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The Evolution of Illinois Tort Statutes of Limitation: Where Are We Going and Why

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THE EVOLUTION OF ILLINOIS TORT STATUTES OF LIMITATION: WHERE ARE WE GOING AND WHY?

Most jurisdictions restrict the time within which a tort cause of action may be commenced.[1] The majority of tort statutes of limitation speak in terms of triggering the running of their time period upon the "accrual" of the cause of action.[2] The traditional view is that the limitation period accrues (or commences to run) when the last act necessary to establish tort liability occurs.[3] In the usual situation, a wronged party will be aware, well before the expiration of the limitation period, that he has been injured and has a possible right of action.[4]

A problem which has come to the fore in recent years is the not uncommon occurrence of a careful and diligent plaintiff who, at the time his

1. Statutes of limitation have been part of the law of every civilized nation from time immemorial. Since each sovereignty may organize its judicial tribunals according to its own notions of policy, it has been recognized since the early days of this republic that statutes of limitation are within the sovereign power of each state to enact.

Hargraves v. Brackett Stripping Mach. Co., 317 F. Supp. 676, 682 (E.D. Tenn. 1970). Statutes of limitation appeared early in the Roman law and are the basis of the limitations found in the Continental codes. *Statute of Limitations—Medical Malpractice—Viability of the Discovery Rule as a Criterion to Determine When a Cause of Action Accrues in Medical Malpractice Actions*. TEX. REV. CIV. STAT. ANN. art. 5526, § 6 (1960), 5 ST. MARY'S L.J. 206 n.2 (1973).

2. Estep & Dyke, *Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases*, 62 MICH. L. REV. 753, 756 (1964); *see* Littel, *Comparison of the Statutes of Limitations*, 21 IND. L.J. 23 (1945); 4 AM. JUR. TRIALS *Statutes of Limitation* § 6 (1966).

3. As a general rule actual damage is the last element to occur which gives rise to tort liability. Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890, 894 (N.D. Ill. 1971). Normally a plaintiff is entitled to at least nominal damages if he proves a violation by the defendant of a technical right. Werthemier v. Glanz, 277 Ill. App. 389, 392 (1934). But a plaintiff is not entitled to any damages in a negligence case, even though he proves such a violation, unless he can prove that he has sustained some actual loss or harm. Jeffrey v. Chicago Transit Auth., 37 Ill. App. 2d 327, 336, 185 N.E.2d 384, 388-89 (1962); 2 F. HARPER & F. JAMES, TORTS § 30 (4th ed. 1956); C. MORRIS, TORTS § 1 at 48 (1953); C. MCCORMICK, DAMAGES § 22, at 88 (1935); W. PROSSER, LAW OF TORTS § 30 (4th ed. 1971) (citing Edwards v. Ely, 317 Ill. App. 599, 47 N.E.2d 344 (1943), as "clearly out of line").

In Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890 (N.D. Ill. 1971), the defendant was being sued for the negligent manufacture of a helicopter sold to the plaintiff. The court held that the last act creating liability was the crash and, consequently, the action accrued at that time. *Id.* at 893. *But see* Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975), where the court decided that *Klondike* properly stated Illinois law but improperly applied it. The court elaborated: "We believe the correct conclusion under Illinois law should have been that the plaintiff was injured, for purposes of this property damage action, when he took possession of the defectively manufactured helicopter." *Id.* at 607 n.8.

With regard to torts which arise from contractual obligations, the statute of limitations has been held to run at the time of the breach, *not* when damages ensue. Pennsylvania Co. v. Chicago, M. & St. P. Ry., 144 Ill. 197, 33 N.E. 415 (1893); Aetna Life & Cas. Co. v. Sal E. Lobianco & Son Co., 43 Ill. App. 3d 765, 357 N.E.2d 621 (1976); H. WOOD, LIMITATION OF ACTIONS § 177 (1882) [hereinafter cited as WOOD].

4. Williams, *Limitation Periods on Personal Injury Claims*, 48 NOTRE DAME LAW. 881, 882 (1973).

cause of action accrues, is unaware that he has suffered a legally redressable injury and remains unaware of the injury throughout the running of the limitation period.[5] Traditionally, the running of the time period was not tolled by the victim's ignorance concerning his cause of action.[6] Once the time period ran the statute operated to deprive such a person of his legal claim even before he was aware of it.[7] For all practical purposes this was a right without a remedy.[8]

A recent judicial invention created by the courts to alleviate this problem is descriptively referred to as the "discovery rule."[9] Under the discovery rule, a cause of action does not accrue and the limitation period begin to run until the wronged party learns of his injury or by the exercise of reasonable care should have learned of it.[10]

The Illinois judiciary has been a leader in the application of the discovery rule to a wide variety of tort statutes of limitation.[11] This leadership, however, has lacked a substantive base. The Illinois Supreme Court has been content to leave to the appellate courts the task of defining the contours of the discovery rule and the status that the rule should assume in Illinois.[12]

5. *Id.*; *see* Petersen, *The Undiscovered Cause of Action and the Statute of Limitations: A Right Without a Remedy in Illinois*, 58 ILL. B.J. 644, 645 (1970); Estep & Van Dyke, *Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases*, 62 MICH. L. REV. 753, 758-59 (1964).

6. Lancaster v. Springer, 239 Ill. 472, 481, 88 N.E. 272, 275 (1909); Board of Educ. v. Perkins & Will Partnership, 119 Ill. App. 2d 196, 225 N.E.2d 496 (1970); Wilson v. White Motor Corp., 118 Ill. App. 2d 436, 254 N.E. 2d 277 (1969); Sabath v. Morris Handler Co., 102 Ill. App. 2d 218, 243 N.E.2d 723 (1968); Board of Educ. v. Joseph J. Duffy Co., 97 Ill. App. 2d 158, 240 N.E.2d 5 (1968); Simoniz Co. v. J. Emil Anderson & Sons, Inc., 81 Ill. App. 2d 428, 225 N.E.2d 161 (1967).

7. *See* cases cited at note 6 *supra*.

8. Petersen, *The Undiscovered Cause of Action and the Statute of Limitations: A Right Without a remedy in Illinois*, 58 ILL. B.J. 644, 645 (1970). The reference is to Article I, section 12 of the Illinois Constitution of 1970 which provides in part: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation." The argument has been raised and rejected that in such situations the statute of limitations operates to deprive the plaintiff of a property right without due process of law. Toth v. Lenk, — Ind. App. —, 330 N.E.2d 336 (1975) (concurring opinion). *See* 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 760-65 (8th ed. 1927).

9. *See* Gates Rubber Co. v. USM Corp., 508 F.2d 603, 606 (7th Cir. 1975).

10. *Id.* One writer lists Taylor v. Rowland, 26 Tex. 293 (1862), as the first American case suggesting the time of discovery rule. Comment, *The Time of Discovery Rule and the Qualified Privilege Defense for Credit Reporting Agencies in Illinois After World of Fashion v. Dun & Bradstreet, Inc.*, 10 J. MAR. J. PRAC. & PROC. 359, 372 n.47 (1977). The rule first appeared in the medical malpractice area in Hahn v. Claybrook, 130 Md. 179, 100 A. 83 (1917). The *Hahn* case was later misconstrued in Pickett v. Aglinsky, 110 F.2d 628, 630 (4th Cir. 1940). Comment, *Limitations in Professional Malpractice Actions*, 28 MD. L. REV. 47, 61 n.102 (1968). The discovery rule was not considered a potent legal theory until it was adopted by the California Supreme Court in Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936).

11. *See* Scott, *For Whom the Time Tolls—Time of Discovery and the Statute of Limitations*, 64 ILL. B.J. 326 (1976).

12. In the initial cases involving the discovery rule the Illinois Supreme Court is surprisingly silent with regard to *any* directions for the use of the rule. The court focused its decisions

This development has taken an extremely narrow case-by-case approach and, consequently, has provided little predictability as to future applications of the rule. The principal questions that had been left unanswered were whether the discovery rule would be limited to any particular types of actions (*e.g.*, personal injury as opposed to property damage actions[13] and professional malpractice as opposed to ordinary negligence actions[14]) or whether the discovery rule would be limited to any particular statutes of limitation (*e.g.*, those which run from when the cause of action *accrued* in comparison to the wrongful death statute which runs from the *death* of some person[15] and statutes with short limitation periods as opposed to those with relatively long ones[16]).

The purpose of this article is to define the status of the discovery rule in Illinois, to evaluate the approach taken by the courts in applying the discovery rule to a particular case, and to consider the merits of the bifurcated statute of limitation which allows a person to commence suit a certain number of years from the time he discovered his injury but also sets an outside limit (computed from the date of injury) beyond which no action may be brought.

HISTORICAL DEVELOPMENT OF THE DISCOVERY RULE

Historically, the only time limitation which governed the bringing of a common law tort cause of action was the maxim *actio personalis moritur cum persona*.[17] As long as both the plaintiff and the defendant were alive, the cause of action could be brought and remedies obtained.[18] A prospective

solely on the facts before it. Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969); Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E.2d 450 (1970).

13. "The very strong policy in favor of adjudication of claims on the merits is no weaker in cases involving injury to real property than in cases involving personal injuries." Basque v. Yuk Lin Liau, 50 Haw. 397, 399, 441 P.2d 636, 637 (1968).

14. In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client.

Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 187-88, 491 P.2d 421, 428, 98 Cal. Rptr. 837, 844 (1971) (footnote omitted).

15. The first case to apply the discovery rule to a non-"cause of action accrued" statute is Praznik v. Sport Aero, Inc., 42 Ill. App. 3d 330, 355 N.E.2d 686 (1976).

16. "A short statute provides a stronger case for a discovery rule approach than a long one. For the probability of injustice resulting from the failure to discover meritorious claims unquestionably diminishes as the statutory period increases." Gates Rubber Co. v. USM Corp., 508 F.2d 603, 612-13 (7th Cir. 1975).

17. "A personal right of action dies with the person." BLACK'S LAW DICTIONARY 47 (4th ed. 1951); WOOD, *supra* note 3, at 2-3; 51 AM. JUR. 2d *Limitation of Actions* § 1 (1970). This approach was based upon the common law rules with regard to abatement or survival of a tort cause of action. *See* 1 AM. JUR. 2d *Abatement, Survival and Revival* §§ 47, 61 (1970).

18. *See* 51 AM. JUR. 2d *Limitation of Actions* § 1 (1970); 1 AM. JUR 2d *Abatement, Survivial and Revival* §§ 47, 61 (1970).

defendant was capable of being subjected to suit long after evidence that might gave been utilized in his defense had dried up or disappeared.[19]

At early common law, when abuses from stale claims became unendurable, Parliament would simply enact a statute extinguishing all causes of action which had arisen prior to that date.[20] This drastic method of protecting defendants and the courts from stale causes of action was merely a temporary stop-gap approach and not a cure for the problem itself. In time a more rational solution took shape. Statutes of limitation were enacted requiring that all prospective plaintiffs commence suit within a fixed period of time after their cause of action arose.[21] In this way, "by one constant law certain limitations might serve for the time present and for all times to come."[22]

Part of the rationalization behind such time limitations rests on the image of a prospective plaintiff, who has failed to bring his action before the running of the limitation period, as a "sleeping claimant," that is, a person who intentionally or negligently postpones suing another person against whom he has a basis for a claim.[23] As one Illinois court expressed it, statutes of limitation "favor the diligent and not the slothful."[24]

Initially, the judiciary regarded such statutes with disfavor and were reluctant to enforce them.[25] This resistance gradually abated and statutes of

19. "A defendant who does not imagine that any claim may be brought against him is not only likely to have parted with evidence that he at one time had but is also likely to have lost track of evidence which at one time he could have obtained." Williams, *Limitation Periods on Personal Injury Claims*, 48 NOTRE DAME LAW. 881, 884 (1973).

