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Stoleson v. United States: FTCA - Expanding the Discovery Rule in Occupational Disease Cases, 14 J. Marshall L. Rev. 873 (1981)

John Wm. Aniol

CASENOTES

*STOLESON V. UNITED STATES**: FTCA—EXPANDING THE DISCOVERY RULE IN OCCUPATIONAL DISEASE CASES

Prior to the enactment of the Federal Tort Claims Act (FTCA),[1] a suit could not be filed against the federal government for injury to a person or damage to property caused by a government employee.[2] Formerly, relief for such injuries was a

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* 629 F.2d 1265 (7th Cir. 1980).

1. There are several pertinent statutes involved in the present case. 28 U.S.C. § 1346(b) (1966) gives federal courts:

> exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

This section establishes the right of an individual to file a tort claim against the United States in a federal district court. *See, e.g.*, Pennsylvania R.R. v. United States, 124 F. Supp. 52 (D.N.J. 1954).

State law determines whether a cause of action is stated in order to file a tort claim since the United States is liable to the plaintiff "in accordance with the law of the place where the act or omission occurred." Bizer v. United States, 124 F. Supp. 949 (N.D. Cal. 1954); Foote v. Public Hous. Comm'r of the United States, 107 F. Supp. 270 (W.D. Mich. 1952).

28 U.S.C. § 2674 (1966) provides in part that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." The United States, in waiving its sovereign immunity, is to be held liable in the same manner as a private individual in like circumstances. Rayonier, Inc. v. United States, 352 U.S. 315, 318 (1957); United States v. Gregory 300 F.2d 11, 12 (10th Cir. 1962). *See* 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 66.03 (1980). The Act sought "to set a uniform standard for persons injured by the conduct of those acting in an official capacity. And that standard was to be the same standard as determined the liability of anyone else." The courts, however, have not felt bound to construe this language narrowly. The United States would be liable in essentially the same manner as a private individual so long as the liability did not generate suits not previously actionable. Feres v. United States, 340 U.S. 135 (1950). *Cf.* Dalehite v. United States, 346 U.S. 15 (1953) (claim not given jurisdiction since it was based on the exercise or failure to exercise a discretionary function or duty).

2. Before the enactment of the FTCA, a plaintiff could only obtain relief by the introduction of a private bill in Congress. The bills became too

matter of Congressional grace. Presently under the FTCA, the United States has waived its sovereign immunity from liability for the torts of government employees, agents, and members of the armed forces.[3] This Act has thereby afforded a remedy of right not previously available to an injured party.

The FTCA, however, is governed by a two-year statute of limitations.[4] This statute encourages a plaintiff to file his lawsuit promptly and protects the defendant from the unjust burden of defending a "stale" claim.[5] Thus, while the FTCA

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numerous and imposed a substantial hinderance to Congress. 8 AM. JUR. TRIALS *Federal Tort Claims Act Proceedings* § 3 (1965). Congress was unable to review most of these private prayers for relief and the litigants continued to be compensated for their damages as a matter of legislative grace, not as a matter of right. *See* Commissioners of the State Ins. Fund v. United States, 72 F. Supp. 549, 553 (S.D.N.Y. 1947).

The definitions pertinent to the statutes involved are found in 28 U.S.C. § 2671 (1966). A "federal agency" includes corporations primarily acting as instrumentalities or agencies of the government, but excludes any independent contractor. An "employee of the government" includes any officers or employees of any federal agency, or persons acting on behalf of a federal agency within the scope of employment. *See* Fentress v. United States, 431 F.2d 824 (7th Cir. 1970) (action by government contractor's employee with resulting negligence); United States v. Becker, 378 F.2d 319 (9th Cir. 1967) (private pilot hired by Forest Service for federal service).

3. The doctrine of sovereign immunity was derived from the English political theory that "the Crown [was] immune from any suit to which it [had] not consented." Feres v. United States, 340 U.S. 135, 139 (1950). The United States, as a sovereign, was therefore immune from suit unless Congress expressly consented to be sued. That consent provided a judicial remedy for the injured plaintiff and defined the court's jurisdiction. United States v. Sherwood, 312 U.S. 584 (1941).

