Ohio's Statute of Limitations for Medical Malpractice

For the last seventy-five years the Supreme Court of Ohio has taken small steps to reduce the harshness of Ohio's one-year statute of limitations for medical malpractice.[1] The court's opinions have at times intimated that the General Assembly should amend the statute in a way more favorable to the injured patient-plaintiff.[2] Impatient with legislative inaction, the court has also fashioned small changes in the malpractice statute of limitations by interpreting it liberally.[3] The disagreement between the court and the legislature over the proper balancing of interests behind the malpractice statute of limitations has resulted in a confusing mesh of statutory law and judicial interpretation. In 1975 the legislature finally amended the malpractice statute of limitations,[4] but the changes stemmed from the perceived medical malpractice crisis and must be categorized as favoring the defendant-doctor.

This Note will attempt to clarify the law governing Ohio's medical malpractice statute of limitations. First, it will examine the pre-amendment law surrounding the statute, which still retains vitality today. This will include the policy considerations that shaped the pre-1975 law, the supreme court's interpretations of the malpractice statute of limitations, and the ambiguities in the prior law that are still troublesome. The second part of this Note will look at the policy considerations underlying the 1975 changes, the provisions of the 1975 amendment, and the probable effect of the amended statute upon prior law. Finally, an interpretation of the statute will be proposed which would help to eliminate some of the confusion in this area and provide for a more equitable balancing of interests between physician and injured patient.

I. Ohio's Medical Malpractice Statute of Limitations Prior to 1975

A. *Balancing of Interests*

Traditionally, legislatures have enacted statutes of limitation in order to protect defendants from stale claims, which are often encumbered by the disappearance of evidence, death of witnesses, and hazi-

1. *See* Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902).

2. Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971); Lundberg v. Bay View Hosp., 175 Ohio St. 133, 191 N.E.2d 821 (1963); DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952).

3. *See* Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972).

4. Medical Malpractice Act, Am. Sub. H.B. 682, § 1, [1975] Page's Ohio Legis. Bull. No. 3, at 175 (codified at Ohio Rev. Code Ann. § 2305.11 (Page Supp. 1975)).

ness of recollection.[5] The Ohio medical malpractice statute of limitations is no exception. The Supreme Court of Ohio in *Melnyk v. Cleveland Clinic* commented that "the defense of a 'stale' claim for medical malpractice . . . [a]s in other fields of highly technical and inexact science . . . is unusually difficult to acquire and present."[6] The malpractice statute of limitations is also a statute of repose and is intended to provide stability to the medical profession and society in general.[7]

On the other side of the scale is the diligent plaintiff's right to have his malpractice action decided upon the merits.[8] Injuries resulting from the doctor's act of malpractice may remain latent for a long period of time and unascertainable to even the most diligent plaintiff.[9] If the malpractice statute of limitations is of short duration, a patient may not discover the doctor's act of negligence until the statute has run. Thus, the policy considerations behind Ohio's medical malpractice statute of limitations represent a balancing of these two countervailing considerations—preventing stale claims and allowing repose on the one hand, and equitable treatment of patients on the other.

B. *Court Interpretation of Ohio's Medical Malpractice Statute of Limitations*

In balancing these opposing interests the Ohio General Assembly kept in force from 1894 to 1975 a malpractice statute of limitations that simply read: "An action for . . . malpractice . . . shall be brought within one year after the cause thereof accrued . . . ."[10] The Ohio Supreme Court has never favored this statute and has attempted to prevent harsh results by liberally interpreting the word "accrued." In the landmark case of *Gillette v. Tucker*[11] the court dismissed the traditional view[12] that the plaintiff's cause of action[13] for malpractice accrued at the time of the physician's negligent act, and

5. *See* Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 133 (1955).

6. 32 Ohio St. 2d 198, 200, 290 N.E.2d 916, 917 (1972).

7. *See* Wyler v. Tripi, 25 Ohio St. 2d 164, 171, 267 N.E.2d 419, 423 (1971).

8. *See* Yoshizaki v. Hilo Hosp., 433 P.2d 220, 222 (Haw. 1967).

9. *See* DeLong v. Campbell, 157 Ohio St. 22, 31, 104 N.E.2d 177, 181 (1952) (Middleton, J., dissenting).

10. The quotation is taken from the earliest codification. Ohio Gen. Code § 11225 (1910). This codification and those that followed are worded slightly differently than the session law on which they are based. Act of May 18, 1894, Ohio H.B. No. 313, 91 Ohio Laws 299.

11. 67 Ohio St. 106, 65 N.E. 865 (1902).

12. *See, e.g.*, Cappuci v. Barone, 266 Mass. 578, 581, 165 N.E. 653, 654-55 (1919).

13. The Ohio Rules of Civil Procedure, adopted in 1970, replaced the term "cause of action" with the term "claim for relief." Because the term "cause of action" has been used in the prior decisions interpreting the malpractice statute of limitations and the term is still employed in the present malpractice statute of limitations, the phrase "cause of action" will be used throughout this Note.

instead held that the cause of action accrued at the termination of the physician-patient relationship.[14]

In *Gillette* the physician negligently left a cheesecloth sponge in the plaintiff's abdomen during surgery, with the result that the incision continued to discharge pus. The plaintiff visited the doctor for further treatment and was told that the incision would heal in time. After a year of this advice the plaintiff became impatient with the doctor and accused him of negligently performing the operation. This angered the doctor, who ordered the plaintiff out of his office "under a threat that an officer would be called to eject [her]."[15] The plaintiff's action would have been barred if the court had decided that the plaintiff's action accrued at the time of the operation. Instead, the court found an implied contract between physician and patient and held that the physician had a continuing duty to exercise due care in effecting a recovery from the time of the operation until the case was abandoned, or the professional relationship terminated.

The court stated in a later case that this "termination rule" was based upon the patient's "right to rely upon the surgeon doing such things . . . as reasonable care and skill would require, and he has a right to continue so to rely until the contract of employment is at an end."[16] The court was also influenced by the policy that the physician should be given a reasonable time to correct his acts of malpractice and that the termination rule was "conducive to that mutual confidence that is highly essential in the relation between surgeon and patient."[17]

The rule announced in *Gillette* was unique, and a number of states followed Ohio's lead in holding that the balance could be properly struck by utilizing the termination rule.[18] Critics, however, recognized that this rule commences the running of the statute of limitations in a way that bears no rational relationship to the time of the patient's discovery of his injury.[19] Starting with the California Supreme Court in 1936,[20] a number of courts and a few legislatures

14. It is not clear whether the statute begins to run at the termination of the physician-patient relationship for the particular ailment that resulted in the malpractice action, or whether the statute runs from the termination of the professional relationship between patient and physician for all medical care. *See* section II.C.1. *infra*. This Note will simply refer to the doctrine announced in *Gillette v. Tucker* as the "termination rule."

15. 67 Ohio St. at 121, 65 N.E. at 868.

16. Bowers v. Santee, 99 Ohio St. 361, 368, 124 N.E. 238, 240 (1919).

17. *Id.*

18. *See* De Haan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932); Schmit v. Esser, 183 Minn. 354, 236 N.W. 622 (1931); Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941); Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1942); Peteler v. Robison, 81 Utah 535, 17 P.2d 244 (1932).

19. *E.g.*, Wyler v. Tripi, 25 Ohio St. 2d 164, 168, 267 N.E.2d 419, 421 (1971); 30 OHIO ST. L.J. 425, 430 (1969).

20. Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936). The full implications of

attacked the problem by adopting the discovery rule.[21] Under this rule a cause of action for malpractice accrues at the time the patient discovers or reasonably should discover the acts or omissions constituting the alleged malpractice.

In the 1952 decision of *DeLong v. Campbell*[22] the Ohio Supreme Court made its first overture to the legislature to adopt the discovery rule. In that case the defendant doctor negligently left a sponge in the plaintiff's abdomen, but the incision healed properly. Thus, the plaintiff was not put on notice of the defendant's negligence. The plaintiff discovered the act of negligence more than a year after the termination of the professional relationship when she was treated for abdominal pains by a second doctor. The plaintiff asked the court to adopt the discovery rule. The court found "much persuasive force in this argument,"[23] but directed the plaintiff to the legislature for the desired change.[24] The court said that the "balance of convenience or justice as between the patient and the physician is a matter for determination by the legislative branch of the government and [the court] can only interpret and enforce the statute as that branch has enacted it."[25] This approach totally ignored the balancing of interests approach implicitly taken in *Gillette v. Tucker* fifty years before.[26]

When the court decided *Corpman v. Boyer*[27] in 1960, eight years had passed since the court had made its oblique suggestion to the legislature, and the malpractice statute of limitations remained unchanged. In *Corpman* the plaintiff's wife had consulted with the defendant-doctor for diagnosis and treatment of a pain in her upper arm. The plaintiff alleged that after an examination the doctor ordered her into the hospital for what was understood between the parties to be a simple operation involving a nerve in the left arm. Instead, the defendant performed a cordotomy, one of the most radical and dangerous

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Huysman were not initially known. As the California Supreme Court continued to refine the formulation, however, it became evident that the court had adopted the discovery rule for all actions based on medical malpractice. *See generally*, Comment, *A Four Year Statute of Limitations for Medical Malpractice: Will the Plaintiff's Case Be Barred?* 2 PAC. L.J. 663, 665-66 (1971).

21. For a list of states that presently follow the discovery rule, see notes 146 and 148 *infra*.

22. 157 Ohio St. 22, 104 N.E.2d 177 (1952).

23. *Id.* at 27, 104 N.E.2d at 179.

24. The court stated that the creation of the statute of limitations was the prerogative of the General Assembly. The court pointed to the statutes of limitation for underground trespass and fraud and noted that the legislature specifically provided that the cause of action in these instances did not accrue until the plaintiff discovered the fraud or underground trespass. In the court's view the legislature could make the same type of provision for the malpractice statute of limitations if that were the legislature's intention. *Id.* at 27-29, 104 N.E.2d at 179-80.

25. *Id.* at 30, 104 N.E.2d at 180.

26. *See* DeLong v. Campbell, 157 Ohio St. 22, 32, 104 N.E.2d 177, 181 (1952) (Middleton, J., dissenting).