20. Housing Auth. of Union City v. Commonwealth Trust Co., 25 N.J. 330, 334, 136 A.2d 401, 404 (1957). The legislature chose for that purpose certain notable dates, such as the beginning of the reign of King Henry I, the return of King John from Ireland, the journey of Henry III into Normandy and the coronation of King Richard I. WOOD, *supra* note 3, at 4.

21. *See* WOOD, *supra* note 3, at 4. The statute of 32 Hen. VIII, c. 2 (1540), was the first effective statute limiting the time for the bringing of a suit upon a cause of action. It was confined to real actions and did not apply to personal actions. *See* 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 81 (2d ed. 1891); Wood v. Carpenter, 101 U.S. 135 (1879). This act was superseded by the Limitation of Action, and Avoidance of Suits at Law Act, 1623, 21 Jac. 1, c. 16, extending the limitation to personal as well as real actions. "The Limitation Act of 1623 marks the beginning of the modern law of limitations on personal actions in the common law." *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1178 (1950). The statute is set out in WOOD, *supra* note 3, at 631-33. The statutes of limitation of the various states are all founded upon the statute of James and retain its essential provisions. *Id.* at 5, 8.

22. WOOD, *supra* note 3, at 5 (quoting Lord Coke).

23. "Statutes of limitation . . . 'are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected.' " Weber v. Board of Harbor Comm'rs., 85 U.S. (18 Wall.) 57, 70 (1873) (quoting Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1869)).

24. Phoebe v. Jay, 1 Ill. (Bresse) 268, 273 (1828).

25. Early cases felt it was dishonorable to invoke the statute of limitations defense. "In honesty, he [the defendant] ought not to defend himself by such a plea." Quantocks v. England, 98 Eng. Rep. 382, 383 (Ex. 1770). Many courts were openly hostile to the enforcement of such statutes. *Cf.* Tynan v. Walker, 35 Cal. 634, 643 (1868); Koop v. Cook, 67 Or. 93, 94, 135

limitation came to be favored by the law,[26] being described as statutes of repose[27] which suppressed "fraudulent, false, frivolous, speculative or uncertain claim[s]."[28]

Today, every state has comprehensive statutes setting forth periods of limitation for substantially all actions which arise by virtue of either statute or common law principles.[29] In addition, most federally created rights of action have specific statutes of limitation.[30] While the language varies, the majority of tort statutes provide that all actions shall be brought within so many years after the *cause of action accrued*.[31] Illinois is no exception.[32] "Cause of action accrued" is simply another way of saying when a cause of action *exists*.[33] A cause of action comes into existence and thereby *accrues* when all the elements necessary to establish tort liability occur.[34] Generations of Illinois lawyers have learned the principle that tort statutes of limitation run from the occurrence of the last act giving rise to a cause of action.[35]

At common law the limitation period was tolled if the prospective plaintiff was under a legal disability at the time his cause of action accrued.[36] Various disabilities came to be recognized as tolling the running of the statute.[37] The prospective plaintiff's knowledge or awareness of his

P. 317, 318 (1913) (Early judicial hostility to statutes of limitation noted but held to have no effect in these decisions).

26. "The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away." Clementson v. Williams, 12 U.S. (8 Cranch) 72, 73 (1814). *See also* Wood v. Carpenter, 101 U.S. 135, 139 (1879).

27. Bell v. Morrison, 26 U.S. (1 Pet.) 350, 360 (1828); McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 277 (1830). "The statute of limitations has been emphatically declared to be a statute of repose. . . ." Beatty v. Burnes, 12 U.S. (8 Cranch) 98, 108 (1814).

28. New Market Poultry Farms, Inc. v. Fellows, 51 N.J. 419, 425, 241 A.2d 633, 636 (1968).

29. *See* note 1 *supra*.

30. For a general compilation of these statutes, *see* 4 AM. JUR. TRIALS *Statutes of Limitation* § 5 (1966).

31. *See* note 2 *supra*.

32. ILL. REV. STAT. ch. 83, §§ 14-16 (1975).

33. Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 68 (1873). "[I]t has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists . . . ." Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (dissenting opinion).

34. *See* note 3 *supra*; Reat v. Illinois Cent. R.R., 47 Ill. App. 2d 267, 197 N.E.2d 860 (1964).

35. *See* Coumoulas v. Service Gas Inc., 10 Ill. App. 3d 273, 293 N.E.2d 187 (1973).

36. Williams, *Limitation Periods on Personal Injury Claims*, 48 NOTRE DAME LAW. 881, 882 (1973).

37. J. ANGELL, LIMITATIONS OF ACTIONS AT LAW 201 (6th ed. 1876); ILL. REV. STAT. ch. 83, § 22 (1975) (disabilities). The disability must exist at the time the statute would normally begin to run. A disability arising after the statute has started running is of no consequence even though the plaintiff may be completely unable to act. Berman v. Palatine Ins. Co., 379 F.2d 371 (7th Cir. 1967); Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (1942).

When the disability existing at the time the cause of action accrues is removed and the statute begins to run another disability will not toll the running of the limitation period. Keil v.

cause of action, however, was considered to be irrelevant except where such ignorance resulted from a tortfeasor's fraudulent concealment of the cause of action.[38] Under this approach, the statute might well run before the victim even acquired knowledge of his cause of action.

The justification put forth for this view lays in the very purpose giving rise to statutes of limitation—the protection of prospective defendants from stale, false and fraudulent claims.[39] The courts felt that arbitrary time limits were necessary to ensure that defendants were not confronted by stale claims[40] which were difficult to disprove. This is because the passage of time often results in the destruction or loss of relevant evidence and in the unavailability of material witnesses. The statutory limitation served as an automatic bar based on an irrebuttable presumption that any claim which was not enforced during the statutory period was either stale or not meritorious.

The judiciary's traditional strict interpretation of the limitation statutes was inflexible. Under the traditional rule, the courts had to uphold the statutory bar when confronted by a meritorious claim for which the evidence was not yet stale and which had not been timely enforced because the party was faultlessly ignorant of his cause of action.[41] The courts reasoned that the hardship imposed in barring such a party's claim before he had even become aware of its existence was merely "part of the price to be paid" in preventing recovery on stale and nonmeritorious demands.[42] The courts took

Healey, 84 Ill. 104 (1876). However, disabilities may be tacked together if they overlap. *See* Duncan v. Nelson, 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972) (allowed the disability of imprisonment to be tacked onto one of minority). If a party is under concurrent disabilities when the claim accrues, the statute will not begin to run until the expiration of the longer. *See generally* ANNOT., 53 A.L.R. 1305 (1928).

38. ILL. REV. STAT. ch. 83, § 23 (1975). In order to toll the statute, the concealment must have been affirmative, intended to prevent discovery of the cause of action and must in fact prevent such discovery. Bush v. Continental Cas. Co., 116 Ill. App. 2d 94, 253 N.E.2d 619 (1969). In Skrodski v. Sherman State Bank, 348 Ill. 403, 181 N.E. 325 (1932), the Illinois Supreme Court rejected the fraudulent concealment answer to defendant-appellee's statute of limitation defense. The court stated, "it could not be said . . . that acts on the part of the appellee, though attempts to conceal a cause of action, could accomplish that purpose." *Id.* at 409, 181 N.E. at 328. *Accord*, Keithley v. Mutual Life Ins. Co., 271 Ill. 584, 594-95, 111 N.E. 503, 507 (1916). Concealment of the identity of the party liable is not deemed sufficient. Proctor v. Wells Bros. Co., 181 Ill. App. 468 (1913), *aff'd*, 262 Ill. 77, 104 N.E. 186 (1915).

39. *See, e.g.*, Burnett v. New York Cent. Ry. Co., 380 U.S. 424, 428 (1965); Order of R.R. Tel'rs. v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944); Missouri, Kan. & Tex. Ry. v. Harriman, 227 U.S. 657, 672 (1913); Halberstadt v. Harris Trust & Sav. Bank, 55 Ill. 2d 121, 125, 302 N.E.2d 64, 66 (1973); Geneva Constr. Co. v. Martin Transfer & Storage Co., 4 Ill. 2d 273, 289-90, 122 N.E.2d 540, 549 (1954); Horn v. City of Chicago, 403 Ill. 549, 560, 87 N.E.2d 642, 649 (1949); Jackson v. Navik, 17 Ill. App. 3d 672, 676, 308 N.E.2d 143, 146 (1974). *See* Scott, *For Whom the Time Tolls—Time of Discovery and the Statute of Limitations*, 64 ILL. B.J. 326 nn.5-8 (1976).

40. "The statute of limitations was . . . enacted to protect persons . . . from ancient claims, whether well or ill founded." Clementson v. Williams, 12 U.S. (8 Cranch) 72, 74 (1814).

41. *See* note 6 *supra*.

42. W. PROSSER, LAW OF TORTS § 30 (4th ed. 1971); *see* Albert v. Sherman, 167 Tenn. 133,

solace in the fact that *most* parties in the exercise of ordinary care would be put on notice of a possible claim well within the statutory period.[43] The legal postulate that *every* meritorious claimant should have an "opportunity" to present his case was overshadowed.[44]

The harshness of the traditional statute of limitation's approach has met with a virtual storm of criticism in the medical malpractice area over the last two decades.[45] In response to this criticism, various judiciaries began to escape the traditional rule's harsh effect by adopting "adroit doctrinal devices."[46] Some adopted a "termination of treatment rule" holding that if a doctor, who had been guilty of malpractice, continued to treat the patient, the period of limitations would not begin until the termination of the physician-patient relationship.[47] A "constructive fraud" theory was utilized in some jurisdictions whereby the physician was under a continuing duty to disclose what he knew or should have known of a patient's condition.

67 S.W.2d 140 (1934). As the court stated in Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 302, 200 N.E. 824, 827-28 (1936): "The Statute of Limitations is a statute of repose. At times it may bar the assertion of a just claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims."

43. *See* note 23 *supra*.

44. *See* Sacks, *Statutes of Limitations and Undiscovered Malpractice*, 16 CLEV.-MAR. L. REV. 65 (1967); *cf.* Basque v. Yuk Lin Liau, 50 Haw. 397, 399, 441 P.2d 636, 637 (1968) (statute tolled until discovery).

45. Comment, *Limitations in Professional Malpractice*, 28 MD. L. REV. 47 (1968); Petersen, *The Undiscovered Cause of Action and the Statute of Limitations: A Right Without a Remedy in Illinois*, 58 ILL. B.J. 644 (1970); Note, *Torts— Statutes of Limitations in Medical Malpractice Cases—Justice Sought and Almost Attained*, 21 DEPAUL L. REV. 234 (1971); *Statute of Limitations—Medical Malpractice—Viability of the Discovery Rule as a Criterion to Determine When a Cause of Action Accrues In Medical Malpractice Actions. Tex. Civ. Stat. Ann. art. 5526, § 6 (1960)*, 5 ST. MARY'S L.J. 206 (1973).

46. Sacks, *Statute of Limitations and Undiscovered Malpractice*, 16 CLEV.-MAR. L. REV. 65, 67 n.8 (1967). Prosser referred to these as "transparent devices to get around the rule." W. PROSSER, LAW OF TORTS § 31 (4th ed. 1971).

47. The first case in which the rule was applied was Gillette v. Tucker, 67 Ohio St. 106, 65 N.E.865 (1902). Illinois rejected the termination of treatment rule in Gangloff v. Apfelbach, 319 Ill. App. 596, 49 N.E.2d 795 (1943). Cases which have applied the rule include Borgia v. City of New York, 12 N.Y.2d 151, 237 N.Y.S.2d 319, 187 N.E.2d 777 (1962); Pump v. Fox, 113 Ohio App. 150, 177 N.E.2d 520 (1961). For a general discussion of this rule see 61 AM. JUR. 2d *Physicians, Surgeons & Other Healers* § 185 (1972) and 4 AM. JUR. TRIALS *Statutes of Limitation* § 35 (1966). Whether or not treatment is "continuous" can prove troublesome. Fonda v. Paulsen, 46 App. Div. 2d 540, 363 N.Y.S.2d 841 (1975).

