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I. INTRODUCTION

By 1980, forty-one jurisdictions, either by court decision or legislation, had adopted some kind of "discovery" rule regarding statutes of limitations in medical malpractice cases.[1] Generally, dis-

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1. *See* Jones v. Rogers Memorial Hosp., 442 F.2d 773 (D.C. Cir. 1971); Shillady v. Elliot Community Hosp., 114 N.H. 321, 320 A.2d 637 (1974); Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972); Seitz v. Jones, 370 P.2d 300 (Okla. 1962); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Morgan v. Grace Hosp. Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965); Alabama (ALA. CODE § 6-5-482 (1975)); Arizona (ARIZ. REV. STAT. ANN. § 12-564 (West Cum. Supp. 1979-1980)); Arkansas (ARK. STAT. ANN. § 34-2616 (1979)); California (CAL. CIV. PROC. CODE § 340.5 (Deering Supp. 1980)); Colorado (COLO. REV. STAT. § 13-80-105 (1977)); Connecticut (CONN. GEN. STAT. ANN. § 52-584 (West 1969)); Delaware (DEL. CODE ANN. tit. 18, § 6856 (Cum. Supp. 1980)); District of Columbia (D.C. CODE ENCYCL. § 12-301(8) (West 1966)); Florida (FLA. STAT. ANN. § 95.11(4)(b) (West Supp. 1980)); Georgia (GA. CODE ANN. §§ 3.1102-1103 (Cum. Supp. 1980)); Hawaii (HAWAII REV. STAT. § 657-7.3 (1977)); Idaho (IDAHO CODE § 5-219(4) (1979)); Illinois (ILL. ANN. STAT. ch. 83, §, 22.1 (Smith-Hurd Supp. 1980)); Iowa (IOWA CODE ANN. § 614.1(9) (West Cum. Supp. 1980)); Kansas (KAN. STAT. ANN. §§ 60-513(a)(7), (b)(c) (1976)); Kentucky (KY. REV. STAT. ANN. § 413.140(2) (Baldwin Supp. 1980)); Louisiana (LA. REV. STAT. ANN. ch. 9, § 5628 (West Supp. 1980)); Maryland (MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1980)); Michigan (MICH. COMP. LAWS ANN. § 600.5838 (Cum. Supp. 1980-1981)); Mississippi (MISS. CODE ANN. § 15-1-36 (Supp. 1980-1981)); Missouri (MO. REV. STAT. § 516.105 (Vernon Supp. 1981)); Montana (MONT. REV. CODES ANN. § 27-2-205 (1979)); Nebraska (NEB. REV. STAT. § 44-2828 (1978)); Nevada (NEV. REV. STAT. § 41A.097 (1979)); New Hampshire (N.H. REV. STAT. ANN. § 507-C:4 (Supp. 1979)); New Jersey (N.J. STAT. ANN. § 2A:14-2 (West 1952)); New York (N.Y. CIV. PRAC. LAW § 214-a (McKinney 1980-1981)); North Carolina (N.C. GEN. STAT. § 1-15(c) (Cum. Supp. 1979)); North Dakota (N.D. CENT. CODE § 28-01-18(3) (Supp. 1979)); Ohio (OHIO REV. CODE ANN. § 2305.11(B) (Page Supp. 1980)); Oklahoma (OKLA. STAT. ANN. tit. 76, § 18 (West Cum. Supp. 1980-1981)); Oregon (OR. REV. STAT. § 12.1104(4) (1979)); Pennsylvania (42 PA. CONS. STAT. ANN. § 5524(2) (Purdon 1980)); Rhode Island (R.I. GEN. LAWS § 9-1-14.1 (Supp. 1980)); South Carolina (S.C. CODE § 15-3-545 (Cum. Supp. 1980)); Tennessee (TENN. CODE ANN. §§ 23-3415, 28-304 (Cum. Supp. 1979)); Utah (UTAH CODE ANN. § 78-14-4 (Supp. 1979)); Vermont (VT. STAT. ANN. tit. 12, § 521 (Supp. 1980)); Washington (WASH. REV. CODE

covery rules provide that the statute of limitations does not begin to run when a negligent act occurs: rather, the statute begins to run when the injured party discovers, or reasonably should have discovered, that a claim exists, whichever occurs first.[2] Until 1980, Massachusetts was aligned with the small minority of jurisdictions that still did not recognize discovery as the event to trigger the statute of limitations.