Under the FTCA, however, the United States only partially waived its sovereign immunity for tort claims. Congress reserved several exceptions to liability for which an individual would normally be accountable. 28 U.S.C. § 2680 (1966). This helps clarify the subtle distinction that the government may be held liable essentially like a private individual, but with reservations. *See* note 1 *supra*.

4. 28 U.S.C. § 2401(b) (1966), the relevant statute of limitations, states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

This section further provides that federal, not state, law controls the time when a claim accrues for purposes of the statute of limitations. Reilly v. United States, 513 F.2d 147 (8th Cir. 1975); Kossick v. United States, 330 F.2d 933 (2d Cir.), *cert. denied*, 379 U.S. 837 (1964); Hammond v. United States, 388 F. Supp. 928 (E.D.N.Y. 1975). *Contra*, Tessier v. United States, 269 F.2d 305, 309 (1st Cir. 1959) (a "claim accrued" when a private person similarly situated would become liable under the law of the state).

For a general explanation of the difficulties experienced by the courts in differentiating between "whether" a claim has accrued and "when" a claim has accrued, see 35 AM. JUR. 2d *Federal Tort Claims Act* § 126 (1967).

5. A "stale" claim is one that is not brought within the statutory period. The legislature will not allow a plaintiff to recover if he has allowed his claim to "slumber until evidence has been lost, memories have faded, and

provides an adequate remedy at law for the injured plaintiff, its statute of limitations simultaneously protects the legal rights of the defendant.

As a general rule, the statute of limitations begins to run when a cause of action accrues. An accident or medical malpractice action usually accrues at the time of injury.[6] The fact and existence of the injury normally provides sufficient notice of the cause of the injury.[7] This alerts the claimant that his legal rights have been invaded.

In litigation, however, situations often arise which prohibit the claimant from asserting his legal rights. His injury may originate from an occupational disease[8] rather than the more commonly litigated accident[9] or patent medical malpractice action.[10]

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witnesses have disappeared. . . . The right to be free of stale claims in time comes to prevail over the right to prosecute them." Railroad Tels. v. Railway Express Agency, 321 U.S. 342, 349 (1944). The primary consideration of the statute of limitations was one of fairness to the defendant. Note, *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1185 (1950).

6. Where the injury coincides with the act and some damage is discernible at the time, the statute of limitations begins to run immediately. *See, e.g.*, Beech v. United States, 345 F.2d 872 (5th Cir. 1965) (fall on hospital floor with resultant injuries); United States v. Reid, 251 F.2d 691 (5th Cir. 1978) (patient X-rayed for chest and backpains, doctor failed to tell patient that X-rays showed tuberculosis).

7. The existence and cause of the injury are ascertainable at the time of the negligence. *See, e.g.*, Steele v. United States, 599 F.2d 823 (7th Cir. 1979) (worker electrocuted while installing lights on inactive runway); Bizer v. United States, 124 F. Supp. 949 (N.D. Cal. 1954) (government doctor negligently punctured plaintiff's bladder during operation); Foote v. Public Hous. Comm'r of United States, 107 F. Supp. 270 (W.D. Mich. 1952) (explosion of coal stove in housing project). *See also* RESTATEMENT (SECOND) OF TORTS § 899, Comment c (1977).

8. Occupational diseases are health impairments arising from conditions of employment. Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916, 916 n.1 (1980) [hereinafter cited as *Occupational Disease*]. Proof of the injury may be extraordinarily difficult. The onset of the illness can occur many years after employment has begun, and in many cases after employment has ended. The cause of the injury may be uncertain or the proof incomplete. Many workers and their doctors may fail to recognize a causal connection between the injury and employment. *Id.* at 922. Occupational diseases usually result from harmful exposure to working conditions in a peculiar or increased degree by comparison with employment generally. 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 41.00 (1979) [hereinafter cited as LARSON]. *See also* WORKMEN'S COMPENSATION § 9.2 (Ill. Inst. for CLE 1979) (definition and explanation of occupational disease in Workmen's Occupational Diseases Act in Illinois).

