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The Statute of Limitations Does Not Begin to Run against the Right to Recover from a Treating Physician for Malpractice Involving a Misdiagnosis until the Injured Patient Knows or Should Have Known of the Physician's Negligence.

Gary B. Weiser

would not be the exclusive factor for consideration. The court also noted that while a minority of the Senate Judiciary Committee expressed reservations as to the possible adverse effects of subsection 3501(c) they did not indicate that they thought a confession, given more than six hours after arrest, should be summarily excluded.[50]

Whether the court, through their construction of Section 3501, has "ameliorated" the long standing rule of *Mallory*, as they felt Congress intended to do,[51] or whether they have overruled *Mallory* is difficult to determine at this juncture. It is quite obvious that through their decision, voluntariness has once again become the test. There is little doubt that Congress has the power, through subsection 3501(c), to overrule *McNabb-Mallory* as that rule rests outside of the Constitution. The constitutionality of subsection 3501(b) and its attempt to surmount the *Miranda* decison present the real issue.

As a result of Congress' failure to take action in the field of criminal justice it became incumbent upon the Court to promulgate the rules of *Miranda*. Simultaneously the *Miranda* Court issued a judicial invitation for congressional action indicating that their rules were not the exclusive method for providing constitutional safeguards and that they were not meant to create a "constitutional straightjacket" to other efforts at reform.[52] With the enactment of 18 U.S.C. § 3501 Congress accepted that invitation and reassumed a responsibility in the field of criminal justice which it had long neglected.

Keith E. Kaiser

LIMITATION OF ACTIONS—MEDICAL MALPRACTICE—DISCOVERY RULE—THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN AGAINST THE RIGHT TO RECOVER FROM A TREATING PHYSICIAN FOR MALPRACTICE INVOLVING A MISDIAGNOSIS UNTIL THE INJURED PATIENT KNOWS OR SHOULD HAVE KNOWN OF THE PHYSICIAN'S NEGLIGENCE. *Renner v. Edwards*, 475 P. 2d 530 (Idaho 1970).

The plaintiff brought suit against a physician to recover for malpractice involving an alleged misdiagnosis and negligent treatment which occurred in 1961. The plaintiff underwent corrective surgery on July 15, 1964, and filed the instant action on June 6, 1966. The lower court dismissed the plaintiff's complaint holding that the action was barred by the statute of limitations.[1] Held—*Reversed and re-*

50 *Id.* at 2116.
51 United States v. Halbert, 436 F.2d 1226 (9th Cir. 1970).
52 Miranda v. Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624, 16 L. Ed.2d 694, 720 (1966).

1 The applicable Idaho statutes of limitations provide: "Civil actions can only be com-

manded. The statute of limitations does not begin to run against the right to recover from a treating physician for malpractice involving a misdiagnosis until the injured patient knows or should have known of the physician's negligence.

The discovery rule as applied to medical malpractice litigation simply means that the statute of limitations does not begin to run against a patient until he discovers, or in the exercise of reasonable care should have discovered the physician's negligence.[2] The rule was first suggested in an early Maryland case which involved a discoloration of the skin through excessive doses of argentum oxide, but the court ruled that the claim was barred because the plaintiff should have discovered the injury within the period of time provided by statute.[3]

At the present time, there is a sharp and evenly divided conflict among the various jurisdictions on the issue of whether or not the discovery doctrine should be extended to include a situation involving a misdiagnosis. Eight jurisdictions limit the discovery rule to cases where a foreign object has been negligently left in the patient's body.[4] Eleven have adopted the discovery test for all malpractice cases regardless of whether or not a foreign object is involved.[5] The courts in twenty-one states do not apply a discovery rule, holding that, in the absence of fraud, the cause of action accrues from the commission of the malpractice.[6] As a result, four basic approaches have been taken

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menced within the periods prescribed in this chapter after the cause of action shall have accrued. . . ." IDAHO CODE § 5-201 (1947); "Within two years: . . . 4. An action to recover damages for an injury to the person, or for the death of one caused by the wrongful act or neglect of another." IDAHO CODE § 5-219 (1947).

2 For a thorough discussion of the discovery rule *see* Harper, *Texas Adopts the Discovery Rule for Limitations in Medical Malpractice Actions*, 1 ST. MARY'S L.J. 77 (1969). *See also* Sacks, *Statutes of Limitations and Undiscovered Malpractice*, 16 CLEV.-MAR. L. REV. 65 (1967); Comment, *Discovery Rule: Accrual of Cause of Action for Medical Malpractice*, 25 WASH. & LEE L. REV. 78 (1968).