27. 171 Ohio St. 233, 169 N.E.2d 14 (1960).

of all surgical operations to the spine. The operation was unsuccessful, causing slight brain damage, and leaving the plaintiff's wife bedridden and completely dependent upon others.[28]

Although both the victim and her husband commenced suit, the wife's action for medical malpractice was barred because the suit was commenced three years after the operation and more than one year after the termination of the physician-patient relationship. The sole question in *Corpman* was whether the husband's cause of action for consequential damages resulting from medical expenses, loss of consortium, and loss of services[29] was also barred by the statute of limitations. The plaintiff argued that *Kraut v. Cleveland Railway Co.*[30] had established that a husband's injury in this situation was a financial and personal loss, independent of any claim that his wife might have for her personal injuries; hence, in the present case as in *Kraut*, the husband's action should be governed by the four-year general statute of limitations.[31] The defendant countered that since the plaintiff-husband would have to establish the defendant's malpractice to recover, the one-year malpractice statute of limitations should control. His view was supported by the fact that in some jurisdictions the statute of limitations for the wife's action had been found to cover the husband's cause of action for consequential damages.[32]

Presented with this persuasive authority on both sides of the question, the court held that the four-year statute of limitations applied. It is conceivable that the court, impatient with the legislature for failing to adopt the discovery rule, opted for the construction that would reduce the harshness of the existing statute. In effect, the court saved the malpractice action to the extent of the husband's consequential damages.

In 1963 the Ohio Supreme Court again revealed its dissatisfac-

28. Brief for Plaintiff-Appellant at 3-5, Corpman v. Boyer, 171 Ohio St. 233, 169 N.E.2d 14 (1960).

29. The term consequential damages was used by the Ohio Supreme Court in Corpman v. Boyer, 171 Ohio St. 233, 169 N.E.2d 14 (1960), to describe an action brought by one spouse to recover damages for loss of services, loss of consortium, and medical expenses caused by the defendant's alleged act of negligence upon the other spouse.

30. 132 Ohio St. 125, 5 N.E.2d 324 (1936).

31. OHIO REV. CODE ANN. § 2305.09(D) (Page Supp. 1975):
An action for any of the following causes shall be brought within four years after the cause thereof accrued . . . (D) For an injury to the rights of the plaintiff not arising on contract, nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14, and 1304.29 of the Revised Code.

32. Mulvey v. Boston, 197 Mass. 178, 83 N.E. 402 (1908); Rex v. Hutner, 20 N.J. 489, 140 A.2d 753 (1958); Maxson v. Delaware L. & W. R. R., 112 N.Y. 559, 20 N.E. 544 (1889). In Hergen v. Weintraub, 29 N.Y. Misc. 2d 396, 215 N.Y.S.2d 379 (Sup. Ct. 1961), the court found that the husband's action for consequential damages stemming from an act of malpractice upon his wife was governed by the time limitation that applied to his wife's suit. An Ohio court of appeals, answering the precise question put forward in *Corpman*, found that the malpractice statute of limitations was controlling. Cramer v. Price, 84 Ohio App. 255, 82 N.E. 2d 874 (1948). Two commentators discussing *Corpman* argued that the Ohio Supreme Court reached the wrong result. *See* 6 VILL. L. REV. 422 (1961); 30 U. CIN. L. REV. 253 (1961).

tion with Ohio's malpractice statute of limitations in *Lundberg v. Bay View Hospital.*[33] The plaintiff, a young married woman, underwent a hysterectomy after the defendant hospital's salaried pathologist "grossly misinterpreted the biopsy material."[34] When other physicians conclusively determined that the plaintiff had never been afflicted with cancer of the cervix, the plaintiff brought suit against the hopsital under the doctrine of respondeat superior. The incorrect diagnosis occurred in April 1955 but the plaintiff continued to return to the hospital for check-ups until February 18, 1956. The court held that the plaintiff's action did not accrue until she terminated the professional relationship with the hospital. Hence, her suit commenced on February 16, 1957, was timely. The court did not decide whether the action against the hospital was governed by the two-year statute of limitations for bodily injuries[35] or the one-year statute for malpractice,[36] for in either case the action was timely.

Even though the discovery rule was not urged upon the court,[37] Justice Gibson's concurring opinion in *Lundberg* advocated adoption of the discovery rule either by judicial interpretation or by legislative amendment.[38] Justice Gibson's suggestion seemed to signal the court's willingness to review and perhaps adopt the discovery rule notwithstanding the legislature's refusal to act on the matter.

In *Wyler v. Tripi*,[39] however, a four-to-three majority declined to adopt the discovery rule and voted to reaffirm the termination rule. The plaintiff, an elderly woman, fractured her hip in October 1965. Her hip was pinned by the defendant, Dr. Tripi, at this time. The plaintiff initially brought suit against the hospital, alleging the negligence of a nurse-employee.[40] The plaintiff claimed that the nurse had treated her carelessly while she was in a wheelchair, causing the pins in her hip to bend and injure her further. In this first suit a verdict was returned in favor of the hospital. On April 30, 1967, six weeks after the unfavorable verdict in the first suit, the plaintiff claimed that she had discovered for the first time the malpractice of Dr. Tripi. Her second suit was filed well over a year after the termination of the physician-patient relationship, but within a year of the time the

33. 175 Ohio St. 133, 191 N.E.2d 821 (1963).

34. *Id.* at 134, 191 N.E.2d at 822.

35. OHIO REV. CODE ANN. § 2305.10 (Page 1954).

36. *Id.* § 2305.11 (Page Supp. 1975).

37. Brief for Plaintiff-Appellee at 13-14, Lundberg v. Bay View Hosp., 175 Ohio St. 133, 191 N.E.2d 821 (1963).

38. 175 Ohio St. 133, 137, 194 N.E.2d 821, 824 (1963) (Gibson, J., concurring).

39. 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971).

40. In Richardson v. Doe, 176 Ohio St. 370, 199 N.E.2d 878 (1964), an action against a hospital based on the negligence of one of its nurses was held to be governed by Ohio Revised Code § 2305.10, the two-year statute of limitations.

plaintiff claimed she could have reasonably discovered the defendant's negligence.[41]

The court's reaffirmation of the termination rule was decidedly reluctant. The majority opinion noted that the strict application of the statute of limitations to a situation "where no injury or damage becomes apparent contemporaneously with the negligent act . . . would lead to the *unconscionable* result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence."[42] The court unabashedly conceded the infirmities of the termination rule:

> [I]t affords little relief in cases where the injury is one which requires a long developmental period before becoming dangerous and discoverable. In those situations, the termination rule extends the period of time at which the statute of limitations commences to run, but does so by a factor which bears no logical relationship to the injury incurred. . . . The termination rule is further *fallible* in that it requires the patient to determine at the time the relationship is terminated that malpractice has taken place, when in fact he may have relied upon the very advice which constitutes malpractice.[43]

Yet, the court reaffirmed the termination rule.[44] While the court felt that "there [was] much to recommend the adoption of the discovery rule,"[45] it again refused to adopt that rule. The court's decision was based on the failure of the General Assembly to adopt any of the recently proposed amendments to the malpractice statute of limitations that would have extended the time for bringing a malpractice action.[46] A dissent by Justice Corrigan attempted to circumvent the conflict with the General Assembly by claiming that the General Assembly never "intended such a limited construction of the word 'accrues,' which, in the present fact situation would operate to deny civil redress."[47] Nevertheless, the majority of the court felt compelled to defer to the perceived will of the legislature.[48]

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41. Supplemental Brief for Defendants-Appellees at 1-4, Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971).

42. 25 Ohio St. 2d at 168, 267 N.E.2d at 421 (emphasis added).

43. *Id.* (emphasis added).

44. Quoting from this portion of *Wyler v. Tripi*, the plaintiff-appellant's brief in *Melnyk v. Cleveland Clinic* commented: "How can it be said that that which is unconscionable . . . harsh or fallible, is the law in this or any jurisdiction? Yet those were the words of the majority used to condemn its own holding." Brief for Plaintiff-Appellant at 9, Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972).

45. 25 Ohio St. 2d at 170-71, 267 N.E.2d at 423.

46. None of the following bills got beyond the committee stage: H.B. No. 177, 101st General Assembly (1955-56) (discovery rule); H.B. No. 907, 103d General Assembly (1959-60) (eliminating the statute of limitations for all malpractice cases); H.B. No. 959, 105th General Assembly (1963-64) and H.B. No. 30, 106th General Assembly (increasing the malpractice statute of limitations to two years).

47. 25 Ohio St. 2d at 176, 267 N.E.2d at 426.

48. The brief for plaintiff-appellant in *Melnyk v. Cleveland Clinic* argued that this reasoning was unconvincing:

One year later, in a somewhat surprising move, the Ohio Supreme Court adopted a limited discovery rule. In *Melnyk v. Cleveland Clinic*[49] the court held that when a foreign object was carelessly left in the patient's body during surgery, the statute of limitations was tolled until the patient discovered or reasonably should have discovered the doctor's negligence. The court found that the evidentiary problems inherent in stale claims were not present. In the case before them the evidence of the defendant's negligence was neatly preserved in the patient's abdomen. The court said:

> To carelessly leave a large and obvious metallic forceps and nonabsorbent sponge in a surgical patient's body is negligence as a matter of law, and the proof thereof is generally unsusceptible to speculation or error. . . . Furthermore, as problems of proof and defense dwindle, so does the persuasiveness of the "stale claims" reasoning.[50]

Although the court in *Wyler v. Tripi* had refused to modify the existing statute of limitations because it believed that this change belonged in the domain of the legislature, in *Melnyk* a unanimous court ventured into that very area.[51] The court was going beyond past holdings. In both *Gillette v. Tucker* and *DeLong v. Campbell* the doctor carelessly left a foreign object in the plaintiff's body during surgery, yet the cause of action was held to have accrued at the termination of the physician-patient relationship. In *Melnyk* the court noted that, to the extent the present decision conflicted with *Gillette* and *DeLong*, those cases were disapproved.[52] The court did not mention that twenty years earlier in *DeLong*, in an almost identical fact pattern, the court stated that the adoption of the discovery rule was the prerogative of the legislature. In 1972 the court felt differently.

How then can this decision be justified? The authors seek refuge in the General Assembly. They find that in the 101st, 103rd and 106th sessions of the legislative body, bills were introduced to ameliorate the "unconscionable" rule. It was observed that none of these bills ever cleared the committee to which they were referred. Thus the voice of the people spoke and the Court was powerless to intervene.

To believe in this instance that the people of this State spoke through their legislative committee is to be naive indeed. Obviously the efforts of the medical profession, acting as a pressure group, prevented their reference out.

Brief for Plaintiff-Appellant at 9, Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972).

49. 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972).

50. *Id.* at 200, 290 N.E.2d at 917.

51. Noting this move, the court in Simmons v. Riverside Methodist Hosp., 44 Ohio App. 2d 146, 150, 336 N.E.2d 460, 463 (1975), commented that the Ohio Supreme Court had "seemingly change[d] its game plan."

52. 32 Ohio St. 2d at 201 n.6, 290 N.E.2d at 918 n.6.