The theory underlying the rule is that the very existence of the physician-patient relationship encourages the patient to rely upon his physician and inhibits his ability to discover the injury. Swang v. Hauser, 288 Minn. 306, 180 N.W.2d 187 (1970). This rule also encourages the patient first to seek recourse through remedial care rather than through the courts and discourages the physician from procrastinating his treatment of the patient until the statutory period has expired.

This theory has been used with regard to attorneys who continue to represent their clients after an act of malpractice. Berry v. Zisman, 70 Mich. App. 376, 245 N.W.2d 758 (1976); Siegel v. Kranis, 29 App. Div. 2d 477, 288 N.Y.S.2d 831 (1974). It has also been used with regard to accountants, Wilkin v. Dana R. Pickup & Co., 74 Misc. 2d 1025, 347 N.Y.S.2d 122 (1973), and architects, County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 358 N.Y.S.2d 998 (1974).

Failure to so disclose amounted to fraud and tolled the running of the limitations period.[48] Other jurisdictions characterized the failure to remove a foreign object negligently left inside a patient's body as "continuing negligence."[49]

The aim of the judiciary was laudable but these devices amounted to nothing more than dubious benign fictions,[50] none of which could solicit substantial support among the states. While their last vestiges still exist today,[51] these theories have been all but discarded in a trend toward the partial or complete adoption of the discovery rule.[52]

The initial justification put forth for the discovery rule's adoption and its judicial transformation of tort statutes of limitation is that the phrase "cause of action accrued" is capable of being defined as either the time of discovery or the time of the commission of the tortious act.[53] Since the

48. Perrin v. Rodriguez, 153 So. 555 (La. 1934); Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934). Some states hold that constructive fraud terminates with the physician-patient relationship and the statute of limitations runs at that time. *See, e.g.*, Toth v. Lenk, 330 N.E.2d 336 (Ind. Ct. App. 1975).

49. Puro v. Henry, 32 Conn. Supp. 118, 342 A.2d 65 (1975); Hotelling v. Walther, 169 Or. 559, 130 P.2d 944 (1942); Frazor v. Osborne, 57 Tenn. App. 10, 414 S.W.2d 118 (1966).

50. The "constructive fraud" theory, for example, is a contradiction in terms. Failure to discover the nature and source of plaintiff's condition may be negligent, but it is hardly fraudulent. *See, e.g.*, Kauchick v. Williams, 435 S.W.2d 342 (Mo. 1968).

51. Georgia presently adheres to a continuing tort theory for foreign object cases. Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605 (1971). Minnesota applies a continuous treatment rule. Johnson v. Winthrop Laboratories, 291 Minn. 145, 190 N.W.2d 77 (1971); Schmit v. Esser, 183 Minn. 354, 236 N.W. 622 (1931). Indiana intermingles a constructive fraud and termination of treatment approach to all medical malpractice actions. Toth v. Lenk, 330 N.E.2d 336, 339 (Ind. Ct. App. 1975). The constructive fraud ends with the termination of the physician-patient relationship. In van Bronckhorst v. Taube, 341 N.E.2d 791 (Ind. Ct. App. 1976) the court held that in cases involving *affirmative* misrepresentations, the end of the physician-patient relationship does not, as a matter of law, "commence the clock ticking on the statute of limitations," *i.e.*, it does not automatically terminate the affirmative fraudulent concealment which serves to toll the running of the statute. *Id.* at 796-98. Montana has codified its constructive fraud theory. MONT. REV. CODES ANN. § 93-2624 (Supp. 1975) (statute tolled where defendant fails to disclose act, error or omission which is known to him or which through the exercise of reasonable diligence should have been known to him).

52. Thirty-five jurisdictions now apply the time of discovery rule to at least some medical malpractice actions. The vast majority of these apply the rule to all such actions. *See* note 58 *infra*.

53. Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E.2d 450 (1970); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Berry v. Branner, 245 Or. 207, 421 P.2d 996 (1966). The typical approach is to refer to the dictionary definition of the word *accrue*; when used with reference to a cause of action it means "when a suit *may* be maintained thereon . . . . [It accrues] whenever one person *may* sue another." BLACK'S LAW DICTIONARY 37 (4th ed. 1951) (emphasis added). The court then focused on the word *may* as referring to the ability of the plaintiff to bring his claim. It concluded from this that a cause of action does not accrue until the plaintiff has knowledge of it for it is only at this time that he acquires the ability to maintain an action on his claim. Berry v. Branner, 245 Or. 307, 421 P.2d 996 (1966).

The underlying defect in this approach is that the word *may* as it is used in the definition of accrue does not refer to the ability of the plaintiff to enforce his claim; rather, it refers to when a defendant becomes subject to tort liability. "When an action may be maintained thereon" is simply another way of saying "when all the elements of tort liability have occurred." *See* Van Dusen v. Barrack, 376 U.S. 612 (1964). *Van Dusen* dealt with the interpretation of 28 U.S.C. §

legislatures have left the matter undetermined, the courts are free to adopt the time of discovery definition.[54] Under this theory the discovery rule is confined to "cause of action accrued" statutes.

In fact what the courts adopting the discovery rule have done is *not* to redefine the phrase "cause of action accrued" but simply to imply the existence of knowledge as a statutory requirement for triggering the running of the limitation period.[55] While a person's claim may accrue (that is, come into existence) without his knowledge, the limitation period should not begin to run until he becomes aware of it. The courts recognize that *any* limitation statute should not be triggered by reference to whether the plaintiff had any technical legal right, but by the existence of a practical remedy.[56] When viewed in this light, the discovery rule's application is not arbitrarily limited to "cause of action accrued" statutes.[57]

The discovery rule has come to dominate tort statutes of limitation

1404(a) (1970), which provided in part: "[A] district court may transfer any civil action to any other district or division where it might have been brought." The Court held the phrase "might have been brought" referred to the suability of the defendant and not to the ability of the plaintiff to bring suit.

In Bernard v. Boulware, 5 Mo. 454, 456 (1838), the court properly recognized that the accrual of a cause of action is in no way dependent upon the plaintiff's awareness that he in fact has a claim. The court stated:

> It is an abuse of language to pretend that the cause of action did not accrue till [*sic*] the plaintiffs were informed that words had been spoken . . . . [I]t does not seem probable that the law-making power should intend to strain language so far as to intend that the time when the right of action accrued, was the time when the plaintiff might come to the knowledge of the speaking of slanderous words.

54. *See* cases cited in note 53 *supra*.

55. *See* Stoner v. Carr, 97 Idaho 641, 550 P.2d 259 (1976).

56. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1205 (1950). It is this view to which the often cited text of Berry v. Branner, 245 Or. 307, 312, 421 P.2d 996, 998 is directed: "To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law." *Accord*, Rosane v. Senger, 112 Colo. 363, 370, 149 P.2d 372, 375-76 (1944). *Branner* refused to ascribe to the legislature any such intention absent an expressed statutory direction.

Some courts have felt that to imply a discovery requirement in the limitation statutes would in effect render the fraudulent concealment exception (ILL. REV. STAT. ch. 83, § 23 (1975)) superfluous. *See* Gates Rubber Co. v. USM Corp., 508 F.2d 603, 612 (7th Cir. 1975); Parmelee v. Price, 105 Ill. App. 271 (1902), *aff'd*, 208 Ill. 544, 70 N.E. 725 (1904). These courts therefore conclude that the legislature did not intend full implementation of the discovery rule. This reasoning, however, is erroneous. A general application of the discovery rule, at least as it exists in Illinois, does not render the fraudulent concealment exception redundant.

The general rule is that a tort statute of limitation runs from the time of the injury or damage. *See* note 3 and accompanying text *supra*. All plaintiffs who are faultlessly ignorant of their cause of action, whether their ignorance is caused by defendant's fraudulent concealment or otherwise, may invoke the discovery rule *if* the plaintiff's interest in being given an opportunity to present his cause of action outweighs the difficulty of proof created by the passage of time. *See* notes 120-21 and accompanying text *infra*. In short, the invocation of the discovery rule is a *qualified* right.

If the plaintiff is not permitted to invoke the discovery rule but can establish that the defendant fraudulently concealed the cause of action, the plaintiff has an *absolute* right to turn to the fraudulent concealment statute. This is justified by the defendant's misconduct.

57. *See* note 15 *supra*.

which govern medical malpractice actions.[58] Recent years have witnessed the expansion of this reformation beyond the confines of medical malpractice to other areas of tort law.[59]

58. The judiciary in thirteen jurisdictions have interpreted their individual tort statutes of limitation to be of the discovery rule type for all cases of medical malpractice. DEL. CODE tit. 10, § 8119 (1974), *see* Oakes v. Gilday, 351 A.2d 85 (1976); D.C. CODE § 12-301 (1966), Jones v. Rogers Memorial Hosp., 442 F.2d 773 (D.C. Cir. 1971); 1907 Haw. Sess. Laws c. 113 § 1 (current version at HAW. REV. STAT. § 657-7 (1968)), Yoshizaki v. Hilo Hosp., 50 Haw. 150, 433 P.2d 220 (1967); LA. CIV. CODE ANN. art. 3536 (West 1977), Duhon v. Saloom, 323 So. 2d 202 (La. Ct. App. 1975), *aff'd*, 325 So. 2d 794 (La. 1976); MD. ANN. CODE art. 57, § 1 (1972), Jones v. Sugar, 18 Md. App. 99, 305 A.2d 219 (1973); NEB. REV. STAT. § 25-208 (1975), Acker v. Sorenson, 183 Neb. 866, 165 N.W.2d 74 (1969); N.J. REV. STAT. § 2A:14-2 (1952), Duffy v. Ackerhalt, 138 N.J. Super. 119, 350 A.2d 283 (1975); OKLA. STAT. ANN. tit. 12, § 95 (West Cum. Supp. 1976-1977), Lewis v. Owen, 395 F.2d 537 (10th Cir. 1968) (applying Oklahoma law); PA. STAT. ANN. tit. 12, § 34 (Purdon 1953), Huber v. McElwee-Courbis Constr. Co., 392 F. Supp. 1379 (E.D. Pa. 1974), Ragan v. Steen, 229 Pa. Super. Ct. 515, 331 A.2d 724 (1974); R.I. GEN. LAWS § 9-1-14 (1969) (amended 1976), Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968); TEX. REV. CIV. STAT. ANN. art. 5526 (6)-(7) (Vernon 1958), Sanchez v. Wade, 514 S.W.2d 812 (Tex. Civ. App. 1974), Grady v. Faykus, 530 S.W.2d 151 (Tex. Civ. App. 1975); W. VA. CODE § 55-2-12(b) (1966), Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967); WYO. STAT. § 1-19 (1957), *cf.* Banner v. Town of Dayton, 474 P.2d 300 (Wyo. 1970) (engineer negligence).

In two other states the judiciaries have limited their discovery construction in medical malpractice cases to those where foreign objects are left in the body: N.H. REV. STAT. ANN. § 508:4 (Supp. 1975), Shillady v. Elliot Community Hosp., 114 N.H. 321, 320 A.2d 637 (1974), Patrick v. Morin, 115 N.H. 513, 345 A.2d 389 (1975); OHIO REV. CODE ANN. § 2305.11 (Page Supp. 1977), Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972). Ohio has rejected the opportunity to extend the rule to other cases of malpractice. Simmons v. Riverside Methodist Hosp., 44 Ohio App. 2d 146, 336 N.E.2d 460 (1975). However, it does apply a termination of treatment rule to non-foreign object cases. Millbaugh v. Gilmore, 30 Ohio St. 2d 319, 285 N.E.2d 19 (1972).