The statute of limitations for medical malpractice, enacted in Massachusetts in 1921, provided that "[a]ctions of contract or tort for malpractice . . . against physicians [and] . . . hospitals . . . shall be commenced only within two years next *after the cause of action accrues*."[3] The Massachusetts Supreme Judicial Court first rejected a "discovery" interpretation of "accrual" in 1929 in *Capucci v. Barone*.[4] The justices, believing that they were constrained by the legislature's failure to adopt a discovery rule in the wake of *Capucci*, reluctantly resisted a growing national trend.[5] In 1966, in *Pasquale v. Chandler*,[6] the court again refused to adopt a discovery rule for medical malpractice actions. Between 1966 and 1980, however, a discovery rule for medical malpractice had been adopted in the vast majority of jurisdictions.[7] During that time, the Massachusetts Supreme Judicial Court interpreted "accrual" of claims to mean "discovery" in two kinds of cases: Legal malpractice actions[8] and actions against real estate agents for misrepresentation.[9]

With this background, the supreme judicial court, in the spring of 1980, was faced once again with the issue of whether to adopt a medical malpractice discovery rule in the cases of *Teller v. Schepens*[10] and *Franklin v. Albert*.[11] Interest in the issue was strong: *amicus curiae* briefs were filed by the Massachusetts Bar

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ANN. § 416.350 (Cum. Supp. 1981)); West Virginia (W. VA. CODE § 55-2-12(b) (1981)); Wyoming (WYO. STAT. § 1-3-107 (1977)).

2. *See* Anderson v. Wagner, 79 Ill. 2d 295, 305, 402 N.E. 2d 560, 564 (1979).

3. MASS. GEN. LAWS ANN. ch. 260, § 4 (West Cum. Supp. 1981) (emphasis added). Section 4 was amended in 1965 to provide a three-year rather than two-year statutory period.

4. 266 Mass. 578, 165 N.E. 653 (1929).

5. In 1965, the Massachusetts House of Representatives rejected a bill which would have established a discovery rule. Pasquale v. Chandler, 350 Mass. 450, 456-57, 215 N.E.2d 319, 322-23 (1966).

6. 350 Mass. 450, 450, 215 N.E.2d 319, 319 (1966).

7. *See* note 1 *supra* and accompanying text.

8. Hendrickson v. Sears, 365 Mass. 83, 310 N.E.2d 131 (1974).

9. Friedman v. Jablonski, 371 Mass. 482, 358 N.E.2d 994 (1976).

10. 1980 Mass. Adv. Sh. 2199, 411 N.E.2d 464.

11. 1980 Mass. Adv. Sh. 2187, 411 N.E.2d 458.

Association, supporting the adoption of the discovery rule, and by the Massachusetts Medical Society, opposing the adoption of the rule.

Plaintiff in *Teller* suffered the total loss of sight in his right eye and substantial impairment of vision in his left eye as a result of a gunshot wound.[12] On April 2, 1976, defendant physician examined plaintiff and recommended surgery on the left eye.[13] Defendant operated on plaintiff on three occasions between April 15 and May 10, 1976 and discharged plaintiff from his care on June 29, 1976.[14] On that date defendant, for the first time, informed plaintiff that nothing could be done to restore vision in his right eye and that the substantial loss of vision in his left eye would be permanent.[15] Plaintiff commenced a malpractice action against defendant on June 27, 1979, just two days short of three years from the date he first learned of the possible malpractice; more than three years, however, had passed since defendant's last operation on plaintiff.[16]

In *Franklin*, plaintiffs, husband and wife, based their malpractice action on the following allegations. Plaintiff husband was admitted to defendant hospital for oral surgery in January 1974.[17] Upon admission he complained of chest pains. A chest x-ray was taken and plaintiff husband was discharged two days later with an erroneous notation on his discharge summary stating that the x-ray was normal.[18] In fact, the radiology department's report mentioned an "apparent left superior mediastinal widening" and noted "[f]urther evaluation of this is recommended."[19] Plaintiff husband nevertheless was discharged without being informed of the radiological findings.[20] In January 1978, plaintiff husband returned to defendant hospital complaining of chest discomfort.[21] An x-ray revealed Hodgkins disease.[22] Plaintiff filed suit in July 1978 claiming that the "widening" noted in the 1974 x-ray was the early stage of Hodgkins disease and that defendant's failure to report and evalu-

