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Laurie L. Paterson  
*University of Georgia School of Law*

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BALANCING INTERESTS: STATUTE OF LIMITATION AND REPOSE IN  
MEDICAL MALPRACTICE CASES

by

LAURIE L. PATERSON

(Under the direction of Prof. Thomas A. Eaton)

ABSTRACT

This paper addresses the history leading up to and including the tort reform of the 1970s and 1980s; the arguments for and against statutes of limitation and repose; the points at which statutes of limitation and repose may accrue or may be tolled; constitutional challenges to such statutes and compares the various statutes of limitation and repose in several jurisdictions to the evolving interpretation of Georgia's time limitations law.

INDEX WORDS: Medical malpractice, Statute of limitations, Statute of repose,  
Insurance crisis, Accrual, Time limitations, Continuing treatment  
doctrine

BALANCING INTERESTS: STATUTES OF LIMITATION AND REPOSE IN  
MEDICAL MALPRACTICE CASES

by

LAURIE L. PATERSON

B.S.N., Valdosta State University, 1986

J.D., Walter F. George School of Law, Mercer University, 1994

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MEDICAL MALPRACTICE CASES

by

LAURIE L. PATERSON

Approved:

Major Professor: Thomas A. Eaton

Reading Chair: Robert D. Brussack

Electronic Version Approved:

Gordhan L. Patel  
Dean of the Graduate School  
The University of Georgia  
May 2002

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## CHAPTER 1

### INTRODUCTION

In the 1970s a crisis occurred in the medical malpractice insurance industry. As tort law began to favor plaintiffs, the number and severity of medical malpractice claims increased.<sup>1</sup> Insurance companies inundated with a deluge of claims correspondingly increased their premiums or pulled out of the malpractice insurance industry all together.<sup>2</sup> Some physicians were unable to obtain medical malpractice insurance and others were faced with as much as a 300% rise in insurance premiums.<sup>3</sup> As a result, the medical profession urged states to enact medical malpractice tort reform.<sup>4</sup> Some states' tort reform included legislation such as award caps, collateral source offset, and the enactment of more stringent and shorter statutes of limitation and repose.<sup>5</sup>

Statutes of limitation date back to early Roman law.<sup>6</sup> The first statute of limitations appeared in English jurisprudence with the enactment of the Limitation Act of 1623.<sup>7</sup> During the late nineteenth century, American courts accepted statutes of limitation as vital to societal welfare because they put defendants on notice to defend against suits within a reasonable period, before claims grew stale and memories dim by the passage of

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<sup>1</sup> DAVID W. LOUISELL & HAROLD WILLIAMS, *MEDICAL MALPRACTICE* §20.01 3 (1999).

<sup>2</sup> *Id.*

<sup>3</sup> Patricia M. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 Ohio St. L.J. 413 (1987).

<sup>4</sup> *James, et al v. Phoenix General Hospital, et al*, 154 Ariz. 594, 744 P.2d 695, 700 (1987).

<sup>5</sup> Danzon, *supra* note 3, at 2.

<sup>6</sup> Andrea C. Rodgers & John A. Parkins, Jr., *Recent Developments in Delaware Case Law*, 3 Del. L. Rev. 253, 254 (2000).

<sup>7</sup> *Id.*

time.<sup>8</sup> While many courts were well aware of the conditions in the 1970s that spawned reform in statutes of limitation and repose, they yet chafed under the draconian effect of the new legislation.<sup>9</sup> Courts were faced with extinguishing, on motions for summary judgment, the valid claims of injured plaintiffs based on an arbitrary number.

Courts are uncomfortable with the inherently arbitrary character of statutes of limitation and repose.<sup>10</sup> As some scholars have observed, “Evidence does not deteriorate overnight, and society’s interest in promoting repose is only marginally greater on day two than it was on day one.”<sup>11</sup> Justice Jackson once stated, “Their operation does not discriminate between the just and the unjust claim, or the voidable or unavoidable delay. They have come into the law not through judicial process but through legislation.”<sup>12</sup> Consequently, many Courts found ways of construing statutes of limitation to favor plaintiffs including varying interpretations of when such statutes of limitation accrue. In addition, Courts have adopted exceptions to these statutes such as the continuing treatment doctrine, the foreign object exception, and discovery rules among others. As Horace G. Wood, a 19<sup>th</sup> century proponent of statutes of limitation stated:

Laws of limitation are to be encouraged; yet, as they are acts which take away existing rights, they should always be construed with reasonable strictness, and in favor of the rights sought to be defeated thereby, so far as is consistent with their letter and spirit.<sup>13</sup>

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<sup>8</sup> Rogers & Parkins, *supra* note 6, at 255.

<sup>9</sup> Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453 510 (1997).

<sup>10</sup> Krusesky v. Baugh, 138 Cal. App.3d 834,835, 188 Cal. Rptr. 90, 95 (1976); See also, GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 31 (1996) “Arbitrariness in the definition of the laws violates our essential expectations in living under the rule of law.”

<sup>11</sup> Ochoa & Wistrich, *supra* note 9, at 511.

<sup>12</sup> Chase Securities Corp. v. Donaldson, et al., 325 U.S. 304, 314, 65 S. Ct. 1137, 1142 (1945).

<sup>13</sup> 1 HORACE G. WOOD, A TREATISE ON THE LIMITATIONS OF ACTIONS (4<sup>th</sup> ed. 1916).

This paper addresses the history leading up to and including the tort reform of the 1970s and 1980s; the arguments for and against statutes of limitation and repose; the points at which statutes of limitation may accrue or may be tolled; and compares the various statutes of limitation and repose in several jurisdictions to the evolving interpretation of Georgia's statute of limitations and repose.

## CHAPTER 2

### THE CYCLE OF CRISIS

#### **The Insurance Crisis**

Insurance premiums are, in part, a function of the severity and frequency of claims.<sup>14</sup> As plaintiffs bring more claims and the amount paid out on those claims increases, insurance companies must charge higher premiums to cover the increased risk of losses. Prior to the 1970s, medical malpractice insurance was relatively unimportant. In the 1950s only one doctor in seven faced a medical malpractice claim from a patient over the entirety of his career.<sup>15</sup> In 1969, St. Paul Fire and Marine Company (St. Paul), a leading malpractice carrier, recorded one claim for every twenty-three doctors they insured.<sup>16</sup> In 1974 the ratio rose to one claim in every ten doctors reflecting a significant increase in the frequency of claims.<sup>17</sup> St. Paul also reported a fifty-five percent increase in claim frequency since 1980, from 10.5 claims per 100 physicians in 1980 to 16.3 claims per 100 physicians in 1983.<sup>18</sup> According to a study performed by Patricia Danzon, a leading scholar in the field, the average annual growth rate of claim frequency per physician is fourteen percent per annum.<sup>19</sup>

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<sup>14</sup> PATRICIA DANZON, MEDICAL MALPRACTICE 60-69, 90 (1985).

<sup>15</sup> LOUISELL & WILLIAMS, *supra* note 1, at 2-3.

<sup>16</sup> TARKY LOMBARDI, JR., MEDICAL MALPRACTICE A LEGISLATOR'S VIEW 11 (1978).

<sup>17</sup> *Id.*

<sup>18</sup> LOMBARDI, *supra* note 16, at 11.

<sup>19</sup> Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims*, 49 Law & Cont. Probs. 57 (Spring 1986).

The severity of claims also increased. The average claim paid in 1969 by St. Paul was \$6,075.00.<sup>20</sup> But by 1974, the average claim paid rose to \$12,534.00, more than twice the average amount paid in 1969.<sup>21</sup> According to one source, the average medical malpractice award rose from \$404,726 in 1980 to \$1,478,028.00 by 1986.<sup>22</sup> Claims can be especially severe in birth related neurological injury cases. In one such 1989 case, the jury awarded \$10.7 million dollars.<sup>23</sup> Danzon stated, “The average malpractice jury award is reported to have risen from \$404,726 in 1980 to \$954,858 in 1984.”<sup>24</sup> Malpractice claim severity has risen approximately twice as fast as the Consumer Price Index.<sup>25</sup> As the number and severity of claims shot up, the cost of liability insurance reflected the rise with a sharp increase in medical malpractice insurance premiums.<sup>26</sup>

Premiums overall increased from 65 million in the 1960s to 330 million in 1970.<sup>27</sup> Staggering premium increases occurred in certain medical specialties. For example, surgeon’s medical malpractice insurance premium rates rose approximately 940% from 1960 to 1970.<sup>28</sup> One study from Florida reported that the cost of a medical malpractice policy in Dade and Broward Counties with limits of \$1,000,000 per occurrence and \$3,000,000 aggregate, rose from \$4,310 per year to \$18,415 per year for family practitioners; from \$21,971 to \$95,875 for general surgeons; and from \$30,433 to

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<sup>20</sup> LOMBARDI, *supra* note 16, at 11.

<sup>21</sup> *Id.*

<sup>22</sup> Amanda E. Haiduc, *A Tale of Three Damage Caps*, 40 Case W. Res. 825, 827-828 (1990).

<sup>23</sup> Scott v. United States, 884 F.2d 1280 (9<sup>th</sup> Cir. 1989) upholding general validity of a \$10.7 million award including \$2 million in noneconomic damages.

<sup>24</sup> Danzon, *supra* note 19, at 57-58 reporting from a study by Jury Verdict Research, Inc.

<sup>25</sup> *Id.* at 75.

<sup>26</sup> LOMBARDI, *supra* note 16, at 11.

<sup>27</sup> *Id.*

<sup>28</sup> Thomas L. Stachler, *Repose v. Right-To-A-Remedy*, 57 U. Cin. L. Rev. 423, 425 (1988).

\$165,320 for obstetricians.<sup>29</sup> Robinson reported, that from 1960 to 1972 the average premium costs rose an estimated six hundred percent for specialties that were considered low-risk and an average of nine hundred percent for high-risk specialties.<sup>30</sup> Robinson cautioned that these numbers are nationwide averages; some states experienced higher rates of increase.<sup>31</sup> In some areas the crisis was not one of rising premiums, but one of availability as insurers fled the market entirely, leaving physicians without coverage.<sup>32</sup> Practitioners panicked, threatening strikes and portending the collapse of the health care system.<sup>33</sup> During the mid-1970s the medical community applied fierce pressure to almost all state legislatures to resolve the burgeoning crisis.<sup>34</sup>

The “insurance crisis” eventually culminated in a flurry of tort reform.<sup>35</sup> As Robinson stated, “The medical profession urged state legislatures across the country to halt or reverse the liberalization trend by shoring up or imposing new constraints on malpractice actions.”<sup>36</sup> Almost all state legislatures responded to the crisis by implementing various reforms in an attempt to reduce the number and amount of malpractice awards, based upon the idea that by enacting the reforms insurance providers would continue to provide coverage.<sup>37</sup> Virtually all medical malpractice tort reform can be seen as an attempt to address the increase in the frequency and/or severity of claims. Many states modified applicable statutes of limitation as part of their tort reform

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<sup>29</sup> Joseph Sanders & Craig Joyce, *Off to the Races: The 1980s Tort Crisis and the Law Reform Process*, 27 Hous. L. Rev. 207, 213 (1990).

<sup>30</sup> Glen O Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 Law & Cont. Prob. 5, 8 (Spring 1986).

<sup>31</sup> *Id.*

<sup>32</sup> DANZON, *supra* note 14, at 2.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Sanders & Joyce, *supra* note 29, at 210-211.

<sup>36</sup> Robinson, *supra* note 30, at 20.

“package.”<sup>38</sup> Reform in time-based limitations addresses both the frequency and severity of claims.

Time-based limitations directly address the frequency of claims. They preclude otherwise valid claims from being brought especially claims involving failure to diagnose and those involving latent injuries.<sup>39</sup> As Danzon suggested:

States that enacted shorter statutes of limitations and set outer limits on discovery rules have had less growth in claim frequency than states with statutes more lenient to plaintiffs. On average, cutting one year off the statute of limitations for adults reduces claim frequency by eight percent. The effect would presumably be greater for a reduction from, say, four to three years than from ten to nine years.<sup>40</sup>

Additionally, statutes of limitation and repose may indirectly moderate the severity of claims if many of the barred claims involve large damages. If plaintiffs are barred from bringing high-damage malpractice suits by applicable statutes of limitation and repose, insurance companies are spared from paying at least some high dollar claims. For example, a 1993 case challenging the constitutionality of the five-year statute of repose in the state of Georgia involved the misdiagnosis by a hospital pathologist of a malignant melanoma, one of the most aggressive forms of cancer.<sup>41</sup> The plaintiff, a

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<sup>37</sup> Stephen Zuckerman, et al, *Information on Malpractice*, 49 Law & Cont. Prob. 85, 101 (Spring 1986); Randall R. Bovbjerg, *Legislation on Medical Malpractice*, 22 U.C. Davis L. Rev. 499, 521-532 (1989) Forty-nine states enacted tort reform.

<sup>38</sup> Robinson, *supra* note 30, at 21.

<sup>39</sup> *Id.* at 22.

<sup>40</sup> Danzon, *supra* note 19, at 78.

<sup>41</sup> Craven v. Lowndes County Hospital Authority, 263 Ga. 657, 437 S.E.2d 308 (1993).

twenty-year-old man at the time of suit, would likely have recovered significant damages if his case had not been barred by Georgia's statute of repose.<sup>42</sup>

### **The Long Tail**

Time limitations are a significant issue in tort reform because of the difficulties insurance companies face in setting premiums when claims have a "long tail."

The crux of the difficulty facing insurance companies is their inability to accurately predict the cost and number of claims that are to be paid out each year.<sup>43</sup> If an insurer cannot predict the number and amount of losses in a given year, it does not know how much to charge for premiums or set aside to preserve an adequate loss reserve fund.<sup>44</sup> One of the main problems that insurers faced prior to the tort reform of the 1970s was the "long tail" caused by the delay in the development and bringing of claims resulting from characteristically long statutes of limitation applied to medical malpractice suits.<sup>45</sup> Raymond Bohl, then Vice President of the Special Accounts division of Wausau Insurance stated, "In no other area is there so great a lag between the date of the act or omission for which a claim is made and the date of final disposition... This time lag is called the 'tail' of malpractice coverage."<sup>46</sup>

A medical malpractice claim on average reaches its final disposition in 123 months from the date of the act or omission for which the claim is made as compared to an automobile accident claim, which is resolved on average in 63 months.<sup>47</sup> As Bovbjerg stated, "Once filed, claims average twenty-five months to close, and sixteen percent

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<sup>42</sup> *Id.*

<sup>43</sup> Stachler, *supra* note 28, at 425.

<sup>44</sup> *Id.*

<sup>45</sup> James, 154 Ariz. at 16.

<sup>46</sup> LOMBARDI, *supra* note 16, at 6.

<sup>47</sup> *Id.*

average more than five years to adjudicate.”<sup>48</sup> This “long-tail” of medical malpractice cases may explain why much of the tort reform of the 1970s specifically targeted medical malpractice claims. In their 1974 position paper, St. Paul Fire and Marine Insurance Company stated, “For our all-time liability from 1974 professional services of our insured doctors, we collected a premium once in 1974. But we’ll pay claims under tomorrow’s unknown law and in tomorrow’s unknown social climate with tomorrow’s dollars.”<sup>49</sup> Longer statutes of limitation increase the cost of liability insurance.<sup>50</sup> A delay in defending and paying additional claims from older occurrences increases the need for capital because the insurer must not only pay the normal rate of return on a risk-free investment, but must also set aside a “risk premium” because of the variability of expected future claims.<sup>51</sup>

Prior to 1975, a large number of states had statutes of limitation that allowed a claim to be filed up to twenty-one years after the event in suits involving the injury of a newborn.<sup>52</sup> Additionally, many states had “discovery rules” which tolled the statute of limitations until the point at which the plaintiff discovered that they had been injured by a medical practitioner’s negligence.<sup>53</sup> Such discovery rules, without any statutes of repose, presented insurance companies with a potentially unlimited tail and little predictability. It is therefore understandable that one of the first lines of reform after the insurance crisis of the 1970s was the reduction of statutes of limitation and the imposition or shortening of statutes of repose.

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<sup>48</sup> Bovbjerg, *supra* note 37, at 507-508.

<sup>49</sup> *Id.* at 12.

<sup>50</sup> Randall R. Bovbjerg & Joel M. Schumm, *Indiana’s Statute of Limitations for Medical Practitioners*, 31 *Ind. L. Rev.* 1051, 1058-1059 (1998).

<sup>51</sup> *Id.*

<sup>52</sup> LOMBARDI, *supra* note 16, at 34-35.

<sup>53</sup> Bovbjerg & Schumm, *supra* note 50, at 1065.

