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PUTTERING ABOUT IN A SMALL LAND: LOUISIANA REVISED STATUTES 9:5628 AND JUDICIAL RESPONSES TO THE PLIGHT OF THE MEDICAL MALPRACTICE VICTIM

INTRODUCTION

For the last decade, legislative efforts have been aimed at alleviating the much publicized crisis in escalating medical malpractice insurance rates. Perceiving a threat to the doctor-patient relationship, many legislatures have enacted tort reforms that have broadly affected all phases of malpractice litigation. Beyond simple guarantees of insurance coverage, many of the most common legislative devices cut to the heart of basic tort doctrine.

The Medical Malpractice Act and other relevant legislation represent a compromise between varied social policies. Most notably, there is a conflict between economic necessity and personal accountability.[1] Tort modifications may be necessary to protect society from prohibitive insurance rates and health care costs. Yet individual plaintiffs and nonphysician defendants often suffer harsh procedural outcomes from such modifications even though they stand no more responsible than their counterparts in other species of tort litigation.[2] While one may argue that the solidarily liable manufacturer of a defective medical device should be held to a higher degree of economic accountability than manufacturers in other fields simply because the risk of financial responsibility is greater where human lives are jeopardized as a result of failure, it is more difficult to say that a plaintiff who places himself under the care of a physician has somehow assumed a greater risk than the plaintiff who places his vehicle in the stream of traffic or dives headfirst into the shallow end of a swimming pool. It is not unjust to allow the economics of the first situation to weigh into a balancing of the accountability of two defendants—one of whom is a medical practitioner subject to the caprices of his malpractice insurer and the Insurance Rating Commission, while the other is a multinational entity that has knowingly assumed a business risk. It may, however, be unjust

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1. One writer has called accountability the "lodestone" at the center of tort law. Dodds, Accountability and Comparative Fault, 47 La. L. Rev. 939, 943 (1987).

2. A nonphysician defendant, such as the manufacturer of a medicine may, for example, be subject to operation of the "discovery rule" for many years after La. R.S. 9:5628 (1983) has cut off its application to the physician who prescribed its use.

to deprive a plaintiff of recovery to accommodate the economic interests of the medical industry when that plaintiff is wholly innocent of any comparative fault.

The medical malpractice legislation, as well as related tort reforms, manifests a clear legislative policy to limit the vulnerability of medical practitioners to lawsuits and to regulate their financial exposure when they are cast in judgment. Irrespective of the laudability, vel non, of this purpose, the courts are often confronted with an "unfair" result or a "socially unworkable rule"[3] when applying the medical malpractice legislation. Some courts genuflect to the intent and purpose of the statute and apply it mechanically, washing their hands of any considerations of substantive justice; the law does what the law says and that is that. In contrast, other courts follow their creative "thrust toward justice"[4] and, instead of simply bowing to broad legislative purpose, take a more "creative" approach. Some may rely upon ingenious statutory interpretation, while others may take the more nebulous path of equity and eschew a mechanical application of a statute when it would lead to a result that "no legislator, living or dead, would ever have intended."[5] No one approach is fully satisfying: the path of restraint leads to certainty but may be "unfair"; the path of remedy fashioning may well be "fair" but leads to uncertainty, has little precedential value, and often extends the power of the court beyond its proper sphere of influence.

The tension between these two approaches can be clearly seen in the decisions interpreting Louisiana Revised Statutes 9:5628. Despite the manifest purpose of this statute, the courts have gone in all directions, leaving implication, ambiguity, and even conflict where the law should be clear.

THE ACT

Medical malpractice claims, whether asserted in tort or contract, were for many years treated much the same as other civil litigation. In 1975, reacting to the spiraling increase in the costs of medical malpractice insurance, the Louisiana legislature passed the Medical Malpractice Act.[6]

3. Tate, The "New" Judicial Solution: Occasions For and Limits To Judicial Creativity, 54 Tul. L. Rev. 877, 913 (1980).

4. Id. at 909-12.

5. Id. at 911.

6. La. R.S. 9:5628 (1983) and La. R.S. 40:1299.37-.48 (1977 and Supp. 1990) [hereinafter the Act or the Medical Malpractice Act]. The portions of the Act significant to this discussion fit the following scheme. Health care providers have the option of "qualifying" under the Act. La. R.S. 40:1299.41A.(1) (Supp. 1990). This category includes physicians, hospitals, dentists, registered nurses, practical nurses, pharmacists, optometrists, podiatrists, chiropractors, physical therapists, psychologists, or any officer, employee or

While not physically located within the act, Louisiana Revised Statutes

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agent thereof acting in the course and scope of his or her employment. If they do not qualify, the Act leaves malpractice claims brought against them wholly unaffected. La. R.S. 40:1299.41D. (Supp. 1990). Such plaintiffs are treated no differently than any other tort victims.

In order to qualify under the Act, a health care provider must file proof of financial responsibility with the commissioner of insurance. La. R.S. 40:1299.42A.(1) (1977). Proof includes minimum malpractice liability insurance coverage of $100,000 or, if self-insured, financial responsibility for an amount greater than $100,000. La. R.S. 40:1299.42E. (Supp. 1990). Any attempts by an insurer to limit its policy coverage are void. La. R.S. 1299.45C. (Supp. 1990); Eisinka v. Keasler, 511 So. 2d 1289, 1292 (La. App. 2d Cir.), writ denied, 514 So. 2d 135 (1987). Once a health care provider has qualified under the Act, the amount of his total liability is limited for any one malpractice claim. A plaintiff's total recovery against a qualified provider may not exceed $500,000, excluding interest, costs, and "future medical care and related expenses." La. R.S. 40:1299.42B.(1) (Supp. 1990) was amended by 1984 La. Acts No. 435 to provide that the limitation shall not apply to "future medical care and related benefits." Prior to September, 1984, the statute acted as an absolute limitation. A health care provider's maximum liability is $100,000 for any single claim, and the balance of the $500,000 limitation comes from the patient's compensation fund. La. R.S. 40:1299.42B.(3)a (Supp. 1990). La. R.S. 40:1299.44C.5 (1977) provides that "the court shall consider the liability of the health care provider as admitted and established." This instruction is enforced when the provider has decided to pay compensation exhausting the $100,000 limit of liability. The plaintiff may then seek additional compensation from the Louisiana patient's compensation fund with liability considered as established. See Moolekamp v. Rubin, 531 So. 2d 1124 (La. App. 4th Cir. 1988).

In addition to the limitation on liability, the Act provides that all plaintiffs must request a medical review panel from whom it receives an expert opinion prior to filing suit in a court of law. La. R.S. 40:1299.47. (Supp. 1990). See Gobble v. Baton Rouge Hosp., 415 So. 2d 425 (La. App. 1st Cir. 1982) ("all malpractice claims" includes wrongful death claims). This requirement may be waived by both parties, and a health care provider's failure to timely file an exception of prematurity when a panel has not been requested is tantamount to waiver of the exception. Barraza v. Scheppegrell, 525 So. 2d 1187 (La. App. 5th Cir. 1988). Constitutionality of the panel requirement was recently upheld in Cooper v. Sams, 532 So. 2d 380 (La. App. 3d Cir.), writ denied, 533 So. 2d 382 (1988) and Bridley v. Alton Ochsner Medical Found. Hosp., 532 So. 2d 905 (La. App. 5th Cir. 1988). Medical review does not apply to a physician who has, instead, chosen to arbitrate.

The sole duty of the panel is to express its expert opinion. No findings are made relative to damages, and no findings are binding on the victim or the health care provider. La. R.S. 40:1299.47G., H. (1977). While inconclusive, the opinion is admissible as evidence in a court of law. Everett v. Goldman, 359 So. 2d 1256, 1264 (La. 1978). The use of medical review panels is intended to weed out frivolous claims and to encourage settlement. A claim found meritless is thought likely to encourage a plaintiff to abandonment or prompt settlement for a "nominal" amount. Id.; see also Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications, 55 Tex. L. Rev. 759 (1977). Conversely, a plaintiff gaining a favorable opinion from the panel is thought more likely to negotiate a favorable settlement. Thus, the employment of review panels is directly aimed at reducing the costs of litigation and the actual recovery of damages.

Generally, the courts have been consistent in their treatment of the review panels. Their opinions are not binding and cannot be relied upon to determine issues of fact. Their

9:5628 establish a special prescriptive period pertaining to medical malpractice. This statute and those that provide for financial limitations of liability are the most controversial of the medical malpractice legislation. This comment will explore the judicial response to the Medical Malpractice Act through an examination of key decisions that have wrestled with the "meaning" of Louisiana Revised Statutes 9:5628.

PRESCRIPTION

Louisiana Revised Statutes 9:5628 provides two periods within which a claim must be brought.[7] A plaintiff has one year from malpractice in which to file suit (or to bring a claim before a medical review panel) unless he fails to immediately discover the act, omission, or neglect. In the latter case, a three year period limits permissible non-discovery to three years. If a plaintiff fails to discover his condition until more than a year after negligent treatment has occurred, he has a year from discovery to bring suit against his treating physician. On the other hand, if he does not discover his condition until two years and eleven months after treatment, he must bring suit within a month of that discovery

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purpose is simply to determine whether a procedure of a health care provider fell below the standard of care. The courts have almost uniformly read the statutes literally, and such readings have rarely affected a plaintiff or defendant adversely.

Further modification of tort law was the Act's prohibition against ad damnum clauses. This statutorily precludes a prayer for a specific amount of damages in an action for negligent health care. The victim of a qualified provider may ask only for "such damages as are reasonable in the premises," not a specific dollar amount. La. R.S. 40:1299.41E. (Supp. 1990). This provision assertedly is beneficial to health care providers because it prevents the possibility of a jury's being unduly impressed by the quantum of damages sought in the petition. It is intended to prevent the implication in the public consciousness of inflated ideas of what claims are worth. *Everett*, 359 So. 2d at 1263 (La. 1978). However, this modification now applies generally to all tort claims. Specific Dollar amounts are no longer permissible in a plaintiff's petition.