12. 1980 Mass. Adv. Sh. at 2199, 411 N.E.2d at 465.
13. *Id.* at 2200, 411 N.E.2d at 465.
14. *Id.*
15. *Id.*
16. *Id.*
17. 1980 Mass. Adv. Sh. at 2188, 411 N.E.2d at 460.
18. *Id.*
19. *Id.*
20. *Id.* at 2188-89, 411 N.E.2d at 460.
21. *Id.* at 2189, 411 N.E.2d at 460.
22. *Id.*

ate such finding constituted malpractice.[23] Suit was filed approximately six months after plaintiff's discovery of the alleged malpractice but four and one-half years after the allegedly negligent act.[24]

The trial judges in both *Teller* and *Franklin* granted defendants' motions for summary judgment, ruling that the claims were barred by the statute of limitations because both actions were commenced more than three years after the occurrence of the last allegedly negligent act.[25] In both cases, the courts relied on *Capucci* and *Pasquale*.[26] Plaintiffs appealed, and the supreme judicial court took the appeals on direct review.

II. Evolution of the Discovery Rule in Massachusetts

Defendants in *Teller* and *Franklin* opposed judicial adoption of a discovery rule. Defendants in *Franklin* argued that the medical malpractice statute of limitations was set by the legislature and that the courts therefore were barred from altering or amending it.[27] By definition a statute of limitations is a creature of the legislature, and it is beyond question that when the legislature clearly articulates the terms of the statute the courts have no role to play, save in enforcing the statute. When the legislature has failed to delineate whether the term "accrues" refers to the happening of the negligent act or to its discovery, however, it is clearly within the courts' traditional province to interpret the statute's meaning. Indeed, in the recent opinion of *Cannon v. Sears, Roebuck & Co.*,[28] the supreme judicial court, in interpreting the statute of limitations for products liability actions, ruled that "[w]hile the Legislature had established a time limit within which tort actions must be brought, it has left for judicial determination the time when 'the cause of action accrues.' "[29]

In so ruling, the *Cannon* court echoed a 1974 decision, *Hendrickson v. Sears*,[30] which announced a discovery rule for legal malpractice. The court stated: "in general the definition of accrual

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23. *Id.*
24. *Id.*
25. *Id.* at 2189, 411 N.E.2d at 460. 1980 Mass. Adv. Sh. at 2200, 411 N.E.2d at 465.
26. 1980 Mass. Adv. Sh. at 2187-88, 411 N.E.2d at 459; 1980 Mass. Adv. Sh. at 2200 n.2, 411 N.E.2d at 465 n.2.
27. 1980 Mass. Adv. Sh. at 2190-91, 411 N.E.2d at 461.
28. 374 Mass. 739, 374 N.E.2d 582 (1978).
29. *Id.* at 740, 374 N.E.2d at 583.
30. 365 Mass. 83, 310 N.E.2d 131 (1974).

has been left to judicial rationalization and interpretation."[31] Indeed, as the court pointed out in *Franklin*, the "date of the act" rule, relied on by defendants, was itself the product of judicial interpretation of chapter 260, section 4 of the Massachusetts General Laws.[32] More particularly, defendants in *Franklin* argued that the court's 1966 *Pasquale* decision "forecloses further judicial consideration of the proper time of accrual of a medical malpractice claim."[33] In so arguing, defendants invited reappraisal of the *Pasquale* decision and the *Capucci* doctrine on which *Pasquale* rested.

A. Capucci: *Discovery Rule Rejected*

In 1929, the supreme judicial court first interpreted chapter 260, section 4 of the Massachusetts General Laws in *Capucci v. Barone.*[34] Citing no authority, the *Capucci* court ruled that "accrual" refers to the time when the negligent act occurs.[35] In so doing, the court expressly refused to adopt a "discovery" interpretation of "accrual," asserting that the date when the actual damage results or is ascertained has no bearing on accrual of the cause of action.[36]

The last is a curious statement since damage is an element of a cause of action in tort or contract and a plaintiff who cannot allege or prove damage cannot maintain an action under either theory. Indeed, the Massachusetts Supreme Judicial Court acknowledged this both before[37] and after[38] the *Capucci* decision. If *Capucci* were correct in holding that the occurrence of damage is irrelevant to "accrual" of a claim, the decision would mandate the ludicrous result that a claim which had not yet matured could be barred because injury did not become manifest within the statutorily mandated time period.