9. An accident may be further defined as an "unlooked for mishap or an untoward event which is not expected or designed." LARSON, *supra* note 8, at § 37.00. Accidents are dramatic and time-definite occurrences which form a clear and immediate relationship between the injury and the work-related event. *Occupational Disease*, *supra* note 8, at 921.

10. Medical malpractice is a personal injury resulting from the misconduct of physicians, surgeons, and others practicing a similar profession

Additionally, numerous medical malpractice situations do not conform to the general rule. For example, the existence or cause of the injury may not be readily apparent.[11] In these cases, the statute of limitations cannot be employed in its general sense.[12] Thus, a more liberal interpretation was developed.

This interpretation, commonly entitled the discovery rule,[13] is justified for several reasons. First, the injury or consequence of the malpractice often goes undiscovered long after the negligent act occurs.[14] Second, even if the injury is patent, the causal connection between the negligence and the resulting injury may be difficult to ascertain.[15] Third, a plaintiff, untutored in medicine, may not discover the negligence until long after the

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(dentists, psychiatrists, chiropractors, pharmacists, and x-ray technicians). Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L. Q. 339, 339-40 (1962). In a patent medical malpractice action, the cause and injury are discernible at or relatively near the time of the negligent act. *See, e.g.*, Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905) (doctor operated on the wrong ear).

11. *E.g.*, Portis v. United States, 483 F.2d 670 (4th Cir. 1973) (hearing loss apparent, but cause not traced to negligent act until many years later); United States v. Reid, 251 F.2d 691 (5th Cir. 1958) (injury manifested itself well after first x-ray examination). *See also* Comment, *Occupational Carcinogenesis and Statutes of Limitations; Resolving Relevant Policy Goals*, 10 ENVT'L L. 113 (1979) [hereinafter cited as *Occupational Carcinogenesis*] (carcinogens in occupational diseases prolong latency period before discovery of injury and produce difficulty in discovering causation).

12. Under the general rule, the statute of limitations would produce severe inequities within the legal system. A plaintiff would be forced to file suit without knowledge of an injury or a supportable causal relation.

13. There is no concrete definition of the "discovery rule." The Supreme Court conceptualized the theory of the discovery rule in Urie v. Thompson, 337 U.S. 163 (1949), as an expansion of the general application of the statute of limitations. The rule permits a plaintiff to discover the existence and cause of his injury by a reasonable diligence standard. The rule was formally acknowledged in a medical malpractice context in Quinton v. United States, 304 F.2d 234, 240 (5th Cir. 1962). Other circuits soon followed in agreement. *See* Sanders v. United States, 551 F.2d 458 (D.C. Cir. 1977); Casias v. United States, 532 F.2d 1339 (10th Cir. 1976); Reilly v. United States, 513 F.2d 147 (8th Cir. 1975); Jordan v. United States, 503 F.2d 620 (6th Cir. 1974); Portis v. United States, 483 F.2d 670 (4th Cir. 1973); Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973; Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962), *overruled on subsidiary issue*, United States v. Martin, 567 F.2d 849 (9th Cir. 1977).

14. *E.g.*, Quinton v. United States, 304 F.2d 234 (5th Cir. 1962) (plaintiff did not learn of improper blood transfusion until her pregnancy three years later). *Cf.* Grigsby v. Sterling Drug, Inc., 428 F. Supp. 242 (D.D.C. 1975), *aff'd*, 543 F.2d 417 (D.C. Cir. 1976) (though injury did not manifest itself for over two years, plaintiff was not reasonably diligent thereafter in prompt filing of claim).

15. In some cases, causation may be difficult to prove because the defendant has control of or has omitted vital information in medical records. *E.g.*, Waits v. United States, 611 F.2d 550 (5th Cir. 1980) (failure of doctor to transcribe culture and sensitivity test in medical record).

services were rendered by the physician.[16] These same factors are often found in occupational disease cases.[17]

Prior to *Stoleson v. United States*,[18] the Seventh Circuit had not decided whether the discovery rule could be applied to occupational disease cases. In *Stoleson*, Mrs. Stoleson filed an action for injuries resulting from constant nitroglycerin exposure. Though her injury was almost immediately apparent,[19] no medically recognized causal relation then existed.[20] Mrs. Stoleson filed suit long after her first demonstrable injury and after the statute of limitations, under the general rule, had run.[21] The precise issue facing the court was, therefore, whether the discovery rule could be applied to occupational disease cases where no recognized causal connection existed coincident to the time of the manifestation of the injury.