## Defining Statutes of Limitation and Repose

The term “statute of limitations”, according to one scholar, “refers to a legislative enactment, or codification thereof, that sets forth a limitation period.”<sup>54</sup> Statutes of limitation are different from statutes of repose. Statutes of limitation circumscribe the time for bringing a claim after it accrues, while a statute of repose limits the time that a claim can accrue in the first place.<sup>55</sup> A statute of repose defines a time limitation after the defendant’s wrongful act that a claim must accrue or be barred.<sup>56</sup> According to the Georgia Supreme Court, statutes of limitation differ from statutes of repose in that:

A statute of limitations is a procedural rule limiting the time in which a party may bring an action for a right which has already accrued. [While] a statute of ultimate repose delineates a time period in which a right *may* accrue. If the injury occurs outside that period, it is not actionable.<sup>57</sup>

For example, if a state has a statute of limitations that allows a plaintiff to bring suit within two years after the discovery of an injury caused by a defendant’s negligence, yet the state has a five-year statute of ultimate repose, should a plaintiff discover her injury five years and one day from the date of the defendant’s negligent treatment, her claim is forever barred and she will recover nothing. The reform of statutes of limitation and repose in the 1970s did much to shorten the tail confronted by insurance companies. Despite these time limitation reforms and other remedial statutes enacted during the 1970s, yet another cycle of crisis occurred in the 1980s triggering a second round of tort reform.

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<sup>54</sup> Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 Ariz. St. L.J. 1015, 1018 (1997).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Craven, 263 Ga. at 264 (emphasis added).

## The Continuing Cycle of Crisis

The problem, in the 1980s, did not appear to be primarily a product of availability of insurance since many physicians and hospitals founded their own insurance companies in response to the previous crisis of the 1970s.<sup>58</sup> The crisis in the mid-1980s was one of rapidly rising insurance premiums.<sup>59</sup> A task force operating under the Department of Justice issued a report stating that “developments in tort law” were the main cause of steeply increasing insurance premiums.<sup>60</sup> Some, however, began to doubt that the insurance crisis of the 1980s resulted from problems within the tort law system. Sanders and Joyce reported:

In 1984, the insurance industry began a campaign in which it placed most of the blame [for the crisis] at the feet of the tort law system. By 1986, the Insurance Information Institute was reportedly spending six and one-half million dollars on advertising and other efforts to tie the insurance crisis to the need for tort reform.<sup>61</sup>

Sloan and others have suggested that for the past 50 years a pattern has been established in the insurance industry.<sup>62</sup> Some have suggested that since the 1950s there may have been as many as four cycles of crisis in the medical malpractice insurance industry.<sup>63</sup> During these cycles, insurance companies state that they have inadequate

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<sup>58</sup> *Id.*, See also, F. Patrick Hubbard, *The Physician's Point of View Concerning Medical Malpractice*, 23 Ga. L. Rev. 295, 297 (1989).

<sup>59</sup> *Id.*

<sup>60</sup> *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, Feb. 1986 (U.S. Gov't Printing Office, 1986-491-510:40090).

<sup>61</sup> Sanders & Joyce, *supra* note 29, at 214.

<sup>62</sup> FRANK A. SLOAN, ET AL., *INSURING MEDICAL MALPRACTICE* 42 (1991).

<sup>63</sup> *Id.* at 43.

funds and must therefore raise insurance premiums or threaten to withdraw from the market all together.<sup>64</sup> According to one economics scholar:

The industry has a pattern of alternating between soft markets characterized by stable premiums and low rates of return to insurers and periodic tight markets with high premiums and returns. From about 1977 until 1985, the industry was in a soft market with declining returns, which was preceded by a tight market in the mid-1970s, which in turn was preceded by a soft market since the late 1960s.<sup>65</sup>

Theories regarding the cause of this pattern of crisis include a need for insurance companies to recoup money on bad investments, competition between oligopolistic insurers, and errors in forecasting anticipated losses.<sup>66</sup> Some have suggested that underwriting losses from bad investments and the downturn in the economy may have been the cause of both crises.<sup>67</sup> Eugene Pavilon, past president of the Association of Trial Lawyers of America stated, “There never was a liability crisis...What happened was there was a crisis of insurance that was foisted upon the country by the insurance industry to make up for their own misjudgments in business.”<sup>68</sup> Other critics of the crisis asserted that insurance companies derived unwarranted profits from unduly high premiums, which were needed, in part, because of poor investments.<sup>69</sup> Bovbjerg pointed out that in the early 1970s “insurers’ investment earnings unexpectedly fell because of

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<sup>64</sup> *Id.*

<sup>65</sup> Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 Yale J. on Reg. 455 (1988).

<sup>66</sup> *Id.*

<sup>67</sup> Zuckerman, *supra* note 37, at 93; Sanders & Joyce, *supra* note 29, at 214-215; and Robinson, *supra* note 30, at 6.

<sup>68</sup> Sanders & Joyce, *supra* note 29, at 215.

<sup>69</sup> Howard A. Lerner, *Restrictive Medical Malpractice Compensation Schemes*, 18 Harv. J. on Legis. 143, 145 (1981).

the first oil crisis and the decline in the stocks and bonds market.”<sup>70</sup> Posner has suggested that premiums in a competitive market decrease when interest rates increase independently of the cost of claims.<sup>71</sup> Some asserted, therefore, that the rise in premiums in the 1980s partially resulted from falling interest rates.<sup>72</sup>

Sloan concluded that the legal reforms of the 1970s were ineffective.<sup>73</sup> He posited that the final objective of malpractice reform is lowering premium levels – which in an open market reflect claims frequency and severity.<sup>74</sup> Sloan found no significant effects on premium rates among fourteen different pro-defendant legal reforms, which lowered either the frequency or severity of malpractice claims.<sup>75</sup> His somewhat bottom-line study seems to indicate that some other factor than the frequency and severity of malpractice claims was driving the crisis of the 1970s as well as the 1980s. Learner commented on the efficacy of tort reform stating, “Despite the widespread legislative enactments, insurance premiums have continued to increase.”<sup>76</sup>

State legislatures generally enacted less severe reforms in the 1980s in response to the “crisis” than they had in the 1970s. They, however, enacted more inclusive reforms, sweeping in all personal injury torts.<sup>77</sup> A few reforms such as those adopted in Florida and Virginia departed from traditional tort principals and adopted “no fault” systems for

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<sup>70</sup> Bovbjerg, *supra* note 48, at 504.

<sup>71</sup> James R. Posner, *Trends in Medical Malpractice Insurance*, 49 *Law & Cont. Probs.* 37, 48 (Spring 1986).

<sup>72</sup> Hubbard, *supra* note 58, at 305-306.

<sup>73</sup> Frank A. Sloan, *State Responses to the Medical Malpractice Insurance “Crisis” of the 1970s*, 9 *J. Health, Pol’y, Pol. & L.* 629, 643 (1985).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 639-642.

<sup>76</sup> Learner, *supra* note 69, at 148.

<sup>77</sup> SLOAN, *supra* note 62, at 1056.

handling infant neurological injuries sustained at birth.<sup>78</sup> Whatever the impetus behind the continued insurance crises, the debate between plaintiffs and their lawyers and physicians and their insurers continue today, with the former arguing the need of injured plaintiffs to be compensated for their injuries resulting from medical malpractice, while the latter argue the need of insurers and physicians to adequately predict the number and severity of malpractice suits.<sup>79</sup> The next chapter will address the competing interests of both parties with regard to time limitations.

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<sup>78</sup> *Id.*, See also, Thomas R. Tedcastle & Marvin A. Dewar, *Medical Malpractice: A New Treatment For An Old Illness*, 16 Fla. St. U. L. Rev. 535, 584-586 (1988).

<sup>79</sup> Bovbjerg & Schumm, *supra* note 50, at 1056.

### CHAPTER 3

#### BALANCING INTERESTS

Given the extinguishing effects of statutes of limitation and repose on plaintiffs' claims, it would seem worthwhile to examine the various policies supporting or disfavoring such time limitations. This chapter will address these policies both in terms of the defendant's interests and the plaintiff's interests.

#### **The Defendant's Interest**

Ochoa and Wistrich suggested that statutes of limitation promote repose, not in the sense that the word "repose" is used in the term "statute of repose", but in its broadest sense.<sup>80</sup> They identified four overlapping concepts of repose which included peace of mind, avoiding disruption of settled expectations, reducing an uncertain future, and reducing the costs of uncertainty.<sup>81</sup> The concept of repose as peace of mind is a fairly straightforward one. If a physician knows that she no longer need worry about a potential malpractice claim after a specific period of time, she naturally experiences peace of mind. The other three concepts identified by Ochoa and Wistrich are, however, less obvious.

The California Supreme Court described statutes of limitation as "giving security and stability to human affairs."<sup>82</sup> Statutes of limitation avoid disrupting settled expectations by maintaining the status quo.<sup>83</sup> Regardless, of how the law arose the

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<sup>80</sup> Ochoa & Wistrich, *supra* note 9, at 460.

<sup>81</sup> *Id.*

<sup>82</sup> Guiterrez v. Mofid, 39 Cal.3d 892, 899, 705 P.2d 886, 890 (1985).

<sup>83</sup> Ochoa & Wistrich, *supra* note 9, at 464.

physician knows she can rely on it and her acquisition of rights by the lapse of time.<sup>84</sup> Statutes of limitation additionally promote repose by reducing uncertainty about the future. As one state Supreme Court acknowledged, “The subsidiary aim of the statute of limitations [is] promptly to resolve disputes in order that commercial and other activities can continue unencumbered by the threat of litigation.”<sup>85</sup> Uncertainty about the potential of future claims can adversely affect the business decisions and transactions of defendants and may adversely affect societal resources by inhibiting new business ventures.<sup>86</sup> The final aspect of repose proposed by Ochoa and Wistrich is the reduction of the direct costs associated with uncertainty of claims.<sup>87</sup> This cost is exemplified by the price of purchasing malpractice insurance and the increasing premiums attendant to the uncertainty of long-tail claims.<sup>88</sup>

In addition to promoting repose, statutes of limitation also affect the evidentiary aspects of medical malpractice. Courts recognize that over time memories grow dim and as a result testimony may be less reliable.<sup>89</sup> Evidence may deteriorate or be destroyed and witnesses become unavailable.<sup>90</sup> Thus, accurate fact-finding is compromised and the appropriate adjudication of claims hindered. The U.S. Supreme Court reflected this concern when it stated:

The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in

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<sup>84</sup> *Id.*

<sup>85</sup> *Elkins v. Derby*, 12 Cal.3d 410, 417, 525 P.2d 81, 86 (1974).

<sup>86</sup> Ochoa & Wistrich, *supra* note 9, at 466.

<sup>87</sup> *Id.* at 468-469.

<sup>88</sup> *Id.*

<sup>89</sup> *Cox v. Upjohn Co.*, 913 S.W. 2d 225, 231 (Tex. App. 1995); See also, *Ackerman v. Price Waterhouse*, 644 N.E. 2d 1009, 1012 (N.Y. 1994).

the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.<sup>91</sup>

The rate at which evidence deteriorates has not been empirically proven, yet our intuition and experience tell us that given enough time, both evidence and memory become less reliable. The passage of time seems to improve only one area of tort law and that is the ascertainment of future damages. Ochoa and Wistrich pointed out that “it is generally more difficult to predict the future than to reconstruct the past.”<sup>92</sup>

Additional policies behind statutes of limitation suggested by Ochoa and Wistrich include promoting the cultural value of diligence, encouraging prompt enforcement of substantive law, avoiding retrospective application of contemporary standards, and reducing the volume of litigation.<sup>93</sup> Richardson discussed the need for a statute of limitations in terms of balancing interests stating:

With time, a plaintiff’s interest in bringing a claim is less compelling, the defendant’s opportunity to mount an effective defense tends to decrease, and society’s courts are more likely to experience frustration in adjudicating the claim. That is why statutes of limitations are related to time, not because there is anything per se wrong with a time lapse, but

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<sup>90</sup> Barrington v. A.H. Robins Co., 39 Cal.3d 146, 152, 702 P. 2d 563, 566 (1985).

<sup>91</sup> Board of Regents v. Tomanio, 446 U.S. 478,487 (1980); See also, United States v. Kubrick 444 U.S. 111, 117 (1979) asserting that statutes of limitation “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”

<sup>92</sup> Ochoa & Wistrich, *supra* note 9, at 476.

<sup>93</sup> *Id.* at 488-500.

rather because a time lapse affects the balance of the relevant interests. Statutes of limitations exist not because lapse of time is intrinsically wrongful or undesirable in and of itself, but because a time lapse effectively turns the balance of interests in favor of barring a claim.<sup>94</sup>

### **The Plaintiff's Interest**

Legislatures and Courts balance the interests of the Defendant in shortening the lapse of time with a strong and often compelling public policy that strives to adjudicate plaintiff's claims on the merits rather than on procedural grounds.<sup>95</sup> The very purpose of our legal system is to resolve disputes on their merits.<sup>96</sup> This concept is so entrenched in our legal system that it prompted one commentator to offer:

No democratic political theory can ignore the sense of injustice that smolders in the psyche of the victim of injustice. If democracy means anything morally, it signifies that the lives of all citizens matter, and that their sense of their rights must prevail. Everyone deserves a hearing at the very least....<sup>97</sup>

In addition, plaintiffs have an interest in deterring future medical malpractice with the threat of social or financial sanction. Besides compensating the injuries of plaintiffs, tort law strives to deter unsafe behavior that may result in injury.<sup>98</sup> Some commentator's however, have expressed a concern that the availability of medical malpractice insurance to cover the economic consequences of medical negligence has resulted in a short-

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<sup>94</sup> Richardson, *supra* note 54, at 1023.

<sup>95</sup> Ochoa & Wistrich, *supra* note 9, at 500.

<sup>96</sup> *Id.*

<sup>97</sup> JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 35 (1990).

<sup>98</sup> Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 Kan. L. Rev. 115 (1993).

circuiting of the deterrence effect of medical negligence law.<sup>99</sup> The concept that the purchase of liability insurance undermines deterrence does not take into account the non-economic consequences of medical malpractice.<sup>100</sup> The medical community in general strongly prohibits medical malpractice. As one scholar stated:

Many doctors believe that if a doctor ‘commits malpractice,’ as defined by the medical community then the doctor is incompetent...The law-abiding citizen obeys the law because he or she wants to do the right thing and because he or she fears disapproval of his or her peer group if he or she violates the law. Likewise, a doctor wants to do the right thing and fears disapproval of other members of the medical community...The basis for the prohibition in medicine means that current empirical efforts to evaluate deterrence are misplaced. One should carefully consider medicine’s autonomously created and administered laws when evaluating the medical malpractice system’s ability to deter future injuries.<sup>101</sup>

Additionally, the argument that insurance undermines deterrence mistakenly assumes that all health care providers are fully insured, that all claims are insurable, and that liability premiums will not be adjusted upward in light of large or repeated claims.<sup>102</sup>

Legislatures and Courts also desire to do justice by providing redress for wrongs suffered by plaintiffs at the hands of negligent defendants.<sup>103</sup> Through vindication of meritorious claims, plaintiffs not only receive monetary compensation for their injuries,

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<sup>99</sup> *Id.* at 129-130.

<sup>100</sup> *Id.*

<sup>101</sup> Ken M. Gatter, *The Continued Existence and Benefit of Medicine’s Autonomous Law in Today’s Health Care System*, 24 *Dayton L. Rev.* 215, 262, 267-268 (1999).

<sup>102</sup> Shuman, *supra* note 98, at 130.

<sup>103</sup> Ochoa & Wistrich, *supra* note 9, at 505.

but the satisfaction of vengeance against those who have wronged them.<sup>104</sup> Courts are faced with the difficult and non-theoretical task, for example, of extinguishing the claim of a woman whose breast cancer was negligently misdiagnosed and now faces death or the claim of a young family with an infant who will be a life-long dependant due to malpractice during its birth, because such claims were filed perhaps only a few, short days after a procedural limitation. Such cases make difficult choices and to extinguish them can offend our sense of justice. Yet, Courts are faced with interpreting statutes of limitation in the context of balancing such interests. As the Supreme Court stated, “It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable.”<sup>105</sup> The following chapter will discuss some of the specific ways courts and legislatures have attempted to balance the competing interests of plaintiffs and defendants.

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<sup>104</sup> *Id.*

<sup>105</sup> Kubrick, 444 U.S. at 125.

## CHAPTER 4

### ACCRUAL AND TOLLING

In an attempt to balance the interests of defendants and plaintiffs legislatures have enacted exceptions that toll the statute of limitations and courts have interpreted the accrual of such statutes to favor either plaintiffs or defendants. Statutes of limitation and repose impact existing claims depending upon when a statute accrues or begins to run, and when a statute is tolled or is suspended. Although the time limitation dictated by a statute of repose is fairly constant, the accrual of a statute of limitations is not always so straightforward.

#### **Accrual of Statutes of Limitation**

The Georgia Supreme Court recognized four points in time when a cause of action sounding in tort may accrue:

(I) When the defendant breaches his duty; (II) when the plaintiff is first injured; (III) when the plaintiff becomes aware of his injury; or (IV) when the plaintiff discovers the causal relationship between his injury and the defendant's breach of duty.<sup>106</sup>

As an example, suppose a young mother of two consults with her physician regarding a lump in her breast. Her physician deciding that the lump is simply fibrocystic disease neither refers her for a mammogram nor performs a biopsy. The lump continues to increase in size, but the patient's physician assures her that it is benign. Five years from her initial visit to her physician she seeks a second

opinion because of unexplained weight loss and other sequelae. The second physician diagnoses breast cancer originating from the sight of the initial lump which has now spread to her sternum and throughout her lymph system. The second physician informs her that the first physician should have either referred her for a mammogram or referred her for a biopsy.