C. *Ambiguities in the Interpretation of Ohio's Medical Malpractice Statute of Limitations*

1. *Termination of the Particular Treatment or of the Professional Relationship Generally?*

Even though the court's interpretation of the malpractice statute of limitations has been fairly consistent since its decision in *Gillette v. Tucker*, the court's formulation of the termination rule has been terse and sketchy, leaving some important questions unanswered. No Ohio case has precisely determined whether the cause of action for malpractice accrues at the date that the physician stops treating the patient for a particular injury or at the date of the last professional contact between the physician and patient for any reason. While in all reported Ohio decisions in this area the date of the final treatment for a particular injury or malady has also been the date of the last contact between the physician and the patient,[53] it is very likely that situations will arise for which the two do not coincide.[54]

Consider, for example, the following hypothetical. On January 2, 1965, physician *A* negligently set a broken bone in patient *B*'s hand. The bone did not heal properly. *B* continued to visit the doctor for treatment to the hand until June 2, 1965, when the physician informed *B* that he could do no more to improve the hand and that *B* would have to live with a slight disability. *B* continued to visit *A* for general health problems until January 2, 1966, when at a check-up *A* in-

53. *See* Amer v. Akron City Hosp., 47 Ohio St. 2d 85, 351 N.E.2d 479 (1976); Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972); Millbaugh v. Gilmore, 30 Ohio St. 2d 319, 285 N.E.2d 19 (1972); Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971); DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952); Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919); Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902); Simmons v. Riverside Methodist Hosp., 44 Ohio App. 2d 146, 336 N.E.2d 460 (1975); Pump v. Fox, 113 Ohio App. 150, 177 N.E.2d 520 (1961); Swankowski v. Diethelm, 98 Ohio App. 271, 129 N.E.2d 182 (1953); Cramer v. Price, 84 Ohio App. 255, 82 N.E.2d 875 (1948); Truxel v. Goodman, 38 Ohio L. Abs. 113, 49 N.E.2d 569 (1942); Meyers v. Clarkin, 33 Ohio App. 165, 168 N.E. 771 (1929); Searer v. Lower, 25 Ohio App. 328, 158 N.E. 199 (1927); Netzel v. Todd, 24 Ohio App. 219, 157 N.E. 405 (1926); Woodgeard v. Miami Valley Hosp. Soc., 47 Ohio Misc. 43 (C.P. Montgomery Cty. 1975); Stewart v. Sachs, 27 Ohio Misc. 29, 266 N.E.2d 262 (C.P. Cuyahoga Cty. 1971). In Morningstar v. Jones, 31 Ohio L. Abs. 440 (1940), the plaintiff claimed that the defendant-doctor continued to treat her for obesity until the professional relationship terminated on August 3, 1937. The malpractice action was based on the physician's negligence in prescribing medication for the plaintiff's obesity. The defendant contended that he last treated the plaintiff for obesity on June 29, 1936, but treated her for injuries stemming from an automobile accident from February 16, 1937 to March 3, 1937, and that the plaintiff visited his office on August 3, 1937, to pay the bill arising from medical care occasioned by the auto accident. The jury believed the plaintiff, and the appellate court did not have to decide whether the contractual relationship terminated at the date of final treatment for the particular disease or at the termination of the relationship generally.

54. The question is of more than academic interest. The medical profession strenuously argues that the statute runs from the date of the final treatment for a particular disease entity. It contends that a doctor's duty to correct his negligence reasonably ends at the time that the patient no longer complains about the particular ailment. However, the profession concedes that the precise question has never been litigated in Ohio. Interview with D. Brent Mulgrew, Director of State Legislation, Ohio Medical Association in Columbus, Ohio (October 26, 1976).

formed *B* that he was retiring from practice and, thereafter, *B* should see physician *D* for any medical problems. A few months later on July 2, 1966, while visiting physician *D* for a back problem, *B* was informed by doctor *D* that physician *A* had been negligent in setting the bone. Under the termination rule, did *B*'s cause of action accrue on June 2, 1965, or on January 2, 1966?

Some jurisdictions have resolved this precise issue.[55] These jurisdictions follow the termination of treatment rule announced in the Minnesota decision of *Schmit v. Esser*.[56] The Minnesota Supreme Court articulated the termination of treatment rule as follows:

> So long as the relation of physician and patient continues as to the particular injury or malady which he is employed to cure, and the physician continues to attend and examine the patient in relation thereto, and there remains something for him to do in order to effect a cure, it cannot be said that the treatment has ceased. If there is nothing further to be done by the physician in the matter, or if he ceases to attend the patient in relation thereto, the treatment ordinarily ceases, without any formality.[57]

Thus, under the termination of treatment rule, the cause of action in the hypothetical problem would accrue on June 2, 1965, when the physician discontinued the treatment for the hand. Although this answers the above question, the rule causes confusion in situations in which it is difficult to determine when the treatment for a specific ailment was discontinued.[58]

The Supreme Court of Ohio has never clearly resolved this issue. In *Bowers v. Santee*[59] the Ohio Supreme Court appeared to say that the contractual relationship between the physician and patient continued so long as the physician treated the patient for the particular

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55. De Haan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932); Schmit v. Esser, 183 Minn. 354, 236 N.W. 622 (1931); Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941); Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1932); N.Y. CIV. PRAC. LAW § 214-a (McKinney Supp. 1976).

56. 183 Minn. 354, 236 N.W. 622 (1931).

57. *Id.* (syllabus 2).

58. For example, in Fonda v. Paulsen, 46 App. Div. 2d 540, 363 N.Y.S.2d 841 (1975), the plaintiff was operated upon in 1969 by Dr. *A* to remove a growth on his right flank. Dr. *B* performed a biopsy, negligently misread it, and declared that the growth was noncancerous. In 1970 the plaintiff was in an automobile accident and returned to Dr. *A* for treatment of an injured knee. During this treatment the plaintiff complained of pain in the same area that had been operated upon in 1969. In 1972, Dr. *A* ordered another biopsy, which Dr. *B* read correctly. Dr. *B* admitted that he had erred in the 1969 reading and that the plaintiff had had cancer since 1969. Plaintiff commenced a malpractice action against both doctors in 1974. Was Dr. *A*'s treatment of the plaintiff's knee in 1970 continuous treatment of the plaintiff's flank problem when the plaintiff still complained of a pain in the right buttock? Was there continuous treatment when there was a gap of twenty months between the 1970 visit for the plaintiff's knee injury and the 1972 operation? The appellate court, rejecting the lower court's view that as a matter of law there could not be continuous treatment under these circumstances, left the resolution of this question to the jury.

59. 99 Ohio St. 361, 124 N.E. 238 (1919).

injury. Looking to the *Gillette* rationale,[60] the court said: "[T]he patient is still at liberty to rely upon the professional skill, care and treatment [of the physician] to complete such recovery so long as the surgeon continues his employment with *reference to the injury*."[61] The syllabus in *Bowers v. Santee*, however, stated that "the statute of limitations does not begin to run until the contract relation is terminated."[62] Thus, the syllabus did not limit the contractual relationship to treatment of a particular injury.

In both *DeLong v. Campbell*[63] and *Wyler v. Tripi*[64] the court stated in the syllabi that at the latest the statute of limitations begins to run when the physician-patient relationship terminates.[65] The court did not restrict the "professional relationship" for accrual purposes to treatment for a particular injury or malady. In *DeLong* the court intimated that there was no such restriction: "The fact that plaintiff did not know of her right of action did not prevent the statute from running, and since the present action was commenced more than one year after the termination of *any* professional relationship between plaintiff and Campbell, it is barred by the statute of limitations."[66] The phrase "any professional relationship" suggests that the statute commences when the patient discontinues being cared for by the doctor for any medical problem. However, the phrase "at the latest," found in the syllabi of both *DeLong* and *Wyler*, implies that the court leaves open the possibility that the statute of limitations may commence running at an earlier time, perhaps at the termination of the physician's treatment of the particular injury. Thus, the court's formulations of the termination rule do not resolve the question.

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60. Some of the confusion in this area has been caused by the supreme court's failure to identify the rule by the same name. In Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919), the rule was merely referred to as the "doctrine in *Gillette v. Tucker*." In Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971), the majority opinion consistently identified the doctrine as the "termination rule." But perhaps the most confusing identification of the rule is found in Justice Corrigan's dissent in *Wyler v. Tripi*. At one point his opinion stated: "As already noted above this court has been committed to the rule that the termination of the *physician-patient relationship* is the event which starts the running of the statute of limitations." Wyler v. Tripi, 25 Ohio St. 2d 164, 174, 267 N.E.2d 419, 425 (emphasis added). From this identification it would appear that the key event commencing the statute is the termination of the professional relationship. But two paragraphs later Justice Corrigan states: "By adopting the termination of *treatment* rule this court avoided for the injured patient the harshness of the general rule that a cause of action accrues at the time the tortious act is committed." 25 Ohio St. at 174, 267 N.E.2d at 425 (emphasis added). From this statement it would appear that the termination of the particular treatment is the event that starts the statute running. It must be noted that no majority opinion has ever referred to the doctrine as the termination of treatment rule.

61. 99 Ohio St. at 366, 124 N.E.2d at 240 (emphasis added).

62. *Id.* at 361, 124 N.E.2d 238 (syllabus 2).

63. 157 Ohio St. 22, 104 N.E.2d 177 (1952).

64. 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971).

65. 157 Ohio St. 22, 104 N.E.2d 177 (syllabus); 25 Ohio St. 2d 164, 267 N.E.2d 164 (syllabus).

66. 157 Ohio St. at 27, 104 N.E.2d at 180 (emphasis added).

Reviewing the justifications for the termination rule, one also finds arguments for either construction. In *Wyler v. Tripi* the court stated:

> The justification given for the termination rule is that it strengthens the physician-patient relationship. The patient may rely upon the doctor's ability until the relationship is terminated and the physician has the opportunity to give full treatment, including the immediate correction of any errors in judgment on his part.[67]

The patient is not penalized for delaying the commencement of his legal remedies while he relies on the doctor to effect a cure by administering a full treatment. Thus, for those who argue that the statute would run from the final treatment for a particular injury, it could be inferred that when that treatment is over, the patient's privilege to forbear his legal action is over, and the patient must bring suit within the period of the statute.

On the other side, it can be argued that so long as the relationship continues at all, the physician has an opportunity to discover his error and correct his negligence, regardless of the disease or injury being treated. Since a physician has a continuing duty to discover his negligence,[68] full treatment is never realized until the physician does in fact correct his negligence.