FACTS AND PROCEDURAL HISTORY

From the onset of Mrs. Stoleson's employment in early 1967 at the Badger Army Ammunition Plant (BAAP),[22] she was continuously exposed to nitroglycerin.[23] Within one year she began

16. *See, e.g.*, Bridgford v. United States, 550 F.2d 978 (4th Cir. 1977) (doctors stated post-operative pain was due to either a slower healing rate or emotional problems, when pain was in fact due to blocked femoral vein); Jordan v. United States, 503 F.2d 620 (6th Cir. 1974) (at time of negligent nose operation, doctor told plaintiff eye injury was a necessary consequence of surgery).

17. *See, e.g.*, Urie v. Thompson, 337 U.S. 163 (1949) (injury of silicosis latent for many years); Pieczonka v. Pullman Co., 89 F.2d 353 (2d Cir. 1937) (same situation); Kuhne v. United States, 267 F. Supp. 649 (E.D. Tenn. 1967) (no causal relation for radiation exposure); Williams v. Julius Klein, Inc., 38 A.D.2d 140, 327 N.Y.S.2d 947 (1972) (no causal relation of blood disease to occupational exposure to benzene).

18. 629 F.2d 1265 (7th Cir. 1980).

19. Mrs. Stoleson started work in early 1967 and was experiencing anginal pains by the end of that year. *See* note 24 and accompanying text *infra*.

20. The causal relation was medically established in 1971, approximately three years after her injury. *See* note 30 and accompanying text *infra*.

21. Under the general application of the rule, Mrs. Stoleson would be barred from bringing suit two years after February 5, 1968, the first demonstrable date of her injury. She filed suit more than four years later, on August 16, 1972.

22. The Olin Corporation operated BAAP at Baraboo, Wisconsin, on a cost-plus fixed fee contract in conjunction with the government. The district court found that since the government was the owner of all structures, materials, and equipment associated with the plant, it had pervasive influence and authority over BAAP. This control categorized BAAP as a "federal agency" under 28 U.S.C. § 2671 (1966). Both parties conceded, as did the 7th Circuit, that BAAP was for all practical purposes a governmental entity. Brief for Appellant at 1, Brief for Appellee at 2-3, Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980).

23. Mrs. Stoleson was hired as a roll house operator in the rocket division. Her job entailed the continuous handling and processing of munitions and rocket propellants containing nitroglycerin. The nitroglycerin was in

experiencing anginal type chest pains on weekends.[24] On February 5, 1968, Mrs. Stoleson suffered a heart attack.[25] She returned to work on May 1, 1968, after several weeks of hospitalization. Although the hospital's physician informed her that exposure to nitroglycerin was not the cause of her illness, she requested a transfer to an area free from nitroglycerin. BAAP refused her request, relying on the company physician's opinion that nitroglycerin exposure would actually be *beneficial* to Mrs. Stoleson.[26] Following her return to work, she suffered progressively worse anginal attacks on the weekends.[27]

After her heart attack in 1968, Mrs. Stoleson suspected a connection between her cardiac ailment and her exposure to nitroglycerin. Subsequently, several other sources offered support of her suspicion,[28] but none proffered the medical proof

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dust or powder form. The principal mode of entrance into the body was through the skin. Stoleson v. United States, No. 74-C-297 at 9 (W.D. Wis. Oct. 18, 1979).

Nitroglycerin is essentially a vasodilating compound. Ingestion causes the blood vessels to dilate; withdrawal produces a vasoconstricting effect. Withdrawal after chronic exposure produces a persistent vasoconstricting effect which may result in angina, myocardial infarctions and ischemic episodes. *See* R. BERKOW, THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 478-79 (13th ed. 1977) [hereinafter cited as MERCK].

Expert testimony established at trial that very little nitroglycerin is necessary to produce these effects. Since nitroglycerin is fat soluble, it is absorbed easily through the skin and the amount ingested is very difficult or impossible to measure. The plaintiff ingested undetermined amounts of nitroglycerin.