In this hypothetical case, point I of accrual occurred when the plaintiff first consulted her physician and he breached his duty to refer her for a mammogram or biopsy. Point II of accrual occurred when the cancer metastasized and spread through her body. Point III of accrual occurred when the plaintiff knew or should have known she had breast cancer, more than likely upon a definitive diagnosis from her second physician. Point IV of accrual occurred when she discovered that her first physician should have sent her for further tests and his failure resulted in the metastasis of her breast cancer. The final two points in time are examples of when a cause of action may accrue in jurisdictions that recognize a discovery rule.<sup>107</sup>

Many state's statutes of limitation contain a "discovery rule" which sets the point of accrual at the time the plaintiff knew or should have known, with the exercise of reasonable care and diligence, that they were injured by a healthcare

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<sup>106</sup> Lumberman's Mutual Casualty Co. v. Patillo Construction, 254 Ga. 461, 330 S.E. 2d 344 (1985).

<sup>107</sup> See for example, South Carolina Code Ann. §15-5-545 (1988) which provides: Any action to recover damages for injury to the person arising out of any medical, surgical or dental treatment, omission or operation by any licensed health care provider...shall be commenced within three years for the date of treatment, omission or operation giving rise to the cause of action or three year from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from the date of occurrence.

provider.<sup>108</sup> The U.S. Supreme Court stated that there were two possible approaches to the construction of the word “accrue” in a statute of limitations:

A claim might be deemed to ‘accrue’ at the moment of injury without regard to the potentially harsh consequence of barring a meritorious claim before the plaintiff has a reasonable chance to assert his legal rights, or it might ‘accrue’ when a diligent plaintiff has knowledge of facts sufficient to put him on notice of an invasion of his legal rights.<sup>109</sup>

The significance of the date of accrual cannot be overemphasized.<sup>110</sup> No matter the length of the limitations period stated in the statute, the deadline for the statute of limitations to begin to run can vary considerably based upon the time of accrual.<sup>111</sup> As one commentator stated, “The point is that a limitations period by itself sets no deadline for bringing a claim; a deadline is set only by counting the limitations period off from the date of accrual.”<sup>112</sup> States diverge widely in their definition of when a claim accrues.<sup>113</sup> Some state legislatures actually define when their statute “accrues”, but more often state courts interpret the time of accrual.<sup>114</sup> The current statute of limitations in the state of Georgia does not contain a discovery rule, nor does it contain a definition of when the statute accrues.<sup>115</sup> Georgia’s statute of limitations has been held to run when the injury or death resulting from a negligent act or omission occurs, rather than when the plaintiff

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<sup>108</sup> Smith v. Reinhardt, et al., 2001 Mich. App. Lexis 1115 (2001); Schultze v. Landmark Hotel Corp., 463 N.W.2d 47 (Iowa 1990); Hackworth v. Hart, 474 S.W.2d 377, 379 (Ky. 1971); Newberry v. Tarvin, 594 S.W.2d 204, 206 (Tex.1980).

<sup>109</sup> Kubrick, 444 U.S. at 126.

<sup>110</sup> Richardson, *supra* note 54, at 1037.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1037-1038.

<sup>114</sup> *Id.*

discovers his injury or the negligence that resulted in his injury.<sup>116</sup> While accrual addresses the point at which a statute of limitations begins to run, there are various exceptions to the statute of limitations, which suspend or toll their running. Although several exceptions to the statute of limitations exist in various states, this paper will address four of the more common exceptions.

### **Tolling Statutes of Limitation: Minority**

Most state's statutes of limitation contain or are modified by a tolling exception for minority. This period of tolling varies from state to state. In California, for example, actions for a minor must be commenced from the date of the alleged wrongful act just as it is for adults, unless the child is less than six years old.<sup>117</sup> If a child is less than six, a claim must be filed within three years or prior to his eighth birthday whichever is a longer period.<sup>118</sup> In Texas, a provision tolling the statute of limitations for minors under the age of twelve years and giving them until their fourteenth birthday to file suit, was held unconstitutional under the open courts provision of the Texas constitution.<sup>119</sup> Under the Texas Court's ruling, a minor now has until two years after his eighteenth birthday in which to file suit, plus an additional seventy-five days if a proper notice letter is sent, leaving a potential insurance tail of twenty years plus two and one half months for a birth related injury.<sup>120</sup>

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<sup>115</sup> O.C.G.A. §9-3-71 provides: (a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful omission occurred....

<sup>116</sup> *Miller v. Kitchens*, 251 Ga. App. 225, 553 S.E. 2d 300 (2001).

<sup>117</sup> CAL. CODE CIV. PROC. §340.2 (2001).

<sup>118</sup> *Id.*

<sup>119</sup> *Weiner v. Wasson*, 900 S.W.2d 316, 38 Tex. Supp. J. 750 (1995); Jeb Wait, *The Statute of Limitations Governing Medical Malpractice Claims*, 41 S. Tex. L. Rev. 371, 449 (2000).

<sup>120</sup> *Id.*

Missouri's constitution like Texas contains a similar open courts provision.<sup>121</sup> Missouri's statute of limitation contained a tolling provision for minors under the age of ten, giving them until their twelfth birthday to file suit.<sup>122</sup> The Missouri Supreme Court declared its statute unconstitutional under the open courts provision ruling that a minor's cause of action is tolled until the minor reaches the age of majority and can bring an action on her own behalf.<sup>123</sup> South Carolina tolls its statute of limitations seven years for minors, while Maryland generously tolls its statute of limitations until three years after a minor turns eighteen.<sup>124</sup>

Some courts view minority as a form of temporary disability which is removed once a minor reaches majority.<sup>125</sup> Courts weigh the need to decrease the long tail of liability with a longstanding public policy protecting minors. In a Utah case the Supreme Court suggested two reasons why minors should be granted special treatment.<sup>126</sup> The Court first suggested that minors lack the capacity to sue stating, "Because of their lack of experience, judgment, knowledge, resources, and awareness, minors cannot effectively assert and protect their legal rights."<sup>127</sup> The Court then suggested that minors should be granted special treatment because their parents or legal guardians are under no legal obligation to sue on their behalf.<sup>128</sup> The Court stated, "Although lawsuits asserting a violation of a minor's rights may be brought by parents, general guardians, or next friends as guardians ad litem, such persons have no legal duty to assert or otherwise

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<sup>121</sup> Strahler v. St. Luke's Hospital, 706 S.W.2d 7, 10, 62 A.L.R.4<sup>th</sup> 735 (Mo. 1986).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 11-12.

<sup>124</sup> S.C. CODE ANN. §15-3-545 (2000); MD. CODE ANN, CTS. & JUD. PROC. 5-201 (2001).

<sup>125</sup> Weiner, 900 S.W.2d at 318-319; Retaliata v. Sullivan, 208 Md. 617, 119 A.2d 420 (1956).

<sup>126</sup> Lee v. Gaufin, 867 P.2d 572, 578 (Utah 1993), See also, Timothy C. Hale, *Recent Developments in Utah Case Law*, 1995 Utah L. Rev. 350, 353-354 (1995).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

protect a minor's legal claims.”<sup>129</sup> As the California Supreme Court suggested, “Our courts have repeatedly recognized the strong public policy protecting minors against the loss of their rights due to the operation of statutes of limitations.”<sup>130</sup>

### **The Foreign Object Exception**

A second frequently seen tolling provision is for foreign objects left or placed in the body. Tolling provisions for foreign objects usually contain some form of discovery rule.<sup>131</sup> At least twenty-two states have adopted discovery rules in foreign object cases.<sup>132</sup> The Texas Supreme Court stated, “The discovery rule referred to may be stated as the legal principle that a statute of limitations barring prosecution of an action for medical malpractice runs, not from the date of the practitioner's wrongful act or omission, but from the date the nature of the injury was or should have been discovered by the plaintiff.”<sup>133</sup>

In a classic foreign object case, a Pennsylvania man underwent surgery for an ulcer.<sup>134</sup> He continued to experience pain and finally, after a series of tests and approximately nine years after his surgery, he discovered that the surgeon had left a surgical sponge in his abdomen.<sup>135</sup> The defendant surgeon asserted that the plaintiff's claim was barred by the two-year statute of limitations.<sup>136</sup> The Pennsylvania Supreme Court holding for the plaintiff stated, “The man who buries a time bomb would argue futilely that he could not be held responsible for a resulting death because the explosion

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<sup>129</sup> *Id.*

<sup>130</sup> *Steketee v. Lintz, Williams & Rothberg, et al.*, 38 Cal.3d 46, 56, 694 P.2d 1153, 1158 (1985).

<sup>131</sup> *Flanagan v. Mount Eden General Hospital, et al.*, 24 N.Y.2d 427, 430, 248 N.E.2d 23, 26 (1969); *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959); and Sarah G. Braun, *Recent Case: Torts-Physician's and Surgeons-Medical Malpractice*, 52 U. Cin. L. Rev. 1055 (1983).

<sup>132</sup> Gregory T. Mueller, *Missouri's Malpractice Statute of Limitations*, 53 J. Mo. B. 360, 364 (1997).

<sup>133</sup> *Weaver v. Witt*, 561 S.W.2d 792, 793-794 (Tex. 1977).

<sup>134</sup> *Ayers*, 397 Pa. 282.

<sup>135</sup> *Id.* at 283.

and death of his victim did not occur until more than a year after he had placed the bomb.” Judge Musmanno, further addressing whether or not the plaintiff could have discovered the cause of his discomfort by the exercise of reasonable care stated, “Certainly he could not open his abdomen like a door and look in; certainly he would need to have medical advice and counsel; certainly he would have to be dependent upon those who with appropriate instruments and devices could pierce the wall of flesh which hid from his own eyes the cause of his wretchedness.”<sup>137</sup>

It states that recognize the foreign object exception to the statute of limitations, the two issues that most frequently arise are whether or not the plaintiff exercised reasonable care in the discovery of the foreign object and whether or not the object is “foreign.” An Idaho woman brought an action against her gynecologist three years after the insertion of an intrauterine device (I.U.D) for birth control purposes.<sup>138</sup> The gynecologist told the plaintiff he removed the device during a subsequent sterilization procedure.<sup>139</sup> She continued, however, to experience pain and chronic pelvic infections until she sought a second opinion and discovered the I.U.D. had been left in her body.<sup>140</sup> The issue before the court was whether the I.U.D. was a foreign object within the meaning of the foreign object exception to the statute of limitations.<sup>141</sup> The Court held that when an I.U.D. is supposed to have been removed, it is no longer deliberately within the body and is therefore properly defined as a foreign object.<sup>142</sup>

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<sup>136</sup> *Id.* at 283-284.

<sup>137</sup> *Id.* at 289.

<sup>138</sup> *Ogle v. DeSano*, 107 Idaho 872, 693 P.2d 1074 (1984).

<sup>139</sup> *Ogle*, 107 Idaho at 874.

<sup>140</sup> *Id.*

<sup>141</sup> 107 Idaho at 1076.

<sup>142</sup> 107 Idaho at 1078.

In a New York case, however, the Court distinguished I.U.D. claims holding that glass left in a plaintiff's forearm did not constitute a foreign object although the defendant doctor failed to remove all of it, because the doctor did not initially place the glass in the plaintiff's arm unlike doctors in I.U.D. cases.<sup>143</sup> In another New York case, a plastic stent (a round plastic tube) was placed in a plaintiff's nose for post surgery healing purposes.<sup>144</sup> The stent, a temporary device was supposed to be removed with the packing material ten days after surgery, but the doctor failed to remove it.<sup>145</sup> For the following six years the plaintiff suffered from chronic nasal and respiratory problems.<sup>146</sup> Finally, a new doctor performed endoscopic rhinoscopy, discovered the stent and removed it.<sup>147</sup> The plaintiff argued that his claim fell within the foreign object exception to the statute of limitations, but the New York Court held that the stent was not a foreign object.<sup>148</sup>

### **The Fraud Exception**

Fraud also tolls the statute of limitations in many states. Fraud can be a knowing concealment or it can be an affirmative action to mislead by the health care provider.<sup>149</sup> In either case fraud, like the foreign object exception, tolls the statute of limitations until the plaintiff discovers or should have discovered the defendant's fraud.<sup>150</sup> The Supreme Court of Colorado held that the fraud exception "...does not toll the statute of limitations perpetually, rather it extends the statute of limitations until two years after the person bringing the action discovered or in the exercise of reasonable diligence and concern

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<sup>143</sup> Garrett v. Brooklyn Hospital, 115 Misc.2d 933, 934, 454 N.Y.S.2d 637, 639 (1982).

<sup>144</sup> LaBarbera v. New York Eye and Ear Infirmary, 91 N.Y.S.2d 207, 209, 691 N.E.2d 617, 618 (1998).

<sup>145</sup> LaBarbera, 91 N.Y.S.2d at 209.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> 91 N.Y.S.2d at 213; See also, Newman v. Keuhnelian, et al., 248 A.D.2d 258, 670 N.Y.S.2d 431 (1998).

<sup>149</sup> Smith, et al. v. Boyett, 908 P.2d 508 (Colo. 1995); Kern v. St. Joseph Hospital, Inc., 102 N.M. 452, 697 P.2d 135 (1985).

<sup>150</sup> Green v. Wedowee Hospital, et al., 584 So.2d 1309, 1312 (Ala. 1991); Kern 102 N.M. at 456.

should have discovered the act or omission.”<sup>151</sup> Some state’s legislatures and courts refer to their fraud exception as a knowing concealment exception or fraudulent concealment exception<sup>152</sup> In Missouri, the plaintiff that wishes to invoke the fraudulent concealment exception has the burden of proving six elements:

(1) In treating the plaintiff, the [doctor] did or failed to do something that caused the injury; 2) The [doctor’s] conduct failed to meet the required standards of professional competence and was therefore negligent; 3) The [doctor] had actual knowledge that he or she caused the injury; 4) With that knowledge, the [doctor] intended by post-injury conduct and statements to conceal from the patient the existence of a claim for malpractice; 5) The [doctor’s] acts were fraudulent; and 6) The patient was not guilty of a lack of diligence in sooner ascertaining the truth.<sup>153</sup>

In a Colorado case, a patient had surgery for gall bladder removal.<sup>154</sup> When the physician probed the common duct of the gall bladder, he perforated it causing bile to leak into the patient’s abdomen.<sup>155</sup> Although two cholangiograms taken before the physician probed the duct showed no leak and two cholangiograms taken after the physician probed the duct indicated a leak, the physician nonetheless discharged the patient to her home where her condition predictably worsened.<sup>156</sup> When the patient confronted her physician he told her that a gallstone caused the hole in her bile duct.<sup>157</sup>

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<sup>151</sup> Smith, 908 P.2d at 512.

<sup>152</sup> *Id.*; 102 N.M. at 455-456.

<sup>153</sup> W. Dudley McCarter, *Missouri Statutes of Limitation*, 54 J. Mo. B. 35, 38 (1998).

<sup>154</sup> Smith, 908 P.2d at 510.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

The patient was readmitted to the hospital requiring a second surgery to repair the duct.<sup>158</sup> She did not find out that the hole in her bile duct was caused by a puncture during surgery until 5 years after the event and two years beyond the statute of limitations.<sup>159</sup>

The Colorado Supreme Court holding for the plaintiff stated, “The knowing concealment exception to [the statute of limitations] embodies the common law concept that a wrongdoer should not be able to take advantage of his own wrong...It prevents a doctor from benefiting from his or her own efforts to hinder the claimant’s discovery of the cause of action against the doctor.”<sup>160</sup> The policy behind the fraud exception to the statute of limitations lies in the equitable concept of estoppel. As the superior court of Pennsylvania stated, “Where through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations.”<sup>161</sup>

### **The Continuous Treatment Exception**

The continuous treatment exception is another common exception to the statute of limitations. The exception, which was first addressed by the Ohio Supreme Court in 1902, has been adopted both judicially and by statute.<sup>162</sup> The North Carolina Court of Appeals discussed what a plaintiff must prove to take advantage of the exception:

The plaintiff must show the existence of a continuing relationship with his physician...Mere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> 908 P.2d at 512.

<sup>161</sup> Levinson v. Souser, 384 Pa. Super. 132, 149, 557 A.2d 1081, 1089 (1989) citing, Schaffer v. Larzelere, 410 Pa. 402, 405, 189 A.2d 267, 269 (1963).

treatment doctrine...Subsequent treatment must consist of either an affirmative act or an omission which must be related to the original act...Plaintiff is not entitled to the benefits of the continuing course of treatment doctrine if during the course of the treatment plaintiff knew or should have known of his or her injuries.<sup>163</sup>

North Carolina's continuous treatment exception is judicially recognized while New York has codified its continuous treatment exception. New York's statute of limitations provides:

An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure...For the purpose of this section the term 'continuous treatment' shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition.<sup>164</sup>

The New York Court of Appeals discussed the purpose behind the continuing treatment exception stating, "The doctrine rests on the premise that the trust and confidence that marks such relationships puts the patient at a disadvantage in questioning the doctors skill because to sue while undergoing treatment necessarily interrupts the course of

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<sup>162</sup> *Gillette v. Tucker*, 65 N.E. 865 (Ohio 1902); Dana D. Peck, *The Continuous Treatment Doctrine*, 49 Alb. L. Rev. 64, 65 (1984); and Melanie Fitzgerald, *The Continuous Treatment Rule*, 52 S.C. L. Rev. 955, 956-957 (2001).