Perhaps the Supreme Court of Ohio has consciously left the doctrine vague for the purpose of giving the lower courts discretion in determining when the contractual relationship has terminated. In its latest pronouncement on the doctrine in *Wyler v. Tripi*, the supreme court held in the syllabus that the cause of action for medical malpractice accrues *at the latest* when the physician-patient relationship finally terminates. By using the phrase "at the latest," the court suggests that in some situations the cause of action will accrue before the termination of the physician-patient relationship. Also, the majority opinion consistently labeled the doctrine the "termination rule," not tying the rule to either termination of treatment or the professional relationship. Perhaps it can be inferred from this language that, depending upon the peculiar facts of the case, the lower courts are to determine whether it is more equitable to commence the statute at the termination of the treatment or at the termination of the professional relationship. This decision would be based on the type of injury that resulted from the alleged malpractice, the treatments administered by the physician, the frequency of the visits, and any other particular circumstance that would make it more equitable to commence the statute either at the termination of the treatment or at the termination of the relationship.

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67. 25 Ohio St. 2d at 167-68, 267 N.E.2d at 421.

68. *See* Gillette v. Tucker, 67 Ohio St. 106, 126-27, 65 N.E. 865, 870 (1902).

2. *Date of Termination of Relationship*

A second area of confusion concerns the exact termination date of the medical relationship. Is it measured from the date of the last office visit, phone call, or even refill of a prescription? In *Pump v. Fox*[69] a court of appeals held that if reasonable minds could differ on the termination date, the issue of fact must be submitted to the jury for determination. But the court laid down no guidelines for the jury to consider.[70] In *Millbaugh v. Gilmore*[71] the supreme court gave some guidance on this matter. The plaintiff failed to show up at a scheduled appointment and never saw or contacted the physician thereafter. The court found that reasonable minds could not disagree that, *at the latest*, the termination date was the date of the missed appointment. The fact that the plaintiff continued to take medicine prescribed by the doctor for a full year after the missed appointment did not extend the date of termination when the pills were taken without the physician's knowledge. The court said: "The taking of the medicine in such an unsupervised manner neither afforded Dr. Gilmore an opportunity to correct any errors on his part, nor provided a basis for the full treatment contemplated in a physician-patient relationship."[72]

When termination of the treatment and termination of the relationship coincide and the only problem involves the exact date of the termination, a two-step analysis follows from *Millbaugh*. First, on what date did the doctor have the final opportunity to correct his error? Second, when did the treatment specifically prescribed by the physician end? In most instances the answer to both questions will lead to the same date, since a physician generally reviews the patient's progress at the completion of treatment. If different dates result from these questions, the later date will probably mark the termination of the relationship. This would follow from the court's intimation in *Gilmore* that if the patient had taken the pills under the doctor's orders, the termination date would have been the final date of the taking of prescribed pills.[73] The court did not expressly so hold, however, and a contrary holding could result.

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69. 113 Ohio App. 150, 177 N.E.2d 520 (1961).

70. In *Pump v. Fox* the plaintiff's action for malpractice was commenced on June 9, 1958. It was uncontroverted that the defendant-doctor had not rendered medical, surgical, or physical treatment after August 1, 1956. However, the plaintiff had continued to consult with the defendant-doctor about her postoperative difficulty. The defendant and plaintiff used these consultations to discuss the treatments proposed by other physicians. The discussions centered, however, around the defendant's obligation to reimburse the plaintiff for these subsequent expenses, which the plaintiff claimed were necessitated by the defendant's alleged act of malpractice in his performance of a prior operation. The court held that it was a jury question whether the relation of physician and patient had continued during these consultations.

71. 30 Ohio St. 2d 319, 285 N.E.2d 19 (1972).

72. *Id.* at 322, 285 N.E.2d at 21.

73. *See* Netzel v. Todd, 24 Ohio App. 219, 157 N.E. 405 (1926), in which the court found that it was for the jury to decide whether the contractual relation between surgeon and patient

D. *Summary of Pre-1975 Law*

Prior to 1975, the law attempted to balance the right of the doctor to repose and protection from stale claims against the diligent patient's right to find legal redress for the doctor's negligence. An action for malpractice was barred one year after the termination of the contractual medical relationship between physician and patient;[74] however, in the case of foreign objects carelessly left within the patient's body during surgery, the patient's cause of action accrued when the patient discovered or reasonably should have discovered the physician's negligence.[75] The court never decided whether a hospital would be given the benefit of the one-year statute of limitations when one of its salaried physicians was guilty of malpractice.[76] A spouse's cause of action for consequential damages stemming from an act of malpractice upon the spouse's mate was governed by the four year catch-all statute of limitations.[77]

The Ohio Supreme Court left vague the formulation of the contractual relationship between physician and patient, and equally strong positions can be maintained that the statute begins to run either upon the termination of the professional relationship or upon the termination of the treatment for the particular ailment. The supreme court has given only a little guidance to the lower courts in deciding the exact termination date of the contractual relationship.[78] When the termination date of the treatment is also the termination date of the professional relationship, the court measures the termination date from either the date of the doctor's final opportunity to correct his error or the date that the doctor's specifically prescribed treatment ended, the termination likely being measured from the most recent date.

existed throughout the period during which the patient was taking pills under the prescription of the surgeon.

74. Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971).

75. Melynk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972). *See* Woodgeard v. Miami Valley Hosp. Soc., 47 Ohio Misc. 43 (C.P. Montgomery Cty. 1975), in which the court refused to apply the foreign object discovery rule against a physician who failed to remove a piece of shattered glass while treating the patient's wound. The court limited *Melnyk* to cases in which the physician carelessly left a surgical instrument in the patient's body during surgery.

76. Lundberg v. Bay View Hosp., 175 Ohio St. 133, 191 N.E.2d 821 (1963). In a suit against a hospital for the negligence of its nurse under the doctrine of respondeat superior, the court held the action was governed by the two-year statute of limitations for bodily injuries, Ohio Revised Code § 2305.10, because a nurse cannot be guilty of medical malpractice. Richardson v. Doe, 176 Ohio St. 370, 199 N.E.2d 878 (1964).

77. Corpman v. Boyer, 171 Ohio St. 233, 169 N.E.2d 14 (1960).

78. Millbaugh v. Gilmore, 30 Ohio St. 2d 319, 285 N.E.2d 19 (1972).

II. OHIO'S MEDICAL MALPRACTICE STATUTE OF LIMITATIONS AFTER 1975

A. *Policy Considerations Behind the 1975 Amendment*

For twenty-five years the Ohio General Assembly ignored the supreme court's proddings to amend Ohio's medical malpractice statute of limitations. The legislature was finally shaken from its lethargy by the medical malpractice insurance crisis of the mid-1970's.[79] The crisis appeared to threaten the quality and even the availability of health care throughout the country. During this crisis the General Assembly, like many other state legislatures, passed a bill aimed at relieving the medical malpractice insurance crisis[80] that included a change in the statute of limitations.[81]

The malpractice insurance crisis added two more considerations to the malpractice statute of limitations balance. First, the rising cost

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79. *See* Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417, 1432.

80. Am. Sub. H.B. No. 682 [1975] Page's Ohio Legis. Bull. No. 3, at 175 (codified at OHIO REV. CODE ANN. §§ 1335.05, 1739.02, 2305.11, 2305.25, 2317.02, 2711.01, 2743.02, 4731.01, 4731.22, 4731.281, 2305.251, 2305.27, 2307.42, 2307.43, 2317.54, 2711.21-2711.24, 2743.43, 3929.482, 3929.71-3929.85, 4731.37 (Page Supp. 1975)).

81. OHIO REV. CODE ANN. § 2305.11 (Page Supp. 1975) reads:

(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical malpractice case that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code [provision tolling the statute of limitations for those persons under the disability of minority, unsound mind, or imprisonment], provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.

(C) A civil action for nonconsensual abortion pursuant to section 2919.12 of the Revised Code must be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim asserted in any civil action against a physician or hospital arising out of the diagnosis, care, or treatment of any person.

of medical malpractice insurance was in part caused by the insurance companies' inability to establish accurate actuarial tables.[82] One report concluded that the discovery rule and other doctrines that allowed the patient to bring a malpractice action a number of years after the negligent act helped to create the inaccurate actuarial tables.[83] Thus, there was pressure to change Ohio's termination rule and foreign object discovery rule, which allowed some patients to bring a malpractice action a number of years after the negligent act.

Second, there was a desire to reduce overall the number of malpractice suits. A short and rigid statute of limitations has the obvious effect of barring a plaintiff's claim if he is dilatory in consulting an attorney. It thus reduces the number of malpractice suits decided upon their merits. As one report showed, the statute of limitations was the most significant issue to the outcome in almost 12% of all malpractice actions.[84] Hence, it was no surprise that the malpractice insurers and the medical profession advocated an inflexible statute of limitations that would bar malpractice claims after a certain date regardless of discovery, termination date, or legal disability. The new statute's four-year outside limit reflects this concern.

B. *The Provisions of Amended Ohio Revised Code § 2305.11*

At first glance amended § 2305.11 does not appear to differ significantly from its predecessor, for malpractice actions still must be brought within one year after the cause thereof accrues.[85] Nevertheless, there are some important changes.

First, the second paragraph of § 2305.11(A) provides that if a patient who is considering bringing an action against a physician for malpractice gives written notice of that intention to the physician within the one-year statutory period, then an action against that physician will be timely if it is brought within 180 days after the notice was given.[86] This change has several effects. The notice may facili-

82. *See* UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 30 (1973) [hereinafter cited as MEDICAL MALPRACTICE REPORT].

83. *Id.* at 42.

84. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE APPENDIX 128 [hereinafter cited as MEDICAL MALPRACTICE APPENDIX].

85. S.B. No. 291, 110th General Assembly (1975-76), would have amended the malpractice statute of limitations to bar malpractice actions two years after the cause of action accrued. Am. Sub. H.B. No. 682 was adopted instead of S.B. No. 291.