3 Hahn v. Claybrook, 100 A. 83 (Md. 1917).

4 Davis v. Bonebrake, 313 P.2d 982 (Colo. 1957); Layton v. Allen, 246 A.2d 794 (Del. 1968); Spath v. Morrow, 115 N.W.2d 581 (Neb. 1962); Fernandi v. Strully, 173 A.2d 277 (N.J. 1961); Seitz v. Jones, 370 P.2d 300 (Okla. 1961); Gaddis v. Smith, 417 S.W.2d 577 (Tex. Sup. 1967); Christiansen v. Rees, 436 P.2d 435 (Utah 1968); Morgan v. Grace Hospital, Inc., 144 S.E.2d 156 (W.Va. 1965).

5 Stafford v. Schultz, 270 P.2d 1 (Cal. 1954); City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954); Yoshizaki v. Hilo Hospital, 433 P.2d 220 (Hawaii 1967); Springer v. Aetna Casualty and Surety Co., 169 So.2d 171 (La. App. 1964); Waldman v. Rohrbaugh, 215 A.2d 825 (Md. 1966); Johnson v. Caldwell, 123 N.W.2d 785 (Mich. 1963); Grey v. Silver Bow County, 425 P.2d 819 (Mont. 1967); Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968); Berry v. Branner, 421 P.2d 996 (Ore. 1966); Ayers v. Morgan, 154 A.2d 788 (Pa. 1959); Wilkinson v. Harrington, 243 A.2d 745 (R.I. 1968).

6 Aeton v. Morrison, 155 P.2d 782 (Ariz. 1945); Crossett Health Center v. Croswell, 256 S.W.2d 548 (Ark. 1953); Saffold v. Scarborough, 86 S.E.2d 649 (Ga. App. 1955); Mosby v. Michael Reese Hospital, 199 N.E.2d 633 (Ill. App. 1964); Guy v. Schuldt, 138 N.E.2d 891 (Ind. 1956); Ogg v. Robb, 162 N.W. 217 (Iowa 1917); Waddell v. Woods, 163 P.2d 348 (Kan. 1945); Carter v. Harlan Hospital Ass'n., 97 S.W.2d 9 (Ky. 1936); Tantish v. Szendey, 182 A.2d 660 (Me. 1962); Pasquale v. Chandler, 215 N.E.2d 319 (Mass. 1966); Wilder v. St. Joseph Hospital, 82 So.2d 651 (Miss. 1955); Thatcher v. De Tar, 173 S.W.2d 760 (Mo. 1943); Cloutier v. Kasheta, 197 A.2d 627 (N.H. 1964); Shearin v. Lloyd, 98 S.E.2d 508 (N.C. 1957);

to deal with the problem as discussed in *Janisch v. Mullins.*[7]

1. *The unavoidable hardship approach.* The statute of limitations is construed literally and the cause of action commences to run from the time of the commission of the negligent act, in the absence of fraud.[8]

2. *The avoidability approach.* In order to avoid hardship to an innocent plaintiff and without the adoption of the discovery rule, the limitation period begins from a date later than that of the negligent act: when the damage occurs;[9] when the patient-physician relationship has ended;[10] upon termination of treatment for the particular illness or condition;[11] when fraudulent concealment of the damage has terminated.[12]

3. *The functional approach.* The statutory language describing the limitation period begins to run when the injured party knows, or in the exercise of due care should know, of the existence of the negligence.[13] The functional approach has been broken down into the *conservative functional approach* and the *liberal functional approach.* Under the *conservative approach* the court limits the discovery doctrine to cases involving foreign substances negligently left in the patient's body.[14] The *liberal approach* does not limit the rule to foreign substance cases and adheres to an extension of the doctrine.[15]

4. *The legislative approach.* The discovery rule is adopted through legislative enactment.[16]

Prior to *Renner v. Edwards,*[17] Idaho followed the *conservative functional approach* by refusing to extend the discovery rule to cases other than those of the "foreign object" class.[18] Idaho first adopted the discovery rule in the 1964 case of *Billings v. Sisters of Mercy of Idaho.*[19] The *Billings* decision involved a situation where the defendant phy-

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De Long v. Campbell, 104 N.E.2d 177 (Ohio 1952); Hinkle v. Hargens, 81 N.W.2d 888 (S.D. 1957); Bodne v. Austin, 2 S.W.2d 104 (Tenn. 1928); Murray v. Allen, 154 A. 678 (Vt. 1931); Hawks v. De Hart, 146 S.E.2d 187 (Va. 1966); Lindquist v. Mullen, 277 P.2d 724 (Wash. 1954); Lotten v. O'Brien, 131 N.W. 361 (Wis. 1911).

7 461 P.2d 895, 896 (Wash. App. 1969).