<sup>163</sup> *Stallings v. Gunter*, 99 N.C. App. 710, 715, 394 S.E.2d 212, 216 (1990); See also, 1 D. Louisell & H. Williams, *Medical Malpractice*, §13.08 (1981) The statute is tolled as long as the patient receives treatment from the doctor "for the particular disease or condition" created by the negligent act.

<sup>164</sup> NY CLS CPLR §214-a (2001).

treatment.”<sup>165</sup> The Court stated that it would be “absurd” to expect a wronged patient to interrupt possible corrective treatment to serve a summons on their physician.<sup>166</sup> The New York courts do not seem to require a patient’s ignorance of the defendant’s negligence as the North Carolina courts do, but they have emphasized that a patient must be under continuous treatment for the same or related illness or injury.<sup>167</sup> The New courts have stated that plaintiffs should not have to interrupt ongoing treatment because the “doctor not only is in a position to identify and correct malpractice, but also is best placed to do so.”<sup>168</sup>

In an early case examining the continuous treatment exception, the Kansas Supreme Court held emphatically that “limitations are created by statute and are legislative, not judicial acts.”<sup>169</sup> Kansas has expressly rejected the judicially created doctrine of continuous treatment as has several other states.<sup>170</sup> As one commentator suggested:

The states which have allowed the use of the continuous treatment rule or a de facto version of the rule have often done so based on notions of fairness or “corrective justice.” Those jurisdictions where the doctrine has been rejected have based their decisions on legislative intent and the protective purpose of the statute of limitations.<sup>171</sup>

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<sup>165</sup> Massie v. Crawford, 78 N.Y.2d 516, 519, 583 N.E.2d 935, 937 (1991).

<sup>166</sup> *Id.*

<sup>167</sup> Cooper v. Kaplan, 78 N.Y.2d 1103, 585 N.E.2d 373 (1991).

<sup>168</sup> *Id.*

<sup>169</sup> Hill v. Hays, 395 P.2d 298, 301(Kan.1964).

<sup>170</sup> Fitzgerald, *supra* note 162, at 959.

<sup>171</sup> *Id.* at 965.

Even if various exceptions toll the statute of limitations in the interest of plaintiffs, what about the outer limits of time dictated by the statute of repose? Next, this paper will address issues of accrual and tolling with regard to statutes of repose.

### **Statutes of Repose: Accrual vs. Abolition**

As previously suggested Statutes of Repose substantively differ from statutes of limitation. Georgia's Supreme Court, discussing statutes of repose, has stated:

...[T]he legislature may conclude that the time may arrive when past transgressions are no longer actionable. The long history of such conclusions emphasizes their rationality. From the biblical time of the year of Jubilee to the present day, policymakers have exercised the right to 'wipe the slate clean' after a fixed period of time. In doing this, there is the clear distinction between a statute of limitation 'barring' an action, and a statute of repose providing for the abolition of a cause of action after the passage of the time provided.<sup>172</sup>

As the Kansas Supreme Court stated, statutes of repose "serve to limit the time within which an action may be commenced after the cause of action has accrued."<sup>173</sup> Statutes of limitation are considered a procedural limitation on a remedy while statutes of repose are considered a substantive definition of rights.<sup>174</sup>

Although there are exceptions, a statute of repose generally disregards the date of discovery of the injury, or if injury occurs at a subsequent date, and generally does not have tolling provisions.<sup>175</sup> As Price advised, "It is impossible to toll or delay a right that

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<sup>172</sup> Craven, 263 Ga. at 658, citing Hill v. Fordham, 186 Ga. App. 354, 357, 367 S.E. 2d 128 (1988).

<sup>173</sup> See v. Hartley, 257 Kan. 813, 817, 896 P.2d 1049, 1052 (1995).

<sup>174</sup> Hartley, 257 Kan. at 816.

<sup>175</sup> *Id.*

no longer exists.”<sup>176</sup> She also suggested, “A repose statute generally supplements or overrides the discovery rule...It is a time limitation that ‘acts as a condition precedent to the action itself’, whereas an ordinary statute of limitations is ‘clearly procedural,’ affecting only the remedy directly and not the right to recover.”<sup>177</sup> Some have proposed that a statute of repose starts to run from the date of the wrongful act or omission “whether or not the act produces a contemporaneous injury,” in contrast to a statute of limitations which does not begin to run until a cause of action evidenced by injury or damage is present.<sup>178</sup>

It is possible for a plaintiff to be within the statute of limitations and yet, run afoul of the statute of repose. A common scenario in the state of Georgia is that a plaintiff files suit for malpractice and then some years later, for tactical or other reasons, dismisses and refiles within six months under Georgia’s renewal statute.<sup>179</sup> The Georgia renewal statute allows a plaintiff to dismiss a case voluntarily and refile within six months and for statute of limitations purposes it would be as if plaintiff filed on the original date.<sup>180</sup> However, if a plaintiff refiles more than five years from the date that the statute began to run, regardless of the renewal statute, the statute of repose extinguishes the plaintiff’s cause of action.<sup>181</sup> The Georgia Supreme Court stated, “Both logic and the plain language of the

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<sup>176</sup> Sarah E. Price, *Survey of Developments in North Carolina Law, 1990*, 69 N.C. L. Rev. 1399, 1412 (1991).

<sup>177</sup> *Id.* at 1402, citing Boudreau v. Baughman, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988).

<sup>178</sup> Robert W. George, *Prognosis Questionable*, 50 Ark. L. Rev. 691, 693 (1998), citing White v. Reagan, 32 Ark. 281, 290 (1877) and Louisell & Williams, *supra* note 163, at 13-20.

<sup>179</sup> O.C.G.A. §§9-11-41(a) and 9-2-61(2001).

<sup>180</sup> *Id.*

<sup>181</sup> Wright v. Robinson, 262 Ga. 844, 846 (1993); See also, Thompson v. Long, 225 Ga. App. 719, 720, 484 S.E. 2d 666, 667 (1997).

statutes lead us to conclude that the legislature never intended for the dismissal and renewal statutes to overcome the statute of repose.”<sup>182</sup>

Another common scenario where a plaintiff’s claim can be extinguished by the statute of repose and yet be within the statute of limitations is in delayed injury cases. For example, if a pathologist misdiagnoses a malignant melanoma and the plaintiff is not injured until the melanoma metastasizes, the injury may occur beyond the five-year period specified by the statute of repose, yet still be within the two-year statute limitations.<sup>183</sup> Although many statutes of repose do not contain tolling provisions, some courts have begun to carve out exceptions which toll the statute of repose as well as the statute of limitations.

### **Statutes of Repose: Tolling Provisions**

Some scholars posit that a substantive right, such as that provided by a statute of repose, cannot be tolled.<sup>184</sup> Yet, some courts when faced with extinguishing plaintiffs’ rights have recognized the tolling of statutes of repose and legislatures have written exceptions into the statutes themselves.<sup>185</sup> In a 1993 Utah case, an infant in his first year began to experience disturbing tremors.<sup>186</sup> The concerned mother brought her infant to the defendant neurologist who diagnosed encephalomyelitis.<sup>187</sup> Not until approximately nine months later, was the child diagnosed with hydrocephalus by a subsequent doctor.<sup>188</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *Craven*, 263 Ga. at 656-659.

<sup>184</sup> *Price*, *supra* note 176, at 1412; citing *Joyner v. Lucas*, 42 N.C. App. 541, 546, 251 S.E.2d 105, 109 (1979).

<sup>185</sup> *Id.*

<sup>186</sup> *Lee*, 867 P.2d at 573.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

By that time, the child suffered from mental retardation due to the pressure exerted on the brain by the hydrocephalus.<sup>189</sup>

The child's mother did not file a complaint until more than four years from the defendant doctor's misdiagnosis and two years from the subsequent doctor's diagnosis of hydrocephalus.<sup>190</sup> In the mother's complaint she asserted that the child's hydrocephalus was treatable and had her son been diagnosed earlier, he would not be mentally retarded and permanently handicapped.<sup>191</sup> The Utah Supreme Court, confronted with a statute of repose that specifically excluded minors from any tolling provision, struck down the statute as unconstitutional holding that minors and adults were not similarly situated under the law and were entitled to "special rules" necessary to protect their rights.<sup>192</sup>

In 1953, the Arkansas Supreme Court recognized a foreign object exception to the two-year statute of repose then in effect.<sup>193</sup> When the Arkansas Legislature revised its statute of repose for medical malpractice in 1979, it included a foreign object exception which tolls the statute of repose until one year after the foreign object is discovered.<sup>194</sup> Colorado's statute of repose also specifically includes an exception for foreign objects providing, "Except as otherwise provided in this section ... in no event shall an action be brought more than three years after the act or omission which gave rise to the action... [unless such] act or omission consisted of leaving an unauthorized foreign object in the body of the patient...."<sup>195</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> 867 P.2d at 574.

<sup>191</sup> *Id.*

<sup>192</sup> 867 P.2d at 577-578.

<sup>193</sup> Crossett Health Center v. Crosswell, 256 S.W.2d 548 (Ark.1953), See also George, *supra* note 178, at 695.

<sup>194</sup> 1979 ARK. ACTS 709 4.

<sup>195</sup> C.R.S. §13-80-102.5 (2001).

Some courts recognize an exception that tolls the statute of repose based on fraud or fraudulent concealment and some do not. In 1988 a Tennessee man injured his back at work.<sup>196</sup> He consulted an orthopedic surgeon who performed back surgery on him using pedicle screws as a fixation device.<sup>197</sup> The defendant surgeon did not inform the plaintiff that such screws would be used during surgery, neither did the defendant inform the plaintiff that the screws were considered experimental and had not been approved by the Food and Drug Administration.<sup>198</sup> The plaintiff experienced persistent, acute pain after surgery and eventually discovered that one of the screws had broken necessitating surgical removal.<sup>199</sup> Approximately four years and nine months after the pedicle screws were implanted, the plaintiff filed a lawsuit against his orthopedic surgeon.<sup>200</sup> The Tennessee Supreme Court recognized that the three-year statute of repose could be tolled where there was fraudulent concealment on the part of the defendant and held that the plaintiff's case should survive a motion for summary judgment.<sup>201</sup> The Court stated:

Fiduciary relationship, confidential relationship, constructive fraud and fraudulent concealment are all parts of the same concept. The nature of the relationship which creates a duty to disclose and a breach of that duty constitutes constructive fraud or fraudulent concealment, springs from the confidence and trust reposed by one in another, who by reason of a specific skill, knowledge, training or expertise, is in a superior position to

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<sup>196</sup> Shadrick v. Coker, 963 S.W.2d 726, 728-729 (Tenn. 1998).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> 963 S.W.2d at 735-736.

advise or act on behalf of the party bestowing trust or confidence in him.<sup>202</sup>

In contrast, the Kansas Supreme Court held in a 1996 case that although it appeared that the defendant doctor had fulfilled the elements of “fraud by silence” when he failed to inform the plaintiff of her treatable, congenital back condition, her claim was nonetheless extinguished by the statute of repose.<sup>203</sup>

Some courts when confronted with difficult cases have recognized an exception to the statute of repose based on the continuing treatment doctrine. In a recent case, the Connecticut Supreme Court acknowledged that a continuing course of conduct tolls the statute of repose.<sup>204</sup> A married father of one was sent for a surgical consultation when his family physician found an enlarged lymph node in his neck. The surgeon removed the node and sent it to a pathologist who determined that the node was benign.<sup>205</sup> Relying on the pathologist’s determination, the plaintiff did not pursue further treatment until he discovered he was suffering from non-Hodgkin’s lymphoma some eleven years later.<sup>206</sup> A reexamination of the slide revealed a comment by the pathologist at the bottom of the report made to the surgeon.<sup>207</sup> The pathologist’s note read, “I’d be interested in a follow up on this patient!! I think at the time we were concerned that [the plaintiff] might be evolving a small lymphocytic lymphoma.”<sup>208</sup>

The plaintiff claimed that the defendant pathologist’s failure to disclose his ongoing concern about the possibility of cancer was tantamount to a duty that triggered

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<sup>202</sup> *Id.*

<sup>203</sup> *Bonin v. Vannaman*, 261 Kan. 199, 210, 929 P.2d 754, 764 (1996).

<sup>204</sup> *Witt v. St. Vincent’s Medical Center*, 252 Conn. 363, 756 A.2d 753 (2000).

<sup>205</sup> *Witt*, 252 Conn. at 365.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

the course of conduct doctrine.<sup>209</sup> The defendant pathologist asserted that the three-year statute of repose began to run when he examined the specimen of the plaintiff's lymph node.<sup>210</sup> The Court held that there was evidence of a continuing course of conduct and that such conduct could toll the statute of repose.<sup>211</sup> The Court stated, "A statute of limitations or repose may be tolled under the continuing course of conduct doctrine, thereby allowing a plaintiff to commence his or her lawsuit at a later date."<sup>212</sup>

Price, a commentator addressing a similar case in North Carolina, indicated that applying the continuing course of treatment doctrine to toll the statute of repose has the potential for "untoward results."<sup>213</sup> She suggested that applying the continuous course of treatment doctrine to toll the statute "would extend indefinitely the period of time in which patients with latent injuries could file suit."<sup>214</sup> Such a result, she asserted, frustrates the purpose behind the statute of repose enacted by the legislature "as a means of decreasing exorbitant malpractice insurance rates."<sup>215</sup> She stated:

The application of the 'continued course of treatment' doctrine to determine the date of accrual in an action involving nonapparent injuries has the effect of rendering the statute of repose useless...The result is contrary to the reasoning underlying the enactment of a statute of repose: to extinguish the right of action after a fixed number of years, regardless

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<sup>209</sup> 252 Conn. at 367.

<sup>210</sup> *Id.*

<sup>211</sup> 252 Conn. at 369-370.

<sup>212</sup> *Id.*

<sup>213</sup> Price, *supra* note 176, at 1409. "[In North Carolina] the continued course of treatment doctrine, as it is commonly articulated, provides that if a doctor's treatment is continuous and the patient's condition is the type that imposes upon the doctor a duty to provide continuing treatment, the statute of limitations does not begin to run until the treatment has terminated unless the patient discovers the doctor's negligence before the treatment ends, in which case the statute begins to run upon discovery."

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

of whether a patient has discovered his or her injury or terminated treatment.<sup>216</sup>

The Illinois Supreme Court declined to toll the statute of repose based on the continuous course of treatment doctrine holding that:

The legislature has clearly stated that no cause of action be brought more than four years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury...We find it significant that the General Assembly has amended section 13-212 numerous times but has never expressly provided for any exception to the statute of repose except for cases of fraudulent concealment.<sup>217</sup>

Other states Supreme Courts, as previously shown, have disagreed with the Illinois Supreme Court, however. As one commentator remarked, “The justifications for adopting a rule that would allow the victims of lengthy medical negligence to seek a remedy exceed the justifications for strict adherence to [time limitations].”<sup>218</sup>

Statutes of limitation and repose strongly affect plaintiffs, defendants, and defendant’s insurers. Each state enacted its own statute of limitations and repose in an attempt to balance these various interests. This paper will explore some of the time limitation strategies employed by different states in the following chapter.

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<sup>216</sup> *Id.*

<sup>217</sup> *Cunningham v. Huffman*, 154 Ill.2d 398, 403, 609 N.E.2d 321, 324 (1993).

<sup>218</sup> Fitzgerald, *supra* note 162, at 973.

## CHAPTER 5

### TIME LIMITATIONS STRATEGIES

Many states faced with the same need for tort reform, responded with a multiplicity of strategies including a variety of statutes of limitation and repose, some favoring plaintiff's interests and some favoring defendant's. Despite the insurance crises of the 1970s and 1980s, some states continued to embrace a discovery rule and an extended period of accrual.

#### **Plaintiff Favored Accrual**

California enacted the Medical Injury Compensation Reform Act “as a response to a perceived major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system.”<sup>219</sup> Prior to 1975, the statute of limitations was four years after the date of injury or one year after the plaintiff discovered or through reasonable diligence should have discovered the injury, whichever occurred first.<sup>220</sup> After 1975, the legislature reduced the statute of limitations to 3 years and retained the one-year discovery rule.<sup>221</sup> It, however, added a statute of repose providing that in no event should the time of commencement of legal action exceed three years unless tolled by certain enumerated exceptions.<sup>222</sup> The three-year statute of repose does not commence to run until the plaintiff is “aware of the physical manifestation of the injury without regard to awareness of the negligent

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<sup>219</sup> *Photias v. Doerfler*, 45 Cal. App.4<sup>th</sup> 1014, 1017, 53 Cal. Rptr. 2d 202, 204 (1996).