Other provisions of the Medical Malpractice Act concern the medical malpractice coverage to be furnished by state owned or state operated hospitals in Louisiana. La. R.S. 40:1299.37 (1977); medical malpractice coverage to be furnished employed physicians and others by each agency of the state (La. R.S. 40:1299.38 (1977)); $500,000 maximum recovery in connection with malpractice claims against persons acting within the course and scope of employment, for and on behalf of the state (La. R.S. 40:1299.39F. (Supp. 1990)); and the Uniform Consent law (La. R.S. 40:1299.40 (1977)).

7. Louisiana Revised Statutes 9:5628(A) provides:

> No action for damages for injury or death against any physician, chiropractor, dentist, psychologist, or hospital duly licensed under the laws of this state, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission or neglect, or within one year from the date of discovery of the alleged act, omission or neglect; however, even as to claims filed within one year of discovery, in all cases such claims must be filed at the latest within three years from the date of the alleged act, omission or neglect.

or suit is barred by Louisiana Revised Statutes 9:5628. The three year period thus is an "absolute" outer limit to the time in which a plaintiff's suit must be filed.

Prescription or Peremption?

An issue that initially arose regarding Louisiana Revised Statutes 9:5628 was whether the three year period was prescriptive or peremptive.[8] A peremptive period can be neither interrupted nor suspended,[9] and upon expiration of a peremptive period, a cause of action is extinguished.[10] Until recently, some Louisiana courts had found the three year limit of Louisiana Revised Statutes 9:5628 to be peremptive.[11] Indeed, the first circuit upheld the constitutionality of the statute over claims that it was unconstitutionally peremptive.[12] That same year, however, the fourth circuit found the three year period to be prescriptive: timely suit against one solidarily liable physician interrupted prescription against another physician who was sued more than three years after the malpractice had occurred.[13] Finally, in *Hebert v. Doctors Memorial Hospital,*[14] the supreme court resolved the issue, holding that the statute was prescriptive.

Prior to *Hebert,* there were several tests whereby Louisiana courts determined whether a limitation was prescriptive or peremptive. In *Guillory v. Avoyelles Railway Co.,*[15] the supreme court focused on two factors: an unusually strong public interest that the right exist for only a short period of time and that the statute in question both creates the right and provides the period within which it could be exercised. Subsequent to *Guillory,* the courts adopted various approaches that ranged

8. Succession of Pizillo, 223 La. 328, 65 So. 2d 783 (1953); Guillory v. Avoyelles Ry., 104 La. 11, 28 So. 899 (1900); See also Note, Prescription—What You Don't Know Can Hurt You—Louisiana Adheres To A Three Year Limit on The Discovery Rule, 58 Tul. L. Rev. 1547, 1553 n.40 (1984).

9. La. Civ. Code art. 3461.

10. La. Civ. Code art. 3458.

11. Maltby v. Gauthier, 506 So. 2d 1190, 1193 (La. 1987) (peremptive "at least in part").

12. Valentine v. Thomas, 433 So. 2d 289 (La. App. 1st Cir.), writ denied, 440 So. 2d 728 (1983). See also Blanchard v. Farmer, 431 So. 2d 42 (La. App. 1st Cir.), writ denied, 438 So. 2d 571 (1983).

13. Chalstrom v. Desselles, 433 So. 2d 866 (La. App. 4th Cir.), writ denied, 438 So. 2d 215 (1983); Note, supra note 8, at 1554 n.40; see also, the strange case of Billiot v. American Hosp. Supply Corp., 721 F.2d 512 (5th Cir. 1983), discussed infra at text accompanying note 80.

14. 486 So. 2d 717 (La. 1986).

15. 104 La. 11, 28 So. 899 (1900).

from a focus solely on the policy behind the statute[16] to tests based on numerous mechanical formulas.[17]

The *Hebert* court followed a structural approach focusing upon four basic factors. First, it noted that the word "prescriptive" in the title of the bill enacting Louisiana Revised Statutes 9:5628 indicated an intent to enact a prescriptive, rather than a peremptive, period. Second, the court drew from *Guillory* and determined that, because Louisiana Revised Statues 9:5628 does not both create a right and provide its period of limitation, the statute was not intended to be peremptive. Third, the court noted that when a period of limitation is short it is more likely peremptive; the fact that Louisiana Revised Statutes 9:5628 provides a three year period evidences a lack of concern for finality. Fourth, the court observed that peremptive statutes are traditionally more common in the case of public rights than private ones such as the right to sue for medically related injuries.

The supreme court therefore characterized the statute as a basic one year prescriptive period for delictual actions, "coupled with the discovery exception . . . of contra non valentum."[18] The three year maximum was considered a "separate and independent . . . qualification" that provided that "the contra non valentum type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission or neglect."[19] In later decisions interpreting *Hebert* the court has described Louisiana Revised Statutes 9:5628 as "both a prescriptive and peremptive statute."[20] *Hebert*, read with these subsequent decisions, means that the opportunity to exercise the discovery rule exception to prescription, but not the cause of action itself, is extinguished at the expiration of the three year period. One lower court opinion stated that the three year limit was incorporated into Louisiana Revised Statutes 9:5628 solely because the statute expressly provided a "reasonable ignorance" suspension of the one year prescriptive period.[21]

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16. See, e.g., Ashbey v. Ashbey, 41 La. Ann. 102, 5 So. 539 (1889); Note, Hebert v. Doctors Memorial Hospital: Three Year Limit On Exercising Medical Malpractice Claims Held To Be Prescriptive, 61 Tul. L. Rev. 941, 944 (1987).

17. Note, supra note 16, at 944.

18. Hebert v. Doctors Memorial Hosp., 486 So. 2d 717, 723 (La. 1986).

19. Id. at 725; See Crier v. Whitecloud, 496 So. 2d 305, 311 n.1 (La. 1986) (Lemmon, J., concurring) ("There has always been great difficulty in distinguishing prescriptive from peremptive statutes.")

20. St. Charles Parish School Bd. v. GAF Corp., 512 So. 2d 1165, 1169 (1987); Maltby v. Gauthier, 506 So. 2d 1190 (La. 1987) ("[T]he Legislature did not simply shorten a prescriptive period . . . but rather substituted, at least in part, a peremptive period for a prescriptive period.") Cf. Landry v. Lafayette General Hosp., 520 So. 2d 947 (La. App. 3d Cir. 1987) (a prescriptive statute rather than a peremptive statute except that the discovery rule is made "inapplicable" after three years).

21. Valentine v. Thomas, 433 So. 2d 289 (La. App. 1st Cir.), writ denied, 440 So. 2d 728 (1983).

If the three year limit was intended only to limit perpetual operation of the discovery rule, then it should not extinguish a plaintiff's opportunity to exercise his right to bring suit when it is based upon any other type of interruption or suspension.

The *Hebert* court may be criticized for its formalistic emphasis on a single word when examining the title of the bill.[22] The bill provided for the creation of a "maximum prescriptive period," and the word "maximum" indicates that the legislature intended to create the strictest form of limitation that was available. At the time of the statute's enactment, however, the term "peremption" was not an officially recognized term in the Louisiana Civil Code, but rather a jurisprudential development. It thus seems logical to conclude that the legislature's failure to use the word "peremption" was due to the fact that it had not yet officially recognized the term.[23]

The court's reasoning regarding the other three factors was also flawed. To require that a statute both create a right and set that right's period of limitation in order to be peremptive is to prevent the legislature from ever making a pre-existing right subject to peremption. It is also difficult to understand the court's conclusion that, because the outer period of Louisiana Revised Statutes 9:5628 is three years, it was not "intended" to be peremptive. It is more logical to conclude that the legislature, concerned that a short peremptive period might be too restrictive, simply created a longer peremptive period than is customary. Lastly, the fact that private rights are not traditionally subject to peremptive periods is no reason to disregard the obvious purpose of the statute, a purpose that is clear from the plain language of the statute.

Although the supreme court read the statute's three year period as peremptive only with regard to claims not filed due to nondiscovery within three years of an act of malpractice, that interpretation is contrary to the literal provisions of the statute. The statutory language makes the three year limit effective "*even as to* claims filed within one year of discovery." Literally, this clause extends to all types of suspension and interruption and seems to support a reading that the three year period is, in fact, intended to be peremptive. Based upon its language, the courts could have followed the broad and universally proclaimed legislative purpose of the statute and read its language as reflective of an intent to bar claims brought after three years irrespective of the reason such claims are untimely filed. Under the current interpretation of the statute, however, the three year limit only applies to the length of time in which a victim must discover the injury. This leads to the

22. Note, supra note 16, at 947.

23. Id. at 947-948. It was not until 1984 that the legislature statutorily adopted peremption.

conclusion that, if the three year limit is solely a bar to the discovery rule, other types of equitable suspensions are still viable under the statute.[24] Although this seems the fairer approach, it was probably not

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24. See infra text accompanying notes 55-64.

In some instances, the point at which prescription commences may be difficult to determine. Generally, in cases such as those in which a single surgical procedure or test has allegedly been performed negligently, there is a clear act, omission or neglect; a clear point from which prescription will run. However, there are also cases where allegedly negligent treatment may have continued over a period of time. Such instances may involve active medical treatment such as chemotherapy or may involve continuing care in connection with nursing home residency or inpatient mental health treatment. Cf. Free v. Franklin Guest Home, 397 So. 2d 47 (La. App. 2d Cir.), writ denied, 401 So. 2d 971 (1981) (unlike suits against physicians, a suit against a nursing home for negligent treatment may be brought ex contractu and is thus governed by the prescription of ten years since La. R.S. 9:5628 (1983) does not apply to those defendants not provided for in the statutory enumeration). Such situations may create problems when various defendants have provided care at successive points in time prior to the patient's suit for injuries. See, e.g., South Central Bell v. Texaco, Inc., 418 So. 2d 531 (1982); Derbofen v. T.L. James & Co., Inc., 355 So. 2d 963 (La. App. 4th Cir. 1977).