In eighteen other states the legislature has stepped in and enacted a discovery rule statute of limitation for medical malpractice cases. ALA. CODE tit. 7, § 25(1) (1960) *as amended* (1)(2) (Supp. 1976); ARIZ. REV. STAT. § 12-564 (Cum. Supp. 1976-1977); CAL. CIV. PROC. CODE § 340.5 (Supp. 1977); CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1977); FLA. STAT. ANN. § 95.11(4)(b) (West Supp. 1977); ILL. REV. STAT. ch. 83, § 22.1 (Supp. 1976); IOWA CODE § 614.1(9) (Supp. 1976); KAN. STAT. § 60-513(4), (7)(c) (1976); KY. REV. STAT. § 413-140(1)(e), (2) (Supp. 1976); MICH. COMP. LAWS ANN. § 600.5838 (Cum. Supp. 1976-1977); MONT. REV. CODES ANN. § 93-2624 (Supp. 1975); N.C. GEN. STAT. §§ 1-52(5), -15(a)-(b) (Supp. 1975); N.D. CENT. CODE § 28-01-18(3) (Supp. 1975); TENN. CODE ANN. § 23-3415 (Supp. 1976); UTAH CODE ANN. § 78-14-4 (Interim Supp. 1976); VT. STAT. ANN. tit. 12, § 512(4) (Supp. 1976) (all personal injury actions); WASH. REV. CODE § 4.16.350 (1975). Idaho has limited its discovery statute of limitation to foreign object cases. IDAHO CODE § 5-219(4) (Supp. 1976).

New York has a unique statute. It provides a two and one-half year statute of limitation which runs from the "act or omission complained of . . . ." It contains, where applicable, a "continuous treatment tolling" provision. Also, a discovery rule approach is utilized with regard to foreign object cases. N.Y. CIV. PRAC. LAW § 214-d (McKinney Cum. Supp. 1976-1977).

59. Four jurisdictions now apply a general discovery rule approach for all professional malpractice: Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); FLA. STAT. ANN. § 95.11(4)(a) (West Supp. 1977); Leonhart v. Atkinson, 265 Md. 219, 289 A.2d 1 (1972); Jones v. Sugar, 18 Md. App. 99, 103 n.1, 305 A.2d 219, 222 n.1 (1973); Banner v. Town of Dayton, 474 P.2d 300 (Wyo. 1970).

Aside from these four jurisdictions the primary activity of the rule has been with regard to attorney malpractice. *See* note 111 *infra*.

There have been only a smattering of cases involving professionals other than attorneys. *See, e.g.*, architects: Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967); insurance agents: Gazija v. Nicholas Jerns Co., 86 Wash. 2d 215, 543 P.2d 338 (1975); land surveyors: Kundahl v. Barnett, 5 Wash. App. 227, 486 P.2d 1164 (1971). See the cases cited in Gates Rubber Co. v. USM Corp., 508 F.2d 603, 610 n.16 (7th Cir. 1975)..

COMMON LAW EVOLUTION OF THE DISCOVERY RULE IN ILLINOIS

The traditional rule, that the running of the limitation period is not tolled by the person's ignorance of his cause of action, was first departed from by the Illinois Supreme Court in *Madison v. Weldron Silica Co.*[60] In that case the plaintiff worked for the defendant from 1924 until 1930, during which time he contracted silicosis. The plaintiff filed suit against the company in 1931 based on violations of the Workmen's Occupational Diseases Act.[61] This act was governed at the time by section 15 of the Limitations Act[62] which provided in part: "Actions for damages for an injury to the person . . . shall be commenced within two years next after the cause of action accrued." The defendant raised this statute as a defense, arguing that the cause of action accrued upon the first inhalation of silica dust and the mere fact the full extent of plaintiff's injuries had not yet occurred did not postpone the accrual of the cause of action.[63] The court rejected the argument when it stated: "[t]he logical view is to consider the time when the employee is forced to quit work because of the cumulative effect of successive injuries resulting in final disablement rather than the

Applications of the time of discovery rule to personal injury or property damage actions not within the professional malpractice sphere are rare. Two jurisdictions have enacted general discovery statutes of limitation for all personal injury actions. KAN. STAT. § 60-513(4) (Supp. 1975); VT. STAT. ANN. tit. 12, § 512(4) (Supp. 1976).

North Carolina has enacted a discovery rule statute of limitations for both personal injury and property damage actions. N.C. GEN. STAT. §§ 1-52, -15 (Supp. 1975). The Pennsylvania judiciary has interpreted its personal injury tort statute to be of the discovery rule type for all personal injury actions. Huber v. McElwee-Courbis Constr. Co., 329 F. Supp. 1379 (E.D. Pa. 1974); Ragan v. Steen, 229 Pa. Super. Ct. 515, 331 A.2d 724 (1974). The Hawaiian judiciary has applied the discovery rule to property damage actions. Basque v. Yuk Lin Liau, 50 Haw. 397, 441 P.2d 636 (1968). The Illinois judiciary has applied the time of discovery rule to personal injury and property damage actions not within the professional malpractice area. *See* Auster v. Keck, 31 Ill. App. 3d 61, 63-66, 333 N.E.2d 65, 65-69 (1975) (chronological discussion of the discovery rule's use in Illinois).

60. 352 Ill. 60, 184 N.E. 901 (1933). There is an earlier subterranean coal case which at first blush seemed to create an exception to the traditional rule. Treece v. Southern Gem Coal Corp., 245 Ill. App. 113 (1923). In *Treece* the defendant had negligently removed coal from under the real estate of the surface owner by failing to provide subterranean support. Eventually the surface began to sink. The court held the statute of limitations began to run when the subsidences of the surface occurred and not when the coal was negligently removed. The court's holding in *Treece* was based not upon an exception to the traditional rule but upon the precept that when an act is not legally injurious until certain consequences occur, the time commences to run from the consequential damage, even though the alleged negligent act occurred years earlier. *See* note 3 *supra*. This is not to say that before the land began to subside a private nuisance action would not have been appropriate.

There were a number of earlier Illinois cases which refused to deviate from the traditional statute of limitations approach. *See, e.g.*, Lancaster v. Springer, 239 Ill. 472, 481, 88 N.E. 272, 275 (1909); Parmelee v. Price, 105 Ill. App. 271 (1902), *aff'd*, 208 Ill. 544, 70 N.E. 725 (1904); Calumet Elec. St. Ry. v. Mabie, 66 Ill. App. 235 (1896); Carr v. Bennett, 21 Ill. App. 137 (1886).

61. ILL. REV. STAT. ch. 48, §§ 173, 185 (1931).

62. *Id.* ch. 83, § 15 (1931).

63. *See* Reat v. Illinois Cent. R.R. Co., 47 Ill. App. 2d 267, 271-72, 197 N.E.2d 860, 863 (1964).

first inhalation or injury.''[64] It determined this was the more liberal and humane view and one which accomplished the purpose of the Workmen's Occupational Diseases Act.[65]

The *Madison* court did not technically adopt the discovery rule. For all practical purposes, however, it ensured that the limitation period would not begin to run against an employee, whose illness or disease manifested itself long after exposure to chemicals or dust, until he had discovered his injury.

The legislature accepted the logic espoused by the Illinois Supreme Court in *Madison* when in 1937 it amended the Workmen's Occupational Diseases Act to include a statute of limitation which began to run upon disablement.[66] The *Madison* court's influence in bringing about this amendment was to be ignored in *Mosby v. Michael Reese Hospital*,[67] an important case regarding the discovery rule.

In *Mosby*, a surgical needle was left inside the plaintiff's body during the course of an operation in 1956. In 1960, a subsequent operation disclosed the needle and the permanent damage it had caused. The complaint filed in 1962 was dismissed by the trial court on the ground that it was barred, having been brought more than two years after the cause of action accrued.[68] An Illinois appellate court, although recognizing that the trend of authority in other states was in favor of the discovery rule,[69] affirmed the trial court's dismissal of the complaint.

After taking notice of the Illinois Workmen's Compensation Act[70] and Workmen's Occupational Diseases Act (both of which had time periods which commenced running on discovery of injury or illness), the court held that the legislature's failure to extend the same rule to the medical malpractice statute of limitation (section 15) was deliberate. It concluded that it could not ''do what the legislature ha[d] failed to do.''[71]

The reasoning of the *Mosby* court is difficult to comprehend. The Illinois Supreme Court in *Madison* had done exactly what the *Mosby* appellate court felt constrained to do, interpret section 15 of the Limitations Act as running from the time the injury became manifest. The subsequent enactment by the legislature of a separate discovery-type limitation period in the Workmen's Occupational Diseases Act was ''in reality the offspring of the Illinois Supreme Court[']s decision] in *Madison*.''[72] This codification

64. 352 Ill. at 62, 184 N.E. at 902. *Accord*, Urie v. Thompson, 337 U.S. 163 (1949).
65. 352 Ill. at 62, 184 N.E. at 902.
66. ILL. REV. STAT. ch. 48, § 172.24 (1937).
67. 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964).
68. ILL. REV. STAT. ch. 83, § 15 (1961).
69. 49 Ill. App. at 338, 199 N.E.2d at 635.
70. ILL. REV. STAT. ch. 48, § 138.6(c) (1961).
71. 49 Ill. App. at 342, 199 N.E.2d at 636.
72. Petersen, *The Undiscovered Cause of Action and the Statute of Limitation: A Right*

would seem to be strong evidence of the legislature's acceptance of *Madison*'s interpretation of section 15. Nevertheless, the appellate court in *Mosby* focused on what the legislature did *not* do in finding a contrary legislative intent. It reasoned that the legislature, by not enacting a discovery-type approach in section 15 had "by implication" rejected the discovery rule for this statute of limitation.[73] Other courts have recognized that "[l]egislative inaction is a weak reed upon which to lean in determining legislative intent."[74]

The legislature acted immediately to nullify *Mosby*. A bifurcated statute of limitation was enacted in which the plaintiff had two years to bring suit after discovery of a foreign object negligently left inside him, but in no event could suit be brought more than ten years after the operation.[75] Medical malpractice actions not involving foreign objects still had to be brought within two years from when the "cause of action accrued."[76]

Despite the legislative nullification of *Mosby*, the appellate courts adhered strictly to *Mosby*'s legislative prerogative theory.[77] They did so even though it meant having to bar a party's cause of action before he had become aware of its existence[78] and even though the trend of authority in other states was in favor of the discovery rule's adoption.[79] For instance, in *Simoniz v. J. Emil Anderson & Sons, Inc.*,[80] the defendants constructed a building for the plaintiff in 1953 which collapsed in 1962. An examination of the structure revealed the collapse was caused by defective design, materials and workmanship. The plaintiff filed suit against the contractor and the material suppliers. The suit was dismissed because it was not brought within five years from when the cause of action accrued,[81] which was held to be when the negligent work was completed.[82] The appellate

Without a Remedy in Illinois, 58 ILL. B.J. 644, 649 (1970). The author also points out that one of the cases on which the *Mosby* court relied heavily, Leroy v. City of Springfield, 81 Ill. 114 (1876), was argued in *Madison* and apparently was rejected by the court. *Id.* at 649.

73. Hereinafter referred to in the text as the legislative prerogative theory.

74. Berry v. Branner, 245 Or. 307, 311, 421 P.2d 996, 998 (1966). *See* Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969). "[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." Helvering v. Hallock, 309 U.S. 106, 121 (1939).

75. ILL. REV. STAT. ch. 83, § 22.1 (1965).

76. *Id.* § 15.

77. Board of Educ. v. Perkins & Will Partnership, 119 Ill. App. 2d 196, 255 N.E.2d 496 (1970); Wilson v. White Motor Corp., 118 Ill. App. 2d 436, 254 N.E.2d 277 (1969); Sabath v. Morris Handler Co., 102 Ill. App. 2d 218, 243 N.E.2d 723 (1968); Board of Educ. v. Joseph J. Duffy Co., 97 Ill. App. 2d 158, 240 N.E.2d 5 (1968); Simoniz Co. v. J. Emil Anderson & Sons, Inc., 81 Ill. App. 2d 428, 225 N.E.2d 161 (1967).