<sup>220</sup> *Id.*, See also, CAL. CODE CIV. PROC. §340.5 (2002).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

cause.”<sup>223</sup> According to the California Supreme Court, the statute was enacted, “not to reduce the potential malpractice liability of doctors,” but to construct a compromise between “a concern over the extended exposure of medical practitioners to malpractice liability and a desire not to bar potentially worthy plaintiffs from court before they have a fair chance to bring suit.”<sup>224</sup>

The Ohio Supreme Court also evinced concern over barring plaintiff’s potential claims. In response to the medical malpractice insurance crisis, the Ohio legislature enacted a statute of limitations that “commenced within one year after the cause of action accrued.”<sup>225</sup> Although the term “accrued” was open to judicial interpretation, Ohio enacted a firm four-year statute of repose providing, “In no event shall any action upon a medical, dental, optometric, or chiropractic claim be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.”<sup>226</sup> Prior to 1975, Ohio’s statute for medical malpractice had no statute of repose.<sup>227</sup> Over time Ohio’s courts interpreted the point of accrual to encompass a discovery rule so that “the statute of limitations was tolled until the patient discovered or should have discovered the negligence with reasonable diligence.”<sup>228</sup> After the medical malpractice crisis reached “alarming proportions”, Ohio’s legislature enacted the four-year statute of repose.<sup>229</sup>

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<sup>223</sup> Hills v. Aronsohn, 152 Cal. App. 3d 753, 199 Cal. Rptr. 816 (1984).

<sup>224</sup> Steketee v. Lintz, et al., 38 Cal. 3d 46, 210 Cal. Rptr. 781 (1985).

<sup>225</sup> ORC ANN. 2305.11(1975).

<sup>226</sup> *Id.*

<sup>227</sup> Stachler, *supra* note 28, at 426-428.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

Ohio's statute of repose received a constitutional challenge in 1987.<sup>230</sup> The Ohio Supreme Court stated that the four-year statute of repose accomplished "one purpose - to deny a remedy for the wrong."<sup>231</sup> It also ruled that the statute of repose violated Section 16, Article I of the Ohio Constitution which provides, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."<sup>232</sup> It finally held that the statute of repose was unconstitutional "as applied to bar the claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries."<sup>233</sup> Thus, the Court when faced with conflicting interests tipped its scales in favor of plaintiffs and delivered a "devastating blow" to Ohio's statute of repose.<sup>234</sup>

South Carolina's statute of limitations provides that an action for medical malpractice "must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from the date of discovery or when it reasonably ought to have been discovered."<sup>235</sup> South Carolina has a six-year statute of repose.<sup>236</sup> Despite South Carolina's more liberal statute of limitations and repose, the South Carolina Court of Appeals is leaning toward the adoption of a continuous treatment rule.<sup>237</sup> As one commentator stated:

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<sup>230</sup> Hardy v. Vermeulen, et al., 32 Ohio St.3d 45, 512 N.E.2d 626 (1987).

<sup>231</sup> *Id.* at 46.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 47.

<sup>234</sup> Stachler, *supra* note 28, at 424.

<sup>235</sup> S.C. CODE ANN. §15-3-545 (2000).

<sup>236</sup> *Id.*

<sup>237</sup> Dunbar v. Carlson, 341 S.C. 261, 553 S.E.2d 913 (Ct. App. 2000); See also, Fitzgerald, *supra* note 162, at 964.

The justifications for adopting a rule that would allow the victims of lengthy medical negligence the opportunity to seek a remedy exceed the justifications for strict adherence to prior interpretations of the statute of limitations, such as the need to protect the medical profession from an insurance crisis.<sup>238</sup>

### **Defendant Favored Accrual**

New York enacted a more stringent defendant favored statute of limitations. New York's statute of limitations for medical, dental or podiatric malpractice provides that an action "must be commenced within two years and six months of the act, omission or failure."<sup>239</sup> It does not recognize a discovery rule.<sup>240</sup> When faced with a due process challenge to the statute of limitations, the New York Supreme Court stated:

The medical malpractice Statute of Limitations was shortened from three years to two years and six months by the 1975 enactment of CPLR 214-a in response to the 'critical threat to the health and welfare of the State by way of diminished delivery of health care services as a result of the lack of adequate medical malpractice insurance coverage at reasonable rates.' (see, Governor's Mem, L 1975, ch 109, 1975 NY Legis Ann, at 1739-1740). Clearly, the objective of preserving the quality of health care services for residents of the State is a legitimate governmental objective. Furthermore, the Legislature's decision to shorten the period of limitation and to continue to measure accrual of a cause of action for medical malpractice

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<sup>238</sup> Fitzgerald, *supra* note 162, at 973.

<sup>239</sup> NY CLS CPLR §214-a (2002).

<sup>240</sup> *Id.*

from the date of occurrence as opposed to the date of discovery of the injury, was rationally related to the accomplishment of that objective.<sup>241</sup>

Although the Court recognized that the statute would leave some plaintiff's without a remedy through no fault of their own, it deemed that the harsh results were neither unreasonable, nor arbitrary given the State's objective.<sup>242</sup>

Illinois' medical malpractice statute of limitations provides that an action must be brought "two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first."<sup>243</sup> It also provides for a four-year statute of repose "after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death."<sup>244</sup> Prior to 1965, the general provisions of the Limitations Act governed medical malpractice actions.<sup>245</sup> Over time Illinois case law developed to encompass a discovery rule in certain proscribed circumstances.<sup>246</sup>

The early 1970s brought the medical malpractice insurance crisis.<sup>247</sup> "By October 1975, 39 States had commissioned studies of the medical malpractice problem and 22 States had revised civil practice laws and rules in an attempt to remedy the problem."<sup>248</sup> Illinois enacted "An Act to revise the law in relation to medical malpractice" which changed the existing statute of limitations to eliminate the discovery rule.<sup>249</sup> In 1979, the

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<sup>241</sup> Helgans v. Plurad, 255 A.D.2d 554, 555,680 N.Y.S.2d 648, 650 (1998).

<sup>242</sup> *Id.*, See also, Goldsmith v. Howmedica, Inc., 67 N.Y.2d 120, 124, 491 N.E.2d 1097, 1099 (1986).

<sup>243</sup> 735 ILCS 5/13-212 (2001).

<sup>244</sup> *Id.*

<sup>245</sup> Anderson v. Wagner, 79 Ill.2d 295, 306, 402 N.E.2d 560, 565 (1979).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 301.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 302.

Illinois Supreme Court received several constitutional challenges involving the validity of its new statute.<sup>250</sup> Responding to these challenges, the Court stated:

The discovery rule was thought to have played a significant role in the medical malpractice crisis. Because it created what came to be called the “long tail” of liability, the discovery rule reduced an insurance company’s ability to predict future liabilities...Responding to these problems, various State and national commissions recommended placing an outside limit on the discovery rule in medical malpractice cases...Although such a result -- a cause of action barred before its discovery -- seems harsh and unfair, the reasonableness of the statute must be judged in light of the circumstances confronting the legislature and the end which it sought to accomplish.<sup>251</sup>

The Court upheld the constitutionality of its new statute of limitations and repose finding no due process or equal protection violations.<sup>252</sup>

The North Carolina General Assembly responded to rising medical liability premiums in the mid-1970s by enacting a limitations statute less favorable to plaintiffs, as well.<sup>253</sup> In 1976, the legislature eliminated the existing discovery rule by changing the accrual point for the statute of limitations for medical malpractice to “the time of the occurrence of the last act of the defendant giving rise to the cause of action.”<sup>254</sup> It then reduced the statute of repose from ten years to four years.<sup>255</sup>

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 307-313.

<sup>252</sup> *Id.*

<sup>253</sup> Price, *supra* note 176, at 1399.

<sup>254</sup> N.C. GEN. STAT. §1-15 (2000), See also, Price, *supra* note 176, at 1401.

<sup>255</sup> *Id.*

Missouri's statute of limitations also favors defendants. According to one commentator, "The deference given to members of the health care profession in the form of a shortened window of potential liability is a product of Missouri's longstanding public policy."<sup>256</sup> Missouri's General Assembly enacted its statute of limitations and repose in 1976.<sup>257</sup> The single sentence, rambling statute contains 187 words and provides that an action for medical malpractice "shall be brought within two years from the date occurrence of the act of neglect complained of."<sup>258</sup> It additionally, however, provides for a generous ten-year statute of repose.<sup>259</sup> Some have demanded a shortening of the ten-year statute of repose calling on the General Assembly to "revisit the medical negligence statute to ensure that the statute's historical protections remain available to Missouri's health care providers."<sup>260</sup>

### **Seeking Middle Ground**

Delaware in an attempt to balance both the interests of plaintiffs and defendants developed a sort of hybrid statute of limitations. Before 1976, Delaware's general personal injury statute of limitations covered medical malpractice actions.<sup>261</sup> By 1968, Delaware's Supreme Court expanded the two-year statute of limitations to include a discovery rule.<sup>262</sup> The Court held where injuries are "inherently unknowable" and the plaintiff is "blamelessly ignorant," the statute did not begin to run until the injuries manifested themselves.<sup>263</sup> In 1976, the Delaware legislature enacted a new medical malpractice statute of limitations which was promulgated to close the potentially open-

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<sup>256</sup> Mueller, *supra* note 132, at 365.

<sup>257</sup> *Id.*

<sup>258</sup> §516.105 R.S. MO. (2001).

<sup>259</sup> *Id.*

<sup>260</sup> Mueller, *supra* note 132, at 365.

<sup>261</sup> Rodgers & Parkins, *supra* note 6, at 255.

<sup>262</sup> Layton v. Allen, 246 A.2d 794 (Del. 1968).

ended period of limitations established by the Supreme Court.<sup>264</sup> The Delaware Supreme Court refers to the new statute as a “hybrid” statute of limitations.<sup>265</sup>

The statute provides that no action for medical malpractice “shall be brought after the expiration of two years from the date upon which such injury occurred.”<sup>266</sup> But, the statute additionally provides that if the injury “was unknown to and could not in the exercise of reasonable diligence have been discovered by the injured person, such action may be brought prior to the expiration of 3 years from the date upon which such injury occurred.”<sup>267</sup> Thus, the statute affords the extension of one year for cases where the injury with due diligence could not have been discovered, a breed of limited discovery rule.<sup>268</sup> Delaware’s new “hybrid” statute of limitations is designed to appease both parties and has shaped subsequent substantive law in that state.<sup>269</sup> Although, states have answered the competing interests of plaintiffs and defendants by enacting a variety of time limitations, many states faced constitutional challenges to their new statutes of limitation and repose. The following chapter will review the basis for some of these challenges and the resulting outcomes.

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<sup>263</sup> *Id.*, See also, Rogers & Parkins, *supra* note 6, at 257.

<sup>264</sup> *Id.* at 260-261.

<sup>265</sup> Ewing v. Beck, 520 A.2d 653, 658 (Del.1987).

<sup>266</sup> DEL. CODE ANN. TIT. 18 §6856 (2001).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Rogers & Parkins, *supra* note 6, at 263.

## CHAPTER 6

### CONSTITUTIONAL CHALLENGES

Prior to the insurance crisis of the 1970s most states general limitations for tort actions applied to claims for medical malpractice.<sup>270</sup> Ultimately, however, every state adopted new statutes of limitation that often substituted the previous discovery-based general limitations for more restrictive limitations aimed solely at medical malpractice plaintiffs.<sup>271</sup> Professor Zablotsky describes four types of statutes that resulted from the tort reform of the 1970s.<sup>272</sup> According to Zablotsky:

The first group of statutes is occurrence based with no discovery exceptions whatever...The second group is occurrence based with limited discovery exceptions for malpractice actions involving either minors, fraudulent concealment, continuous treatment, or foreign objects. The discovery period for these exceptions, however, is capped at a stated number of years...The third group of statutes is also occurrence based with discovery exceptions...but, the period applicable to the exceptions is not capped...The fourth group of statutes is discovery based for all medical malpractice causes of action, but the discovery period is capped.<sup>273</sup>

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<sup>270</sup> Peter Zablotsky, *From a Whimper to a Bang*, 103 Dick. L. Rev. 455, 460 (1999).

<sup>271</sup> *Id.* at 461.

<sup>272</sup> *Id.* at 461-462.

<sup>273</sup> *Id.*

After the perceived crisis of the 1970s not one state adopted a pure discovery based statute of limitations for medical malpractice.<sup>274</sup> Considering the consequences of such statutes and the relative political powerlessness and vulnerability of medical malpractice victims, it is no surprise that plaintiffs challenged the constitutionality of the statutes shortly after enactment.<sup>275</sup> Although most plaintiffs challenged the constitutionality of their state's statute of limitations or repose on multiple fronts, for the purposes of analysis this paper will address each category of challenge separately.

### **Equal Protection Challenges**

One of the early equal protection challenges to a medical malpractice statute of limitations occurred in New Hampshire. Prior to *Carson v. Maurer*, state courts were divided regarding constitutional challenges to their newly reformed time limitations.<sup>276</sup> In *Carson*, the New Hampshire Supreme Court examined the constitutionality of the New Hampshire medical malpractice statute of limitations as it applied to latent injuries.<sup>277</sup> The New Hampshire statute did not recognize a discovery rule except as to individuals who were entitled the foreign object exception.<sup>278</sup> The Court applied an equal protection analysis under the fourteenth amendment to the United States Constitution.<sup>279</sup> Generally, the equal protection guarantee means that a state legislature may not create a classification in the law that deprives a class of citizens rights enjoyed by those not so classified.<sup>280</sup> The New Hampshire Supreme Court held:

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<sup>274</sup> *Id.* at 463.

<sup>275</sup> *Id.* at 465. See also, *Learner*, *supra* note 69, at 185.

<sup>276</sup> *Id.*, 120 N.H. 925, 424 A.2d 825 (1980).

<sup>277</sup> 120 N.H. at 935-936.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Zablotsky*, *supra* note 270, at 468.

[The statute of limitations] is invalid insofar as it makes the discovery rule unavailable to all medical malpractice plaintiffs except those whose actions are based upon the discovery of a foreign object in the injured person's body...The legislature may not abolish the discovery rule with respect to any one class of medical malpractice cases in which the cause of action is not discovered and could not reasonably be discovered during the applicable limitation period, that period will not begin to run until the plaintiff discovers both his injury and its cause.<sup>281</sup>

### **Standard of Review**

When examining the Constitutionality of a statute whether under the Federal or State Constitutions, courts apply one of three separate standards of review: strict scrutiny for fundamental rights or suspect classifications, an intermediate standard for important substantive rights, and a rational basis review for all other rights.<sup>282</sup> Most states have examined constitutional challenges to their statutes of limitation and repose under the rational basis standard of review focusing on the absence of traditional suspect classes or the violation of fundamental rights.<sup>283</sup> The *Carson* court, however, employed intermediate scrutiny stating:

Although the right to recover for personal injuries is not a 'fundamental right' it is nevertheless an important substantive right...We now conclude, however, that the substantive rights involved herein are sufficiently important to require that the restrictions imposed on those rights be

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<sup>281</sup> 120 N.H. at 936.

<sup>282</sup> Bakke v. Board of Regents, 438 U.S. 265, 357 (1978); See also, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 257 (Kermit L. Hall, et al. eds.,1992) and Zablotzky, *supra* note 270, at 468.

subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.<sup>284</sup>

Lerner has suggested that victims of medical malpractice should be considered a suspect or semi-suspect class and thus, entitled to increased scrutiny.<sup>285</sup> He proposes that the political powerlessness of medical malpractice victims as compared to the powerful medical professional and insurance industry lobbies, is functionally equivalent to other suspect and semi-suspect classes.<sup>286</sup> He also suggests that victims of medical malpractice have a “quasi-fundamental right to bodily freedom from uncompensated private assault.”<sup>287</sup> “Surely,” he states, “no personal liberty can be more fundamental to the individual than freedom from unconsented assaults.”<sup>288</sup> Standards of review are critical to the outcome of any constitutional challenge.<sup>289</sup> Although statutes of limitation and repose have been struck down under the rational basis standard of review, they are more likely to withstand constitutional challenges under this lowest level of scrutiny.<sup>290</sup> One commentator suggested that courts have accepted, on occasion, “any conceivable explanation to sustain the rationality of economic and social legislation” under the rational basis test.<sup>291</sup>

The Colorado Supreme Court, however, in *Austin v. Litvak* applied low level scrutiny and yet struck down Colorado’s statute of repose.<sup>292</sup> *Austin* was admitted to the

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<sup>283</sup> Learner, *supra* note 69, at 186.

<sup>284</sup> 120 N.H. at 931-932.

<sup>285</sup> Lerner, *supra* note 69, at 185.

<sup>286</sup> *Id.* at 185, 187.

<sup>287</sup> *Id.* at 189.

<sup>288</sup> *Id.* at 190.

<sup>289</sup> George, *supra* note 178, at 713.

<sup>290</sup> *Id.* at 716.

<sup>291</sup> E. Haavi Morreim, *Cost Containment and the Standard of Medical Care*, 75 Calif. L. Rev. 1719, 1739 (1987).