There are a paucity of cases in Louisiana discussing the principle of continuing tort in connection with personal injuries, as, generally, it is only applied in cases involving property damage. In cases where continuous conduct has caused continuous damage, the principle of "continuing tort" might be applicable. A court that wished to find a "fair" result, within the three year limit might find that repeated wrongful acts or omissions amount to a single wrong which gives rise to a single action, rather than a series of successive actions. The date that prescription commences would, thus, be the date of the last wrongful act, omission or neglect. One decision dismissed a claim that medical treatment constituted a continuing tort. Crawford v. Howard, 539 So. 2d 735 (La. App. 3d Cir.), writ denied, 541 So. 2d 840 (1989), involved a medical malpractice claim brought against a dentist over two years from the date that his services had been terminated. In order to suspend prescription it was argued that the malpractice constituted a continuing tort because the damages suffered continued over an extended period of time. The court affirmed the trial court's rejection of this theory because when the dentist was discharged all tortious conduct ceased. Although the damages suffered by the victim continued, the conduct of the dentist had ceased and could not constitute a continuing tort.

In Laughlin v. Breaux, 515 So. 2d 480 (La. App. 1st Cir. 1987), a woman brought a civil action against her boyfriend for batteries that had occurred over the previous two years. The defendant contended that any claims for damages that had occurred prior to the one year prescriptive date were prescribed. The plaintiff countered that the series of abuses leading to her Battered Woman's Syndrome had amounted to a continuing tort. Disagreeing with the plaintiff, the court held that the Battered Woman's Syndrome, from which the plaintiff allegedly suffered, was not in itself sufficient to prevent prescription from running. The one year prescriptive period for each civil battery action arising out of the defendant's alleged physical and verbal abuse began to run on the respective dates that each injury was inflicted and regardless of the fact that several different injuries may have combined to produce the plaintiff's Battered Woman's Syndrome, prescription ran separately for each incident in which damages were sustained. The court held:

> [D]amages are sustained from the date that the injury is inflicted if they are immediately apparent to the victim, even though the extent of damages may not be known. . . . In this action, Plaintiff testified to several different incidents

the effect intended when the statute was enacted. In *Hebert*, the court ignored both the language of Louisiana Revised Statutes 9:5628 and its underlying purpose by relying upon formalistic criteria to determine "legislative intent." This kind of legislative intent is a patent fiction when it conflicts both with the words of the statute and the policy behind it.

> of abuse. . . . She was physically bruised and sore, and emotionally upset. These injuries were immediately apparent.

Id. at 482-83.

In *Laughlin*, the defendant could not have inflicted harm against the plaintiff "continuously." It may simply be impossible for human beings, who must stop all behavior periodically, to commit a continuing tort against another human being. However, it may be possible for an institutional defendant such as a hospital to commit a continuing tort against an inpatient under its care. Treatment in such a situation might be said to be continuous.

Where a plaintiff brings an action alleging medical malpractice based upon successive negligent acts, be they discrete or continuous, the issue of discovery becomes relevant. If the malpractice is not immediately apparent, the discovery rule comes into play and prescription is suspended. When the patient subsequently becomes aware of the negligence which has caused the injuries suffered, prescription commences to run. In property damage cases, the courts have found that if damage is immediately apparent and "where the damage resulting from a wrongful ("noncontinuous") act itself is continuous and progressive, the party whose property is being damaged cannot postpone bringing the action until after the full extent of the damages has been sustained and then sue for the whole damage." Griffin v. Drainage Co. of New Orleans, 110 La. 840, 34 So. 799 (1903). If he does so, claims for the portion of damages sustained more than one year prior to the bringing of the action are prescribed.

Although no Louisiana cases have found a continuing tort in connection with a physician's treatment or care, there is one New Jersey case on point. In Lopez v. Swyer, 115 N.J. Super. 237, 279 A.2d 116 (App. Div.), writ granted, 59 N.J. 361, 283 A.2d 105 (1971), the plaintiff and her husband sued a group of osteopaths and radiologists for medical malpractice in the treatment of a malignancy. Over a period of time, the physicians had treated Mrs. Lopez with a concentration of x-rays that had caused burns. The court held that the negligent treatment of Mrs. Lopez by the doctors was a continuing tort and that "if a defendant doctor is guilty of a negligent conduct, whether of commission or omission, in a continuing course of treatment, the statute [of limitations] does not ordinarily begin to run until the injurious treatment is terminated unless the patient discovered or should have discovered the injury and its casual connection with the negligent treatment before that time." Id. at 250, 279 A.2d at 123.

It is submitted that, where a patient's injuries are due to continuing negligent treatment, the discovery prong of La. R.S. 9:5628 (1983), or some other suspension based upon contra non valentum, should be looked to in order to determine the point at which prescription commences to run. In addition, an analogy that might be made is to a jurisprudential rule that has developed in the legal malpractice context. Prescription on such claims is suspended until the plaintiff has discharged his negligent attorney. Newsom v. Boothe, 524 So. 2d 923 (La. App. 2d Cir.), writ denied, 531 So. 2d 479 (1988); Edward J. Milligan, Jr., Ltd. v. LaCaze, 509 So. 2d 726 (La. App. 3d Cir.), writ denied, 512 So. 2d 440 (1987).

Commencement of Prescription, Discovery, and Suspension

The Medical Malpractice Act provides that the one year prescriptive period contained in Louisiana Revised Statutes 9:5628 begins to run from "the date of the alleged act, omission, or neglect" or "from the date of discovery of the alleged act, omission, or neglect," rather than from the date the damage is suffered. The fact that the one year period runs from these points seems to presuppose that in all medical malpractice actions injury is coterminous with the act of malpractice.[25] The discovery rule then serves to continuously interrupt or suspend prescription until injury becomes manifest.

The discovery rule is presently considered an application of the doctrine of contra non valentum.[26] Originally there were only three situations in which this jurisprudential doctrine was applicable:

> (1) where a legal cause prevented the court from acting or taking cognizance of the plaintiff's claim;
> (2) where a condition of a contract or some matter coupled with the proceedings prevented the creditor from acting;
> (3) where the debtor has done something to prevent the creditor from acting.

In *Corsey v. State Department of Corrections*,[27] Justice Tate explained in dicta that a fourth category exists when a cause of action is not known or reasonably knowable by the plaintiff (unless his ignorance is attributable to his own willfulness or neglect).

It is arguable that, as provided in Louisiana Revised Statutes 9:5628, the discovery rule does not suspend prescription so much as it prevents maturation of the cause of action itself. Thus, the discovery rule is not an application of contra non valentum in its traditional sense. Indeed, the court stated in *Corsey* that, where the discovery rule has been provided *by statute*, the cause of action does not "mature" until it is known or knowable.[28] If the word "mature" is synonymous with "accrue," then under Louisiana Revised Statutes 9:5628, a cause of action does not accrue until discovery of the injury has occurred. If this is

25. See infra text accompanying notes 40-51 for discussion.

26. Note, St. Charles Parish School Board v. GAF Corp.: Contra Non Valentum as Applied to Nontort Prescription Statutes, and a Proposed Interpretation of La. R.S. 38:2189, 48 La. L. Rev. 1465 (1988).

27. 375 So. 2d 1319, 1321-1322 (La. 1979). The court rested its holding, that contra non valentum did apply, upon the third situation where the tort itself caused the plaintiff's incapacity. Id. at 1321-22 n.7.

28. 375 So. 2d at 1322, citing La. Civ. Code art. 3537; La. Civ. Code art. 189; La. R.S. 9:5628 (1983).

so, then the three year limit may, in some circumstances, bar suit before it has ever accrued.[29]

However, there may be no distinction between contra non valentum and the discovery rule as it is provided in Louisiana Revised Statutes 9:5628. Recent decisions have cited statutory discovery rule cases interchangeably with contra non valentum cases.[30] The Louisiana Supreme Court has stated that Louisiana Revised Statutes 9:5628 "expressly incorporated" contra non valentum in the form of the discovery rule.[31] In addition, the court has observed that the statute did not change the rules of prescription as expressed in pre-enactment cases applying the discovery rule.[32]

The courts have interpreted discovery of injury, as contemplated in Louisiana Revised Statutes 9:5628, to require "more than a mere apprehension that something is wrong."[33] A patient must be put on inquiry that his health care provider has negligently performed his duties.[34] Even in the case in which an undesirable condition has developed shortly after medical treatment, prescription does not commence to run as long as the victim reasonably does not recognize that the condition is related to negligent treatment.[35] According to the court in *Griffin v. Kinberger*, the proper focus of a discovery analysis is the reasonableness of the victim's action or inaction. The court stated that

> even if a malpractice victim is aware that an undesirable condition developed at some point in time after medical treatment, prescription does not run as long as it was reasonable for the victim not to recognize that the condition may be related to the treatment.[36]

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29. For a further discussion of this result in another context, see Comment, All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff, 48 La. L. Rev. 1411 (1988).

30. See, e.g., St. Charles Parish School Bd. v. GAF Corp., 512 So. 2d 1165 (La. 1987) (original hearing), vacated at 1173.