78. See cases cited at note 77 *supra*.

79. Wilson v. White Motor Corp., 118 Ill. App. 2d 436, 439, 254 N.E.2d 277, 279 (1969).

80. 81 Ill. App. 2d 428, 225 N.E.2d 161 (1967).

81. ILL. REV. STAT. ch. 83, § 16 (1965).

82. 81 Ill. App. 2d at 437, 225 N.E.2d at 166. *See* note 3 *supra*.

court rejected any application of the discovery rule, citing *Mosby*. It was the court's opinion that "[m]odifying or changing the applicable time limitations, on the basis of the precedents in this State, must be left to the legislature."[83]

It was in light of the adoption of the legislative prerogative theory at the appellate level in Illinois that the Illinois Supreme Court considered *Rozny v. Marnul*.[84] In *Rozny*, a land surveyor had issued an inaccurate survey of a certain lot on August 27, 1953. A house was later built on this lot in reliance upon the survey. In January of 1956, the plaintiff purchased the property. In September of 1964, he discovered his house and garage encroached on an adjacent lot. The plaintiff filed suit against the surveyor in 1964, eleven years after the issuance of the survey.

The Illinois Supreme Court labeled the action as one lying in tort and held that the applicable statute of limitation was five years from when the "cause of action accrued."[85] The defendant argued that the cause of action accrued when the plat was delivered to the builder who ordered it or, at the latest, at the time the plaintiff relied on the guarantee. Under either construction the action would have been barred. The court rejected both arguments holding that the "cause of action accrued," that is, the limitation period began to run, when plaintiff knew or should have known of the defendant's error.[86] In adopting the discovery rule the court articulated a balancing test that was to eventually govern the future use of the discovery rule in Illinois:

> The basic problem is one of balancing the increase in difficulty of proof which accompanies the passage of time against the hardship of the plaintiff who neither knows nor should have known of the existence of his right to sue . . . . [W]here the passage of time does little to increase the problems of proof, the ends of justice are served by permitting plaintiff to sue within the statutory period computed from the time at which he knew or should have known of the existence of the right to sue.[87]

The *Rozny* court felt that the discovery rule was in keeping with more recent authorities of other jurisdictions and also with the legislative policy manifested by the Illinois General Assembly.[88] The legislative policy referred to as support for the adoption of the discovery rule was section 24g of the Limitations Act.[89] This statute had been enacted prior to the court's

83. 81 Ill. App. 2d at 438, 225 N.E.2d at 166.

84. 43 Ill. 2d 54, 250 N.E.2d 656 (1969). The *Rozny* case also involved a privity question. The Illinois Supreme Court found that lack of privity was not per se a bar to the plaintiff's action. It felt the privity doctrine was archaic and held that "tort liability will henceforth be measured by the scope of the duty owed . . . ." *Id.* at 62, 250 N.E.2d at 660. The privity doctrine is beyond the scope of this article.

85. ILL. REV. STAT. ch. 83, § 16 (1961).

86. 43 Ill. 2d at 72-73, 250 N.E.2d at 665-66.

87. *Id.* at 70, 250 N.E.2d at 664.

88. *Id.* at 72-73, 250 N.E.2d at 665-66.

89. ILL. REV. STAT. ch. 83, § 24g (1967).

opinion and provided for a discovery rule approach in actions against registered land surveyors for errors in the making of a survey. *Rozny*'s expressed reliance upon this statute caused its precedential value to be severely circumscribed by subsequent appellate court decisions.[90] The courts utilized this reliance on legislative policy as a means of distinguishing *Rozny*.

In *Wilson v. White Motor Co.*,[91] the plaintiff had purchased a new truck from the defendant in April of 1962. The rear suspension system repeatedly collapsed and each time it was repaired by the seller. In August of 1967 the plaintiff filed suit for the latest breakdown which had occurred on June 21, 1966. The appellate court in affirming the trial court's dismissal of the suit reiterated *Mosby*'s legislative prerogative theory.[92] The appellate court determined that *Rozny* was limited in its application to cases within section 24g of the Limitations Act and, therefore, did not affect the precedential value of *Mosby*.

In 1970, *Lipsey v. Michael Reese Hospital*[93] provided the Illinois Supreme Court with an opportunity to evaluate the merits of *Mosby*'s theory that the legislature had rejected the discovery rule for all statutes of limitation except those which expressly incorporated the rule. In *Lipsey* a doctor and a pathologist in 1963 had negligently diagnosed as benign a lump removed from under a woman's arm. In 1966, a frozen section of this same lump was reexamined and pronounced malignant. As a result of the three-year delay, the woman had to undergo radical surgery for the removal of her left breast, arm and shoulder. She filed suit in 1966 against the doctor and the pathologist. The defendants moved for summary judgment on the ground that the woman's action was time-barred because it was not filed within two years from when the cause of action accrued.[94] The defendants, citing *Mosby*, argued that the legislature, by adopting the discovery rule for foreign object cases,[95] had rejected the rule's application for all other types of medical malpractice actions. The court's application of the rule, therefore, would amount to judicial legislation.

The Illinois Supreme Court rejected the *Mosby* argument, quoting an Oregon decision:

> The legislature . . . did not provide that the time of accrual was when the physician performed the negligent act. This court did. The legislature left the matter undetermined. A determination that

90. Wilson v. White Motor Corp., 118 Ill. App. 2d 436, 254 N.E.2d 277 (1969); Board of Educ. v. Perkins & Will Partnership, 119 Ill. App. 2d 196, 255 N.E.2d 496 (1970).
91. 118 Ill. App. 2d 436, 254 N.E.2d 277 (1969).
92. *Id.* at 439-40, 254 N.E.2d at 279.
93. 46 Ill. 2d 32, 262 N.E.2d 450 (1970).
94. ILL. REV. STAT. ch. 83, § 15 (1969).
95. *Id.* § 22.1.

> the time of accrual is the time of discovery is no more judicial legislation than a determination that it is the time of the commission of the act.[96]

It is important to note precisely what the Illinois Supreme Court held would trigger the statute of limitation. The plaintiff must have discovered, or through the exercise of reasonable diligence should have discovered, "her true condition *and* the defendant's claimed negligence."[97] It is not the mere

96. 46 Ill. 2d at 39, 262 N.E.2d at 454 (quoting Berry v. Branner, 245 Or. 307, 313, 421 P.2d 996, 999 (1966)).

97. This is the language the court used in phrasing the issue. 46 Ill. 2d at 37, 262 N.E.2d at 453. Its holding simply said that the limitation period began to run on "discovery of the injury." *Id.* at 39, 262 N.E.2d at 455. The court's holding raised a question as to whether discovery of injury was enough to start the limitation time running without also discovering the causal connection between the defendant's act(s) and the injury.

Subsequent Illinois cases which have applied the discovery rule have made it clear that discovery of both factors is required. Wigginton v. Reichold Chems., Inc., 133 Ill. App. 2d 776, 274 N.E.2d 118 (1971) ("Granted that the plaintiff in the case before us knew that he was ill, he nevertheless has alleged that he had no knowledge for some period of time as to the cause of that illness." *Id.* at 779, 274 N.E.2d at 120); Kohler v. Woollen, Brown & Hawkins, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973) (discovery of the facts constituting the elements of the cause of action).

The recent supreme court case of Tom Olesker's Exciting World of Fashion, Inc., v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 334 N.E.2d 160 (1975), however, has raised a further question. The court described the discovery rule as the plaintiff's actual or constructive knowledge "of the existence of his right to sue." *Id.* at 133, 334 N.E.2d at 162. This implies that discovery of the injury, the causal connection *and* the fact such conduct is tortious is required to trigger the limitations statute. The court may simply have been lax in its discussion of the discovery rule. *See* Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974). In any event, "[i]t is unrealistic to require actual or constructive knowledge of 'fault' which is essentially a legal conclusion that cannot normally be known until trial." J. KING, THE LAW OF MEDICAL MALPRACTICE IN A NUTSHELL 273 (1977). The better view is that articulated in *Kohler*; the statute begins to run when the plaintiff has actual or constructive knowledge of the factual basis for an actionable claim regardless of whether the plaintiff knows he has a "right to sue." Kohler v. Woollen, Brown & Hawkins, 15 Ill. App. 3d 455, 460, 304 N.E.2d 677, 681 (1973).

Most other states have held that the statute is triggered under the discovery rule when the plaintiff has actual or constructive knowledge that he has been injured *and* that it was caused by the conduct of the defendant. *See, e.g.*, Bridgford v. United States, 550 F.2d 978 (4th Cir. 1977); Baines v. Blenderman, 223 N.W.2d 199 (Iowa 1974); Jones v. Sugar, 18 Md. App. 99, 305 A.2d 219 (1973) (plaintiff need not be informed by counsel that he has a cause of action); Patterson v. Estate of Flick, 69 Mich. App. 101, 244 N.W.2d 371 (1976). See also the numerous cases cited in Hall v. Musgrave, 517 F.2d 1163, 1168-72 (6th Cir. 1975) (Celebrezze, J., dissenting). The ABA INTERIM REPORT OF THE COMMISSION OF MEDICAL PROFESSIONAL LIABILITY (1976) also favors this position. *Id.* D app., at 50 .

Even under this approach, however, the line is not clear cut. In the situation where an employee discovers that the cause of his respiratory illness is a company's chemical compound, this would be sufficient to start the statute running. The employee should be aware of the basis for a claim. In the situation where a patient is tortiously injured by a doctor, more should be required than just the discovery of the injury and its causal connection with the acts of the doctor. Often injury or pain is to be expected. Even if not expected the patient must necessarily rely on those providing medical care. Therefore, "it is only when (the patient) is acquainted with the problem that in fact exists," and realizes that his injury was possibly caused by the doctor's misconduct, that the statute of limitations begins to run. Bridgford v. United States, 550 F.2d 978 (4th Cir. 1977); Jones v. Rogers Memorial Hosp., 442 F.2d 773, 775 (D.C. Cir. 1971). *See* Hulver v. United States, 393 F. Supp. 749 (W.D. Mo. 1975); Alfone v. Sarno, 139 N.J. Super. 518, 354 A.2d 654 (1976); Seitz v. Jones, 370 P.2d 300 (Okla. 1962). In Singh v. Carle Clinic, No. 76L-969 (6th Judicial Circuit, filed July 1977) an Illinois trial court held that "the

discovery of the injury that starts the statute running but the knowledge, actual or constructive, that it was caused by the defendant's negligent act or omission, that is, the discovery of a basis for a claim.[98]

A principal question left unanswered by *Lipsey* was the approach to be taken in determining the boundaries of the discovery rule's expansion. It became the task of the appellate courts to determine: (1) whether the discovery rule could be applied in connection with statutes *not* containing "cause of action accrued" language;[99] and (2) whether the discovery rule

holding of Lipsey v. Michael Reese Hospital, 46 Ill. 2d 32, 262 N.E.2d 450 (1970) means the cause of action accrues not when the patient learns or should have learned of her loss of health or deteriorated physical condition, but when she learns of [or] should have learned of an actual wrong done to her to bring about her lessened condition." *Id.* In this regard the experience, background and medical skills of the patient may be considered. Hayes v. Weyrens, 15 Ill. App. 3d 365, 367, 304 N.E.2d 502, 503 (1973); Jones v. Sugar, 18 Md. App. 99, 305 A.2d 219 (1973).