<sup>292</sup> 682 P.2d 41, 49-50 (Colo.1984).

hospital for kidney stones where through a series of tests his physician incorrectly diagnosed a brain tumor resulting in an invasive exploratory surgery involving the removal of part of the plaintiff's skull and the placement of a permanent screen in his head.<sup>293</sup> The plaintiff's physician informed him that his tumor was inoperable.<sup>294</sup> Sixteen years after the negligent misdiagnosis, *Austin* discovered that he never had a brain tumor.<sup>295</sup> In response to the plaintiff's equal protection challenge, the Colorado Supreme Court stated:

We are persuaded that the statutory classification prescribed by section 13-80-105 fails to meet the [rational basis test]. The statutory exceptions which permit 'foreign object' and 'knowing concealment' claimants but not 'negligently misdiagnosed' plaintiffs to avoid the three-year statute of repose and to invoke the discovery rule are without a rational basis in fact, thereby creating an arbitrary classification.<sup>296</sup>

In contrast, the Illinois Supreme Court, applying a rational basis test, upheld Illinois' statute of limitations against an equal protection challenge.<sup>297</sup> After surveying the various states which have upheld their statutes of limitation against such challenges, the Court held:

The equal protection clause does not prevent a State from adjusting its legislation to differences in situation. A statute effecting the classifications of persons or objects is not unconstitutional merely because it affects one class and not another, provided that it affects all members of the same

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<sup>293</sup> *Id.* at 44.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 50.

class alike; so long as the classification is not arbitrary and is founded upon some substantial difference in circumstances or conditions properly related to the classification.<sup>298</sup>

Plaintiff's bring constitutional challenges on multiple fronts usually adding due process challenges to those of equal protection.

### **Due Process Challenges**

The fifth and fourteenth amendments to the U.S. Constitution both prohibit deprivation of life, liberty or property without due process of law.<sup>299</sup> The fourteenth amendment extends such prohibition to the states.<sup>300</sup> Courts recognize two types of due process, procedural and substantive.<sup>301</sup> Procedural due process requires that a plaintiff will be heard at a reasonable time with notice and in a meaningful manner.<sup>302</sup> Substantive due process requires that a statute bear a rational relationship to the underlying legislative purpose.<sup>303</sup> In practice the two types of due process, procedural and substantive, often become blurred falling under the single aegis of a "due process analysis."<sup>304</sup>

In *Helgans v. Plurad*, the New York Supreme Court upheld New York's statute of limitations against the plaintiff's due process challenge.<sup>305</sup> The decedent's physician excised a suspicious mole from her calf and sent it to the defendant pathologist who stated it was benign.<sup>306</sup> Eight years later the decedent discovered she had malignant

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<sup>297</sup> *Anderson*, 79 Ill. at 310.

<sup>298</sup> 79 Ill.2d at 310-311, citing *Hamilton Corp. v. Alexander*, 53 Ill.2d 175, 179 (1972).

<sup>299</sup> U.S. Const. Amends. V.; XIV, 1.

<sup>300</sup> U.S. Const. Amend. XIV, 1.

<sup>301</sup> *Zablotsky*, *supra* note 270, at 478.

<sup>302</sup> *Id.* at 478-479; See also *Connecticut v. Dehr*, 501 U.S. 1 (1991).

<sup>303</sup> *OXFORD*, *supra* note 282, at 237.

<sup>304</sup> *Zablotsky*, *supra* note 270, at 479.

<sup>305</sup> 255 A.D.2d 554, 680 N.Y.S.2d 648 (1998).

<sup>306</sup> *Id.*

melanoma originating from the site of the excised mole.<sup>307</sup> Reexamination of the original sample confirmed that the mole was malignant.<sup>308</sup> The decedent's husband asserted that the statute of limitations violated his right to due process.<sup>309</sup> The Court held:

The medical malpractice statute of limitations was shortened from three years to two years and six months...in response to the 'critical threat to the health and welfare of the State by way of diminished delivery of health care services as a result of the lack of adequate medical malpractice insurance coverage at reasonable rates.' Clearly, the objective of preserving the quality of health care services of residents of the State is a legitimate governmental objective. Furthermore, the Legislature's decision to shorten the period of limitation and to continue to measure accrual of a cause of action for medical malpractice from the date of the occurrence, as opposed to the date of discovery of the injury, was rationally related to the accomplishment of that objective. Thus, [the statute] does not violate due process.<sup>310</sup>

In 1997, in a similar case the Wisconsin Supreme Court struck down Wisconsin's statute of repose in *Makos v. Wisconsin Masons Health Care Fund*.<sup>311</sup> In *Makos* the decedent had a growth on her left leg biopsied and the defendant pathologist diagnosed it as benign.<sup>312</sup> Some nine years later the decedent was diagnosed with malignant melanoma.<sup>313</sup> The biopsy was reexamined and was found to be malignant.<sup>314</sup> The

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> 255 A.D.2d at 555.

<sup>310</sup> *Id.*

<sup>311</sup> 211 Wis.2d 41, 564 N.W.2d 662 (1997).

<sup>312</sup> 211 Wis.2d at 45.

<sup>313</sup> *Id.*

plaintiff asserted that Wisconsin's five-year statute of repose violated her procedural due process rights.<sup>315</sup> The Court stated that the opportunity to be heard was essential to "the principles of fundamental fairness that are behind the Due Process Clause."<sup>316</sup> The Court then held:

We find that to preclude this action was in violation of Cheryl Makos' procedural due process rights. There is no basic fairness to eliminate her claim for injury before she knew or could have known that she was injured. The operation of the statute of repose effectively denied Cheryl Makos her opportunity to be heard because the doors of the courtroom were closed before she was even injured. Because her procedural due process rights as guaranteed by the Fourteenth Amendment were violated, we find [the statute of repose] to be unconstitutional beyond a reasonable doubt as applied in this case.<sup>317</sup>

However, just three short years later, the Wisconsin Supreme Court expressly overruled its decision in *Makos* holding that the Wisconsin statute of limitations and repose were constitutional and did not violate procedural due process rights because "an unaccrued cause of action is not a property interest."<sup>318</sup> Often, along with Equal Protection and Due Process challenges, plaintiffs challenge the constitutionality of a statute under state constitutional provisions.

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<sup>314</sup> *Id.*

<sup>315</sup> 211 Wis.2d at 46.

<sup>316</sup> 211 Wis.2d at 47.

<sup>317</sup> 211 Wis.2d at 49.

<sup>318</sup> *Aicher v. Wisconsin Patients Compensation Fund, et al.*, 237 Wis.2d 99, 105, 613 N.W.2d 849, 854-855 (2000).

## State Constitutional Challenges

State constitutional provisions frequently contain broader protections under equal protection, open court, and right to remedy provisions.<sup>319</sup> Open court provisions are generally adopted to ensure that justice will be available to every citizen of the state for redress of wrongs without denial or delay.<sup>320</sup> The majority of state courts have held that their statutes of limitation and repose do not run afoul of the open court provisions of their constitutions.<sup>321</sup> Courts seem to rely on three main arguments when upholding their statutes.<sup>322</sup> One argument is that a legislature can abolish the right to bring a cause of action because it is not a vested right.<sup>323</sup> A second argument is that if plaintiffs are injured after the expiration of the statute of repose they do not have a legally recognized injury and therefore, the open courts provision does not apply.<sup>324</sup> A third argument is that the open courts provision applies only to actions by the judiciary, not by the legislature and thus, statutes of repose do not fall under the open courts provision.<sup>325</sup> Both open courts and right to remedy provisions of state constitutions are generally analyzed under a procedural due process test.<sup>326</sup>

Although the majority of state courts have upheld their time limitations statutes under state constitutional provisions, the Ohio Supreme Court struck down its state's statute of repose under the Ohio Constitution's "right to remedy" provision.<sup>327</sup> The

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<sup>319</sup> Zablotzky, *supra* note 270, at 486.

<sup>320</sup> Josephine Herring Hicks, *The Constitutionality of Statutes of Repose*, 38 Vand. L. Rev. 627, 644 (1985); See also, George, *supra* note 178, at 710.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 710-711.

<sup>325</sup> *Id.*

<sup>326</sup> Zablotzky, *supra* note 270, at 488; 120 N.H. 925, 424 A.2d 825 (1980).

<sup>327</sup> Hardy, 32 Ohio St.3d at 45.

plaintiff's claim under Ohio's statute of repose would be extinguished before he knew of the injury or could have reasonably discovered it.<sup>328</sup> The Court held:

...A statute such as [Ohio's statute of repose] unconstitutionally locks the courtroom door before the injured party has had an opportunity to open it. When the Constitution speaks of remedy and injury to person, property or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner. Accordingly we hold that [Ohio's statute of repose], as applied to bar the claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution.<sup>329</sup>

In an Indiana case, the Appellate Court held that the statute of limitations violated the open courts provision of the Indiana Constitution.<sup>330</sup> The Court stated that the statute as written "would require the plaintiffs to do the impossible - to sue before they had any reason to know they should sue."<sup>331</sup> "Such a result," stated the Court, "is rightly described as 'shocking' and is so absurd and so unjust that it ought not be possible."<sup>332</sup> The Indiana Supreme Court did not, however, share the Appellate Court's conviction.<sup>333</sup> It held that the statute was facially constitutional and was to be upheld, but unconstitutional under the open courts provision as applied to that particular plaintiff who suffered from a latent injury.<sup>334</sup> The Court stated:

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<sup>328</sup> 32 Ohio St.3d at 47.

<sup>329</sup> *Id.*

<sup>330</sup> Martin v. Richey, 674 N.E.2d 1015, 1023-1024 (Ind. 1997).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999).

<sup>334</sup> Martin, 711 N.E.2d at 1279.

Although we agree with plaintiff and with the Court of Appeals that it was error to grant summary judgment for the defendant, we need not strike down the statute to reach this conclusion. Rather, giving due deference to the function of the legislature and to its legislative enactment, we conclude only that the statute of limitations is unconstitutional as applied to plaintiff.<sup>335</sup>

Zablotsky submits that after *Carson v. Maurer* courts began to follow a pro-plaintiff trend, striking down statutes of limitation under constitutional attack resulting in nearly one third of states eviscerating their time limitations statutes for medical malpractice on constitutional grounds.<sup>336</sup> However, the majority of states have upheld their statutes against constitutional attack and whether or not a pro-plaintiff pattern is emerging remains to be seen.

### **Judicial Interpretation and Separation of Powers**

Court's decisions to uphold statutes against constitutional attack reflect trust by the judiciary in the legislative process. If the court believes that the process of representative democracy adequately weighs and properly resolves the competing interests of health care providers, insurance companies and malpractice victims, it is less likely to overturn statutes enacted by the legislature on constitutional grounds. This unwillingness to overturn legislatively enacted law comports with democratic theory and reflects a conservative view of the role of courts in disrupting the product of the legislative process. One scholar stated, "Democratic theory suggests that elected legislative bodies are generally best suited to make decisions requiring ... a choice among

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<sup>335</sup> 711 N.E.2d at 1280.

<sup>336</sup> Zablotsky, *supra* note 270, at 456-457.

values.”<sup>337</sup> Conversely, a court’s willingness to overturn a statute on constitutional grounds indicates mistrust that the legislative process adequately protects some vulnerable group. Decisions that apply a heightened level of scrutiny give less deference to the legislature raising fundamental questions about separation of powers and belief in the democratic process.

Relatively recently, a theory of political science emerged which applies economic principles to the political process known as “public choice theory.”<sup>338</sup> Describing public choice theory, Kahn stated:

In this view, representative democracy gives unwarranted weight to the interests of small or discrete pressure groups, whose interests may be directly opposed to the interests of the larger public. Advocates of this view...have concluded that small groups of beneficiaries are more effective in lobbying for special interest legislation than those larger groups...As a result most regulation is viewed as merely special interest legislation designed to serve some politically powerful group at the expense of the public.<sup>339</sup>

Either openly or subliminally, some courts possess the same political cynicism as public choice theorists.<sup>340</sup> Courts are surely aware that the American Medical Association, state medical associations, and economically powerful insurance lobbies influence the legislature as evidenced by the mass tort reforms of the 1970s and 1980s.

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<sup>337</sup> Stanley Ingber, *Alternate Compensation Schemes and Tort Theory*, 73 Calif. L. Rev. 772, 842 (1985).

<sup>338</sup> David S. Samford, *Cutting Deals in Smoke-Filled Free Rooms*, 87 Ky. L.J. 845, 847 (1998/1999).

<sup>339</sup> Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 Cornell L. Rev. 280, 281 (1990).

<sup>340</sup> Samford, *supra* note 338, at 847; See also, WILLIAM C. MITCHELL, PUBLIC CHOICE IN AMERICA 195 (1971).

The judiciary may feel the need to protect malpractice victims from the harsh effects of statutes enacted in response to these powerful lobbies and are thus, more willing to overturn statutes when constitutionally challenged. Decisions that strike down tort reform legislation reflect an activist role for the court as an appropriate organ of government to protect underrepresented groups. However, the American Trial Lawyers Association and some state trial lawyers associations provide an organized lobby on behalf of plaintiffs. Although these lobbies may be powerful, the question remains whether they are powerful enough to provide a meaningful counterbalance to the medical professional and insurance lobbies. Given the draconian effects of many of the statutes of limitation and repose that have been upheld in the face of constitutional challenges, the likelihood that trial lawyers associations are providing an effective counterbalance seems remote. The next chapter will narrow the focus to Georgia's medical malpractice time limitations statutes and its response to the divergent interests of plaintiffs and defendants.

**CHAPTER 7**  
**THE LIMITATIONS OF MALPRACTICE**  
**CLAIMS IN GEORGIA**

The Georgia legislature and courts face the same dilemmas faced by other states when enacting or interpreting time limitations. Since the legislature enacted a statute of limitations and repose specifically for medical malpractice, Georgia courts have heard repeated constitutional challenges to their validity under both the Federal Constitution and Georgia's State Constitution. This chapter will examine the development of Georgia's medical malpractice time limitations law and its evolving strategies for balancing the conflicting interests of plaintiffs and defendants.

**Accrual in Georgia**

Prior to the insurance crisis of the 1970s, Georgia's malpractice actions, like many other states, were governed by the general tort statute of limitations, former Code Ann. §3-1004.<sup>341</sup> Under this general statute medical malpractice claims were to be brought "within two years after the right of action accrued."<sup>342</sup> The point when an action "accrued" under the statute was left to judicial interpretation.<sup>343</sup> Under Georgia's case law, a personal-injury claim accrued when an injury occasioned by the defendant's negligence occurred.<sup>344</sup> In *Everhart v. Rich's*, the Georgia Supreme Court held that, "On

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<sup>341</sup> *Quinn v. Stafford*, 257 Ga. 608, 609, 362 S.E.2d 49, 50 (1987).

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Everhart v. Rich's Inc.*, 229 Ga. 798, 801, 194 S.E.2d 425, 428 (1972).

a tort claim for personal injury the statute of limitation generally begins to run at the time damage caused by a tortious act occurs, at which time the tort is complete.”<sup>345</sup>

In 1976, the Georgia General Assembly passed its first statute of limitations directed solely at medical malpractice claims.<sup>346</sup> Under the Act entitled, “Limitations of Actions for Medical Malpractice” Code Ann. §3-1102, a plaintiff wishing to bring a malpractice suit must file it “within two years after the date on which the negligent or wrongful act or omission occurred.”<sup>347</sup> The language of the new statute effectively moved the point of accrual from the time of the plaintiff’s injury to the time of the defendant’s negligent act. The statute had a draconian effect on plaintiffs with delayed or latent injuries. As the Court stated in *Allrid v. Emory University*, “We find Code Ann. §3-1102 to be an extremely harsh limitation in application because it has the effect, in many cases, of cutting off rights before there is any knowledge of injury.”<sup>348</sup> The Court in *Allrid* nonetheless upheld the statute against constitutional attack stating that it bore a fair and substantial relation to the object of legislation.<sup>349</sup>

In 1983, the Georgia Supreme Court ameliorated the harsh effects of the malpractice limitations act as applied to actions for wrongful death. In *Clark v. Singer*, a widow brought a suit for wrongful death based upon a physician’s failure to diagnose and treat her husband’s lung cancer.<sup>350</sup> The negligent act allegedly occurred prior to June 3, 1978; the plaintiff’s husband died on June 11, 1979; and the plaintiff filed suit on June 8, 1981, within two years of her husband’s death but more than two years from the alleged

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<sup>345</sup> *Id.*

<sup>346</sup> *Quinn*, 257 Ga. at 609.

<sup>347</sup> *Id.*; GA CODE ANN. §3-1101 (1976).

<sup>348</sup> 249 Ga. 35, 37, 285 S.E.2d 521, 524 (1982).

<sup>349</sup> 249 Ga. at 37-40.