After *Capucci*, the court did not have the opportunity to interpret section 4 again until 1966 when the court reaffirmed the *Capucci* rule in *Pasquale v. Chandler.*[39]

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31. *Id.* at 88, 310 N.E.2d at 134.

32. 1980 Mass. Adv. Sh. at 2193, 411 N.E.2d at 462.

33. *Id.* at 2190, 411 N.E.2d at 461. *Franklin* overruled *Pasquale*. *Id.* at 2191, 411 N.E.2d at 461.

34. 266 Mass. 578, 580, 165 N.E. 653, 654 (1929).

35. *Id.* at 581, 165 N.E. at 654-55.

36. *Id.*, 165 N.E. at 655.

37. Sullivan v. Old Colony St. Ry., 200 Mass. 303, 303, 86 N.E. 511, 511 (1908).

38. Cannon v. Sears, Roebuck & Co., 374 Mass. at 742, 341 N.E.2d at 584.

39. Pasquale v. Chandler, 350 Mass. 450, 456, 215 N.E.2d 319, 319. *Franklin* overruled *Pasquale*. *See* note 33 *supra*.

B. Pasquale: Capucci *Reluctantly Affirmed*

In *Pasquale* the supreme judicial court recognized that in the period between *Capucci* and *Pasquale* the trend toward "discovery" had begun in earnest throughout the United States.[40] The court, reluctantly following *Capucci*, stated that "were it not for recent legislation, we would be disposed to reconsider the question [of a discovery rule]."[41]

The recent legislation alluded to was a bill considered in 1965 by the Massachusetts House of Representatives.[42] This bill would have amended section 4 to explicitly provide a modified discovery rule with a five-year "outer limit."[43] In other words, the two-year statute of limitations would have begun to run upon discovery, but in no event could the action have been maintained after five years from the date of the negligent act. The bill was passed by the house[44] and sent to the Massachusetts Senate with a single modification, elimination of the outer limit. In deleting the outer limit, the house apparently endorsed an unrestricted discovery rule. The senate, however, failed to pass the house bill, instead adopting a version of section 4 which was identical to the old one except for an extension of the statute of limitations from two years to three years.[45] According to the supreme judicial court in *Pasquale*, this legislative history made it apparent that the legislature chose to reject a discovery rule.[46]

Because of this legislative action, or inaction, the *Pasquale* court held that it was barred from interpreting "accrues" to mean "discovery."[47] This reasoning has superficial appeal. After all, if the statute is a creature of the legislature, any change in the statute should come from the legislature. If the legislature rejects a bill that would have overturned an earlier judicial interpretation of the statute regarding the term "accrual," then the legislature apparently seeks no change in meaning. All this is unexceptionable but is beside the point. The *Pasquale* court was not called upon to change a statute but to interpret it, clearly a role historically within

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40. 350 Mass. at 456, 215 N.E.2d at 322.
41. *Id.*
42. *See* legislative history of House Bill No. 530, *cited in* Pasquale v. Chandler, *id.*
43. *Id.* at 455-58, 215 N.E.2d at 322-23.
44. *Id.* at 457-58, 215 N.E.2d at 323.
45. 1965 Mass. Acts, ch. 302.
46. 350 Mass. at 458, 215 N.E.2d at 323.
47. *Id.*

the court's province.[48] Indeed, since *Pasquale*, the court has made it abundantly clear that it is empowered to interpret statutes in general and the term "accrual" in particular.[49]

In addition, the *Pasquale* court emphasized that the drafters of the rejected discovery rule bill referred to "accrual" as "time of occurrence" rather than "time of discovery."[50] The house bill provided that "actions of contract or tort for malpractice . . . shall be commenced only within two years next after the injured party has knowledge of the facts which give rise to a cause of action but only within five years after the cause of action accrues."[51] The *Pasquale* court reasoned that the drafters of the house bill recognized that section 4 incorporated the *Capucci* "time of occurrence" interpretation of accrual or else the drafters would not have sought to amend it. According to the court, therefore, rejection of the bill meant that the legislature intended *Capucci* to continue in effect.[52] The legislative drafters' recognition that "accrual" means "time of occurrence," however, was merely the recognition that *Capucci* was the law. This is not legislative intent; it shows only that members of the legislature can read a controlling court decision. To admit that *Capucci* exists does not verify its correctness.