31. Chaney v. State Through Dept. of Health, 432 So. 2d 256, 259 (La. 1983).

32. Cordova v. Hartford Accident & Indem. Co., 387 So. 2d 574, 576 n.4 (La. 1980).

33. Grant v. Carroll, 424 So. 2d 389, 391 (La. App. 2d Cir. 1982).

34. Gunter v. Plauche, 439 So. 2d 437 (La. 1983).

35. Griffin v. Kinberger, 507 So. 2d 821 (La. 1987).

36. Id. at 823-24. See also Poole v. Physicians & Surgeons Hosp., 516 So. 2d 1185 (La. App. 2d Cir. 1987), writ denied, 519 So. 2d 127, 128 (1988) (Decided under *Griffin*. A 32 year old college graduate did not have sufficient knowledge of malpractice involved in the birth of a son who suffered from cerebral palsy, mental retardation and other organic brain disorders.); Chandarlis v. Shah, 535 So. 2d 895 (La. App. 2d Cir. 1988) (Parents of a minor child who was injured in a diving accident brought suit for malpractice in his treatment more than two years after the incident which had caused seizures, brain damage and, eventually, the death of the child. The court found that at the time the

The general rule relative to discovery provides for constructive knowledge.[37] Prescription commences:

> when plaintiff knew or should have known by exercising reasonable diligence that tortious conduct occurred and that certain parties are responsible.[38]

Until malpractice victims are "reasonably alerted that they might have a cause of action and should seek to develop further information,"[39] prescription does not commence to run. As a subjective standard, the discovery rule leaves great latitude for judicial creativity.

Discovery and the Three Year Limit

Crier v. Whitecloud[40] involved a defective Harrington Rod which had been implanted in plaintiff's back. The rod was implanted in 1978 and broke in 1982; suit was filed in 1983. On first hearing, the court found suit to be timely filed despite the fact that it was filed more than three years after the act of implantation. The court observed that the plaintiff could not have asserted an "action for damages for injury" at the time the rod was implanted because the injury had not yet occurred. It found that the three year limitation in Louisiana Revised Statutes 9:5628 only contemplates situations where "damage or injury occurs immediately after an act or omission and then progresses slowly until the injury becomes manifest and discoverable."[41] Because the onset of injury marks the first point at which a court may take "cognizance" of any claim, prescription in actions for injuries caused by an initial act or omission is suspended until injury actually occurs.[42]

In contrast, Justice Marcus, dissenting on first hearing, stated that *Whitecloud* was a discovery case:

> The plaintiff's one and only cause of action against the doctor arose when he allegedly implanted the rod incorrectly. Perhaps prior to the rod's breaking, plaintiff did not realize that she had a claim . . . . Her failure or inability to discover the alleged malpractice, however, did not suspend prescription.[43]

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seizures occurred the plaintiffs had immediately received explanations that something was wrong and, therefore, had acquired sufficient knowledge for prescription to commence to run.).

37. Cartwright v. Chrysler Corp., 255 La. 597, 232 So. 2d 285 (1970).

38. Strata v. Patin, 545 So. 2d 1180, 1189 (La. App. 4th Cir.), writ denied, 550 So. 2d 618 (1989).

39. Griffin v. Kinberger, 507 So. 2d 821, 824 (La. 1987).

40. 486 So. 2d 713 (La.) (hereinafter *Whitecloud I*), aff'd on rehearing, 496 So. 2d 305 (1986) (hereinafter *Whitecloud II*).

41. 486 So. 2d at 715.

42. Id. at 716.

43. Id. at 716.

Because the Court had established in prior cases that the discovery rule was qualified by the three year limit,[44] characterizing *Whitecloud* as a discovery case mandated the result reached on rehearing. Justice Marcus, writing for the majority in the *Whitecloud* rehearing, followed the reasoning of his previous dissent to find that the plaintiff's claim was barred by prescription.

The holding in the *Whitecloud* rehearing seems to be based upon the reasoning that "damage" to medical malpractice victims necessarily occurs with the act of malpractice rather than the injury. This reasoning is inconsistent with a basic principle of tort law. In a negligence action, fault, causation, and damage are needed in order for a cause of action to exist.[45] To give rise to a cause of action, damage must follow a wrongful act or omission, and prescription runs from damage, not from the date of the wrongful act.[46] Damage is considered sustained when it has manifested itself with sufficient certainty to be proven in court.[47]

One older case uses language similar to that in the original hearing of *Whitecloud* to explain why prescription on a claim for the death of a mule did not run until the mule died. In *Jones v. Texas & Pacific Ry. Co.*,[48] the defendant's locomotive struck two of plaintiff's mules. One died immediately; the other survived with a flesh wound and appeared to be on its way to recovery. Two months later, however, the mule died, and plaintiff filed suit within a year of its death. Defendant argued that the damage was sustained at the time of the negligent act and that prescription therefore ran from that point. In rejecting this claim, the court said: "In law, things which are not susceptible of ascertainment are considered as not existing. . . . Until by the death of the mule the damage had been revealed, or, to use the legal term, had

44. Chaney v. Dept. of Health, 432 So. 2d 256 (La. 1983); Hebert v. Doctors Memorial Hosp., 486 So. 2d 717 (La. 1986).

45. Owens v. Martin, 449 So. 2d 448 (La. 1984); Lucas v. Commercial Union Ins. Co., 198 So. 2d 560 (La. App. 1st Cir. 1967).

46. Malone v. Wright, 525 So. 2d 13 (La. App. 3d Cir. 1988).

47. Such reasoning is similar to that used in decisions involving the slow manifestation of disease. Generally, in cases involving cumulative diseases such as asbestosis or silicosis, the cause of action is considered as having arisen upon contraction of the disease although the manifestation of symptoms does not occur until years later. See, e.g., Faciane v. Southern Shipbuilding Corp., 446 So. 2d 770, 773 (La. App. 4th Cir. 1984). The reason for this rule is that at one single point, albeit difficult to accurately fix, the effects of exposure to asbestos or silica dust will progress independent of further exposure. At that point, "[t]he victim's body [is] injured just as surely as if it had been hit by a truck." Id. at 773. La. R.S. 9:5628 (1983) may follow this approach by assuming that malpractice injury occurs simultaneously with act, omission or neglect and any later symptoms or progression of disease occurs independent of further medical interference.

48. 125 La. 542, 51 So. 582 (1910).

been made certain, plaintiff had no cause of action for it. Until then, it was at best uncertain, contingent, speculative."[49]

In *Rayne State Bank & Trust v. National Union Fire Insurance*,[50] a decision involving a legal malpractice claim based upon defectively drafted mortgages, the court quoted the "ascertainment" language of *Jones* in holding that, until the mortgages at issue had been contested in court, damages were contingent and speculative. If a third party never attacked the validity of the security and the debtor never became insolvent, then the debt itself would never be at risk. Under *Rayne*, it is clear that ascertainability is not a question of suspension of prescription, but rather a requisite to the accrual or maturation of a cause of action. This may have been the reasoning that the court used in the original hearing of *Whitecloud*: until the plaintiff suffered ascertainable damage there was no cause of action against which prescription could run.

On rehearing, however, the court must have assumed one of two things: that, according to the specific evidence at issue, damage did in fact occur with the act, omission, or neglect and simply remained undiscovered; or that Louisiana Revised Statutes 9:5628 modifies a fundamental rule of tort law and may, in some cases, cause prescription to run before injury is ever suffered. Justice Marcus' dissent on first hearing suggests that the court made the former assumption on rehearing. He found that the plaintiff's cause of action against the doctor arose when the rod was negligently implanted, and that a plaintiff whose injury does not manifest within the three years has simply failed to timely discover that injury.[51]

However, *Whitecloud* suggests a broader reading of Louisiana Revised Statutes 9:5628. On first hearing, the court found that the three year limitation should be interpreted "in a traditional prescriptive sense to contemplate injury causing acts or omissions."[52] On rehearing, however, the court applied the literal language of the statute to apparently find that prescription on malpractice claims runs not from ascertainable injury but from the moment of malpractice. Based upon the clear legislative purpose behind the statute, *Whitecloud* indicates that, even if a physician's actions create a condition that does not produce any noticeable effects for many years, a claim must be brought within three years of the alleged act, omission, or neglect or it will be considered extinguished. This approach is inconsistent with the rule that prescription on a tort claim runs from the time damage is suffered.[53]

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49. 125 La. at 544-45, 51 So. at 583.
50. 483 So. 2d 987 (La. 1986). See also Riddick & Miller Inv. Co. v. Denicola, 486 So. 2d 186 (La. App. 1st Cir.), writ denied, 489 So. 2d 1275 (1986).
51. Crier v. Whitecloud, 486 So. 2d 713, 716 (La. 1986).
52. Id. at 716.
53. See supra text accompanying notes 45-47.

Contra Non Valentum

While Louisiana courts uniformly agree that the discovery rule category of contra non valentum is inapplicable more than three years following the act, omission, or neglect, it is not entirely clear whether other forms of the doctrine have been similarly barred three years after the act of malpractice at issue.[54]

The supreme court may have implicitly applied the first category of the doctrine in the first hearing of *Whitecloud.* The most common phrasing of the first category of contra non valentum is where a "legal cause" has "prevented the courts or their officers from taking cognizance of" the plaintiff's claim.[55] While the cases that have applied contra non valentum in this situation have generally dealt with physical accessibility to the courts,[56] this situation may exist in instances where the plaintiff is unable to file suit until a further development has occurred.[57] The language used in the first hearing of *Whitecloud,* although the term contra non valentum was not expressly used, echos the traditional description of this first category:

> Because the onset of injury marked the first point in time that *the courts could take cognizance of the plaintiff's claim,* we conclude that the commencement of prescription on any "action for damages for injury" resulting from the initial act or omission was suspended until the injury actually occurred.[58]

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54. Rajnowski v. St. Patrick's Hosp., 551 So. 2d 806 (La. App. 3d Cir. 1989) (noting that it remains unresolved whether the three year limitation can be "tolled" by the fraud category of contra non valentum and failing to reach the issue due to plaintiff's failure to prove fraud).