86. Query when the notice will be deemed to have been given—upon mailing or upon receipt? Virginia's recently enacted malpractice statute of limitations makes mandatory the notification of a physician or health care provider before suit can be instituted. The notice tolls the statute of limitations when "delivered or mailed by registered or certified mail to the appropriate claimant or health care provider at his office, residence or last known address." VA. CODE § 8-919 (Cum. Supp. 1976).

tate a negotiated settlement before institution of legal proceedings. The HEW Report on Medical Malpractice recommended this notice:

> For the physician, such notice can give forewarning and possible resolution without court intervention in meritorious cases. For the patient, such notice can produce prompt settlement, when warranted, without the cost and delay of court trials. Thus such notice may result in a reduction of the number of malpractice suits brought.[87]

Although under Ohio law the notice is not a prerequisite to the filing of a complaint, the plaintiff's attorney will find it advantageous to give notice if the statute has almost run. Thus, the notice should also reduce the number of frivolous suits filed by attorneys who are presented with a questionable malpractice suit immediately before the running of the statute. Instead of hurriedly filing suit to beat the statute, the lawyer need only send notice to the doctor of his client's intention to sue. In the next 180 days the lawyer will have the chance to investigate the merits of the case. If the lawyer determines that his client's charges are without substance he can advise the client not to bring suit.[88]

The new statute also provides that it will govern an action for malpractice against a hospital. Although the legislature has defined "hospital," it is not clear just what types of cases are embraced by the phrase, "a malpractice action against a hospital." Since in Ohio a hospital cannot engage in the practice of medicine,[89] it can only be guilty of malpractice through the acts of its servants. Also, the Supreme Court of Ohio has held that a nurse's failure to meet the requisite standard of care constitutes negligence and not malpractice.[90] Thus, an action for malpractice against a hospital is probably limited to those situations in which a hospital's employee-physician commits an act of malpractice.[91] Whether a hospital will be deemed the em-

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87. MEDICAL MALPRACTICE REPORT, *supra* note 82, at 37.

88. If in the future Ohio should recognize a physician's cause of action against a lawyer or patient who brings a frivolous claim against the doctor for malpractice, *see, e.g.*, Nathan v. Berlin, unreported Illinois Circuit Court opinion, Cook County, this provision in § 2305.11(A) would bear on the issue of the lawyer's justification for bringing suit. It gives the lawyer the option and ability to investigate a questionable malpractice claim before the running of the statute. The provision would tend to strip the lawyer of the defense to a counter suit that he was forced to bring the suit before the running of the statute of limitations and did not have the time to substantiate the story of his client.

89. OP. OHIO ATT'Y GEN. No. 3197 (1962); OP. OHIO ATT'Y GEN. No. 3031 (1962); OP. OHIO ATT'Y GEN. No. 1751 (1952).

90. Richardson v. Doe, 176 Ohio St. 370, 199 N.E.2d 878 (1964), held that a nurse's acts of negligence were governed by Ohio Revised Code § 2305.10, the statute of limitations for bodily injury.

91. A footnote in Amer v. Akron City Hosp., 47 Ohio St. 2d 85, 87 n.1, 351 N.E.2d 479, 481 n.1 (1976), appears to substantiate this position. The footnote reads in part:

> [I]t is to be noted that this court has not judicially determined whether a hospital, liable under the doctrine of respondeat superior by reason of acts of a physician-employee, has the benefit of the one-year limitation in R.C. 2305.11, as does the physician-employee. . . . In Lundberg v. Bay View Hospital, although the lower

ployer of the physician hinges on all of the facts of the particular case; however, when the hospital hires the physician, pays him a salary, and directs him to perform routine hospital medical services, it is likely that the master-servant relationship will be found.[92]

C. *The Probable Effect of § 2305.11(B)*

Perhaps the most significant change in the malpractice statute of limitations involves § 2305.11(B), which begins: "In no event shall any medical claim against a physician or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred."[93] This provision appears to set an absolute outer limit of four years beyond which no action for malpractice may be brought. There is little doubt that the legislature was persuaded by the medical malpractice insurers' and the medical profession's argument that an absolute cut-off date for malpractice actions was necessary to develop sound actuarial tables and to prevent stale claims, particularly claims involving acts of malpractice upon minors. Despite the mandatory language of the four-year limitation, its relationship to certain tolling statutes, the termination rule, and the foreign object discovery rule is not altogether clear. The Ohio Supreme Court has also indicated that subsection (B) will have ramifications in actions not directly governed by § 2305.11, but which are associated with an act of malpractice.[94]

1. *Effect of § 2305.11(B) upon Legal Disabilities*

The legislature clearly intended the four-year bar of § 2305.11(B) to apply to the claims of individuals under the legal disability of minority, unsound mind, or imprisonment. The second sentence in § 2305.11(B) specifically states that the four-year bar applies "regardless of legal disability . . . provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice . . . ."[95] Thus, the legislature intended that persons under the disability of unsound mind or imprisonment bring their action within four years of the alleged negligent act or else be barred from maintaining an action. For minors, the legisla-

courts gave the hospital the benefit of R.C. 2305.11, this court specifically left open such question. However, in Am. Sub. H.B. No. 682 effective July 28, 1975, wherein substantial amendment was made to R.C. 2305.11, malpractice actions against hospitals are expressly included within such section. [Citations omitted].

92. Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952); Stuart Circle Hosp. Corp. v. Curry, 173 Va. 136, 3 S.E.2d 153 (1939).

93. OHIO REV. CODE ANN. § 2305.11(B) (Page Supp. 1975).

94. In a surprising development, § 2305.11(B) provided an added reason for barring a husband's cause of action for consequential damages stemming from an act of malpractice upon his wife. *See* section II.C.4. *infra*, discussing Amer v. Akron City Hosp., 47 Ohio St. 2d 85, 351 N.E.2d 479 (1976).

95. OHIO REV. CODE ANN. § 2305.11(B) (Page Supp. 1975).

ture intended that the statute be tolled until the minor reaches his tenth birthday, at which time the minor has four years to commence suit.

The application of § 2305.11(B) to persons under a legal disability may violate the due process clauses of both the Ohio and United States Constitutions[96] because these persons may never have a full opportunity to commence and litigate their claims. Traditionally, legislatures have enacted tolling provisions in this area because of the virtual inability of legally disabled individuals to commence their action.[97] The mentally incompetent and the minor also have difficulty giving accurate information to an attorney and testifying in court.[98] Even the appointment of a guardian or representative has been found insufficient to cure all of these disadvantages and remove the disability.[99] Although Ohio law permits an imprisoned felon to sue,[100] the very fact of incarceration makes client-attorney communications and trial appearances extremely troublesome. Hence, the commencement of a civil action by an individual encumbered by any of these three legal disabilities is very difficult.

The courts are very reluctant to strike down a statute of limitations for reasons of due process.[101] When assessing the constitutionality of a statute of limitations under the due process clause, the courts ask whether the statutory time is so short that it amounts to a virtual denial of the right itself.[102] If it is, the statute is unreasonable and violative of due process. In resolving the constitutionality of § 2305.11(B) as applied to those under the legal disability of unsound mind or minority, the Ohio courts will probably have to decide whether in medical malpractice cases the rights of the legally disabled plaintiff can be adequately protected by a guardian, so that the patient will have had an opportunity to commence suit within the statutory time without significantly burdening the full litigation of the claim. For those individuals who are imprisoned, the court will have to decide whether the circumstances of prison life and regulation are so restrictive as to deny the individual the opportunity to commence suit within

96. U.S. CONST. amend. XIV, § 1; OHIO CONST. art. I § 16.

97. *See* Wolf v. United States, 10 F. Supp. 899 (S.D.N.Y. 1935).

98. *Id.*

99. *Id.*; *In re* Gress' Estate, 28 Ohio Op. 268, 40 Ohio L. Abs. 172 (P. Ct. Montgomery Cty. 1944).

100. In Neff v. Massachusetts Mutual Life Ins. Co., 158 Ohio St. 45, 107 N.E.2d 100 (1952), the court refused to recognize the doctrine of civil death which takes away all of the prisoner's civil rights. Absent a statute abrogating the imprisoned convict's right to sue, the right exists. Also, article I, § 12 of the Ohio Constitution buttresses this right as it provides that no conviction of crime shall work corruption of blood or forfeiture of estate.

101. *See* Landgraff v. Wagner, 26 Ariz. App. 49, 546 P.2d 28 (1976).

102. Owen v. Wilson, 537 S.W.2d 543, 545 (Ark. 1976). In *Owen* the court held that due process was not violated when the plaintiff did not discover that the defendant had left a surgical instrument in her abdomen within the two-year statutory time set for medical malpractice actions.

the statutory time. The resolution of these questions is beyond the scope of this Note.

2. *Effect of § 2305.11(B) on Saving Clause and Saving Statute*

Section 2305.11(B) states specifically that it overrides the tolling of the statute of limitations in cases of legal disability; however, the effect of § 2305.11(B) upon the "saving clause"[103] and the "saving statute"[104] was not set forth in the amended statute. The saving clause tolls the statute of limitations whenever the defendant conceals himself within the state or leaves the state.[105] The saving statute allows a plaintiff to recommence his case within one year from the time the plaintiff's first attempt failed for reasons other than upon the merits.[106] Thus, either the saving clause or the saving statute might authorize a malpractice action to be commenced more than four years after the negligent act or omission.

A strong argument can be made that § 2305.11(B) should prevail over both the saving clause and the saving statute. Section 2305.11(B) begins with the words "in no event shall." These words put forth a command that permits no discretion.[107] Second, in *City of Cincinnati v. Holmes*[108] the supreme court held that when there is an irreconcilable conflict between two statutes, both referring to the same subject, it is the latest expression of the legislature that is to be given full effect.

On the other side, the supreme court has stated that, in general, statutes of limitation are to be narrowly construed.[109] Since § 2305.11 (B) does not specifically state that it modifies the saving clause or the saving statute when a conflict arises, it can be argued that the legislature intended that the saving clause and the saving statute maintain full vitality. Furthermore, the saving statute is to be liberally construed, for the statute is remedial and its purpose is to allow controversies to be decided upon their merits.[110] The same argument can be made on behalf of the saving clause. Also, the problem of a

103. OHIO REV. CODE ANN. § 2305.15 (Page 1975).

104. *Id.* § 2305.19.

105. The saving clause is often employed when the plaintiff files the complaint a few days or weeks after the statutory time set for the cause of action. If it can be shown that the defendant was absent from the state for any period, even if just for a vacation, then the statute will be extended by the number of days that the defendant was absent from the state. Wetzel v. Weyant, 41 Ohio St. 2d 135, 323 N.E.2d 711 (1975). *See generally* 37 OHIO ST. L.J. 451 (1976).

106. *See generally* Note, *Pitfalls Associated With the Ohio Saving Statute*, 36 OHIO ST. L.J. 876 (1975).

107. F. MCCAFFREY, STATUTORY CONSTRUCTION: A STATEMENT AND EXPOSITION OF THE GENERAL RULES OF STATUTORY CONSTRUCTION 107 (1953).

108. 56 Ohio St. 104, 46 N.E. 514 (1897).

109. Chisnell v. Ozier Co., 140 Ohio St. 355, 44 N.E.2d 464 (1942).

110. Hershner v. Deibig, 64 Ohio App. 328, 28 N.E.2d 784 (1939).

stale claim is not presented by a case recommenced under the saving statute; since the first action was timely, the defendant had an opportunity to preserve evidence through depositions, physical examinations, and other discovery devices while the claim was still fresh. A court may also find that the equities favor the plaintiff under a situation governed by the saving clause when the defendant conceals himself. Thus, it appears that good arguments exist to resolve the conflicts either way.