The interpretation of what constitutes discovery of the "injury" for purposes of applying the *judicial* time-of-discovery rule is important in interpreting ILL. REV. STAT. ch. 83, § 22.1 (Interim Supp. 1976). Section 22.1 provides that any malpractice suit against a physician or hospital must be brought within two years after plaintiff has actual or constructive "knowledge of his injury," but in no event may such an action be brought more than four years from the date on which occurred the act or omission giving rise to the injury. The question raised is what the legislature meant by "knowledge of the injury." Since the legislature was merely codifying the judicially created discovery rule (albeit by placing an outside limit on it), *knowledge of the injury* under Section 22.1 should be interpreted in the same manner as *discovery of the injury* under the judicial time-of-discovery rule.

One Illinois court has held that the discovery rule is not intended to apply where the plaintiff knows he has a cause of action but is unaware of the identity of the proper party defendant. Solt v. McDowell, 132 Ill. App. 2d 864, 868, 272 N.E.2d 53, 57 (1971). This parallels the approach taken with regard to the Illinois fraudulent concealment statute (ILL. REV. STAT. ch. 83, § 23 (1975)). Proctor v. Wells Bros. Co., 181 Ill. App. 468 (1913), *aff'd*, 262 Ill. 77, 104 N.E. 186 (1915).

98. *See* cases cited at note 97 *supra*. Earlier cases *intimated* that the plaintiff did not have the full statutory period from the point of discovery within which to file suit but only a reasonable period of time. *See* New Market Poultry Farm v. Fellows, 51 N.J. 419, 423, 241 A.2d 633, 636 (1968); Fernandi v. Strully, 35 N.J. 434, 442, 173 A.2d 277, 286 (1960); Rothman v. Silber, 90 N.J. Super. 22, 36, 37-38, 216 A.2d 16, 25, 26 (concurring opinion of Gaulkin, S.J. App. Div.), *cert. denied*, 46 N.J. 538, 218 A.2d 405 (1966).

The Illinois Appellate Court for the First District in E. J. Korvette v. Esko Roofing, 38 Ill. App. 3d 905, 350 N.E.2d 10 (1976), has held that a plaintiff may avail himself of the *full* statutory period from the time he discovers or should have discovered the facts constituting the basis for a claim. *Id.* at 909, 350 N.E.2d at 13. Compare this to the approach another Illinois court has taken with regard to the fraudulent concealment statute (ILL. REV. STAT. ch. 83, § 23 (1975)) in Solt v. McDowell, 132 Ill. App. 2d 864, 272 N.E.2d 53 (1971).

New Jersey has adopted a different approach under the discovery rule with regard to plaintiffs who discover their cause of action within the statutory period computed from the actionable conduct of the defendant. If the plaintiff files his suit within the statutory period computed from the point of discovery, the suit is prima facie timely filed. If the defendant can establish, however, peculiar or unusual prejudice resulting from the lapse of time between the expiration of the statutory period (computed from the actionable event) and the date suit is filed, and can also show that the plaintiff had a reasonable period of time to file suit before expiration of the statutory period (computed from the actionable event), the cause of action may be dismissed on limitation grounds. Fox v. Passaic Hosp., 71 N.J. 122, 363 A.2d 341 (1976).

99. *Lipsey's* adoption of the discovery rule was based on its redefining the phrase "cause of action accrued." Closer analysis of *Lipsey* and the other cases adopting the rule, however, reveal this is not an adequate justification for its adoption. *See* note 53 *supra*. What these courts have done is *not* to redefine any particular terms but simply to imply the existence of

should be automatically applied where a particular limitation statute was susceptible to a discovery rule interpretation. *Rozny* had articulated a possible balancing test approach in deciding whether a plaintiff would be entitled to invoke the discovery rule.[100] *Lipsey*, however, made no reference to it.

The judicial response to being freed from the shackles of *Mosby* was not long in coming. The Illinois Appellate Court for the Third District extended the discovery rule to personal injury negligence actions not within the medical malpractice sphere. In *Wigginton v. Reichold Chemicals, Inc.*[101] and *McDonald v. Reichold Chemicals, Inc.*,[102] the defendant had negligently sold defective chemical compounds to Sea Sled Industries for a three-year period, 1963 to 1966. Both plaintiffs were employees of Sea Sled and were exposed to vapors of isocyanates during the course of their employment. The plaintiffs alleged the vapors caused injury to their respiratory systems. McDonald and Wigginton became ill in 1963 and both suits were filed in 1967. The appellate court held that the causes of action were not barred by the two-year limitation period applicable to personal injury claims[103] and concluded "in factual situations . . . where . . . a disease existed, the cause of which was not known for a long period of time, . . . the 'time of discovery rule' should be applied . . . ."[104]

While the appellate court utilized the discovery rule, it was concerned with the effect the rule's general use would have on statutes of limitation. Its statement in this regard, though, is difficult to understand:

> [W]e in no way agree with the statement contained in the brief for the plaintiff that . . . 'it makes no difference what type of an action for injury to the person is involved. [That] [w]hether it be caused by malpractice, negligence, a defective product or any other, the time of accrual is the same.' To subscribe to such a broad statement would in effect abrogate and nullify the limitations statute. This we do not desire or intend . . . .[105]

Lipsey had made clear that all "cause of action accrued" statutes were susceptible to a discovery rule interpretation.[106] Surely a person who is injured by *any* type of negligence and who remains ignorant of the facts giving rise to his claim is no less deserving of the discovery rule's application than were the employees, Wigginton and McDonald. What the appel-

knowledge as a statutory requirement for triggering the running of the statutory period. *See* note 55 *supra*. If viewed in this light, the discovery rule is not limited to cause of action accrued statutes. *See* note 15 *supra*.

100. *See* note 87 and accompanying text *supra*.
101. 133 Ill. App. 2d 776, 274 N.E.2d 118 (1971).
102. 133 Ill. App. 2d 780, 274 N.E.2d 121 (1971).
103. ILL. REV. STAT. ch. 83, § 15 (1971).
104. 133 Ill. App. 2d at 780, 274 N.E.2d at 121.
105. *Id.*
106. *See* note 96 and accompanying text *supra*.

late court seemed to be questioning was the nullification of the purpose underlying limitation statutes—the protection of defendants from stale and nonmeritorious claims—by the *automatic* application of the discovery rule in all situations. An automatic application of the rule does "abrogate and nullify" this interest of the defendants. This problem was to be corrected by the Illinois Supreme Court in *Tom Olesker's Exciting World of Fashion v. Dun & Bradstreet, Inc.*[107]

The discovery rule was next extended into the professional malpractice sphere. In *Kohler v. Woolen, Brown & Hawkins*,[108] two passengers driven by an uninsured motorist died in an automobile accident in 1962. The defendants, a co-partnership of attorneys, were retained by the administrators of the estates to seek recovery for the deaths. The defendants filed a claim in 1963 with the insurance company that carried uninsured motorist coverage on the two decedents. The company advised the defendants that it would not pay the claim. The defendants did not file a demand for arbitration until 1965. In the arbitration proceeding the defendants procured judgments of $16,000 and $17,500, but these awards were ultimately vacated because the arbitration demand was not filed within two years from the death of the decedents as required by the Injuries Act.[109] The respective administrators subsequently filed suit in October 1970 and April 1971 against the defendants for malpractice.

The trial court held for the administrators and the defendants appealed. The appellate court found that the applicable limitations period was five years from when the cause of action accrued.[110] The defendants argued that the action was time-barred because the limitations period began to run when their negligence occurred, that is, May 14, 1964, when the two-year period for a wrongful death action had expired. The appellate court rejected this approach and held that the cause of action did not accrue until the administrators discovered or should have discovered the facts establishing the elements of their cause of action.[111]

107. 61 Ill. 2d 129, 334 N.E.2d 160 (1975). *See* notes 120-21 and accompanying text *infra*.

108. 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973).

109. ILL. REV. STAT. ch. 70, § 2(c) (1973).

110. ILL. REV. STAT. ch. 83, § 16 (1971). Much has been written about whether or when a claim against an attorney sounds in contract for the purposes of selecting the applicable statute of limitations. *See, e.g.*, W. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 380, 423 (1954); Baxter, *Statutes of Limitations in Legal Malpractice*, 18 CLEV.-MAR. L. REV. 82 (1969); Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. VA. L. REV. 225, 227-28 (1958); Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1292-94 (1963).

111. *Kohler* repudiates Toft v. Acacia Mausoleum Corp., 322 Ill. App. 514, 54 N.E.2d 616 (1944), and Maloney v. Graham, 171 Ill. App. 409 (1912). Eleven other jurisdictions apply the discovery rule to attorney malpractice cases. Cameron v. Montgomery, 225 N.W.2d 154 (Iowa 1975); Hendrickson v. Sears, 365 Mass. 83, 310 N.E.2d 131 (1974); Berry v. Zisman, 70 Mich. App. 376, 245 N.W.2d 758 (1976), and Corley v. Logan, 35 Mich. App. 199, 192 N.W.2d 319 (1971); United States Nat'l Bank of Ore. v. Davies, 274 Or. 663, 548 P.2d 966 (1976); Woodruff

It was in light of this expansion of the discovery rule following the Illinois Supreme Court's decision in *Lipsey* that Judge John Paul Stevens, writing for the Seventh Circuit, considered *Gates Rubber Co. v. USM Corp.*[112] In *Gates* Judge Stevens refused to extend the scope of the discovery rule to a commercial property damage action.[113] A manufacturer had bought a defective punch press which subsequently, over six years from the date of sale, caused substantial damage to his plant. After an extensive analysis of Illinois case law, Judge Stevens reasoned that the Illinois Supreme Court had limited the discovery rule to carefully circumscribed situations involving relationships of expertise or confidence (the professional malpractice cases) and to situations where a defective product caused a personal injury.[114] He felt the Illinois Supreme Court did not intend the rule to have general applicability.[115]

One of the cases relied upon by Judge Stevens was the Illinois appellate court decision in *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*[116] In that case the court refused to apply the discovery rule to a libel action under section 14 of the Limitations Act.[117] The Illinois Supreme Court, however, accepted *Tom Olesker* on appeal and reversed the appellate court[118] in a decision handed down a few months after Judge Stevens' decision in *Gates*.

v. Tomlin, 511 F.2d 1019 (6th Cir. 1975) (Erie-educated guess); Peters v. Simmons, 87 Wash. 2d 400, 552 P.2d 1053 (1976); Family Savings & Loan, Inc. v. Ciccarello, 207 S.E.2d 157 (W. Va. 1974). The other four jurisdictions apply the discovery rule to *all* professional malpractice cases. *See* note 59 *supra*. *See* Comment, *Legal Malpractice—Is the Discovery Rule the Final Solution*? 24 HAST. L.J. 795 (1973).

112. 508 F.2d 603 (7th Cir. 1975).

113. He did find, however, that a question of fact existed with regard to the plaintiff's fraudulent concealment claim raised in opposition to defendant's motion for summary judgment. *Id*. at 615-16.

114. In Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970), the plaintiff sought recovery under strict liability for injuries received while operating a trencher manufactured by defendant. The court held that statute of limitations began to run when the injury occurred and *not* when the product was sold. While *Williams* is often referred to as a discovery rule case, one writer correctly noted that it dealt "with a somewhat different proposition . . . namely, the extension of a manufacturer's liability beyond the traditional limits of warranty and privity of contract." Comment, *The Time of Discovery Rule and the Qualified Privilege Defense for Credit Reporting Agencies in Illinois after World of Fashion v. Dun & Bradstreet, Inc.*, 10 J. MAR. J. PRAC. & PROC. 359, 385-86 (1977). In the same regard is Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974). In each of these cases no contractual relationship existed between the defendant and plaintiff. Thus, regardless of the discovery rule, a cause of action could *not* arise until the injury occurred.

115. *Accord*, Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265 (7th Cir. 1975) (no time of discovery rule in a commercial transaction). For a general discussion of *Gates*, see Note, *Negligence—Discovery Rule Held Inapplicable in a Commercial Setting (Gates Rubber Co. v. USM Corp.)* (7th Cir. 1975), 6 SETON HALL L. REV. 728 (1975).