55. Plaquemines Parish Comm'n Council v. Delta Dev. Co., 502 So. 2d 1034, 1054 (citing Reynolds v. Batson, 11 La. Ann. at 730-31 (1856)).

56. Smith v. Stewart, 21 La. Ann. 67 (1869) (refusing to suspend prescription while the courts were closed due to the civil war), overruled in Levy v. Stewart, 78 U.S. (11 Wall.) 244 (1870); Quierry's Executor v. Faussier's Executors, 4 Mart. (o.s.) 609 (La. 1817) (prescription suspended due to law closing the courts during wartime); Ayraud v. Babin's Heirs, 7 Mart (N.S.) 471 (La. 1829) (suspended prescription on a judges claim, due to a conflict of interest, until another judge was authorized to adjudicate the action); Saxon v. Fireman's Ins. Co., 224 So. 2d 560 (La. App. 3d Cir. 1969) (suspended prescription where clerks office was closed on the day that cause of action was to prescribe). See generally, Note, Plaquemines Parish Commission Council v. Delta Development Co.: Contra Non Valentem Applied to Fiduciaries, 48 La. L. Rev. 967 (1988), which assumes that the first situation is based upon physical "accessibility to the courts.".

57. Such as death. See Minor v. Casten, 521 So. 2d 465 (La. App. 4th Cir. 1988) (medical malpractice suit for wrongful death suspended until death of the victim). The *Minor* court did not expressly state that it was applying contra non valentum to the first situation but did indicate that it found the first and second situations "viable." Id. at 467. The doctrine permitted an "equitable review of the circumstances . . ." Id. See infra text accompanying notes 85-106 for discussion.

58. Crier v. Whitecloud, 486 So. 2d 713, 716 (La. 1986).

In *Gover v. Bridges*,[59] the court discussed the applicability of contra non valentum to Louisiana Revised Statutes 9:5628 in the context of a wrongful death action. Recognizing that the discovery rule embodies the fourth type of contra non valentum, the *Gover* court cited *Chaney v. Dept. of Health*,[60] which had observed that the enactment of Louisiana Revised Statutes 9:5628 overruled the fourth category of contra non valentum as it applied to medical malpractice actions filed more than three years from the date of the act, omission, or neglect. *Chaney* did not, however, make any findings as to whether the other three categories of the doctrine were similarly overruled by the statute. The *Gover* court took notice of a lower court opinion[61] that found that application of the doctrine in the case of fraud was not barred after three years, and another opinion[62] that held that contra non valentum was in all situations unavailable outside the three year limit. The *Gover* court did not resolve this conflict, however, because the alleged fraud was found to have been a simple assurance by the physician of the quality of care that he had given the decedent rather than a misrepresentation or nondisclosure that would have in any way prevented the timely filing of suit. This decision therefore left unanswered the question of the availability of contra non valentum in situations in which simple non-discovery is not at issue.

Being an equitable creation of the courts, there is no compelling reason that contra non valentum should be limited to strict categories of application. As long as there are exceptional circumstances,[63] the doctrine could be applied. If, however, the courts feel constrained to follow a common-lawesque adherence to the four categories, then many

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59. 497 So. 2d 1364 (La. 1986).

60. 432 So. 2d 256 (La. 1983).

61. Harvey v. Davis, 432 So. 2d 1203 (La. App. 4th Cir. 1983). See Note, supra note 8 (While noticing other state statutes that specifically include provisions for tolling of the statute of limitations in the case of fraud, the author remarked that "Louisiana's failure to include a tolling provision may indicate that the legislature intended to overrule the fraud exception of contra non valentum . . ."). Id. at 1556 n.49.

62. Rameriz v. St. Paul Fire & Marine Ins. Co., 433 So. 2d 219 (La. App. 3d Cir.), writ denied, 441 So. 2d 212 (1983), cert. denied, 465 U.S. 1106, 104 S. Ct. 1610 (1984). See Note, Gover v. Bridges: Prescription—Applicability of Contra Non Valentum Doctrine to Medical Malpractice Actions, 61 Tul. L. Rev. 1541 (1987) (disagreeing that there was a split in the circuits, the writer noted that the plaintiff had plead the fourth category of contra non valentum and, therefore, the court's holding must be read narrowly "in light of the pleadings").

63. Concern arose with the amendment of the language of La. Civ. Code art. 3521 (1870) as reenacted in La. Civ. Code art. 3467 to substitute "legislation" for "law." Prescription now runs unless exception is established by "legislation," defined by the truism of La. Civ. Code art. 2 as "the solemn expression of legislative will." Comment (d) of Article 3467 provides that "in exceptional circumstances" contra non valentum continues to be applicable. See Note, supra note 56, at 967.

medical malpractice cases in which injury is not yet ascertainable might fall into the first category of the doctrine.[64]

INTERRUPTION BY SUIT AND STATUTORY SUSPENSION

The Louisiana Revised Statutes provide that the prescriptive period for medical malpractice suits may be suspended when a claim has been filed with a medical review panel.[65] The effects of such a suspension depend upon whether there is one or more defendants and upon the classification of each defendant as qualified or unqualified.

Louisiana recognizes two classes of medical malpractice defendants: "qualified" health care providers and anyone else. This latter class is comprised of all unqualified defendants.[66] Because of this distinction, there are several possible scenarios involving multiple defendants, each having different rules of suspension of prescription.

In the first situation, all defendants are qualified health care providers. If a timely request is made for a medical review panel, prescription against all defendants is suspended until ninety days after the claimant is notified by certified mail of the issuance of the panel's opinion.[67]

This situation is modified when all defendants are qualified health care providers but a medical review panel has not been requested for

64. The supreme court recently explained *Gover* observing that it had "not yet resolved whether La. R.S. 9:5628 prevents the filing of suit more than three years from the negligent act when the third category of contra non valentum (prevention by debtor) is applicable, although our opinion in Gover v. Bridges . . . implied that it does not." Whitnell v. Menville, 540 So. 2d 304, 310 (La. 1989). In *Whitnell*, the court found that on the face of the petition the third category of contra non valentum was inapplicable and remanded the case to the trial court to allow the plaintiffs time to amend. After stating that it refused to "resolve" the issue on a less than complete record the court "simply" held that the plaintiffs, "having raised a colorable argument that certain facts exist *which are sufficient to interrupt prescription* . . . should be given an opportunity to amend their petition to allege those facts." Id. at 317 (emphasis mine). With this unobtrusive statement in its arsenal, a lower court can argue that fraud will suspend prescription beyond the three year limit.

Concurring in *Whitnell*, Justice Lemmon writes:

> La. R.S. 9:5628 was intended to limit the period of applicability of the discovery rule, which is itself recognized in the statute. I do not believe the Legislature intended to impose a peremptive period in cases in which the alleged debtor (here the doctor) withheld from the creditor (here the plaintiff) the only information on which the plaintiff could state a cause of action against the doctor.

Id. at 312.

65. See La. R.S. 40:1299.37-48 (1977 and Supp. 1990). Some cases, however, have inexplicably used the word "interruption," in dicta, to describe what occurs during the deliberations of a medical review panel. Shortess v. Turo Infirmary, 535 So. 2d 446 (La. App. 4th Cir. 1988).

66. Fontenot v. Opelousas General Hosp., 503 So. 2d 709 (La. App. 3d Cir.), writ denied, 505 So. 2d 62 (1987).

67. La. R.S. 40:1299.47A.(2)(a) (Supp. 1990).

all involved. In such an instance, the jurisprudence indicates that prescription as to the defendants not involved in the medical review panel is suspended for a period of ninety days after the panel is formed even if a claim has been timely made against only one of the qualified health care providers.[68] However, this jurisprudence is contrary to the statute, which does not effect a suspension in such a situation.[69] Furthermore, the filing of a claim is not tantamount to the filing of suit for purposes of interruption.

In the second situation, all defendants are unqualified. Generally, no review panel will be requested and there is therefore no suspension of prescription.[70] If, however, a medical review panel has been timely requested, prescription is suspended until sixty days after notification by the commissioner that the defendants are all unqualified health care providers.[71]

In the third situation, one or more defendants are qualified, but one or more others are not qualified. Prior to 1981, the courts did not suspend prescription against unqualified defendants when a claim was pending against qualified defendants because it found that the rights of tort victims could not be regulated if their health care providers had not qualified under the act. Because the filing of a claim was not equivalent to the filing of suit, there was also no interruption as to unqualified defendants liable in solido with a qualified defendant.[72] Decisions espousing this rule were soon overruled by legislation that provided for a suspension of prescription against unqualified defendants solidarily liable with qualified defendants. If a claim is made against a qualified health care provider, prescription against unqualified defendants who are liable in solido with the qualified defendant is suspended for ninety days following the formation of the medical review panel.[73] If the unqualified defendants are not liable in solido with a qualified defendant, then prescription against them is not suspended.[74]

Generally, the filing of a lawsuit against one solidary obligor will interrupt prescription against all other solidary obligors. Absent solidary

68. Guidroz v. Mullins, 496 So. 2d 519, 520 (La. App. 1st Cir. 1986).

69. Id. at 521. Referring to "suspension as provided in LSA-RS 40:1299.41(G)."

70. La. R.S. 49:1299.41D. (Supp. 1990).

71. La. R.S. 40:1299.47A.(2)(a) (Supp. 1990).

72. Ferguson v. Lankford, 374 So. 2d 1205 (La. 1979); Dupont v. Doctor's Hospital, 369 So. 2d 1092 (La. App. 1st Cir.), writ denied, 371 So. 2d 834 (1979).

73. La. R.S. 40:1299.41G.; Fontenot v. Opelousas General Hosp., 503 So. 2d 709, 712 (La. App. 3d Cir. 1987); Doyle v. St. Patrick Hosp., 499 So. 2d 704 (La. App. 4th Cir. 1986), writ denied, 503 So. 2d 478 (La. 1987).