3. *Effect of § 2305.11(B) on Termination Rule and Foreign Object Discovery Rule*

Section 2305.11(B) will probably have its greatest effect on the judicially developed tolling devices—the termination rule and the foreign object discovery rule. If the phrase "in no event" is interpreted to bar all malpractice claims four years after the alleged negligent act, a patient who continues to be treated by the same physician will only be given the benefit of the termination rule during the four years immediately following the alleged negligent act. Similarly, the foreign object discovery rule is useful only if the patient is fortunate enough to discover the object and commence suit within four years from the time that the doctor carelessly left the surgical instrument in the patient.

By using a theory of continuing negligence, it is possible to save Ohio's foreign object discovery rule from the four-year bar of § 2305.11(B). The court might find this a desirable result since *Melnyk v. Cleveland Clinic*[111] was premised on the theory that in these cases the major evidence cannot be stale. Section 2305.11(B) measures the four-year outer limit from the date that the "alleged act or omission constituting malpractice occurred." The use of the singular makes it appear that the legislature only contemplated malpractice actions that were predicated upon a single negligent act or omission and ignored the concept of continuing negligence as a basis for malpractice. In the recent case of *Puro v. Henry*,[112] a Connecticut superior court found that the doctor's negligent act of leaving a clamp in the patient's body was a continuing tort. Connecticut's applicable statute of limitations bars all malpractice actions "brought more than three years from the date of the act or omission complained of."[113] Even though a clamp was left in the plaintiff's body during a surgical operation in 1967, the court found that the action did not accrue until October 1972 when the plaintiff discovered the negligence. The court reasoned that the doctor's failure to warn of the dangerous condition

111. 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972).

112. 32 Conn. Super. 118, 342 A.2d 65 (1975).

113. CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1976).

was an act or omission that could continue until the patient discovered the condition.[114]

A similar interpretation of the facts underlying the *Melnyk v. Cleveland Clinic* decision would save the Ohio foreign object discovery rule and perhaps the physician-patient rule from the bar of § 2305.11(B). But notwithstanding the past tension between the legislature and the supreme court over the malpractice statute of limitations, it is doubtful that the Ohio Supreme Court will circumvent the provisions of § 2305.11(B) by adopting the continuing negligence rationale.[115] In *Amer v. Akron City Hospital* the court recognized that § 2305.11(B) represented "a recent reappraisal by the General Assembly of the policy of this state as to time limitations for commencing malpractice actions."[116] The court recognized that § 2305.11 (B) was amendatory legislation.[117] When forced to choose between two interpretations of an amendatory statute, one that would change the pre-amendment law and one that would not, the court presumes that the legislature intended to change the existing law.[118] Since adoption of the continuing negligence interpretation would lead to no change in the substantive law, it probably will not be adopted by the Ohio courts.

4. *Effect of § 2305.11(B) on Actions Stemming Indirectly from Malpractice*

It appears that § 2305.11(B) will also have some influence on the court's disposition of actions not clearly governed by § 2305.11. In *Amer v. Akron City Hospital* the court acknowledged that the plaintiff's cause of action was governed by § 2305.09(D), the four-year general statute of limitations, since his action was for consequential damages stemming from the defendant's alleged malpractice upon the

114. *See* DeLong v. Campbell, 157 Ohio St. 22, 31, 104 N.E.2d 177, 181 (1952) (Middleton, J., dissenting): "Every day that the sponge remained in the body, added elements of injury occurred. There was, in my judgment, a continuing tort and it cannot reasonably be said under these circumstances that the cause of action 'accrued' at the date of the original operation so as to start the running of the statute of limitations."

115. When the physician is guilty of consecutive affirmative acts of negligence, a court starts the statute running from the time of the final act of negligence. Gross v. Wise, 16 App. Div. 2d 682, 227 N.Y.S.2d 523 (1962). For example, when a patient receives too much radiation during a series of treatments, the cause of action accrues on the date of the last treatment, at least when that date is also the final contact between the physician and the patient. *See* Amer v. Akron City Hosp., 47 Ohio St. 2d 85, 89, 351 N.E.2d 479, 481 (1976). This is to be differentiated from the Connecticut rationale, which finds one negligent act and the events that occur after it to constitute continuing negligence.

116. 47 Ohio St. 2d 85, 91, 351 N.E.2d 479, 484 (1976).

117. *Id.*

118. Malone v. Industrial Comm., 140 Ohio St. 292, 299, 43 N.E.2d 266, 270 (1942): "When an existing statute is repealed and a new statute is enacted to include an amendment, as in this case, it is presumed that the Legislature intended to change the effect and operation of the law as to the extent of the change in the language thereof."

plaintiff's wife. The plaintiff's action was commenced within four years from the termination of his wife's professional relationship with the doctor, but more than four years after the date of the negligent act. The court refused to extend the termination rule to her husband in this situation because the husband was not a party to the implied contract between his spouse and her physician. "[A]s to [the husband] no contractual duty of continuing care is imposed upon the physician which is the base upon which the termination rule is structured."[119]

In dictum, the court buttressed this decision by citing the legislature's recent enactment of § 2305.11(B):

> Whether the amendatory legislation § 2305.11(B) was prompted in part by the holdings of this court with respect to time limitations for bringing actions for consequential damges having their origin in asserted malpractice, such legislation represents a recent reappraisal by the General Assembly of the policy of this state as to time limitations for commencing malpractice actions.[120]

While the court's reasoning in this part of the decision is unclear, it appears that the court recognized the legislature's desire to bar all actions based on malpractice four years after the alleged negligent act —even an action for consequential damages.

The court's use of § 2305.11(B) in *Amer* is troublesome since it conflicts with the court's holding in *Corpman v. Boyer*.[121] If, as held in *Corpman*, the husband's action was totally separate from an action for malpractice, how could the malpractice statute of limitations have any bearing on the disposition of the situation in *Amer*? Perhaps the court was merely saying that § 2305.11(B) was a legislative signal, telling the court to cease expanding the exceptions to the running of the statute of limitations when the action was based directly or indirectly upon an act of malpractice.[122]

5. *Possible Retroactive Effect of the Amended Statute*

Finally, the application of the amended statute to malpractice actions that originated in a negligent act committed prior to the effective date of the amended statute may also be problematic. First, the law surrounding the retroactive application of amended statutes is not well defined.[123] Second, the retroactive application of an

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119. 47 Ohio St. 2d at 89, 351 N.E.2d at 483.

120. *Id.* at 91, 351 N.E.2d at 484.

121. 171 Ohio St. 233, 169 N.E.2d 14 (1960).

122. This same reluctance to expand the exceptions to the statute of limitations accounts in part for the holding in Woodgeard v. Miami Valley Hosp. Soc., 47 Ohio Misc. 43 (C.P. Montgomery Cty. 1975). The court refused to extend the foreign object discovery rule to a situation in which the defendant physician closed a wound and failed to remove a piece of shattered glass. Instead, the court limited *Melnyk* to situations in which forceps, instruments, and other operating paraphernalia were left in the patient's body.

123. *See* Gregory v. Flowers, 32 Ohio St. 2d 48, 60, 290 N.E.2d 181, 189 (1972) (Leach,

amended statute to a malpractice action is made even more confusing by the frequent time lag between the commission of the negligent act and the initial running of the statute of limitations. Situations may arise for which it is difficult to determine whether the pre-1975 malpractice statute of limitations or the amended statute governs.

Consider, for example, the following hypothetical. On May 5, 1973, *A* underwent an appendectomy at which time Doctor *B* negligently left a clamp in *A*'s body. Pursuant to the law in effect in 1973, *A* could timely commence a malpractice suit against *B* within one year from the time *A* discovered or reasonably should have discovered B's negligence; the statute was tolled until *A*'s discovery.[124] On July 28, 1975, the effective date of the amended malpractice statute of limitations, the statute provided that all malpractice suits would be barred four years after the date of the negligent act.[125] Suppose *A* discovers *B*'s negligence on May 5, 1978, and brings suit against *B* on June 5, 1978. If the statute in effect in 1973 governs, *A*'s action is timely since it was commenced within a year of discovery. If the amended statute governs, then *A*'s action is barred since it was not commenced within four years of the negligent act. The effect of Ohio Revised Code § 2305.11(B) upon a cause of action having its origin in a negligent act prior to the effective date of the amended statute is a very complicated problem, which cannot be answered until the Ohio Supreme Court resolves certain key issues. A three-part analysis may help to set forth those key issues in this area.

First, did the legislature intend that the 1975 amendment be applied retroactively? Prior to 1972, Ohio Revised Code § 1.20[126] governed the effect of an amended statute upon a cause of action that accrued prior to the amended statute's effective date. Unless the action had been commenced prior to the amendment, the amended statute was applied retroactively to all causes of action, even those that accrued prior to the amendment's effective date.[127] But § 1.20 was repealed in 1972 and replaced by Ohio Revised Code § 1.58, which states in part:

> (A) The . . . amendment of a statute does not . . .
> (1) Affect the prior operation of the statute or any action taken thereunder;
> (2) Affect any validation, cure, right, privilege, obligation or liability previously acquired, accrued, accorded, or incurred thereunder . . . .[128]

J., concurring); Note, *The Retroactive Application of Ohio Statutes*, 30 OHIO ST. L.J. 401, 401 (1969).

124. Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972).

125. OHIO REV. CODE ANN. § 2305.11(B) (Page Supp. 1975).

126. Act of February 19, 1866, 63 Ohio Laws 22 (repealed 1972).

127. Smith v. New York Cent. R.R., 122 Ohio St. 44 (1930); Elder v. Shoffstall, 90 Ohio St. 265, 19 N.E. 437 (1914).

128. OHIO REV. CODE ANN. § 1.58 (Page Supp. 1975).

Thus, under § 1.58 the legislature will be deemed not to have intended by its amendment of § 2305.11 to affect any right of privilege acquired prior to the effective date of the amendment.