116. 16 Ill. App. 3d 709, 306 N.E.2d 549 (1973), *rev'd in part*, 61 Ill. 2d 129, 334 N.E.2d 160 (1975).

117. The text of the statute reads: "Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued." ILL. REV. STAT. ch. 83, § 14 (1969).

118. 61 Ill. 2d 129, 334 N.E.2d 160 (1975).

Tom Olesker presented the supreme court with an opportunity to provide guidance for any further expansion of the discovery rule. In that case Dun & Bradstreet had published in January 1969 a credit report which pictured incorrectly the financial state of the plaintiff's business. The plaintiff filed suit in March 1970. The defendant contended that the suit was barred by the one-year statute of limitation for defamation. The court took notice that such reports are distributed only to subscribers of defendant's service. Plaintiff was not a subscriber. The court held that the statute of limitations began to run "at the time [the plaintiff] knew or should have known of the existence of the allegedly defamatory report."[119]

The supreme court clarified its holding when it stated that the invocation of the discovery rule was *not* automatic. Merely because the plaintiff was free from negligence in failing to prosecute his claim within the statutory period and merely because the particular limitation statute was susceptible to a discovery rule interpretation did not mandate the rule be applied. Instead, a court should utilize the *Rozny* balancing test[120] to determine whether the plaintiff will be allowed to invoke the rule. It should balance the defendant's interest in being free from stale claims against the plaintiff's interest in being given an opportunity to present his cause of action.[121]

The Illinois Supreme Court in *Tom Olesker* took notice of the discovery rule's application in other states to a wide variety of actions.[122] Illinois appellate courts have relied upon the *Tom Olesker* decision, and in particular the supreme court's reference to the wide application of the discovery rule in other states, in rejecting Judge Stevens' decision in *Gates*.[123] They feel the Illinois Supreme Court has plainly indicated its intention to give wide application to the time of discovery rule.

119. *Id.* at 136, 334 N.E.2d at 164.

120. "In deciding whether to apply the discovery rule, this court, in *Rozny* stated what considerations . . ." should be weighed. *Id.* at 133, 334 N.E.2d at 162. *See* note 87 and accompanying text *supra*.

121. This is sometimes referred to as a balancing of the equities. A few other courts have adopted a similar approach regarding the invocation of the discovery rule. *See, e.g.*, Owens v. White, 342 F.2d 817, 820 (9th Cir. 1965) (applying Idaho law); Grey v. Silver Bow County, 149 Mont. 213, 216-18, 425 P.2d 819, 821 (1967); Lopez v. Swyer, 62 N.J. 267, 274-76, 300 A.2d 563, 566-68 (1973).

Such an approach has been in operation in England for some time. Williams, *Limitation Periods on Personal Injury Claims*, 48 NOTRE DAME LAW. 881, 885 n.18 (1973). The Limitation Act, 1963, 11 & 12 Eliz. 2, c. 47, provides that a plaintiff may be relieved from the bar of the statute of limitations upon a showing that "material facts of a decisive character" were not known until after the running of the statute. The plaintiff must establish that under the circumstances he could not reasonably have known the facts. Lopez v. Swyer, 62 N.J. at 276 n.4, 300 A.2d at 568 n.4.

122. 61 Ill. 2d at 135-36, 334 N.E.2d at 163-64.

123. *See* E.J. Korvette v. Esko Roofing, 38 Ill. App. 3d 905, 350 N.E.2d 10 (1976); Praznik v. Sport Aero, Inc., 42 Ill. App. 3d 330, 355 N.E.2d 686 (1976).

The latest supreme court case dealing with the discovery rule is *Auster v. Keck*.[124] In that case the court put Illinois lawyers on notice that the discovery rule may *not* be raised to overcome the defendants' invocation of the statute of limitations defense unless lack of knowledge is properly pleaded. In *Auster* the plaintiffs were second purchasers of a home which had been designed by the defendant architect in 1960 and built shortly thereafter. The plaintiffs purchased the home in 1969 and the ceiling soon began to collapse. In 1972, the plaintiffs filed a malpractice action against the architect. The architect moved to dismiss based on section 16 of chapter 83[125] which provides that any action to recover damages for injury to property must be filed within five years after the cause of action accrues.[126] The trial court dismissed the action, holding the limitation statute began to run when construction was completed. The appellate court reversed, applying the discovery rule. It held that the statute began to run when the plaintiffs discovered the architectural malpractice.[127]

The Illinois Supreme Court reversed the appellate court and reinstated the trial court's decision.[128] It held that the plaintiffs' failure to properly plead the discovery rule prevented its application. This decision should be scrutinized carefully. The supreme court proceeded on the erroneous assumption that the plaintiffs' cause of action was somehow "dependent on the alleged tort arising from the contractual relationship between the architect and the prior owner."[129] This assumption explains the supreme

124. 63 Ill. 2d 485, 349 N.E.2d 20 (1976).

125. ILL. REV. STAT. ch. 83, § 16 (1973).

126. In 1963 the Illinois legislature had enacted ILL. REV. STAT. ch. 83, § 24f (1963), which provided, *inter alia*, that no action to recover for personal injury, property damage or wrongful death arising out of a defective or unsafe condition of an improvement to realty could be brought against those who perform or furnish the design, plan, supervision or construction "unless such cause of action . . . accrued within four years after the performance or furnishing" of design or construction services. In the case of a personal injury suit, the limitation period would be six years following the performance or furnishing of design or construction services, four years for the cause of action to accrue under section 24f plus two years within which to bring suit under section 15 (ILL. REV. STAT. ch. 83, § 15 (1963)). In the case of a property damage claim, the limitation period would be nine years, four years under section 24f plus five years within which to bring suit under section 16 (ILL. REV. STAT. ch. 83, § 16 (1963)). Section 24f was found unconstitutional because it protected special classes of persons without extending equal protection to material men and owners of the real estate. Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967). Five other courts have found similar statutes to be unconstitutional while twelve have upheld them. *See* cases cited in Kittson County v. Wells, Denbrook & Assocs., 241 N.W.2d 799, 801 n.3 (Minn. 1976). For an analysis of the constitutional considerations in these special limitation statutes, *see* Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Nonaction*, 18 CATH. L. REV. 361 (1969).

In October 1969, the legislature enacted ILL. REV. STAT. ch. 51, § 58 (1969), which establishes a presumption of reasonable care in design and construction, if the improvement manifests no defects for a six-year period. This statute has yet to be tested in litigation.

127. 31 Ill. App. 3d 61, 333 N.E.2d 65 (1975); *accord*, Society of Mount Carmel v. Fox, 31 Ill. App. 3d 1060, 335 N.E.2d 588 (1975).

128. 63 Ill. 2d 485, 349 N.E.2d 20 (1976).

129. Aetna Life & Cas. Co. v. Sal E. Lobianco & Son Co., 43 Ill. App. 3d 765, 772, 357

court's decision regarding the discovery rule. The plaintiffs had alleged that they had no knowledge of the defect prior to its appearance. The supreme court noted, however, that the complaint was fatally silent with respect to the knowledge or lack thereof that the *prior* owner had concerning the existence of the defect.[130] Implicit in this holding is that if the *prior* owner had such knowledge the plaintiffs' suit was barred even before they had purchased the home and had a right, or for that matter any reason, to sue the architect.[131]

One of the most interesting applications of the discovery rule occurred in *Praznik v. Sport Aero, Inc.*[132] where the rule, for the first time in any jurisdiction, was applied to a wrongful death action. On March 23, 1969 Mr. and Mrs. Ronald J. Dobbs departed by aircraft for the Bahama Islands. They travelled in an aircraft owned by Sport Aero, a non-profit flying club and leased to one of its members. The Dobbs did not return on March 29, 1969 as expected. Without any further information the administrator of the Dobbs' estates filed suit against Sport Aero on March 29, 1971, basing the action on the theory of res ipsa loquitur. In November of 1971, two years and eight months after the crash, the wreckage of the aircraft was discovered.

The defendant moved to dismiss the complaint as barred by the Illinois Wrongful Death Act[133] which provided that "every action shall be commenced within two years after the death of such person." The appellate court rejected the argument, holding that the statute of limitation did not begin to run until November 1971 when the wreckage was discovered because it was at this time that plaintiff first knew with any certitude of the

N.E.2d 621, 626 (1976). *Lobianco* distinguished *Auster* on this ground. In *Lobianco* a home was built in 1966 and plaintiffs, the homeowners, bought it in 1971. The house was partially destroyed by fire in 1972. The plaintiffs had no contractual relationship with the masonry contractor. The court held that the plaintiffs' cause of action, charging the masonry contractor with negligence in the construction of the fireplace, arose at the time of the fire.

130. Even assuming the plaintiffs' action was interrelated with that of the prior owner, such a requirement as this "appears to be an unprecedented and potentially impossible standard of proof." Note, *Malpractice: The Design Professionals Dilemma*, 10 J. MAR. J. PRAC. & PROC. 287, 306-07 (1977). The plaintiff "must allege and prove lack of knowledge on the part of all previous owners, some of whom may have moved, dissolved their corporation, merged their organization or worse of all died. *Id.*

131. This premise of the *Auster* decision has been rejected in AETNA LIFE & CAS. CO. v. SAL E. LOBIANCO & SON CO., 43 Ill. App. 3d 765, 357 N.E. 2d 621 (1976). *See* note 129 *supra*.

132. 42 Ill. App. 3d 330, 355 N.E.2d 686 (1976).

133. ILL. REV. STAT. ch. 70, § 2 (1969). It was recently held in Wilbon v. D.F. Bast Co., — Ill. App. 3d —, 365 N.E.2d 498 (1977), that a wrongful death cause of action of a decedent's minor child may be brought within the time specified by section 22 of the Limitations Act (ILL. REV. STAT. ch. 83, § 22 (1975)) notwithstanding the wrongful death statute of limitations (ILL. REV. STAT ch. 70, § 2 (c) (1975)). The court felt that "the intent of the Legislature to extend the time to bring an action for persons under 18 years of age, as set forth in section 22 of the Limitations Act . . . overrides section 2 of Chapter 70." — Ill. App. 3d at —, 365 N.E. 2d at 501.

decedents' deaths. The evolution of the discovery rule in Illinois caused the court to determine that the discovery rule was now the general rule[134] and that the only question which remains is its application in specific situations.

LEGISLATIVE CODIFICATION OF THE DISCOVERY RULE IN ILLINOIS

The initial legislative codification of the discovery rule was a medical malpractice statute[135] in which a plaintiff had two years to bring suit after discovery of a foreign object negligently left inside him. In no event, however, could suit be brought more than ten years after the operation.

In 1975 and 1976 the General Assembly completely revamped the medical malpractice statute of limitation. Following the Illinois Supreme Court's decision in *Lipsey*, the discovery rule applied to all medical malpractice actions with only foreign object cases having an outside limit of ten years. The legislature passed the Medical Malpractice Act[136] in 1975 which included a revision of the statute of limitation.[137] They placed an outside limit of five years on medical malpractice claims not involving foreign objects.

In 1976, the General Assembly passed medical malpractice legislation,[138] which included another revision of the limitation statute,[139] whereby a uniform rule was adopted for all medical malpractice suits brought against a physician or hospital. Such a suit must be brought within two years after the plaintiff has actual or constructive knowledge of the "injury" but in no event may such an action be brought more than four years from the date "on which occurred the act or omission or occurrence alleged . . . to have been the cause of such injury . . . ."[140] The legislature rejected a bill which

134. 42 Ill. App. 3d at 336, 355 N.E.2d at 691. The discovery rule also seems to have taken a dominant position with regard to federal limitation statutes. In Hulver v. United States, 393 F. Supp. 749 (1975), the court stated: "It is well settled that the period of limitations does not begin to run until the [defendants'] alleged acts or omissions . . . are discovered, or in the exercise of reasonable diligence, should have been discovered by the plaintiff. This equitable doctrine applies to all federal statutes of limitation . . . ." *Id.* at 754.