74. Cart v. Ducote, 490 So. 2d 731, 735 (La. App. 3d Cir.), writ granted, 494 So. 2d 1164 (1986), writ dismissed, 519 So. 2d 1161 (1988). However, it may be interrupted where the nonsolidary unqualified defendant has not been discovered. Shortess v. Touro Infirmary, 535 So. 2d 446 (La. App. 4th Cir. 1988).

liability between an unnamed defendant and the defendants timely named, prescription is interrupted only against those named.[75] Prescription is similarly interrupted in a medical malpractice proceeding, and the fact that a defendant may or may not be qualified under the Act is irrelevant.

In *Chalstrom v. Desselles*, the plaintiff filed suit against two of several potentially liable parties. Eventually, the plaintiff discovered the responsibility of the additional defendants and brought suit within a year of discovery, but more than four years after the date of the alleged malpractice.[76] The court held that prescription is interrupted against the unnamed defendant when two physicians are liable in solido and only one is sued before the three year period has run.

Chalstrom has been clarified by one court of appeal that held that the three year limit "applies only to the discovery rule."[77] So long as suit is pending against a solidarily liable defendant, other defendants in solido may be sued at any time. When suit is no longer pending, however, the plaintiff has one year from judgment or dismissal to file suit against the remaining defendants.[78] The three year period is applicable only to the discovery of malpractice before expiration of the period. The discovery of the liability of other defendants after suit has interrupted prescription is not affected by the three year limit in any way. The court also answered the question, created by the facts in *Chalstrom*, of whether suit must be brought within one year of the discovery of the liability of the additional defendants. It is not the time that the plaintiff discovers the existence of additional defendants that is relevant, but rather, it is the point at which the interrupting suit is no longer pending. At that point, the plaintiff has one year to file suit.[79]

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75. *Ducote*, 490 So. 2d at 734; Bennett v. General Motors Corp., 420 So. 2d 531 (La. App. 2d Cir. 1982).

76. 433 So. 2d 866, 869 (La. App. 4th Cir.), writ denied, 438 So. 2d 215 (1983), distinguishing, Louviere v. Shell Oil Co., 703 F.2d 846 (5th Cir. 1983) (certified question to establish whether interruption by suit continues during its pendency).

77. Hebert v. Doctors Memorial Hosp., 477 So. 2d 1227, 1229 (La. App. 1st Cir. 1985), rev'd on other grounds, 486 So. 2d 717 (La. 1986).

78. Hernandez v. Lafayette Bone & Joint Clinic, 467 So. 2d 113 (La. App. 3d Cir. 1985).

79. The operation of prescription can become quite complex when many defendants are involved, some of whom are not subject to the special prescriptive periods. One well reasoned decision illustrates the interrelationship between statutorily created suspension and interruption by suit in the medical malpractice context. Hernandez v. Lafayette Bone & Joint Clinic, 467 So. 2d 113 (La. App. 3d Cir. 1986); cf. Cart v. Ducote, 490 So. 2d 732 (La. App. 3d Cir. 1986). The plaintiff underwent treatment in January of 1980, discovered malpractice in March of 1981, and filed suit against four qualified physicians in March of 1982. A week later, the plaintiff requested a medical review panel, and a month later the lawsuit was dismissed without prejudice for prematurity because it had been filed prior to the request for the panel. The panel notified the plaintiff of its decision

The United States Court of Appeals for the Fifth Circuit rendered a suspect decision based upon *Chalstrom*. In *Billiot v. American Hospital Supply Corp.*,[80] the court found, as one writer has suggested, that the three year period could be interrupted after it had run.[81] The plaintiff filed suit against the manufacturer of defective breast implants within a year after the implants had burst, but more than three years after

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in August of 1983, and the plaintiff duly filed a second suit against all defendants in December of 1983, more than three years following the alleged malpractice. The trial court found that the cause of action in the second suit had prescribed.

The court of appeal reversed and found the second suit was timely filed. When the plaintiff's suit was dismissed in 1982, prescription would have "begun to run anew" had there not been an opinion of the medical review panel already pending. 467 So. 2d at 115. The deliberations of the panel suspended the commencement of the new one-year prescriptive period until ninety days from the date the plaintiff was notified of the panel's opinion. The plaintiff was notified of the opinion in August of 1983. Thus prescription began to run anew in November of 1983, and the plaintiff had until November of 1984 to file his second suit against the defendants. Therefore, the plaintiff's second suit filed in December of 1983 was timely.

Further legislative enactments have complicated the above judicial rules. Prior to September 1, 1987, the relevant portion of Article 2324 proposed that "[p]ersons whose concurring fault has caused injury, death or loss to another are also answerable, in solido. . . ."

The relevant portion of new Article 2324 reads as follows:

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

B. If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages . . . . Except as described in Paragraph A of this Article, or as otherwise provided by law, and hereinabove, the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise. La. Civ. Code art. 2324. See Schewe, Obligations, Developments in the Law, 1986-1987, 48 La. L. Rev. 423 (1987).

1988 La. Acts No. 430 added paragraph C to La. Civ. Code art. 2324C., which provides that an action against one joint tortfeasor interrupts prescription as to all joint tortfeasors whether the obligation is joint and divisible or solidary. Thus, the rules of interruption by suit, applicable in the medical malpractice context, will now apply to all defendants whether liable in solido or otherwise. The rules relative to suspension of prescription remain unaffected by Article 2324C. as the article specifically excludes from its application actions brought under the provisions of La. R.S. 40:1299.41G. (Supp. 1990), the provision relevant to the filing claims before a Medical Review Panel. However, there is an ambiguity that arises out of the wording of this exemption. While the rules of solidarity that are intended to govern the exempted suspension are not specified, it must be presumed that the old rules of solidarity are to be followed.

80. 721 F.2d 512 (5th Cir. 1983).

81. For brief criticism of *Billiot*, see Note, supra note 8, at 1554 n.40.

the date of the implant surgery. A year after suit was filed, she amended her complaint to join the operating surgeon as a defendant, alleging that he and the manufacturer were liable in solido. The Fifth Circuit found that the facts of *Chalstrom* were "generally identical" and, thus, that case was dispositive of the issue of interruption. It accordingly remanded *Billiot*, holding that suit against the doctor was timely.

The difficulty with *Billiot* is that no defendant was sued within the three year limit. Suit was filed against the manufacturer more than three years after the alleged malpractice had occurred. This aspect of the opinion runs any analysis of *Billiot* upon the shoals of a basic principle that once prescription has run it cannot be interrupted.[82]

The factual situation of *Billiot* is precisely that which was ostensibly contemplated by the legislature when it enacted the three year period. According to the Louisiana Supreme Court, the three-year limit was intended to place an outer limit on the time for bringing actions against a health care provider even if the injury is one which progresses so slowly that the victim does not discover the injury until more than three years after the act or omission.[83] As to the doctor's negligent insertion of the breast implants in *Billiot*, the act, omission, or neglect occurred at the time of the surgery, and the later rupture of the implant was simply the point at which the earlier malpractice was discovered.[84] In *Billiot*, discovery came too late for timely suit against the physician; an action should not have been allowed against the physician after the three year period had run merely because a suit could be timely brought against another defendant. *Billiot* is a clear example of a court fashioning a "fair" result where an "unjust" outcome would have resulted from a mechanical application of the statute. The fact that the implants had not burst would amount to nondiscovery, and, while contra non valentum

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82. A later Fifth Circuit case cited Billiot v. American Hosp. Supply Corp., 721 F.2d 512 (5th Cir. 1983), but declined to "toll" the three-year period. Montagino v. Canale, 792 F.2d 554 (5th Cir. 1986). The plaintiff, after having had a tuberculoma tumor removed from a lung, was subsequently told that she did not need anti-tuberculin medication. Six years later she was diagnosed as suffering from tuberculosis and, within a year, filed suit in State and Federal court against the surgeon as well as "three unknown insurance companies." The plaintiff argued that, despite the prescriptive bar to suit against the physician, found in La. R.S. 9:5628 (1983), timely filing of the action against the medical insurers who were not governed by the three year limit "saved" the cause of action against the physician under the rule of *Billiot*. In rejecting the plaintiff's contention, the court simply stated that her action in federal court could not be saved because the action in state court "was prescribed by the passage of the alleged wrongful act and the date of filing the state action." Id. at 555 n.1.

83. Crier v. Whitecloud, 496 So. 2d 305, 311-12 (1986) (Lemmon, J., concurring).

84. See 486 So. 2d at 716 (Marcus, J., dissenting).

would suspend prescription against the manufacturer, the three year period would have barred suit against the physician. To bar suit in *Billiot* would have been to find that prescription had run before injury was ascertainable.

Application of Louisiana Revised Statutes 9:5628 to Wrongful Death Claims

A question arises concerning the applicability of Louisiana Revised Statutes 9:5628 to wrongful death claims based upon medical malpractice. Because it provides that all actions for injury "or death" must be brought in conformity with its prescriptive period, the statute seems to encompass such claims. The victim certainly cannot claim damages for his own death; therefore, it logically follows that the statute is intended to supercede the prescriptive period for a wrongful death action provided in Louisiana Civil Code article 2315.2. By attempting to avoid unfairness in specific cases, however, the jurisprudence involving this issue has become quite unsettled.

The first case that discussed Louisiana Revised Statutes 9:5628 in the context of a wrongful death claim was *Lambert v. Michel*.[85] There, the plaintiff brought a wrongful death claim in November of 1976 for the death of his wife from cancer of the cervix. The last time the defendant physician had treated the victim was in April of 1975, and his failure to perform certain tests prevented the victim from discovering her cancer until October of 1975. The victim died less than a year later, in July of 1976. Ordinarily, under Article 2315.2, the victim's husband would have been permitted to file suit within "a period of one year from the death of the deceased."[86] However, the issue was raised concerning the applicability of Louisiana Revised Statutes 9:5628 to the claim because that statute would have caused the one year prescriptive period to run, not from death, but from the date of the discovery of the physician's omission.[87] The plaintiff's suit had been filed more than one year after the alleged omission, and, arguably, more than one year after discovery of the omission of treatment as well.