<sup>350</sup> 250 Ga. 470, 298 S.E.2d 484, 485 (1983).

wrongful act or omission.<sup>351</sup> The Court recognized that the statute of limitations created two classes of wrongful death claimants in medical malpractice cases: “(1) those whose spouse, child or parent died within two years of the negligent or wrongful act or omission, and (2) those whose spouse, child or parent died more than two years after the negligent or wrongful act or omission.”<sup>352</sup> The Court, applying the rational relationship test to the plaintiff’s equal protection challenge, held that the statute was unconstitutional as applied to actions for wrongful death.<sup>353</sup> The Court stated, “To impose a limitation period which may be exhausted before the cause of action accrues (i.e., before the patient dies), arbitrarily distinguishes between wrongful death, medical malpractice plaintiffs.”<sup>354</sup>

Relying on its decision in *Clark v. Singer*, the following year the Court held that a plaintiff with a delayed injury was denied equal protection under the law by Georgia’s existing medical malpractice statute of limitations.<sup>355</sup> In *Shessel v. Stroup*, the plaintiff alleged that her physician negligently performed a sterilization procedure on her resulting in the birth of a child.<sup>356</sup> The physician performed the procedure on April 3, 1978; the plaintiff discovered her pregnancy on May 1, 1981; and she filed suit on November 16, 1982, more than four years after the alleged wrongful act.<sup>357</sup> The Court held:

Just as a wrongful death action may not be brought until death occurs, a personal injury claim may not be brought until there is injury. Therefore we have the same arbitrary...classification held unconstitutional in *Clark*

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<sup>351</sup> *Id.*

<sup>352</sup> *Clark*, 250 Ga. at 471.

<sup>353</sup> 250 Ga. at 472.

<sup>354</sup> *Id.*

<sup>355</sup> *Shessel v. Stroup*, 253 Ga. 56, 316 S.E.2d 155 (1984).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

*v. Singer*...The medical malpractice statute begins to run from the date of negligence, thereby classifying cases into one category where injury occurs within the two-year period and another where injury occurs after... We find no substantial relation in this...classification. All who are similarly situated are not treated alike.<sup>358</sup>

Not surprisingly, in 1985 the Georgia General Assembly enacted a new statute in response to the Georgia Court's evisceration of its previous statute of limitations for medical malpractice actions.

The new O.C.G.A. §9-3-71 subsection (a) required that a plaintiff bring a medical malpractice action "within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred."<sup>359</sup> Subsection (b) of the statute provided that "in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred."<sup>360</sup> Thus, while the statute provided that the two-year limitations period could run from the date of injury rather than from the negligent act, it set a five-year period of repose on delayed or latent injuries that would run from the date of the negligent act as opposed to the date of the injury.<sup>361</sup> This statute of limitations and repose for medical malpractice actions is still in effect today.

Although, the new 1985 statute of limitations returned to the pre-1976 "date of injury" accrual point that plaintiff's enjoyed under the general tort statute of limitations, it still created a hardship on plaintiff's with latent injuries. In a 1992 case, *Stone v.*

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<sup>358</sup> 253 Ga. at 58-59.

<sup>359</sup> O.C.G.A. §9-3-71 (1985), See also, Quinn, 257 Ga. at 610.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

*Radiology Services*, the Georgia Court of Appeals distinguished between latent and delayed injuries.<sup>362</sup> In *Stone*, the plaintiff, who had been suffering chronic headaches, consulted defendant radiologists to evaluate a CAT scan of his brain.<sup>363</sup> The defendants noted no areas of abnormal density in the plaintiff's brain.<sup>364</sup> Three years later, the plaintiff discovered through further testing that he suffered from a brain tumor requiring surgical removal.<sup>365</sup> The plaintiff citing to *Whitaker v. Zirkle*, asserted that his actual injury was delayed from the date of misdiagnosis and occurred within the time limitations period.<sup>366</sup>

In *Whitaker*, the plaintiff had a suspicious mole on her back evaluated by a pathologist in 1978 who pronounced it benign.<sup>367</sup> The plaintiff had no symptoms of cancer until 1985.<sup>368</sup> Reexamination of the original sample revealed malignant melanoma.<sup>369</sup> The plaintiff filed suit in 1986, one year from the diagnosis of cancer, but eight years from the original misdiagnosis.<sup>370</sup> The Court stated that the crux of the case was when the plaintiff's injury occurred.<sup>371</sup> The Court held:

Plaintiffs do not allege the misdiagnosis caused Mrs. Zirkle to have cancer; the basis of plaintiffs' claims is that she had cancer all along. The injury complained of is the subsequent metastasis of cancerous cells which remained at the site where the mole was removed...When an injury occurs

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<sup>362</sup> 206 Ga. App. 851, 426 S.E.2d 663 (1992).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> 206 Ga. App. at 851-852.

<sup>366</sup> *Id.*, 188 Ga. App. 706, 374 S.E.2d 106 (1988).

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> 188 Ga. App. at 707.

subsequent to the date of medical treatment, the statute of limitation commences from the date the injury is discovered.<sup>372</sup>

Thus, the Court in *Whitaker* described a delayed injury that occurred some time later than the wrongful or negligent act which was the misdiagnosis of the plaintiff's cancer.

Although the plaintiff in *Stone* asserted that his injury did not occur until his brain tumor grew, the Court disagreed.<sup>373</sup> It distinguished *Whitaker* holding that Mr. Stone's injury occurred at the point of misdiagnosis, rather than at a later point.<sup>374</sup> The Court held:

In most misdiagnosis cases, the injury begins immediately upon the misdiagnosis due to the pain, suffering or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated. The misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis...Mr. Stone was already suffering from the effects of the tumor at the time he was seen by appellees. Thus, the misdiagnosis of Mr. Stone's condition injured him by allowing his pain and suffering to continue.<sup>375</sup>

The *Stone* Court distinguished between a delayed injury, such as the injury present in the *Whitaker* case, and a latent injury such as was present in Mr. Stone's case. A latent injury, then would be one that is present, but not visible or known to the patient. Georgia, unlike some other states, has never legislatively recognized a discovery rule for those plaintiffs with latent injuries that could not, even with the exercise of reasonable

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<sup>372</sup> 188 Ga. App. at 707-708.

<sup>373</sup> 206 Ga. App. at 852.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

diligence, discern their injury. However, Georgia Courts have at times interpreted the accrual of statutes of limitation to favor plaintiffs.<sup>376</sup> The only area where the Georgia legislature recognizes a discovery rule for latent injuries is in tolling the statute of limitations for the foreign object exception

### **Tolling the Statute of Limitations: The Foreign Object Exception**

Under O.C.G.A. §9-3-72, the statute of limitations “...shall not apply where a foreign object has been left in a patient’s body, but in such case an action shall be brought within one year after the negligent or wrongful act or omission is discovered...”<sup>377</sup> The Georgia Supreme Court in *Dalby v. Banks* articulated the purpose of the foreign object exception:

Where a physician places a foreign object in his patient’s body during treatment, he has actual knowledge of its presence. His failure to remove it goes beyond ordinary negligence so as to be classified by the legislature as a continuing tort which tolls the statute of limitations until the object is discovered. The purpose of the legislature in making a distinction between the two types of medical malpractice was to allow the plaintiff’s claim which does not rest on professional diagnostic judgment or discretion to survive until actual discovery of the wrongdoing. In such situations the danger of belated, false or frivolous claims is eliminated. The foreign object in the patient’s body is directly traceable to the doctor’s malfeasance.<sup>378</sup>

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<sup>376</sup> See *Whitaker*, 206 Ga. App. 851, 426 S.E.2d 663 (1992).

<sup>377</sup> O.C.G.A. §9-3-72 (2001).

<sup>378</sup> 245 Ga. 162, 163-164, 264 S.E.2d 4 (1980).

The same issues that confront other state courts with respect to foreign object cases also confront Georgia courts. For example, Georgia courts have been faced with determining what constitutes a foreign object. Thus, they have determined that a dental bridge and ceramic glass shards left in a hand are not foreign objects, while a misplaced suture and a metal washer left in the leg from an internal fixation device are foreign objects.<sup>379</sup> In 1988, however, the Georgia Supreme Court faced a somewhat novel defense in *Ringewald v. Crawford Long Memorial Hospital*.<sup>380</sup>

In *Ringewald* the plaintiff underwent quadruple bypass surgery and the surgeon left a bulldog clamp in his chest.<sup>381</sup> The surgeon discovered the clamp that same day and the plaintiff required a second surgery for its removal which plaintiff claimed led to complications.<sup>382</sup> The plaintiff filed his claim within two days of the two-year statute of limitations for medical malpractice actions, but the defendant asserted that the foreign object exception applied and therefore, plaintiff had only one year within which to file from the date the clamp was discovered.<sup>383</sup> The Court held that “there is nothing ambiguous about the statute’s requirement that the action must be brought within one year of the discovery of a foreign object, regardless of whether this has the effect of extending or diminishing the general limitation period for a medical malpractice action.”<sup>384</sup>

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<sup>379</sup> *Id.*, See also, *Spivey v. Whiddon*, 260 Ga. 502, 397 S.E.2d 117 (1990); *Shannon v. Thornton*, 155 Ga. App. 670, 272 S.E.2d 535 (1980); and *Ivey v. Scoggins*, 163 Ga. App. 741, 295 S.E.2d 164 (1982).

<sup>380</sup> 258 Ga. 302, 368 S.E.2d 490 (1988).

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> 258 Ga. at 302-303.

<sup>384</sup> *Id.*

Two years later in 1990, the Georgia Supreme Court reversed itself and overturned its decision in *Ringewald*.<sup>385</sup> In *Spivey v. Whiddon*, a plaintiff underwent surgery after an automobile accident.<sup>386</sup> The surgeon applied internal fixation with a metal screw and washer to hold the broken bones in her leg together so that they could heal.<sup>387</sup> Later the defendant surgeon removed the screw from the plaintiff's leg, but did not remove the washer.<sup>388</sup> When the plaintiff continued to have pain she sought a second opinion and discovered that the defendant surgeon left the washer in her leg necessitating another surgery for its removal.<sup>389</sup> The plaintiff filed suit less than two years from the surgery when the defendant left the washer in her leg, but more than one year from the date she discovered it had been left in her leg.<sup>390</sup>

The defendant, relying on the Court's decision in *Ringewald*, asserted that the plaintiff's claim fell under the foreign object exception and therefore, she had only one year from the discovery of the foreign object within which to bring suit.<sup>391</sup> The Court expressly overruled its decision in *Ringewald* stating that the foreign object exception was enacted by the legislature to cure a perceived "mischief" which was "the injustice of a claim being barred before its existence became known to the injured party."<sup>392</sup> The Court held that the purpose of the statute was "curative" and that "the legislature never intended the statute to shorten the time within which a cause of action may be asserted."<sup>393</sup> Recently the Court of Appeals in *Abend v. Klaudt*, also held that as a matter

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<sup>385</sup> *Spivey*, 260 Ga. at 503.

<sup>386</sup> 260 Ga. at 502.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> 260 Ga. at 503.

<sup>393</sup> 260 Ga. at 504.

of law the five-year statute of repose does not bar a foreign object medical malpractice action timely filed within the one-year period dictated by the exception.<sup>394</sup> Thus, the Court recognized that exceptions which toll the statute of limitations are enacted to favor the interests of certain plaintiffs in need of protection.

### **The Minors and Incompetents Exception**

The Georgia General Assembly also recognized the need to protect minors and incompetents from the sometimes harsh effects of the medical malpractice statute of limitations. O.C.G.A. §9-3-73 provides:

...A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years...in no event may an action for medical malpractice be brought by or on behalf of a minor...(A) After the tenth birthday of the minor if such minor was under the age of five years on the date on which the negligent or wrongful act or omission occurred or (B) after five years from the date on which the negligent or wrongful act or omission occurred if such minor was age five or older on the date of such act or omission.

The first portion of the statute provides for a statute of limitations for minors and the second portion provides a statute of repose. Although the General Assembly was willing to extend the time limitations for minors, they did not go so far as to encompass a

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<sup>394</sup> 243 Ga. App. 271, 531 S.E.2d 722, 723 (2000) (cert. den.).

discovery rule for minors. In *Crowe v. Humana*, the plaintiffs challenged the constitutionality of the minor's exception in Georgia.<sup>395</sup>

The plaintiffs brought their one-year-old child, Ashley, to the emergency room for fever and seizures where the defendants treated her.<sup>396</sup> Ashley sustained permanent brain damage as a result of oxygen deprivation.<sup>397</sup> The plaintiffs filed suit on behalf of their daughter approximately six and one half years from the date of the alleged malpractice, but approximately one month from the date they discovered the defendants negligence.<sup>398</sup> The Court declined to adopt an accrual date consistent with the discovery of the defendant's negligence, holding that the "cause of action arises on the date on which the injury arising from the alleged negligence occurs."<sup>399</sup> The plaintiffs then asserted that the statute violated their equal protection guarantees.<sup>400</sup>

They contended that the statute of limitations for minors creates one class of plaintiffs whose disabilities end at five years of age and another class of plaintiffs under O.C.G.A. §9-3-90, the general exception for minors for other causes of action whose disabilities end upon reaching the age of majority.<sup>401</sup> The Court held that the separate classification for minors in medical malpractice cases was constitutional because it bore a reasonable relationship to legitimate state objectives.<sup>402</sup> These state objectives were previously described in *Smith v. Cobb-Kennestone Hosp. Authority* as the tendency to "prevent stale medical malpractice claims" and the tendency to "lower insurance and

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<sup>395</sup> 263 Ga. 833, 439 S.E.2d 654 (1994).

<sup>396</sup> *Crowe*, 263 Ga. at 833.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> 263 Ga. at 834.

<sup>401</sup> *Id.*, See also, O.C.G.A. §9-3-90 (2001).

<sup>402</sup> *Id.*

medical costs by decreasing the period in which health care providers and their insurers would be exposed to suit.”<sup>403</sup>

Also, under O.C.G.A. §9-3-73, a person who is legally incompetent “because of mental retardation or mental illness” cannot bring an action for medical malpractice “more than five years after the date on which the negligent or wrongful act or omission occurred.”<sup>404</sup> Therefore, while the Georgia legislature carves out an exception from the two-year statute of limitations for medical malpractice for minors and mental incompetents, it excludes them from the protection of O.C.G.A. §9-3-90 which allows other causes of action to be tolled until the disability of the minor or mental incompetent is lifted.<sup>405</sup>

### **The Fraud Exception**

Like many other states Georgia also recognizes an exception for fraud. O.C.G.A. §9-3-96 provides, “If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitations shall run only from the time of the plaintiff’s discovery of the fraud.”<sup>406</sup> Under Georgia law, “Actual fraud, through nondisclosure of a known injury by the defendant and through acts to conceal the injury, which deters or debars the bringing of the action, tolls the statute of limitation and tolls the running of the statute until discovery of the fraud.”<sup>407</sup> As the Court in *Miller v. Kitchens* stated:

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<sup>403</sup> 262 Ga. 566, 571, 423 S.E.2d 235, 239 (1992).

<sup>404</sup> O.C.G.A. §9-3-73 (2001).

<sup>405</sup> O.C.G.A. §9-3-90 (2001).

<sup>406</sup> O.C.G.A. §9-3-96 (2001).

<sup>407</sup> *Miller v. Kitchens*, 251 Ga. App. 225, 226, 553 S.E.2d 300 (2001); *Wade v. Thomasville Orthopedic Clinic, Inc.*, 167 Ga. App. 278, 280-281, 306 S.E.2d 366 (1983); and *Hamilton v. Mitchell*, 165 Ga. App. 717, 718-719, 302 S.E.2d 589 (1983).

Fraud that will toll the statute of limitation requires: (1) actual fraud involving moral turpitude on the part of the defendant; (2) the fraud must conceal the cause of action from the plaintiff, thereby debarring or deterring the knowing of the cause of action; and (3) the plaintiff must have exercised reasonable diligence to discover the cause of action, notwithstanding the failure to discover within the statute of limitation.<sup>408</sup>

However, in *Lorentzson v. Rowell* the Court stated, "...[C]oncealment of material facts may in itself amount to fraud when direct inquiry is made and the truth evaded."<sup>409</sup> The Court noted that the relationship between a doctor and patient embodies trust and confidence and where a confidential relationship exists between a patient and doctor "there is no requirement that actual fraud be shown in order to come within the purview of O.C.G.A. §9-3-96."<sup>410</sup>

In *Hill v. Fordham*, a plaintiff visited his dentist because of a toothache.<sup>411</sup> He authorized the dentist to extract five of his bottom teeth in order to be fitted for bottom dentures.<sup>412</sup> Although the defendant dentist noted that the plaintiff had an impacted wisdom tooth in his lower jaw that he thought "may erupt later," the plaintiff asserted the defendant never informed him of the tooth.<sup>413</sup> Over approximately three months after being fitted with dentures, the plaintiff complained of pain, but the defendant told the plaintiff that his pain was caused by bone slivers which normally took time to work their way out of the gum.<sup>414</sup> The plaintiff did not pursue the cause of his pain until four and a

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<sup>408</sup> 251 Ga. App. at 256.

<sup>409</sup> 171 Ga. App. 821, 825, 321 S.E.2d 341, 345 (1984).

<sup>410</sup> *Id.*

<sup>411</sup> 186 Ga. App. 354, 367 S.E.2d 128, 129 (1988).