Second, not only does § 1.58 forbid the retroactive application of an amended statute to extinguish a right or privilege, but section 28, article II of the Ohio Constitution states: "The General Assembly shall have no power to pass retroactive laws . . . ." The ban against retroactive legislation has traditionally been interpreted to apply to substantive laws as opposed to procedural or remedial laws.[129] In *Gregory v. Flowers* the supreme court recognized that the line between procedural and substantive laws was difficult to draw.[130] Speaking of statutes of limitations, the court stated that, "while such statutes are procedural in the sense that they regulate the time within which litigation must be commenced, they also smack of substance because they operate to extinguish a party's accrued right to seek recovery."[131]

In *Flowers* the plaintiff had been injured at work and was seeking a modification of his workmen's compensation award. Between the time the plaintiff's cause of action accrued and his action was commenced, the legislature shortened the applicable statute of limitations. Under prior law the plaintiff's action was timely, but under the amended law it was barred. The court held: "When the retroactive application of a statute of limitation operates to destroy an accrued substantive right, such application conflicts with Section 28, Article II of the Ohio Constitution."[132] The court found that the plaintiff's statutory right to modify his workmen's compensation award was an "accrued substantive right." Whether this status inures to any cause of action that is retroactively barred by an amended statute of limitations remains unclear.

Third, even if it is found that a claim for malpractice is an accrued substantive right, it is not clear whether the right exists at the time of the negligent act or at the time the cause of action accrues, that is, when the patient discovered or reasonably should have discovered the doctor's negligence. In the hypothetical, was any substantive right acquired by *A* before the effective date of the amended statute when *A* had not yet discovered the doctor's negligence? Theoretically, *A* had a right to sue from the date of the negligent occurrence. It can be argued that under § 1.58 and article II, § 28 of the Ohio Constitution, *A*'s right cannot be abrogated by an amendatory statute.[133] On the

129. *E.g.*, Gregory v. Flowers, 32 Ohio St. 2d 48, 53, 290 N.E.2d 181, 186 (1972).

130. *Id.* at 55, 290 N.E.2d at 181.

131. *Id.*

132. *Id.* at 48, 290 N.E.2d at 181 (syllabus 3).

133. The concurring opinion of Justice Leach expressed the view that the legislature can modify the statute of limitations and shorten the time in which a plaintiff's cause of action must be brought; however, there must be a reasonable time after the amendment of the statute during which the cause of action will be timely.

other hand, it can be asserted that since *A*'s right is conditioned upon the discovery of the foreign object, his right to sue is too speculative to come within the purview of these provisions.

III. THE DISCOVERY RULE: AN ANSWER TO THE UNFAIRNESS AND RIDDLE OF OHIO'S MEDICAL MALPRACTICE STATUTE OF LIMTATIONS

The Ohio General Assembly's amendment to the statute of limitations for medical malpractice has made the time ripe for the judicial adoption of the discovery rule. The Supreme Court of Ohio previously refused to adopt a general discovery rule because it felt that the adoption of the rule involved a substantial change in the statute of limitations and this change belonged in the domain of the legislature.[134] The recent enactment of Ohio Revised Code § 2305.11(B), placing an outer limit of four years upon all actions for malpractice, represents the legislature's most recent resolution of the rights of the patient, physician, and the medical malpractice insurer.

Nevertheless, it should be recognized that the legislature retained the language in § 2305.11(A) that an action for malpractice "shall be brought within one year after the cause thereof accrued."[135] It may be argued that since the legislature did not change the language of this portion of the statute, the legislature impliedly approved the court's prior interpretation of the word "accrued," thus approving the termination rule and foreign object discovery rule. This hypothesis is nothing more than guesswork. If the legislature actually wanted to lock the interpretation of "accrued" to the termination rule and foreign object discovery rule, the legislature could have codified these interpretations into the statute itself, as has been done by many state legislatures.[136] In the absence of such a codification these judicial interpretations of the statute are subject to judicial change.

Thus, within the four-year limit of § 2305.11(B), it is still within the province of the Ohio Supreme Court to interpret the word "accrued" in a manner that will commence the statute of limitations in a fair, consistent, and unambiguous manner for all Ohio plaintiffs.[137]

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134. Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971); DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952). *See* section I.B. *supra.*

135. OHIO REV. CODE ANN. § 2305.11(A) (Page Supp. 1975).

136. The termination rule has been codified in the following states: MICH. COMP. LAWS ANN. § 600.5805 (1968); N.Y. CIV. PRAC. LAW, § 214-a (McKinney Supp. 1976). The foreign object discovery rule has been codified in the following states: H B. 2001, § 5.1, Arizona Leg. Service No. 1, at 13-14 (codified at ARIZ. REV. STAT. § 12-564); CAL. CIV. PROC. CODE § 340.5 (West Supp. 1976); GA. CODE ANN. §§ 3-1101 to 3-1105 (Supp. 1976); IDAHO CODE § 5-219 (Supp. 1976); ILL. ANN. STAT., ch. 83 § 22.1 (Smith-Hurd Supp. 1976); IOWA CODE ANN. § 614.1 (West Supp. 1976); N.Y. CIV. PRAC. LAW § 214-a (McKinney SUPP. 1976); R.I. GEN. LAWS § 9-1-14 (Supp. 1975); TENN. CODE ANN. § 23-3415(a) (Supp. 1975).

137. That the court would like to do so seems apparent. *See* Melnyk v. Cleveland Clinic,

The discovery rule does just that. By adoption of the discovery rule the plaintiff's cause of action would be barred one year after the plaintiff discovered or reasonably should have discovered the defendant's negligence, but in no event could the plaintiff maintain his action four years after the negligent act.

Four reasons call for the adoption of the discovery rule, subject to the four-year limit of § 2305.11(B): the ambiguities of the present termination rule; the frequent inability of the termination rule to mitigate the harshness of the one-year statute when the doctor's act of malpractice takes longer to become ascertainable to the plaintiff; the court's ability to adopt the discovery rule without frustrating the most recent balancing of interests by the Ohio General Assembly; and the weight of authority in other states favoring the adoption of the discovery rule within specified outer limits.

First, because the court's formulation of the termination rule is ambiguous, it is not clear whether the statute commences from the date of the last treatment for the particular injury or condition or from the date of the last contact between the physician and patient.[138] The difficulty in determining the exact termination date also militates against the continued application of the termination rule.[139] The discovery rule does not involve these complications. It simply starts the running of the statute from the time the plaintiff discovered or reasonably should have discovered the doctor's negligence. When controversy arises under the discovery rule concerning the reasonable date of discovery, the jury simply reviews all relevant factors, including the nature of the patient's physical symptoms and the treatments and advice of the defendant-physician.[140]

Second, the Ohio Supreme Court has acknowledged the basic unfairness of the termination rule when it is applied to patients whose malpractice injuries take a longer period to develop.[141] This problem is most pronounced in malpractice actions based on a negligent surgical operation. The surgeon is generally not the patient's family physician and contact between the patient and surgeon is often very limited.[142] In this situation the termination rule does not extend the running of the one-year statute of limitations for any appreciable length of time from the date of the negligent act. This has

32 Ohio St. 2d 198, 290 N.E.2d 916 (1972); Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971).

138. *See* section II.C.1. *supra.*

139. *See* section II.C.2. *supra*

140. *See* Rawlings v. Harris, 265 Cal. App. 2d 452, 71 Cal. Rptr. 288 (1968).

141. Wyler v. Tripi, 25 Ohio St. 2d 164, 168, 267 N.E.2d 419, 421 (1971).

142. *See generally* D. MECHANIC, THE GROWTH OF BUREAUCRATIC MEDICINE (1976); Mechanic, *The Changing Structure of Medical Practice*, 32 J. LAW & CONT. PROB. 707 (1967); Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma*, 1975 DUKE L.J. 1179, 1182 (1975).

the effect of commencing the malpractice statute of limitations on the day of the negligent act or shortly thereafter, and forces the plaintiff to discover the surgeon's negligence within a year of the operation or else be barred from legal redress. If the malpractice injury takes a long period to develop, it would be virtually impossible for these patients to discover and commence their suit within a year of the operation.

In *Wyler v. Tripi* the Ohio Supreme Court impliedly recognized the "unconscionable" harshness of this result when the court criticized the traditional interpretation of the world "accrued" in tort actions, which commenced the statute at the time of the negligent act.[143] What the court failed to note was the "unconscionability" of the termination rule when the termination date is also the date of the physician's negligent act or omission, or a date shortly thereafter. Unfortunately a significant number of Ohio plaintiffs are faced with this problem because the majority of all malpractice actions arise from surgical operations.[144]

The discovery rule would remove the burden from those Ohio plaintiffs whose injuries required a longer period of time to become ascertainable. For this plaintiff, the statute would begin to run when the plaintiff discovered or reasonably should have discovered the doctor's act of negligence, but in no event would the plaintiff be allowed to bring his action four years after the date of the negligent act.[145] The timeliness of a plaintiff's cause of action would no longer hinge on the fortuities of continuous treatment and the physician-patient termination date. Thus, the judiciary's adoption of the discovery rule would also be a more uniform method of applying the statute of limitations to malpractice actions.

Third, judicial adoption of the discovery rule would not frustrate the will of the legislature. With the enactment of § 2305.11(B), the plaintiff is barred from maintaining his action four years after the negligent act or omission, regardless of the date of discovery. Because of § 2305.11(B), the legislature's concern for protecting defendants from stale claims and its desire to provide medical insurers with actuarial certainty would not be frustrated by this move. Thus, the provisions of § 2305.11(B), particularly its four year outside limit, safeguard the legislature's balancing of the interests behind the statute

143. 25 Ohio St. at 168, 267 N.E.2d at 421.

144. Statistics show that 57.2% of all malpractice claims stemmed from surgical operations. MEDICAL MALPRACTICE REPORT, *supra* note 82, at 10.

145. A California study showed that 90.8% of all malpractice claims were discovered within four years of the negligent act. Comment, *A Four Year Statute of Limitation for Medical Malpractice: Will the Plaintiff's Case Be Barred?* 2 PAC. L.J. 663, 672 nn.62-66 (1971). Thus, if Ohio adopted a discovery rule with a four-year limit, the overwhelming majority of injured plaintiffs would have an opportunity to find redress in the legal system.

of limitations. They also make the change to the discovery rule less severe.

Fourth, the court's adoption of the discovery rule would be in line with the weight of authority throughout the country. The discovery rule has finally emerged as the majority rule.[146] But perhaps the best indication of the discovery rule's ultimate fairness is shown by its survival in the overwhelming number of states that have recently amended their medical malpractice statutes of limitation in response to the medical malpractice insurance crisis. In the last three years, twenty-five other state legislatures have amended their malpractice statutes of limitation.[147] Like Ohio, these legislatures have had to add and weigh the medical malpractice insurance crisis into the statute of limitations balance.