Certainly, recognizing the problems that might have arisen from finding that the wrongful death claim had prescribed under Louisiana Revised Statutes 9:5628, the court found that the statute was simply inapplicable to all wrongful death claims. Because Louisiana Revised

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85. 364 So. 2d 248 (La. App. 3d Cir. 1978), writ denied, 366 So. 2d 917 (1979).

86. La. Civ. Code art. 2315.2C. See *Lambert*, 364 So. 2d at 250 (citing J. Wilton Jones Co. v. Liberty Mutual Ins. Co., 248 So. 2d 878 (La. App. 4th Cir. 1971)), writ denied, 259 La. 61, 249 So. 2d 202 (1971)); Carter v. Mule, 346 So. 2d 882 (La. App. 4th Cir.), writ denied, 349 So. 2d 870 (1977).

87. La. R.S. 9:5628 (1983). See supra text accompanying note 51.

Statutes 9:5628 makes no "specific provisions" for wrongful death actions, the court held it to be a general statute. It then looked to Article 2315 which, at that time, provided:

> [Those] in whose favor [the survival action] survives may also recover the damages which they have sustained through the wrongful death of the deceased.[88]

This provision led the court to conclude that Article 2315 was a "special statute relating to actions arising from the death of tort victims."[89] It then stated the rule that, where a general and special law conflict, the special law prevails. Unless the intent to repeal the preexisting special law is unquestionably present, this rule is followed even if the general law has been enacted at a later date.[90] Thus, the court acknowledged the conflict between Article 2315 and Louisiana Revised Statutes 9:5628 and held that the special statute, Article 2315, provided the prescriptive period governing all wrongful death claims. This decision was later adopted by the first circuit.[91]

While the reasoning in *Lambert* provides an equitable result,[92] it is not as clear as the court suggests that Article 2315 is a special statute and that Louisiana Revised Statutes 9:5628 is a general statute. As noted above, Louisiana Revised Statutes 9:5628 specifically covers suits for damages for death. This language, at the very least, implicitly includes a wrongful death claim in the limited context of claims against a health care provider.[93] In contrast, Article 2315, at the time *Lambert* was decided, spoke very generally of the wrongful death claim. It is thus arguable that Louisiana Revised Statutes 9:5628 was the specific statute, and Article 2315 was the general statute. Hence, Louisiana Revised Statutes 9:5628, while not repealing Article 2315, would certainly have been intended to supercede its applicability to wrongful death claims sounding in medical malpractice.[94]

In *Gover v. Bridges*, the second circuit disagreed with the first and third circuits in finding that Louisiana Revised Statutes 9:5628 prevails over Article 2315 because the former specifically set forth time limits for filing claims in the context of a medical malpractice action.[95] The

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88. La. Civ. Code art. 2315 (1960).

89. *Lambert*, 364 So. 2d at 251.

90. Id., citing Hewett v. Webster, 118 So. 2d 688 (La. App. 2d Cir. 1960).

91. Giroir v. South Louisiana Medical Center, 453 So. 2d 949 (La. App. 1st Cir. 1984).

92. Note, however, that the court went on to affirm the jury's decision in favor of the defendants and against the plaintiff. *Lambert*, 364 So. 2d at 252.

93. See id. at 253 (Guidry, J., concurring).

94. Id.

95. Gover v. Bridges, 486 So. 2d 1117 (La. App. 2d Cir.), writ granted, 491 So. 2d 13 (1986).

supreme court affirmed the decision,[96] strongly implying that it agreed with the second circuit's interpretation of Louisiana Revised Statutes 9:5628 as a specific statute that governed wrongful death claims.

Subsequently, the fourth circuit joined the second circuit, relying upon the supreme court's decision in *Gover*[97] as authority for the position that Louisiana Revised Statutes 9:5628 now governs all claims alleging medical malpractice, including wrongful death claims.[98] This finding was affirmed by the fourth circuit two years later.[99]

One case raises some questions regarding the procedural effects that Louisiana Revised Statutes 9:5628 will have on wrongful death claims alleging medical malpractice. As discussed above, the *Crier v. Whitecloud* opinion on rehearing seems to indicate that prescription, under Louisiana Revised Statutes 9:5628, may sometimes extinguish an action prior to the point at which damage is actually suffered. Taken to its extreme, *Whitecloud* may bode ill for wrongful death claims alleging medical malpractice. While one lower court has held, in a dissimilar case, that a cause of action for wrongful death does not arise until the victim dies,[100] it seems that this rule has been superceded by Louisiana Revised Statutes 9:5628 in the medical malpractice context.

There is a strong argument that prescription in a wrongful death action cannot possibly run until a victim dies because, until that time, there can be no cause of action for death. Despite the fact that Louisiana Revised Statutes 9:5628 provides that prescription runs from the date of malpractice, it cannot contemplate instances where prescription would commence before the plaintiff has a cause of action. Can it be said that a malpractice suit for wrongful death arises at the date of malpractice and not at the time of death? Is a victim's ultimate demise simply a "manifestation" of the fact that he was killed years before? Is there not a distinct difference between a victim being injured as opposed to being killed by an act, omission, or neglect? It is difficult to extend *Whitecloud*, assuming that its result was somewhat fact based, to a wrongful death claim to find that a plaintiff simply failed to "discover" his wrongful death claim until the victim died.

Even assuming that prescription always runs from the date of the act, omission, or neglect for wrongful death claims sounding in medical malpractice, the question then arises of the applicability of contra non

96. 497 So. 2d 1364 (1986).

97. Id.

98. Brown v. Dept. of Health & Human Resources, 498 So. 2d 785 (La. App. 4th Cir. 1986), writ denied, 500 So. 2d 430 (1987).

99. Minor v. Casten, 521 So. 2d 465 (La. App. 4th Cir. 1988).

100. Smith v. Hurd, 408 So. 2d 357 (La. App. 1st Cir. 1981). See also Esteve v. Iberia Parish Hosp., 520 So. 2d 848 (La. App. 3d Cir.), writ denied, 522 So. 2d 561 (1987) (implying that prescription ran from malpractice).

valentum. While the supreme court has continued to hold, since 1986, that the three year period is in effect peremptive in the context of nondiscovery, the issue of whether the other categories of contra non valentum are similarly inapplicable after three years remains unanswered.[101]

Because death is the first point at which a court can take cognizance of a claim for wrongful death, contra non valentum should suspend prescription until death has occurred. One post-*Whitecloud* opinion contains language relevant to this argument. The court in *Minor v. Casten*[102] held that the "utile tempus" or "cognizance" category of contra non valentum was applicable, within the three year period, to a wrongful death suit. The decedent had complained to his dentist of a mouth lesion, and the dentist neither treated the lesion nor referred the decedent to a specialist. A year later, an oral surgeon diagnosed the lesion as cancerous, and the victim died a year after this diagnosis. A full year after death, the plaintiffs filed suit, within the three year period but "more than one year from the alleged neglect or its discovery."[103] The plaintiffs relied on contra non valentum as a "exception to prescription, alleging that one of the first three categories applied. Using language that could have come from the first hearing of *Whitecloud*, the court found that the "plaintiffs could not assert a cause of action . . . until [the victim's] death . . . Therefore, the date of discovery of the neglect, act or omission [was] not relevant."[104] It then went on to find that contra non valentum had suspended prescription until the victim's death. In holding that discovery was irrelevant until death occurred, the court was able to distinguish the *Whitecloud* rehearing opinion and to fashion a specific solution. Interestingly, by failing to observe that a wrongful death claim simply does not arise until the death of the victim, the court implied that, by virtue of the changes Louisiana Revised Statutes 9:5628 has made to the basic rules of prescription, some form of contra non valentum may actually be necessary to suspend prescription until a victim's death when the claim arises out of a physician's act, omission, or neglect.[105]

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101. It is not clear how the court would have ruled in *Gover* had the decedent died more than three years after the malpractice occurred because the case dealt with a victim who died within several hours of surgery.

102. 521 So. 2d 465 (La. App. 4th Cir. 1988).

103. Id. at 467.

104. Id. at 468.

105. See Owens v. Martin, 449 So. 2d 448, 451 n.4 (La. 1984) (Discussing contra non valentum in connection with Article 3492 tort prescription, the court observed that "[t]here is no need to invoke the doctrine where the damage does not occur until some time after the negligent act. In that case, the code itself provides that prescription does not commence until the damage is sustained.").

While the decision dealt with interruption of the one year prescriptive period, the reasoning of *Minor v. Casten* could be extended to suspensions of the three year period. The supreme court has implicitly recognized that Louisiana Revised Statutes 9:5628 does not prohibit application of all categories of contra non valentum after three years. If they are applicable, then a plaintiff, urging the inability of the court to take "cognizance" of his claim until the victim's death, may still have a wrongful death claim when death occurs more than three years from the act, omission, or neglect.[106]

Survival Action

The prescriptive period of the Medical Malpractice Act may be applicable to survival actions as well as wrongful death claims that allege medical malpractice. However, the rules governing each claim are different. Survival claims and wrongful death claims are separate and distinct causes of action that arise from a common tort, but at different times.[107] The survival action comes into existence with the commission of the tort and is transmitted to the beneficiaries at the victim's death. It permits recovery solely for damages suffered by the victim from the time of injury until the moment of death. In contrast, a wrongful death action does not arise until the victim dies and permits recovery of damages suffered, not by the victim, but by the beneficiaries from the moment of the victim's death and thereafter.