C. Franklin: *Discovery Rule Prevails*

More fundamentally, however, as the *Franklin* court recently pointed out, it is impossible for the court to find legislative intent in the legislature's failure to pass a particular bill.[53] Rather, debates and other legislative history concerning a bill which was enacted into law reveal the intent of the majority of those who voted for it. Knowing the legislature's intent aids in the interpretation of an enacted statute. In *Pasquale*, however, the court did not look to legislative history but merely to postenactment occurrences to see if the legislature chose to amend the existing law. This is not legislative history and cannot indicate the intent of the legislature which passed section 4. The history of the house bill shows that the legislature chose not to enact a two-year discovery rule with a

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48. *Id.* at 455-56, 215 N.E.2d at 321-22.

49. *See* Cannon v. Sears, Roebuck & Co., 374 Mass. at 740, 374 N.E.2d at 583; Hendrickson v. Sears, 365 Mass. at 88, 310 N.E.2d at 134; notes 29-32 *supra* and accompanying text.

50. 350 Mass. at 457, 215 N.E.2d at 322-23.

51. *Id.* at 456-57, 215 N.E.2d at 323.

52. Pasquale v. Chandler, 350 Mass. at 458, 215 N.E.2d at 323.

53. 1980 Mass. Adv. Sh. at 2191-93; 411 N.E.2d at 461-62.

five-year outer limit, but it fails to indicate how another discovery rule would have fared.

Mistaken reliance on the legislature's decision not to enact a discovery rule was discussed by the Oregon Supreme Court in 1966 in *Berry v. Branner.*[54] Prior to *Berry*, the Oregon legislature twice had rejected bills which would have adopted a discovery rule in medical malpractice cases. This rejection occurred while the prevailing judicial interpretation of "accrual" in Oregon was the "time of the negligent act."[55] Faced with the argument that such legislative rejection of "discovery" made further judicial interpretation of "accrual" inappropriate, the Oregon Supreme Court said:

> The fallacy in this argument is that no one knows why the legislature did not pass the proposed measures. . . . Did the legislature fail to pass the measures because it was satisfied with the [prior case law's] interpretations of the statute or because it was not in favor of an overall limitation, or because it disliked the length of the overall limitation? The practicalities of the legislative process furnish many reasons for the lack of success of a measure other than legislative dislike for the principle involved in the legislation. Legislative inaction is a weak reed upon which to lean in determining legislative intent.[56]

Having demonstrated the weakness of the *Pasquale* court's reasoning, the *Franklin* court liberated itself from *Pasquale*'s restraints:

> [W]e do not read the failure to enact these bills as necessarily disapproving, in principle, a discovery rule. Further, we reject the suggestion that defeated legislative proposals have the power to disable us, in a proper case, from considering the questions presented by such proposals and from abandoning prior conclusions that now seem inappropriate.[57]

The court further declared that Massachusetts courts have long exercised the power to interpret statutes of limitations when explicit legislative direction is absent.[58] The court explained that its 1929

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54. 245 Or. 307, 311-12, 421 P.2d 996, 998 (1966), *cited in* Franklin v. Albert, *id.* at 2192, 411 N.E.2d at 461.

55. As in Massachusetts, the Oregon House passed discovery rule statutes only to have them rejected in the state senate. *See* Berry v. Branner, 245 Or. 307, 311, 421 P.2d 996, 998 (1966).

56. 245 Or. at 311, 421 P.2d at 998.

57. 1980 Mass. Adv. Sh. at 2193, 411 N.E.2d at 462.

58. *Id.*, 411 N.E.2d at 462.

decision in *Capucci*, and not a statute, first established that a medical malpractice claim accrues at the time of the negligent act.[59]

Having decided that the court had the power to interpret section 4, the justices then turned to the task of interpretation. In construing the meaning of the term "accrues," the court looked to three commonly employed sources. First, the court referred to its own prior interpretations of the term "accrues." As the court noted, the term "accrues" had been before it three times in recent years in the context of contract, deceit, and products liability causes of action.[60] In the 1974 case of *Hendrickson v. Sears*,[61] the court ruled that the term "accrues" refers to the time when an act of legal malpractice is discovered rather than the time when the act occurs.[62] The court ruled that this definition of "accrual" was required whether the action was brought under Massachusetts' contract statute of limitations[63] or under the general tort statute of limitations.[64] Similarly, in the 1976 case of *Friedman v. Jablonski*,[65] the supreme judicial court held that a cause of action for a broker's deceit in the sale of real estate "accrues" on plaintiff's discovery of such deceit.[66] Finally, in *Cannon v. Sears, Roebuck & Co.*,[67] the court said, without reaching the question of a discovery rule, that a cause of action in products liability "accrues," at least, at the time of injury rather than on the earlier date of manufacture or sale.[68] The *Franklin* court commented that all three cases, including *Cannon*, "recognize the principle that a plaintiff should be put on notice before his claim is barred."[69]