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

half years later when a second dentist diagnosed an erupted and abscessed wisdom tooth.<sup>415</sup> The plaintiff brought suit five years and four months after he last saw the defendant.<sup>416</sup> The plaintiff appealed from a lower court decision granting the defendant summary judgment on the grounds that the plaintiff's action was barred by the medical malpractice statute of limitations and statute of repose.<sup>417</sup>

After reviewing the facts, the Court stated, "In this case there is evidence the defendant knew of the existence of the wisdom tooth, the condition which allegedly caused plaintiff's pain and discomfort."<sup>418</sup> The Court acknowledging the plaintiff's claim that the defendant failed to inform him of the tooth and that he relied on the defendant's statements that his condition would eventually resolve itself stated, "A patient has the right to believe what he is told by his medical doctors about his condition."<sup>419</sup> The Court went on to hold that whether or not the statute was tolled by fraud was an issue for the trier of fact.<sup>420</sup> Regarding the defendant's assertion that in any case the plaintiff's cause of action was barred by the statute of repose, the Court responded:

The statute of ultimate repose should not be applied to relieve a defendant of liability for injuries which occurred during the period of liability, but which were concealed from the patient by the defendant's own fraud. The statute of ultimate repose should not provide an incentive for a doctor or other medical professional to conceal his or her negligence with the

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<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> 186 Ga. App. at 355.

<sup>419</sup> *Id.*

<sup>420</sup> 186 Ga. App. at 357.

assurance that after five years such fraudulent conduct will insulate him or her from liability. The sun never sets on fraud.<sup>421</sup>

### **The Continuing Treatment Exception**

Historically, Georgia's Courts have steadfastly refused to recognize a continuing treatment doctrine. That position has recently undergone a significant challenge. In a 1993 case, *Vitner v. Miller*, the Court came closest at that time to recognizing a continuing treatment rule without actually adopting one.<sup>422</sup> In *Vitner*, the defendant performed an abortion on the plaintiff on March 11, 1989.<sup>423</sup> She retained the products of conception and experienced pain and bleeding so the defendant performed a second abortion on March 15, 1989.<sup>424</sup> Again, the plaintiff retained the products of conception and finally, she consulted another physician who performed a third procedure on March 20, 1989.<sup>425</sup> The plaintiff filed suit for medical malpractice on March 18, 1991 alleging negligent performance of an abortion.<sup>426</sup>

The Georgia Court of Appeals held that the third abortion “was part of the course of treatment which resulted from appellant’s failure to remove all of the products of conception in performing the abortion on appellee and was not the injury to the appellee.”<sup>427</sup> Chief Judge Pope, in his concurrence, urged his fellow judges to adopt the continuous treatment doctrine stating:

This court should seize the opportunity presented by this case to adopt the doctrine of ‘continuous treatment’ in medical malpractice cases...There

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<sup>421</sup> 186 Ga. App. at 358.

<sup>422</sup> 208 Ga. App. 306, 430 S.E.2d 671 (1993).

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> 208 Ga. App. at 306-307.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

are several bases for the rationale underlying this doctrine: (1) a patient should properly place trust and confidence in his physician and should be excused from challenging the quality of care being rendered him until that confidential relationship terminates; (2) to require a patient to bring suit against his physician before treatment is terminated would conceivably afford the physician a defense that the patient left before treatment was terminated and before the physician had a chance to effectuate a proper result; and (3) the treating physician is in the best position to identify and correct the malpractice.<sup>428</sup>

The Court of Appeals, however, declined to adopt the continuous treatment doctrine at Judge Pope's urging.<sup>429</sup>

In 1995, the Court of Appeals expressly declined to apply the continuous tort theory in *Ford v. Dove*.<sup>430</sup> In *Ford*, the plaintiff complained that his primary care physician failed to follow up on a urinalysis that revealed blood in his urine and to perform an x-ray to rule out kidney cancer.<sup>431</sup> The plaintiff filed suit more than two years after the symptoms of kidney cancer were manifested.<sup>432</sup> The Court expressly held:

We decline to apply the continuous tort theory in this case so as, in essence, to extend the date when the statute of limitation...would commence to run; application of such a theory would appear to thwart the intent of the legislature in amending [the statute of limitations] in 1985.

We further decline to adopt any theory of 'continuous treatment' as a

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<sup>428</sup> 208 Ga. App. at 308.

<sup>429</sup> *Id.*

<sup>430</sup> 218 Ga. App. 828, 463 S.E.2d 351 (1995).

<sup>431</sup> 218 Ga. App. at 829.

vehicle for judicially legislating a change to the applicable statute of limitation.<sup>433</sup>

The Court again rejected a plaintiff's invitation to apply a continuous treatment doctrine in *Crawford v. Spencer*.<sup>434</sup>

In *Crawford*, the plaintiff's primary care physician continued to prescribe a medication that was contraindicated for patients with ulcers, even though the plaintiff was definitively diagnosed with peptic ulcer.<sup>435</sup> The plaintiff filed suit more than two years beyond the date the injury was suffered, but less than two years beyond the date that he was last treated by the defendant physician.<sup>436</sup> After rejecting the plaintiff's contention that his case fell within a continuing tort theory, the Court held:

We also reject appellant's enticement of this court to expand substantially the period of limitation in medical malpractice cases of this nature by adopting a theory of 'continuous treatment.' Although the opportunity to do so was presented, the continuing treatment theory was not adopted by a majority of the judges of this court in *Vitner v. Miller*.<sup>437</sup>

After repeated invitations by plaintiffs to the Court of Appeals to apply the continuous treatment doctrine, the Appellate Court recently adopted the doctrine in *Williams v. Young*.<sup>438</sup> In *Williams*, a diabetic patient first sought care from the defendant doctor on September 29, 1995 complaining of swelling and pain in her left ankle and

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<sup>432</sup> *Id.*

<sup>433</sup> 218 Ga. App. at 830.

<sup>434</sup> 217 Ga. App. 446, 457 S.E.2d 711 (1995).

<sup>435</sup> 217 Ga. App. 446-447.

<sup>436</sup> *Id.*

<sup>437</sup> 217 Ga. App. at 449; See also, Charter Peachford Behavioral Health System v. Kohout, 233 Ga. App. 452, 504 S.E.2d 514 (1998).

<sup>438</sup> 247 Ga. App. 337, 543 S.E.2d 737 (2000).

foot.<sup>439</sup> The plaintiff went to see the defendant doctor repeatedly for the same condition until September 30, 1996.<sup>440</sup> Finally, on November 4, 1996, after seeking a second opinion the plaintiff discovered that she had a dislocation of the talonavicular joint in her foot.<sup>441</sup> The plaintiff underwent surgery for repair of her foot on December 10, 1996, although the long-term prognosis for her foot was poor.<sup>442</sup> The plaintiff filed suit on October 28, 1998 arguing that telephone consultations with the defendant doctor and his continued course of treatment extended beyond October 28, 1996 and thus, her complaint was timely filed.<sup>443</sup>

The Court of Appeals described the harsh effect that can occur when symptoms of an injury manifest themselves to a plaintiff at or before misdiagnosis, but a plaintiff does not become aware until later that the diagnosis was incorrect.<sup>444</sup> The Court, thus describing a classic latent injury case held:

Williams urges us to read the statute of limitation expansively by holding that the alleged negligence continues, for purposes of calculating the running of the statute, as long as the plaintiff remains in ‘continuous treatment.’ Although in the past this court has declined to adopt this doctrine...we conclude that the better course is to adopt the doctrine in appropriate medical malpractice cases alleging misdiagnosis.<sup>445</sup>

The Appellate Court citing to an Arkansas case, went on to describe its new rule for continuing course of treatment cases stating:

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<sup>439</sup> *Id.*

<sup>440</sup> 247 Ga. App. at 338.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> 247 Ga. App. at 340.

<sup>445</sup> *Id.*

If the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuous treatment and care, the statute does not commence running until treatment by the doctor for the disease or condition has terminated – unless during the treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.<sup>446</sup>

In support of adopting the continuous treatment doctrine the Court used verbatim the same rationale that was suggested by Judge Pope in *Vitner v. Miller* in 1993.<sup>447</sup> The Court additionally expressly held that the statute of repose would not be tolled for the continuous treatment doctrine and therefore, still provided a five-year outside limit on such medical malpractice cases.<sup>448</sup>

Judge Andrews in his dissent asserted that the adoption of the continuous treatment doctrine is contrary to the doctrine of stare decisis and “goes beyond the limits of judicial restraint and into the area of unauthorized judicial legislation.”<sup>449</sup> He pointed to the only Georgia Supreme Court case that previously touched on this issue, *Hunter, MacLean, Exley & Dunn v. Frame*.<sup>450</sup> There, the Supreme Court declined to apply a “continuing representation rule” in a legal malpractice case citing to previous medical malpractice cases that declined to apply the continuous treatment doctrine.<sup>451</sup>

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<sup>446</sup> *Id.*, citing *Taylor v. Phillips*, 304 Ark. 285, 801 S.W.2d 303, 304 (1990); See also, LOUISELL & WILLIAMS, *supra* note 163.

<sup>447</sup> 247 Ga. App. at 341; 208 Ga. App. at 308-309.

<sup>448</sup> *Id.*

<sup>449</sup> 247 Ga. App. at 344.

<sup>450</sup> 269 Ga. 844, 507 S.E.2d 411 (1998).

<sup>451</sup> *Hunter, MacLean, Exley & Dunn v. Frame*, 269 Ga. at 849; citing, *Ford v. Dove*, 218 Ga. App. 828, 463 S.E.2d 351 (1995) and *Crawford v. Spencer*, 217 Ga. App. 446, 457 S.E.2d 711(1995).

Finally, on March 11, 2002, the Georgia Supreme Court reversed the Court of Appeals in *Young v. Williams*.<sup>452</sup> It declined to expand the exceptions to the statute of limitations to include the continuing treatment doctrine, holding:

Prescribing periods of limitation is a legislative, not a judicial function...The legislatively prescribed statute of limitation does not provide for the commencement of the period of limitation upon the termination of the health-care provider's treatment of the patient, and the judicial branch is not empowered to engraft such a provision on to what the legislature has enacted.<sup>453</sup>

In his concurrence, Justice Carley suggested that the "recognition of the 'continuous treatment' theory in medical malpractice cases certainly has much to commend it."<sup>454</sup> He noted that the Court was constrained, however, by the doctrines of stare decisis and separation of powers.<sup>455</sup> He added that the Court awaited "legislative response."<sup>456</sup>

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<sup>452</sup> *Young v. Williams*, 2002 Ga. LEXIS 201, S01G0589 (2002).

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

## CHAPTER 8

### CONCLUSION

Given the General Assembly's historically pro-defendant stance, Justice Carley may be waiting a long time for legislative response.<sup>457</sup> Georgia has traditionally favored health care providers and insurance companies over injured plaintiffs in its time limitations law for medical malpractice cases. As noted previously, the General Assembly has never recognized a discovery rule for plaintiffs except in the context of the foreign object exception to the statute of limitations. This policy often leads to harsh effects on plaintiffs who have latent injuries and are unable to discover the defendant's negligence until after the statute of limitations has run.

When the Georgia General Assembly first altered the medical malpractice statute of limitations from an injury based to a wrongful occurrence based statute, it did so in response to the perceived insurance crisis of the 1970s. Many scholars, however, dispute that an actual insurance crisis occurred in either the 1970s or the 1980s.<sup>458</sup> The increase in premiums may have been the result of factors unrelated to the increase in either the severity or frequency of claims.<sup>459</sup> Thus, legislative justification for tort reform that clearly favors defendants may be based on an uncertain foundation. If tort reform does not affect the rise in insurance premiums, then extinguishing plaintiff's valid claims due to harshly restrictive time limitations appears unjust. Yet, there are other valid purposes for the imposition of time limitations. Evidence degrades or is lost over time, witnesses

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<sup>457</sup> *Id.*

<sup>458</sup> SLOAN, *supra* note 62, at 42; Sanders & Joyce, *supra* note 29, at 214.

become unavailable and memories dim.<sup>460</sup> Some certainty of repose is necessary for peace of mind and to conduct unencumbered business transactions.<sup>461</sup> These purposes are not without significant merit in our justice system.

Georgia courts have attempted to ameliorate the harsh effects of the statutes enacted by the General Assembly. The Court struck down the negligent occurrence based statute of limitations in *Shessel v. Stroup*.<sup>462</sup> And in *Whitaker v. Zirkle* it recognized that misdiagnosis can result in delayed injury, extending the point of accrual to favor plaintiffs in such cases.<sup>463</sup> Most recently, the Court of Appeals attempted to adopt the continuous treatment doctrine in *Williams v. Young*.<sup>464</sup> Although rejected by the Georgia Supreme Court, the Court of Appeals attempt to adopt the continuous treatment doctrine represents awareness by the Georgia judiciary that plaintiffs need relief from the effects of Georgia's statute of limitations. Attempts to circumvent the statute demonstrate a dynamic tension between the Court's constitutional mandate to comply with separation of powers and fundamental concepts of justice and fairness. If the legislature achieved an appropriate balance when it enacted the statutes of limitation and repose between plaintiffs and defendants, the Georgia judiciary has apparently been the last to know.

A balanced approach in Georgia might include the Assembly's recognition of a discovery rule within the statute of limitations, but the imposition of a fixed statute of repose which would provide an absolute bar to plaintiffs' claims. Many states have enacted statutes of limitations that contain discovery rules, yet have set outside limits in

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<sup>459</sup> *Id.*

<sup>460</sup> *Barrington*, 39 Cal.3d at 152.

<sup>461</sup> *Ochoa & Wistrich*, *supra* note 9, at 460, 464-466.

<sup>462</sup> 253 Ga. at 58-59.

<sup>463</sup> 188 Ga. App. at 707-708.

<sup>464</sup> 247 Ga. App. at 341.

the form of statutes of repose beyond which plaintiff's claims are barred.<sup>465</sup> By embracing a discovery rule within Georgia's statute of limitations, the legislature would recognize those plaintiff's whose injuries are either delayed or latent assuring their day in court.

The statute of limitations should begin running from the date the plaintiff knew or should have known with the exercise of reasonable diligence that he has suffered an injury due to the defendant's negligent action. The Assembly should allow two years from the date of discovery for the plaintiff to bring suit in view of the particular Georgia requirement that plaintiffs obtain the affidavit of a medical expert prior to filing suit.<sup>466</sup> The affidavit requirement imposes an additional burden on plaintiffs to gather all pertinent medical files, locate and hire a medical expert, and obtain a sworn affidavit prior to filing a claim.<sup>467</sup> Thus a two-year statute from the date of discovery would be necessary at minimum.

However, by retaining an absolute statute of repose, such as Georgia's existing five-year statute, the legislature would address the interests of defendants and promote the viability of memory and evidence. The legislature should place a five-year absolute outside limit on such suits. By imposing an absolute statute of repose defendants and insurance companies would not suffer from the uncertainty of future claims. The long tail of medical malpractice suits would be effectively docked. The only exceptions to the

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<sup>465</sup> CAL. CODE CIV. PROC. §340.5 (2002); Stachler, *supra* note 28, at 428; and S.C. CODE ANN. §15-3-545 (2000).

<sup>466</sup> O.C.G.A. §9-11-9.1 (2001), In part provides: "In any action for damages alleging professional malpractice against a professional licensed by the State of Georgia...or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional... the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."

<sup>467</sup> *Id.*

five-year statute of repose should be the foreign object exception and the fraud exception. The foreign object exception should toll the statute of repose because the evidence of the physician's malfeasance does not degrade. Memory is unnecessary because the foreign object speaks for itself. Fraud should toll the statute of repose because as Judge Pope noted in *Hill v. Fordham*, "The sun never sets on fraud."<sup>468</sup> Such a time limitations scheme addresses both the plaintiff's need for justice and compensation and the defendant's need for certainty and repose.

As medical malpractice plaintiffs are not a well-organized, well-funded interest group, their only hope in changing Georgia's time limitations law lies with the Georgia Trial Lawyers Association and the American Trial Lawyers Association. These organizations could act to influence the legislature for change. Until such change occurs, however, Georgia's medical malpractice victims will continue to be disadvantaged by an imbalance of interests.

As of the writing of this paper, *U.S.A. Today*, reported a story of hundreds of doctors in Edinburg, Texas protesting their skyrocketing medical malpractice premiums.<sup>469</sup> Physicians again are calling for tort reform.<sup>470</sup> In Nevada, the Governor announced that the state would set up an insurance association to help those physicians who could not get malpractice insurance from the licensed market.<sup>471</sup> The Nevada Trial Lawyers, responding to blame for the rising cost of malpractice insurance pointed a finger at St. Paul stating, "They created the problem, they exacerbated the problem by writing policies for bad doctors, and then, when the consequences of their actions became

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<sup>468</sup> 186 Ga. App. at 358.

<sup>469</sup> Steve Friess, *Malpractice Gets Costlier Insurance Rate Hikes Put Doctors In a Bind*, U.S.A. Today, April 9, 2002, at 7D.

<sup>470</sup> *Id.*

known, they leave the market and the physicians holding the bag.”<sup>472</sup> The Nevada trial lawyers association insists there is no correlation between jury awards and malpractice insurance rates.<sup>473</sup> Balancing the interests between the two parties remains as ubiquitous a problem throughout the United States as it was decades ago. Until the true source or sources of rising insurance rates is ascertained and effectively managed, both plaintiffs and health care professionals will continue to suffer the consequences.

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<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

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