Cases that have discussed the applicability of Louisiana Revised Statutes 9:5628 to wrongful death claims generally have also discussed

106. A plaintiff who has timely filed suit for loss of consortium should certainly be allowed to amend this petition to add a claim for wrongful death. Where an amendment states a different cause of action from that asserted in the original timely pleading, the amendment relates back, despite prescriptive bars if the original pleading gives fair notice of the general fact situation from which the amended claim arises. Esteve v. Iberia Parish Hosp., 520 So. 2d 848 (La. App. 3d Cir. 1987); Gunter v. Plauche, 439 So. 2d 437 (La. 1983). In *Esteve*, the plaintiff filed a medical malpractice claim for injuries sustained by his wife in February, 1979. The claim was filed with a Medical Review Panel in January, 1980 and during the pendency of the decision, the plaintiff's wife died. Her death occurred in March, 1982. From the facts, it is not clear whether it occurred more than three years from the alleged malpractice, however, in any case, the pendency of the Panel's opinion suspended prescription. A decision was rendered by the Panel in April, 1984 and suit was filed timely in May, 1984 by the plaintiff for damages for his wife's injuries and death. In March, 1986, plaintiff amended his original petition to make an additional claim for wrongful death. The court found that, by the broad language contained in the original petition, the defendant had been put on sufficient notice to effect an interruption of prescription relative to the wrongful death claim.

107. Guidry v. Theriot, 377 So. 2d 319 (La. 1979).

survival actions. Indeed, some have actually involved survival actions[108] filed in connection with wrongful death claims.

The court in *Nathan v. Touro Infirmary*[109] held, contrary to an abundance of review panel suspension decisions holding otherwise, that the victim's filing of a claim with a medical review panel is the equivalent of filing suit. Therefore, if the plaintiff dies of causes related to his malpractice claim after requesting a review panel, his heirs will inherit the cause of action. This is based upon the reasoning that, once suit is instituted, the "right" of action under Louisiana Civil Code article 2315, is transformed into an "action." The rules of substitution, as provided in Article 801 of the Louisiana Code of Civil Procedure, control the survival action, and there is no longer the one year prescriptive period of Article 2315 with which to contend. The action is governed, instead, by the abandonment provisions of the Louisiana Code of Civil Procedure.

The court in *Nathan* held that where the malpractice victim has made a timely request for a medical review panel, the determination of the proper prescriptive period to apply to a survival action, whether that of Article 2315 or that of Louisiana Revised Statutes 9:5628, is unnecessary. The court in *Nathan* was otherwise silent on the issue of prescription, but at least one subsequent case has indicated that when suit has not been instituted by the plaintiff prior to death, the prescriptive period of Louisiana Revised Statutes 9:5628 is applicable.[110] Earlier decisions also applied this statute to survival actions when the victim had died before he was able to institute suit.[111]

It, therefore, appears that a different rule will apply depending upon whether the malpractice victim has filed a claim for damages prior to his death. If he has filed a claim, no prescriptive period will apply; if he has not, his survivor's claims will be governed by Louisiana Revised Statutes 9:5628.

A survival action transmits the victim's right to recover damages that he himself was entitled to recover as a plaintiff. However, when the victim's own cause of action has prescribed during his life, his heirs cannot manufacture a cause of action by waiting until his death.[112] Thus,

108. Lambert v. Michel, 364 So. 2d 248 (La. App. 3d Cir. 1978), writ denied, 366 So. 2d 917 (1979); Minor v. Casten, 521 So. 2d 465 (La. App. 4th Cir. 1988); Brown v. Dept. of Health & Human Resources, 498 So. 2d 785 (La. App. 4th Cir. 1986), writ denied, 500 So. 2d 430 (1987).

109. 512 So. 2d 352 (La. 1987).

110. Minor v. Casten, 521 So. 2d 465 (La. App. 4th Cir. 1988).

111. Lambert v. Michel, 364 So. 2d 248 (La. App. 3d Cir. 1978), writ denied, 366 So. 2d 917 (1979); Brown v. Dept. of Health, 498 So. 2d 785 (La. App. 4th Cir. 1986), writ denied, 500 So. 2d 430 (1987).

112. Holmes v. Pottharst, 438 So. 2d 622 (La. App. 4th Cir. 1983), writ denied, 447 So. 2d 1076 (1984).

in the malpractice context, if the victim either discovers his cause of action but fails to file suit within a year or simply fails to discover his cause of action within three years of the alleged malpractice, his heirs cannot revitalize his prescribed cause of action.[113]

The Suggested Schemes

Discussing the applicability of Louisiana Revised Statutes 9:5628 to survival actions and wrongful death claims in *Minor v. Casten*, Judge Plotkin, writing separately, proposed a "solution" to the "prescriptive problem." Accepting the panel's interpretation that *Hebert* establishes a rule that Louisiana Revised Statutes 9:5628 applies to all claims based upon medical malpractice, he hypothesized that such a rule would result in a total bar to survival and wrongful death actions whenever malpractice occurs and is discovered more than a year prior to the decedent's death. In such an instance, the slow death of the victim would deprive the survivors of the opportunity to file an action to recover their own losses. While concerned that the one year period runs from malpractice, or, at the latest, the discovery thereof, Judge Plotkin wrote:

> I believe that the purpose of LRS-R.S. 9:5628 is to bar all medical malpractice actions after three years from the date of the act, omission or neglect giving rise to the action, regardless of whether the alleged malpractice has been discovered prior to that date. This three-year prescriptive period should apply even to wrongful death and survivor actions. However, within that limit, when, as in the instant case, both the injured party and his legal successors fail to bring the action within the one-year period, but the successors file suit within a year of the death, the action should be allowed under the wrongful death and survivor articles. Survivor actions should be allowed under the above rule only when the decedent's own cause of action has not expired at the time of his death.[114]

Judge Plotkin suggests that the three year period should govern both wrongful death and survival actions. Survival actions and wrongful death actions should not be barred by the statute if the victim's survivors timely file suit, within the three year period, under the provisions of Article 2315. If, for any reason, suit is not filed within three years of the malpractice, however, the survivor's claims are barred by prescription.

Recently, the second circuit offered its own prescriptive scheme for Louisiana Revised Statutes 9:5628. In *Dunn v. North Community Hosp.*,[115]

113. 521 So. 2d at 468-70.
114. Id. at 470.
115. 545 So. 2d 1267 (La. App. 2d Cir.), writ denied, 550 So. 2d 633 (1989).

the court explained that *all* medical malpractice actions must be brought within the three year outside limit, with the sole possible exception being the case of intentional concealment by a physician. "However, rather than applying contra non valentum, such a case could be resolved by holding that the doctor's actions estopped him from raising the exception of prescription."[116] The court then addressed wrongful death and survival actions. Regarding the former, the court suggested that contra non valentum would apply within the three year limit to create the same effect as would Article 2315.2: that the plaintiff must file suit within one year of the victim's death. However, the court also stated that in all cases, suit must be brought within the three year period. Regarding survival actions, the court suggested that the foregoing rule would apply, "with the exception of the situation in which the patient knows of the alleged act of malpractice, but refuses or neglects to file an action for a period in excess of one year, subsequent to which the patient dies."[117]

While *Dunn* presents nothing novel, it does agree rather closely with the approach suggested by Judge Plotkin in *Minor v. Casten*. Within the three year limit, the equitable doctrines of suspension and interruption have free play, but the three year limit cuts off any equitable tolling. Only fraud on the part of the defendant can preserve the plaintiffs right to bring his claim, and, as *Dunn* suggests, this preservation can rest on the notion of estoppel rather than contra non valentum. While such a distinction may simply be a matter of semantics, to prevent the operation of the contra non valentum doctrine in all situations certainly pays lip service to the literal "even as to discovery" language of the statute.

The *Dunn* approach seems to move the three year limit closer toward becoming a peremptive period. Although, presumably, the period is still regarded as susceptible to interruption by suit and suspension by the deliberations of a review panel, the period would act as an absolute cut-off point for a plaintiff's malpractice claims against the negligent practitioner. Arguably, the *Dunn* approach is more consistent with the language of the statute, as well as with its legislative purpose, than the "peremptive-only-as-to-the-discovery-rule" approach of earlier decisions. However, difficulties arise with wrongful death claims, as noted above, when a victim fails to die within three years of the defendant's act, omission or, neglect. It can be called nothing but unfair to require a malpractice victim to die quickly for his heirs to have a claim for his wrongful death.

Conclusion

Unlike tort modifications that simply limit a plaintiff's recovery, the courts look with obvious disfavor upon modifications that serve as

116. Id. at 1270.
117. Id.

a complete bar to a plaintiff's recovery. This is especially true where a plaintiff has had absolutely no opportunity to file suit, either because he did not know he was injured or because he was prevented from filing because his cause of action had not yet accrued. The collection of statutes making up the Medical Malpractice Act represent a clear policy choice by the legislature to favor low insurance rates as the means to insure quality medical care at reasonable rates. To achieve this goal, the legislature has chosen to limit a medical malpractice plaintiff's recovery in several ways. Primarily, the Act requires the filing of suit within a certain period of time following the act of malpractice regardless of the excuse for untimely filing. However, being generally loathe to find that a cause of action has prescribed, many courts have revealed their extreme dissatisfaction with the prescription statute and gone on to determine that the unfairness of a mechanical application in many situations calls for a tailored solution. As demonstrated above, this fashioning of remedies has led to an enigmatic body of jurisprudence.

The creation of remedies through statutory interpretation or equity is not in itself improper. Yet, when these remedies create an inconsistent body of jurisprudence that clearly flies in the face of legislative purpose and intent, it is fair to question whether the courts have, on occasion, gone too far. While a legislative policy choice may be unfair to certain plaintiffs in certain situations, it is not the province of the courts to ignore that choice by legal sophistries.

E. Scott Hackenberg