None of the legislatures overruled their highest court's adoption of the discovery rule. Two-thirds of these states either affirmed their highest state court's prior decision to adopt the discovery rule or adopted the discovery rule at that time.[148] The majority of these legis-

146. Twelve states adopted some form of the discovery rule prior to 1973 and have not amended their statute of limitations since 1973. COL. REV. STAT. § 13-80-105 (1971) (two years from discovery, but within six years of negligent act); CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1976) (two years from discovery, but within three years of negligent act); DEL. CODE tit. 10, § 8119 (1975) (two years from date injury sustained) (*see* Layton v. Allen, 246 A.2d 794 (Del. 1968) in which the supreme court did not adopt the discovery rule as such, but ruled that an injury is sustained under § 8119 when the harmful effect first manifests itself and becomes physicially ascertainable); KY. REV. STAT. § 413.140 (1970) (*see* Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970), in which discovery rule was judicially adopted); NEB. REV. STAT. § 25-222 (1975) (two years from discovery, but within ten years of negligent act); N.J. REV. STAT. § 24-14-2 (1937) (*see* Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563, (1973) in which discovery rule was judicially adopted); OKLA. STAT. tit 12, § 95 (1971) (*see* Lewis v. Owen, 395 F.2d 537 (10th Cir. 1968) in which federal court under *Erie* doctrine determined that Oklahoma courts followed the discovery rule generally; Seitz v. Jones, 370 P.2d 300 (Okla. 1962), in which court adopted the discovery rule for foreign objects); PA. STAT. ANN. tit. 12, § 34 (Purdon Supp. 1971) (*see* Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959) in which discovery rule was judicially adopted); R.I. GEN LAWS § 9-1-14 (Supp. 1975) (*see* Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968), in which discovery rule was judicially adopted); TEX. CIV. CODE ANN. tit. 91, § 5526 (1958) (*see* Hays v. Hall, 488 S.W.2d 412 (Tex. Sup. 1973) and Grady v. Faykus, 530 S.W.2d 151 (Tex. Civ. App. 1975), in which discovery rule was judicially adopted); UTAH CODE ANN. § 78-12-28 (Smith Supp. 1975) (two years from discovery, but within four years of negligent act); W. VA. CODE § 55-2-12 (1966) (*see* Bishop v. Bryne, 265 F. Supp. 460 (S.D. W. Va. 1967), in which federal court under *Erie* doctrine determined that West Virginia courts followed the discovery rule generally; Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965), in which the court adopted discovery rule for foreign objects). For a list of those states that have amended their malpractice statute of limitations since 1973 and follow the discovery rule, see note 148 *infra*.

147. *See* notes 148 and 150 *infra*.

148. Seventeen states have amended their medical malpractice statute of limitations since 1973 and follow the discovery rule. ALA. CODE tit. 7, § 25(1) (Supp. 1976) (six months after discovery but within four years of negligent act); CAL. CIV. PROC. CODE § 340.5 (West Supp. 1976) (one year from discovery, but within three years of negligent act); FLA. STAT. ANN. § 95.11 (West Supp. 1976) (two years from discovery, but within four years of negligent act); HAW. REV. STAT. § 657-7.3 (1975) (two years from discovery, but within six years of negligent act); ILL. ANN. STAT. ch. 83, § 22.1 (Smith-Hurd Supp. 1976) (two years from discovery, but within five years of negligent act); IOWA CODE ANN. § 614.1 (West Supp. 1976) (two years from discovery, but within six years of negligent act); LA. REV. STAT. ANN. § 5628 (West

latures, however, placed outer limits on the discovery rule, facilitating actuarial soundness for malpractice insurers and protecting defendants from extremely stale claims.[149] Of the eight legislatures that did not adopt the discovery rule, none were in states where the highest state court had previously adopted the rule.[150]

It is interesting to note that of these eight states, all have an amended statutory limit of two years or longer.[151] Even among those states whose courts have not adopted a discovery rule or whose legislatures have not recently amended the statute, their statutes of limitation are two years or longer.[152] Therefore, from the plaintiff's per-

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Supp. 1976) (one year from discovery, but within three years of negligent act); MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (Supp. 1976) (three years from discovery, but within five years of negligent act); MICH. COMP. LAWS ANN. § 600.5838 (Supp. 1976) (six months from discovery or two years after termination of treatment); MISS. CODE ANN. § 15-1-36 (Supp. 1976) (two years from discovery); MONT. REV. CODES ANN. § 93-2624 (Supp. 1975) (three years from discovery, but within five years of negligent act); NEV. REV. STAT. § 11.400 (1975) (two years from discovery but within four years of negligent act); N.D. CENT. CODE § 28-01-18(3) (1974) (two years from discovery, but within six years of negligent act); OR. REV. STAT. § 12.110 (1975) (two years from discovery, but within five years of negligent act); TENN. CODE ANN. § 23-3415(a) (Supp. 1976) (one year from discovery, but within three years of negligent act); VT. STAT. ANN., tit. 12, § 512 (Supp. 1976) (three years from discovery); Sub. H.B. No. 1470, ch. 56, § 1, [1976] Wash. Leg. Service No. 1, at 176 (codified at WASH. REV. CODE § 4.16.350) (one year from discovery, but within eight years of negligent act).

149. Utah's medical malpractice statute of limitation exemplifies this type of statute. It reads in part:

> No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence. . . .

UTAH CODE ANN. § 78-14-4 (Interim Supp. 1976).

150. The Arizona legislature did overrule an intermediate appellate court's adoption of the discovery rule. *Compare* Mayer v. Good Samaritan Hosp., 14 Ariz. App. 248, 482 P.2d 497 (1971) *with* Ariz. Rev. Stat. § 12-564 (West Supp. 1977).

Eight states have amended their medical malpractice statute of limitations since 1973 and do not follow the discovery rule. H.B. 2001, § 5.1 [1976] West's Leg. Service No. 1, at 13-14, (codified at ARIZ. REV. STAT. § 12-564) (three years from date of injury); GA. CODE ANN. §§ 3-1101 to 3-1103 (Supp. 1976) (two years from wrongful act); IND. CODE ANN. § 16-9.5-3-1 (Burns Supp. 1975) (two years from wrongful act); MASS. ANN. LAWS ch. 231, § 60D (Michie Law Co-op Supp. 1976) (three years after cause of action accrues), N.M. STAT. ANN. § 58-33-18 (Interim Supp. 1976) (three years from wrongful act); N.Y. CIV. PRAC. LAW § 214-a (McKinney Supp. 1976) (two and one half years after wrongful act or termination of treatment); S.D. COMPILED LAWS ANN. § 15-2-14.1 (Supp. 1976) (three years from negligent act); VA. CODE § 8-24 (Cum. Supp. 1976) (two years after cause of action accrues).

151. *See* Note 150, *supra.*

152. Twelve states have not amended their medical malpractice statute of limitations since 1973 and have a statute of two years duration or longer. ALASKA STAT. § 09.10.070 (1962) (two years from negligent act); ARK. STAT. ANN. § 37-205 (1962) (two years from wrongful act); IDAHO CODE § 5-219 (Supp. 1976) (two years from act or omission); KAN. STAT. § 60-513 (Supp. 1975) (two years from time cause of action accrues); ME. REV. STAT. tit. 585.14 § 753 (1965) (two years from time cause of action accrues), MINN. STAT. § 541.07 (1945) (two years from time cause of action accrues); MO. REV. STAT. § 516.140 (1969) (two years from act of neglect complained of); N.H. REV. STAT. ANN. § 508: 4 (Supp. 1973) (six years from time cause of action accrues); N.C. GEN. STAT. § 1-52 (Supp. 1975) (three years from time cause of action accrues); S.C. CODE § 10-142 (1952) (six years from time cause of action accrues); WIS. STAT. §§ 330.19(5), 893.19 (1973) (must give notice of injury within two years of negligent act); WY. STAT. § 1-18 (1959) (four years from time cause of action accrues).

spective, Ohio undoubtedly has one of the harshest malpractice statutes of limitation in the country.

The discovery rule has emerged as the majority rule in this country largely through state supreme courts' interpretation of their statutes.[153] These courts have taken the initial step by finding that a cause of action for malpractice "accrued" when the plaintiff discovered or reasonably should have discovered the doctor's act of malpractice. The Ohio Supreme Court's adoption of the foreign object discovery rule in *Melnyk* shows that it, too, has been willing to take action in this area. It is well within the Ohio Supreme Court's authority to adopt the discovery rule and add Ohio to the growing list of states that subscribe to this more equitable rule.

IV. CONCLUSION

The medical malpractice insurance crisis added two new elements into the balance underlying the medical malpractice statute of limitations: the need for actuarial certainty and the desire for a reduction in the overall number of malpractice suits decided on their merits. The amended statute reflects these concerns in § 2305.11(B), which cuts off all medical malpractice claims four years after the doctor's negligent act or omission. This cut-off will most probably occur regardless of the tolling effects of the termination rule and the foreign object discovery rule. It may even occur regardless of the tolling effects of the saving clause and saving statute. The retroactive application of the amended statute probably hinges upon whether the Ohio Supreme Court finds that the amendment extinguishes an accrued substantive right.

The amended statute did not stamp its approval upon the court's prior interpretation of the word "accrued" in § 2305.11(A). By not codifying the termination rule and the foreign object discovery rule, the legislature left the word "accrued" open to interpretation. This Note has urged that, subject to the four-year limit of § 2305.11(B), the Ohio Supreme Court should adopt the discovery rule, *i.e.*, that a cause of action for malpractice must be brought one year after the plaintiff discovered or reasonably should have discovered the physician's negligent act. The court's adoption of the discovery rule would rid Ohio law of the inequitable and ambiguous termination rule. Be-

153. Stafford v. Schultz, 42 Cal. 2d 767, 270 P.2d 1 (1954); Yoshizaki v. Hilo Hosp., 433 P.2d 220 (Haw. 1967); Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970); Springer v. Aetna Cas. & Sur. Co., 169 So. 2d 171 (La. App. 1964); Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785, (1963); Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819 (1967); Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968); Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973); Berry v. Branner, 245 Ore. 307, 421 P.2d 996 (1966); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Wilkinson v. Harrington, 243 A.2d 745 (R.I. 1968); Grady v. Faykus, 530 S.W.2d 151 (Tex. Civ. App. 1975).

cause the absolute four-year limitation of § 2305.11(B) safeguards the legislature's balancing of interests between patient, doctor, and malpractice insurer, the adoption of the discovery rule would not frustrate the will of the legislature. Furthermore, the discovery rule is in line with the weight of authority in this country.

The time is ripe for the adoption of the discovery rule. As Justice Celebrezze recently wrote in his dissent in *Amer v. Akron City Hospital*: "How can anyone be precluded from asserting a claim by a statute of limitations which expires before the discovery of the injury? How can anyone charged with the responsibility of administering justice allow such an absurdity?"[154] The logic of the discovery rule alone is reason enough for its adoption.

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154. Amer v. Akron City Hosp., 47 Ohio St. 2d 85, 93, 351 N.E.2d 479, 485 (1976).