Schmidt v. Merchant's Desp. Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936).

[35] Hymowitz v. Eli Lilly Co, 73 N.Y.2d 487, 539 N.E. 1069, 541 N.Y.S.2d 941 (1989).

[36] Rothstein Tennessee Gas Pipeline Co., 87 N.Y.2d 90, 661 N.E.2d 146, 637 N.Y.S.2d 674 (1995).

[37] Consorti v. Owens-Corning Fibreglas Corp., 86 N.Y.2d 449, 657 N.E.2d 1301, 634 N.Y.S.2d 18, (1995).

determined that the statute of limitations began to run from the date of last usage or the date that injury first manifested itself, whichever was earlier. [38]

VII. TWO INJURY RULE

CPLR 214-c did not address the situation where some injury or disease is manifest, but a more serious injury is not yet present. Does the statute of limitations bar an action for a serious injury disease where a plaintiff failed to bring a timely action when a milder disease manifested itself? For example, does an asbestos victim who did not sue for pleural plaque or mild asbestosis, lose out if he develops mesothelioma, a virulent cancer caused by asbestos exposure? Or, is a breast implant plaintiff precluded from suing for a systemic injury if she failed to timely sue for a local injury such as capsular contraction? If such a plaintiff is barred, then does the mildly injured plaintiff have a cause of action for risk of cancer? What about fear of cancer or fear of systemic injury? Some states, including Illinois, Massachusetts and Pennsylvania, have established pleural registries or inactive dockets whereby the statute of limitations is tolled and cases are put on the shelf so to speak, with the right to return to the active docket upon demonstration that serious disease or injury is manifest. New York, has instead become a "two injury" state.[39] A plaintiff may bring an action for a milder or specific disease caused by the toxic substance or may forego the right to bring such an action. In either event, the plaintiff is not precluded from suing again when the more serious injury develops. The statute of limitation for the second injury does not start to run until the second disease becomes manifest. For that reason, the plaintiff is

---

[38] Blanco v. AT&T Co., 90 N.Y.2d 757, 689 N.E.2d 506, 666 N.Y.S.2d 536 (1997); *See also* Edmond v. IBM Corp., 91 N.Y.2d 949, 694 N.E.2d 438, 671 N.Y.S.2d 437 (1998) (holding that aggravation of a pre-existing injury was an independent cause of action in a repetitive stress injury case).

[39] Fusaro v. Porter Hayden Co., 145 Misc. 2d 911, 548 N.Y.S.2d 856 (Sup. Ct. New York County 1989), *aff'd,* 170 A.D.2d 239, 565 N.Y.S.2d 357 (1st Dep't. 1991); *see also* Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982).

precluded from seeking damages for risk of developing the serious disease in the first action; although, if there is a rational basis for it, the plaintiff may still claim damages for fear of disease.[40]

CONCLUSION

In conclusion, a judge handling mass tort cases is confronted with numerous product liability issues, including case management, choice of laws and theories of liability, scientific causation, product identification, trial management and utilization of alternate dispute resolution techniques, and statutes of limitations, all of which contribute to making such litigation both challenging and exciting.

[40] *Fusaro,* 145 Misc. 2d at 916, 548 N.Y.S.2d at 859.