8 Mosby v. Michael Reese Hospital, 199 N.E.2d 633 (Ill. App. 1964); Hill v. Hays, 395 P.2d 298 (Kan. 1964); Tantish v. Szendey, 182 A.2d 660 (Me. 1962); Pasquale v. Chandler, 215 N.E.2d 319 (Mass. 1966); Roybal v. White, 383 P.2d 250 (N.M. 1963); McCluskey v. Thranow, 142 N.W.2d 787 (Wis. 1966).

9 United States v. Reid, 251 F.2d 691 (5th Cir. 1958).

10 Lundberg v. Bay View Hospital, 191 N.E.2d 821 (Ohio 1963).

11 Samuelson v. Freeman, 454 P.2d 406, 410 (Wash. 1969).

12 Lakeman v. La France, 156 A.2d 123 (N.H. 1959).

13 Wilkinson v. Harrington, 243 A.2d 745 (R.I. 1968).

14 Gaddis v. Smith, 417 S.W.2d 577 (Tex. Sup. 1967).

15 Yoshizaki v. Hilo Hospital, 433 P.2d 220 (Hawaii 1967); Frohs v. Greene, 452 P.2d 564 (Ore. 1969); Wilkinson v. Harrington, 243 A.2d 745 (R.I. 1968).

16 ALA. CODE TITLE 7, § 25(1) (1958); CONN. GEN. STAT. ANN. TITLE 52, § 52-584 (1958).

17 475 P.2d 530 (Idaho 1970).

18 Billings v. Sisters of Mercy of Idaho, 389 P.2d 224 (Idaho 1964).

19 *Id.*

sician left a gauze sponge in the plaintiff's body during the course of an operation performed in 1946. The plaintiff did not discover the presence of the gauze sponge until an exploratory operation disclosed its presence in May of 1961. The plaintiff brought suit for malpractice in May of 1962. The lower court dismissed the suit holding that the complaint was barred by the statute of limitations. The Supreme Court of Idaho reversed holding that the cause of action did not accrue for statute of limitation purposes until the sponge was discovered in 1961, and therefore, the plaintiff's claim was not barred by limitation. However, the *Billings* decision was restricted to the particular facts of that case; the leaving of a foreign object in a patient's body.[20]

Owens v. White,[21] a federal case decided three years after *Billings*, interpreted the *Billings* decision and predicted that the Idaho Supreme Court would restrict the discovery rule to cases involving foreign objects. The plaintiff in *Owens v. White* sought damages for an alleged misdiagnosis of a suspected lump in her breast. The court refused to grant the plaintiff relief holding that she was barred by limitations. The court also refused to extend the discovery rule to claims of misdiagnosis explaining that it was the court's intention in rendering the *Billings* decision to restrict the rule to cases involving foreign objects.[22] The principal case emphatically overrules *Owens v. White*[23] in its extension of the discovery rule to include cases involving a misdiagnosis.

Renner v. Edwards is not the first case to extend the rule to include misdiagnosis situations. In *Yoshizaki v. Hilo Hospital*[24] the defendant hospital negligently diagnosed the plaintiff's neck ailment as cancer and the plaintiff submitted herself to radiation therapy. The plaintiff received radiation burns as a result of the incorrect diagnosis and underwent several operations to correct the damage from the radiation treatments. The trial court granted a summary judgment in favor of the defendant applying the rule that the cause of action accrued, and therefore the statute began to run from the time of the injury. The Supreme Court of Hawaii reversed holding that the statute of limitations does not begin to run until the plaintiff knows or should have

20 *Id.* at 232.
We will, therefore, adhere to the following rule: where a foreign object is negligently left in a patient's body by a surgeon and the patient is in ignorance of the fact, and consequently of his right of action for malpractice, the cause of action does not accrue until the patient learns of, or in the exercise of reasonable care and diligence should have learned of the presence of such foreign object in his body.

21 342 F.2d 817 (9th Cir. 1965), *on rehearing*, 380 F.2d 310 (9th Cir. 1967).

22 *Id.* at 316.

23 Renner v. Edwards, 475 P.2d 530, 531 (Idaho 1970). "While *Owens v. White*, . . . may have been a correct inference based on the then existing Idaho decisions, our opinion today renders that decision an incorrect prediction of the future actions of this Court.