The court's inquiry next turned to the law of sister jurisdictions. The vast majority of jurisdictions were found to have adopted some form of a discovery rule.[70] Moreover, the court could have argued that not only have forty-one other jurisdictions adopted a discovery rule in medical malpractice cases but, more to the point,

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59. *Id.*
60. *Id.* at 2194-95, 411 N.E.2d at 463.
61. 365 Mass. 83, 83, 310 N.E.2d 131, 131 (1974).
62. *Id.* at 91, 310 N.E.2d at 136.
63. MASS. GEN. LAWS ANN. ch. 260, § 2 (West Cum. Supp. 1981).
64. *Id.* § 2A.
65. 371 Mass. 482, 358 N.E.2d 994 (1976).
66. *Id.* at 485-86, 358 N.E.2d at 997.
67. 374 Mass. 739, 739, 374 N.E.2d 582, 582 (1978).
68. *Id.* at 742-43, 374 N.E.2d at 584.
69. 1980 Mass. Adv. Sh. at 2195, 411 N.E.2d at 463.
70. *Id.* *See* note 1 *supra* for a list of jurisdictions which have adopted a discovery rule.

the vast majority of courts that have faced the issue have construed "accrual" of a malpractice claim to mean "discovery."[71]

Finally, the court addressed the policy arguments advanced both in favor of and in opposition to a discovery rule. Though recognizing that the "policy of affording repose"[72] and the policy of encouraging plaintiffs "to bring actions within prescribed deadlines when evidence is fresh and available"[73] are important goals of statutes of limitations, the court noted that *Capucci* and *Pasquale* had failed to balance these goals against "the harm of being deprived of a remedy."[74] Though declining, by ignoring, plaintiffs' invitation to declare the *Capucci* doctrine unconstitutional as a deprivation of due process, the *Franklin* court determined: "the manifest injustice of the *Capucci* doctrine is that, rather than punishing negligent delay by the plaintiff, it punishes blameless ignorance by holding a medical malpractice action time-barred before the plaintiff reasonably could know the harm he has suffered."[75] In short, the court reasoned that statutes of limitations, though designed to protect a defendant from a stale claim, should not concomitantly deny a

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71. Jones v. Rogers Memorial Hosp., 442 F.2d 773 (D.C. Cir. 1971); Mayer v. Good Samaritan Hosp., 14 Ariz. App. 248, 482 P.2d 497 (1971); Stafford v. Schultz, 42 Cal. 2d 767, 270 P.2d 1 (1954); Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1970); Layton v. Allen, 246 A.2d 794 (Del. 1968); City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954); Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605 (1971); Yoshizaki v. Hilo Hosp., 50 Hawaii 150, 433 P.2d 220 (1967); Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1969); Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E.2d 450 (1970); Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967); Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971); Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970); Springer v. Aetna Cas. & Surety Co., 169 So. 2d 171 (La. App. 1964); Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Dyke v. Richard, 390 Mich. 739, 213 N.W.2d 185 (1973); Johnson v. St. Patrick Hosp., 148 Mont. 125, 417 P.2d 469 (1966); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Shillady v. Elliot Community Hosp., 114 N.H. 321, 320 A.2d 637 (1974); Fox v. Passaic Gen. Hosp., 71 N.J. 122, 363 A.2d 341 (1976); Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 301 N.Y.S.2d 23 (1969); Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968); Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972); Seitz v. Jones, 370 P.2d 300 (Okla. 1962); Frohs v. Greene, 253 Or. 1, 452 P.2d 564 (1969); Berry v. Branner, 245 Or. 307, 421 P.2d 996 (1966); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968); Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974); Hays v. Hall, 488 S.W.2d 412 (Tex. 1972); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967); Christiansen v. Rees, 20 Utah 2d 199, 436 P.2d 435 (1968); Janisch v. Mullins, 1 Wash. App. 393, 461 P.2d 895 (1969).

72. 1980 Mass. Adv. Sh. at 2194, 411 N.E.2d at 463.

73. *Id.*

74. *Id.* at 2193, 411 N.E.2d at 462.

