

# SCHAUM LAW OFFICES

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## **TO: MEMBERS OF THE LONG ISLAND JEWISH ORGANIZED MEDICAL STAFF**

*We would take this opportunity to report on two recent court decisions which are of unique interest in analyzing the legislative meaning of statutes applying to the profession.*

***FOREIGN OBJECT RULE** – The normal 30 month rule within which to bring a malpractice suit is tolled when a foreign object has been left in the body. The case in question involved a capsule camera which had been placed for diagnostic purposes and suit being brought after 30 months had expired. Primary care physician, radiologist and hospital were all sued and the court wisely ruled that the foreign object rule was designed for items placed in the body for purposes of surgery (and not removed) but not to items used for diagnostic purposes.*

***COMMENCEMENT DATE FOR WRONGFUL BIRTH CLAIM** – The interesting fact pattern entailed the failure of the physician(s) to allegedly perform adequate screening of an egg donor in an in-vitro fertilization. The parents were not informed that the donor was the carrier of an abnormality and the claim contended that a “wrongful” birth had ensued. Suit was brought more than 30 months post the embryos being implanted claimed malpractice but within 30 months of the actual birth. The plaintiffs claimed they were faced with extraordinary expenses as a result of the birth which could not have been anticipated prior to the delivery.*

*A divided Court of Appeals stated that this was not a typical medical malpractice claim and that plaintiffs could not have discovered the claimed malpractice until the actual birth and thus the limitation period would begin at that point. A minority of the Court argued strongly that the statute triggered from the date of the malpractice itself and that the statute had codified what was previously the recognized law on the matter. In response the majority cited an earlier finding in a suit brought against Albany Medical Center where it was held that in an infant's suit based upon an injurious act prior to birth the earliest date upon which the infant could have theoretically sued would have been his/her actual birth date and thus the statute began running on that later date. All these cases bear witness to the legal axiom that "hard cases make bad law."*

*Respectfully submitted,*

*Schaum Law Offices*