24 433 P.2d 220 (Hawaii 1967).

known of the defendant's negligence. The court rejected the distinction made between foreign object cases and those concerning a misdiagnosis. In support of its decision the court reasoned that in the typical misdiagnosis case a physical object is not involved and proof becomes more difficult. However, "this does not necessarily mean that a fraudulent claim may be more easily asserted" because, generally, treatment follows diagnosis, and this treatment is an objective fact which can be easily proved or disproved.[25]

Wilkinson v. Harrington,[26] another recent case which has extended the doctrine reasoned that without the extension of the discovery rule a patient would be forced to submit himself to countless examinations by a series of physicians after every operation or treatment he received from a physician of his first choice in order to protect his legal rights.[27]

In *Frohs v. Greene*,[28] rendered just prior to *Renner*, the Oregon Supreme Court refused to be bound by recognized exceptions to the discovery rule and said in effect that fairness and common sense impel the extension of the rule to cover a misdiagnosis. *Frohs* involved a situation in which the plaintiff alleged she suffered various illnesses from penicillin injections she received in 1951. Fourteen years later, in 1965, when she discovered the reasons for her physical difficulties, she brought an action for malpractice. The court referred to and overruled an earlier Oregon decision[29] which refused to apply the discovery rule in similar circumstances. In justifying the extension of the doctrine the court used reasoning very similar to that applied by the principal case,[30] saying:

> . . . it is impossible to justify the applicability of the discovery rule to one kind of malpractice and not to another. . . . It is manifestly unrealistic and unfair to bar a negligently injured party's cause of action before he has had an opportunity to discover that it exists.[31]

Renner v. Edwards relies on the same theories and reasoning adopted by the *Billings* decision in extending the discovery doctrine to the area of misdiagnosis.[32] In doing away with a strict construction of the

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25 *Id.* at 223.

26 243 A.2d 745 (R.I. 1968).

27 *Id.* at 753.

To construe the statute narrowly so as to preclude a person from obtaining a remedy simply because the wrong of which he was the victim did not manifest itself for at least two years from the time of the negligent conduct, is clearly inconsistent with the concept of fundamental justice.

28 452 P.2d 564 (Ore. 1969). For a good discussion of *Frohs see* 1970 WISCONSIN L. REV. 915 (1970).

29 Wilder v. Haworth, 213 P.2d 797 (Ore. 1950).

30 *See* concurring opinion in Renner v. Edwards, 475 P.2d 530, 536 (Idaho 1970).

31 Frohs v. Greene, 452 P.2d 564, 565 (Ore. 1970).

32 Renner v. Edwards, 475 P.2d 530, 532 (Idaho 1970). "We believe the theories and reasons enunciated in *Billings* for the adoption of the 'discovery rule' are equally applicable to the case at bar."

statute of limitations and adopting the discovery rule, the court in *Billings* said:

> In one context or another, it has been stated that statutes of limitations are statutes of repose, the object of which is to prevent fraudulent and stale actions from springing up after a great lapse of time . . . . These considerations are not present in a foreign object case. First of all, the existence of a sponge, or gauze, or pin in the body of a plaintiff negatives fraud. Secondly, we do not often encounter a plaintiff who is guilty of "sitting on his rights." If one is unaware that he has any rights, it cannot be said that he is "sitting" on them.[33]

Due to the unknown nature of the injury in a misdiagnosis situation and the indirect proof it lends itself to, the courts have been reluctant to bring the matter under the discovery rule. As the court noted in *Owens*, in misdiagnosis cases the danger of fraudulent and stale claims is obviously enhanced.[34] While it is true that the possibility of fraudulent claims is increased, "the possibility does not remotely approach the point where possibility becomes probability and hence a decisive reason for cutting off the claim."[35]

The courts have overcome their fears concerning fictitious claims in other areas[36] and their decisions have gone largely untouched. In the case of misdiagnosis, our legal system imposes a strenuous burden of proof on the claiming plaintiff that more than offsets any danger of fraud on his part. The plaintiff must prove the incorrectness of the doctor's diagnosis; that the mistaken diagnosis was negligence rather than failure of judgment; and the causal relationship between the injury complained of and the negligent act.[37] Add to this the reluctance of other doctors to testify as to the conduct of a fellow doctor at medical malpractice trials, and the burden on the plaintiff becomes excessive.[38]

To distinguish between those cases asserting "foreign object" malpractice and those asserting negligent diagnosis is unreasonable. Although the latter case admittedly may be more difficult to prove, the line of demarcation is too fine, and certainly deprives the plaintiff of a means of redress. The adherence to the strict construction of the statute of limitations with reference to cases involving a negligent diagnosis

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33 Billings v. Sisters of Mercy of Idaho, 389 P.2d 224, 231 (Idaho 1964).
34 380 F.2d 310, 316 (9th Cir. 1967).
35 342 F.2d 817, 819 (9th Cir. 1965).
36 W. PROSSER, THE HANDBOOK OF LAW OF TORTS, § 30, 147 (3d ed. 1964).
37 29 U. PITT. L. REV. 341, 349 (1967) quoted in Renner v. Edwards, 475 P.2d 530, 534 (Idaho 1970).
38 Salgo v. Leland Stanford Jr. University Board of Trust., 317 P.2d 170, 175 (Cal. App. 1957). This case refers to the so-called "conspiracy of silence."