75. *Id.* at 2194, 411 N.E.2d at 463.

plaintiff the right to assert a claim before such claim has matured, particularly when a plaintiff is utterly blameless for the delay in commencing suit.

Defendants asserted that recognition of a discovery rule in the medical malpractice context could be contrary to public policy: defendants argued that a discovery rule would somehow exacerbate the "malpractice crisis."[76] The burgeoning number of malpractice actions and the increasing size of awards together have caused malpractice insurance rates to increase dramatically, even compelling some insurance companies to refuse to insure doctors in Massachusetts.[77] According to defendants, if a discovery rule were adopted, higher rates and the refusal of some insurers to underwrite at least some kinds of medical specialties would affect the delivery of health and medical services in the Commonwealth.[78]

Though a medical malpractice insurance crisis might exist, defendants failed to make any fair and reasonable connection between alleviation of that crisis and a rejection of the discovery rule. If the cause of the crisis is an increase in the number of fraudulent malpractice claims, then the medical malpractice screening procedure,[79] followed since 1975, is the much more efficient vehicle for separating false claims from legitimate actions. The frequency of fraudulent claims will not increase significantly by extending the commencement of the statute of limitations period to the time when individuals reasonably might discover the injury and thus assert the claim. Indeed, one suspects that the real argument in the minds of defendants goes as follows: the malpractice crisis is caused essentially by the dramatic increase in the volume of claims and the amount of awards; any measures which serve to reduce the volume of litigation are salutary; and rejection of a discovery rule will reduce the number of claims because potential claims will be time-barred. Such a policy argument, however, in no way relates to the purpose of statutes of limitations and fails to discriminate between valid and frivolous claims. The argument's most serious deficiency is its failure to account for the elimination of valid claims prior to their discovery and maturity, the basic unfairness which led the supreme judicial court to abandon the *Capucci* doctrine.

Finally, defendants, on behalf of medical practitioners, hospi-

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76. *Id.* at 2195, 411 N.E.2d at 463.
77. *Id.*
78. *Id.*
79. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West Cum. Supp. 1981).

tals, and their insurers, asserted that the increased number of malpractice actions that would follow adoption of a discovery rule was not their primary concern. Rather, defendants worried that uncertainty as to the length of the period during which claims could be asserted against an insured would so unsettle the rating process as to make insuring doctors and hospitals very expensive or even prohibitive. That is, by creating a "long tail"[80] of liability, a discovery rule could impair the insurers' effectiveness in predicting future liability. Although the court failed to address this argument, probably in deference to the legislature, the solution seems clear.

D. *Statutory Solution: Outer-Limit Statute*

Most of the states that have adopted the discovery rule have legislatively placed an outer limit on the statute of limitations.[81] A discovery rule with an outer limit provides that the statute will begin to run upon discovery, but in no event may the plaintiff commence an action more than a specified period from the date of the negligent act. The discovery rule with a reasonably lengthy outer limit appears to be a wise compromise between the needs of the victims of malpractice and the needs of health care providers and insurers. Victims benefit because symptoms, in most cases, will appear by the time the outer limit is reached. Insurers' needs also are met since insurance rating can be relatively certain due to the absolute cutoff date for claims.

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80. *See generally* Anderson v. Wagner, 79 Ill. 2d 295, 307, 402 N.E.2d 560, 565 (1979), *appeal dismissed sub nom.* Woodward v. Burnham City Hosp., 101 S. Ct. 54 (1980).