135. ILL. REV. STAT. ch. 83, § 22.1 (1965).

136. "An Act to revise the law in relation to medical practice." PUB. ACT 79-960, 1975 ILL. LAWS Vol. II.

137. ILL. REV. STAT. ch. 83, § 22.1 (1975). The Illinois Supreme Court held unconstitutional the Medical Malpractice Review Panel, ILL. REV. STAT. ch. 110, §§ 58.2-.10 (1975); the regulation of malpractice insurance rates, ILL. REV. STAT. ch. 73, § 1013a (1975); and the $500,000 limitation of recovery, ILL. REV. STAT. ch. 70, § 101 (1975). Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

138. The various sections are contained in "An Act in relation to the regulation of medical practice and recovery for injuries from malpractice." PUB. ACT 79-1434, 1976 ILL. LAWS.

139. ILL. REV. STAT. ch. 83, § 22.1 (Interim Supp. 1976).

140. *Id.* The statute places a limit on the use of the discovery rule only in actions against physicians and hospitals as opposed to other health care providers. Who exactly is encompassed within the term "physician" is open to speculation:

> [I]t is by no means clear that dentists, osteopaths, or chiropractors, all of whom are licensed to practice in this state, are included within the term 'physician' so as to receive the benefits of the protection of Sec. 22.1 as would those holding an M.D.

would have completely eliminated a discovery rule approach for all medical malpractice actions except foreign object cases.[141]

ANALYSIS

Many judiciaries have applied the discovery rule to their tort statutes of limitation. They recognize that while there is a need to protect prospective defendants from stale lawsuits, an absolute bar has the adverse effect of removing a legal remedy for meritorious claims that are not discovered until after the limitation period has run. Most of these courts have failed to realize, however, that while the discovery rule achieves a result more beneficial to the plaintiff in such cases, it has the automatic consequence of exposing prospective defendants to suit for events which occurred twenty-five, fifty or even a hundred years previous and for which no evidence now exists with which the defendant can defend himself.

The Illinois judiciary has recognized that in attempting to achieve justice for both the plaintiff and the defendant "any attempt to favor one must be at the expense of the interests of the other."[142] For this reason the Illinois Supreme Court, in *Tom Olesker*, set out the *Rozny* balancing test as the proper approach to be used in considering the judicial application of the discovery rule in a particular case. In light of the particular facts presented, the judge will balance "the increase in the difficulty of proof which accompanies the passage of time against the hardship of the plaintiff who neither knew nor should have known of the existence of his right to sue."[143] In other words, the courts will balance the policy of protecting parties from false and fraudulent claims which become increasingly difficult to disprove

> degree. Additionally, the court has some doubts whether out-patient clinics would receive those protections or . . . whether an *association* or *professional corporation* of physicians would receive the protection that the individual physician members thereof would receive . . . .

Singh v. Carle Clinic, No. 76L-969 (6th Judicial Circuit, filed July 1977).

It is clear that section 22.1 does *not* apply to *e.g.*, nurses, anesthetists, lab and X-ray technicians, occupational and physical therapists, nursing homes, and independent laboratories providing services to physicians. The statute of limitations applicable to causes of action against these health care providers is the personal injury statute (ILL. REV. STAT. ch. 83, § 15 (1975)), ("two years after the cause of action accrued"). The discovery rule is applicable to these defendants without any outside time limit.

In Singh v. Carle Clinic, No. 76L-969 (6th Judicial Circuit, filed July 1977), Trial Judge Robert E. Steigmann held that section 22.1 is unconstitutional as being special privilege legislation (Article 4, section 13 of Illinois Constitution of 1970) in favor of hospitals and physicians. *See also* Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

141. House Bill 3545, Proposed Amendment 15. The legislature also rejected a proposed re-extension of the outside limit on foreign object cases to that limit which existed in 1965, ten years from the date of operation. "An Act in relation to the regulation of medical practice and recovery for injuries from malpractice." PUB. ACT 79-1434, 1976 ILL. LAWS § 6, at 1352-53.

142. Williams, *Limitation Periods on Personal Injury Claims*, 48 NOTRE DAME LAW. 881, 885 (1973).

143. Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 133, 334 N.E.2d 160, 162 (1975).

with passage of time against the policy of insuring that a party with a valid claim be given an opportunity to present it.

The Illinois legislature has stepped in and placed an outside limit on the use of the discovery rule in the medical malpractice area. With regard to those cases that fall within the time period provided, the legislature has also replaced the judicial balancing test with a hard and fast approach. If the plaintiff has remained faultlessly ignorant of the facts constituting his claim, he is automatically entitled to invoke the discovery rule.

The outside limit imposed by the Illinois legislature on the use of the discovery rule in medical malpractice cases is not unique. Eighteen states have a discovery statute of limitation for medical malpractice actions.[144] The vast majority of these statutes contain an outside time limit after which suit may not be brought; the exceptions being Michigan[145] and Vermont[146] which provide no outside limit for *any* medical malpractice actions, while Iowa,[147] Tennessee[148] and Utah[149] have no outside limit for foreign object cases.

The distinguishing factor which has caused the enactment of these bifurcated statutes of limitation in this area of tort law is the medical malpractice crisis.[150] The discovery rule subjects a professional to undetermined liability. This "long tail of exposure" (the discovery rule's application without any outside time limit) makes it impossible to make actuarial predictions, that is, a prediction of ultimate exposure to contingent liabilities. A result is an increase in professional malpractice insurance costs.[151] An absolute outside limit on the discovery rule will enable insurance companies to restrict their reserves according to a specified time period and may thereby result in a reduction in the cost of malpractice insurance.[152]

144. *See* note 58 *supra*. While the courts have not felt constrained in adopting the discovery rule they feel that the creation of an outside limit on the rule must be left to the legislature. *See* Landgraff v. Wagner, 26 Ariz. App. 49, 546 P.2d 26 (1976).

145. MICH. COMP. LAWS ANN. § 600.5838 (Cum. Supp. 1976-77).

146. VT. STAT. ANN. tit. 12, § 512(4) (Supp. 1976).

147. IOWA CODE § 614.1(9) (Supp. 1976).

148. TENN. CODE ANN. § 23-3415 (Supp. 1976).

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

150. The Illinois State Medical Society, Illinois Hospital Association and the insurance underwriters had introduced the various medical malpractice legislation including the revised statute of limitations. *See* ILLINOIS TRIAL LAWYERS ASSOC., PETITION TO THE HONORABLE DAN WALKER, GOVERNOR OF THE STATE OF ILLINOIS, REQUESTING THE GOVERNOR TO EXERCISE HIS AMENDATORY VETO POWER AS TO SECTION FOUR OF SENATE BILL 1024 3 (1975). One of their major complaints was the discovery rule's application without any outside time limit. This made it impossible for insurance companies to make accurate actuarial predictions.

151. Insurance companies have had to increase their premiums in order to reflect the lack of predictability of the costs underlying malpractice insurance claims. ILLINOIS INSURANCE COMMISSION, FINAL REPORT 47-60 (June 1975).

152. Note, *A Four Year Statute of Limitations for Medical Malpractice Cases: Will Plaintiff's Case be Barred?* 2 PAC. L.J. 663, 668-69 (1971). *See* Henahan, *Malpractice*, 237 ATLANTIC MONTHLY 11 (1976).

The bifurcated statute is a severe measure adopted to combat this serious insurance problem.[153]

Most commercial and professional entities carry liability insurance and the cost of their insurance will also increase because the discovery rule prevents accurate actuarial predictions on behalf of the insurer. Such an increase, however, would have to be severe to justify a similar limitation on the scope of the discovery rule as now exists in the medical malpractice arena. This is especially true in light of the fact that the customers of any commercial or professional entity ultimately bear the cost of such insurance. The public may be more willing to bear the increased cost in malpractice insurance rather than to have an absolute time bar imposed against undiscovered meritorious claims against the company or professional.

The bifurcated statute should *not* be adopted in other tort areas because it does not achieve a proper balance between the competing interests of the plaintiff and defendant. The bifurcated statute does reduce the probability of injustice which results when a party has a meritorious claim barred before he even becomes aware of the facts constituting the claim. It does not, however, eliminate the possibility of such an injustice ever occurring, as does the judicial balancing test. The justification put forth for the bifurcated statute is that society has a need for certainty and finality in the administration of affairs. "[T]he Illinois legislature concluded that, after an adequate time interval has passed, the separate interest in finality outweighs the interest of affording every plaintiff a remedy for his wrong."[154]

The purpose of the statutes of limitation, however, is not to shield a wrongdoer,[155] and they are not intended to provide eventual peace of mind to a tortfeasor regarding potential liability.[156] The primary purpose of limitation periods is to "prevent a plaintiff from gaining an unfair advantage by carelessly and wilfully sleeping on his rights. . . ."[157] It is difficult to

153. "Special considerations in medical malpractice indicate that legislative limitation in other areas is not immediately anticipated." Scott, *For Whom the Time Tolls—Time of Discovery and the Statute of Limitations*, 64 ILL. B.J. 326, 332 (1976). *See* James & Thorton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431 (1950). *See generally*, G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

154. Gates Rubber Co. v. USM Corp., 508 F.2d 603, 612 (7th Cir. 1975). The statute of limitations of the Uniform Commercial Code states that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued," and that the "cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." ILL. REV. STAT. ch. 26, § 2-725(1), (2) (1975). Comment 2 to this code provision states that the rule is "based on a policy 'that commercial interests are best served by quickly bringing finality to commercial transactions.' " ILL. ANN. STAT. ch. 26, § 2-725 (Smith-Hurd 1963).

155. Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 137, 334 N.E.2d 160, 164 (1975).

156. Romano v. Westinghouse Elec. Co., 336 A.2d 555, 560 (R.I. 1976).

157. *Id.* at 560. Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d at 132, 334 N.E.2d at 162.

understand how any interest in finality can outweigh the policy of providing every plaintiff a remedy for his wrong. This is especially difficult to comprehend in light of the judicial balancing test now being used by the Illinois courts with respect to the discovery rule—a test which achieves a proper balance between the competing interests of the plaintiff and defendant. The absolute time bar of the bifurcated statute prevents the court from ascertaining whether a plaintiff has in fact slept on his rights and whether there has been any increase in the difficulty of proof as a result of the passage of time. It creates an unfounded presumption that any claim left unattended for a specified period results in such a destruction and disappearance of relevant evidence as to warrant taking away the legal remedy of a meritorious claimant.

CONCLUSION

The discovery rule is in a process of judicial and legislative evolution in practically every jurisdiction. The harshness and sometimes flagrant injustice caused by the traditional rule that a cause of action accrued when the tortious act occurred, regardless of the wronged party's lack of knowledge of the tortfeasor's negligence, cried out for an alternative approach, a modification. Where the legislature has been unwilling to act, the courts have stepped in and adopted the discovery rule, leaving to the legislature the question of whether the reform should be retained or rescinded in whole or in part.

The discovery rule is now the general rule in Illinois and it will be applied in appropriate circumstances. The Illinois courts have seen the folly, however, in abandoning one extreme position (an absolute time bar for the protection of a prospective defendant from stale claims) for another (strict application of the discovery rule as a means of preserving a plaintiff's meritorious cause of action). Instead the Illinois courts apply a judicial balancing test which is both workable and flexible.

The intriguing questions which remain are: (1) whether the discovery rule will come to dominate in other states, as it has in Illinois, all areas of tort law; and (2) whether state legislatures will confine the discovery rule's activity to arbitrarily defined time periods by the use of the bifurcated statute. As a result, most tort statutes of limitation, which had remained virtually unchanged since the era of King James I, will be in a state of transformation for years to come.

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