81. Alabama (ALA. CODE § 6-5-482 (1975)); Arizona (ARIZ. REV. STAT. ANN. § 12-564 (West Cum. Supp. 1980)); California (CAL. CIV. PROC. CODE § 340.5 (Deering Supp. 1980)); Colorado (COLO. REV. STAT. § 13-80-105 (1977)); Connecticut (CONN. GEN. STAT. ANN. § 52-584 (West 1969)); Delaware (DEL. CODE ANN. tit. 18, § 6856 (Cum. Supp. 1980)); Florida (FLA. STAT. ANN. § 95.11(4)(b) (West Supp. 1980)); Hawaii (HAWAII REV. STAT. § 657-7.3 (1977)); Illinois (ILL. ANN. STAT. ch. 83, § 22.1 (Smith-Hurd Supp. 1980)); Iowa (IOWA CODE ANN. § 614.1(9) (West Cum. Supp. 1980)); Kansas (KAN. STAT. ANN. § 60-513(c) (1976)); Kentucky (KY. REV. STAT. ANN. § 413.140(2) (Baldwin Supp. 1980)); Louisiana (LA. REV. STAT. ANN. § 9:5628 (West Supp. 1980)); Maryland (MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1980)); Missouri (MO. REV. STAT. § 516.105 (Vernon Supp. 1981)); Montana (MONT. REV. CODES ANN. § 27-2-205 (1979)); Nebraska (NEB. REV. STAT. § 44-2828 (1978)); Nevada (NEV. REV. STAT. § 41A.097 (1979)); North Dakota (N.D. CENT. CODE § 28-01-18(3) (Supp. 1979)); Ohio (OHIO REV. CODE ANN. § 2305.11(B) (Page Supp. 1980)); Oregon (OR. REV. STAT. § 12.110(4) (1979)); South Carolina (S.C. CODE § 15-3-545 (Cum. Supp. 1980)); Tennessee (TENN. CODE ANN. § 23-3415 (Cum. Supp. 1979)); Utah (UTAH CODE ANN. § 78-14-4 (Supp. 1979)); Vermont (VT. STAT. ANN. tit. 12, § 521 (Supp. 1980)); Washington (WASH. REV. CODE ANN. § 416.350 (Cum. Supp. 1981)).

Outer-limit statutes, however liberal, time-bar some claims prior to maturity. Because of this, outer-limit statutes recently have been subjected to attack on the ground that such statutes, like any nondiscovery statute of limitations, violate the due process clause of the fourteenth amendment in that they deprive persons of property, a claim, without due process.[82] Courts reviewing outer-limit statutes have found them reasonable both in protecting most victims and in eliminating "long tail" liability; therefore the statutes do not contravene due process.[83] In October 1980, the United States Supreme Court refused to hear an appeal in one of these due process cases, *Woodward v. Burnham City Hospital*,[84] so the constitutionality of outer-limit statutes has not yet been established definitively.

Having considered the weight and trend of judicial decisions and the various policy positions regarding discovery rules, the court in *Franklin* squarely overruled *Capucci* and *Pasquale*, holding that "a cause of action for medical malpractice does not 'accrue' under G.L. c. 260, § 4, until a patient learns, or reasonably should have learned, that he has been harmed as a result of defendant's conduct."[85] Because no "foreign objects" were involved in the cases before it, the court refused to limit the scope of its discovery rule to malpractice actions which arise from the presence of foreign objects left in the patient's body.[86] Though many states have limited the scope of their discovery rules to foreign object cases, the supreme judicial court, in dicta, observed that it could discern no principled basis for such a distinction.[87]

III. CONCLUSION

Prior to 1980, Massachusetts' statute of limitations for medical malpractice actions barred claims commenced more than three years from the date of injury, regardless of whether the injury was discoverable within that period. In 1980, Massachusetts joined the

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82. U.S. CONST. amend. XIV.

83. *See, e.g.*, Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968); Owen v. Wilson, 260 Ark. 21, 537 S.W.2d 543 (1976); Landgraff v. Wagner, 26 Ariz. App. 49, 546 P.2d 26 (1976); Dunn v. Felt, 379 A.2d 1140 (Del. 1977); Anderson v. Wagner, 79 Ill. 2d 295, 402 N.E.2d 560 (1979), *appeal dismissed sub nom.* Woodward v. Burnham City Hosp., 101 S. Ct. 54 (1980).

84. 101 S. Ct. 54 (1980).

85. 1980 Mass. Adv. Sh. at 2188; 411 N.E.2d at 459-60.

86. *Id.* at 2196, 411 N.E.2d at 464.

87. *Id.*

vast majority of American jurisdictions by adopting a discovery rule for medical malpractice actions. The discovery rule promotes fairness by providing plaintiffs with the right to assert their claims once they discover they have been wronged. The Massachusetts legislature might perceive the resulting "long tail" liability as unreasonably aggravating the medical malpractice crisis: expanding the period when individuals may file claims will increase the number of malpractice actions brought and will raise the price of insurance premiums. Should the legislature wish to alleviate these additional burdens yet uphold the discovery rule, a solution adopted in the majority of states is available: An outer-limit statute. A discovery rule with an outer-limit statute allows a plaintiff to commence an action upon discovery of an injury but no later than a specified period from the date of the negligent act. If an outer limit is grafted onto the discovery rule announced in *Teller* and *Franklin*, then Massachusetts' discovery rule, like those enacted in the majority of jurisdictions, will accommodate the needs of both doctors and patients.