24. Angina, in this case angina pectoris, produces a pressure, or strangling sensation, which is relieved by rest or sublingual nitroglycerin. MERCK, *supra* note 23, at 478.

25. Her condition was diagnosed as a myocardial infarction caused by a vascular spasm. Myocardial infarction is characterized by precordial pain similar to, but more intense than angina pectoris. This causes moderate to severe cardiac damage (heart attack). *Id.* at 484. The vascular spasm is the fibrillation or fluttering of the heart which leads to acute myocardial infarction. *Id.* at 449.

26. The benefit of nitroglycerin was probably the vasodilating relief from angina attacks. This relieved the strangling sensation due to the onset of an angina attack.

27. At the time of her termination, the attacks were occurring 4-5 times per weekend.

28. In Spring, 1969, Mrs. Stoleson read in a union newspaper that sudden withdrawal from nitroglycerin may cause anginal chest pains. In Fall, 1969, a Wisconsin occupational safety inspector, George Coolidge, told Mrs. Stoleson that he believed her heart problems were caused by exposure to nitroglycerin. He cautioned her, however, that he was unaware of any supportive medical evidence.

Though Mr. Coolidge remarked that he had "proof" of the causal relation, he qualified his statement by requiring the need for medical confirmation. Mr. Coolidge was neither a medical school nor college graduate. His proof consisted of a series of case histories on nitroglycerin exposures. Interestingly, these same case histories formed the empirical basis of Dr. Lange's treatise, which substantiated the causal connection. Brief for Ap-

necessary to substantiate a causal connection.[29] It was not until April, 1971, that Mrs. Stoleson obtained this concrete medical correlation. Dr. R. L. Lange, chief of cardiology at the Medical College of Wisconsin, examined her and concluded that her cardiovascular problems *were* related to nitroglycerin exposure. Based upon Mrs. Stoleson's case and eight other BAAP case histories, Dr. Lange published the first article establishing a causal connection between anginal problems and chronic exposure to nitroglycerin.[30] Despite Dr. Lange's diagnosis, the BAAP physician still maintained that nitroglycerin was not causally connected to Mrs. Stoleson's ailment.[31] Rather than transfer Mrs. Stoleson to a nitroglycerin-free area of the plant as she had pre-

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pellant at 11, Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980). *See* note 30 and accompanying text *infra*.

The zealousness of Mr. Coolidge was probably precipitated by the government's refusal to recognize Mr. Coolidge's jurisdiction over BAAP. Mr. Coolidge could only render advisory opinions. The workers had to rely solely on "the government's own safety program or lack thereof." Brief for Appellant at 11 n.3, Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980).

Shortly after Mrs. Stoleson spoke with Mr. Coolidge, she sought the opinion of one of her personal physicians who confirmed that no causal relation existed. BAAP continually assured Mrs. Stoleson that there was no basis for her causal suspicion. This opinion contradicted Mr. Coolidge's tentative proof.

29. The *Stoleson* court failed to clarify which "cause" it relied on—medical or legal. Though the court spoke of medically recognized causal proof, it was actually using the legal definition of causation. The difficulty in failing to differentiate between these two definitions occurs when a physician is reluctant to testify outright that an event was *the* cause of the resulting injury, preferring to testify instead that the event *might* have caused the injury. The legal definition, however, did not demand that the act be the *sole* cause of the injury, but that the act was in fact *a* cause. *See* Bender v. Dingwerth, 425 F.2d 378 (5th Cir. 1970). The jury, not the medical witnesses, decides the legal question of causation. The jury need not exclude all other causes in order to return a verdict affirming causation. The focal point of the issue "is the reasonableness of the particular inference or conclusion drawn by the jury." Sentilles v. Inter-Carribean Shipping Corp., 361 U.S. 107, 110 (1959); *accord*, Jones v. Landry, 387 F.2d 102 (5th Cir. 1967) (Supreme Court made it clear that the legal determination of the issue of causation is not to be made by the physicians but by the jury). *See generally* Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation*, 31 TEX. L. REV. 630 (1953).

30. This article established the first medical recognition of the causal relation in question. Neither medical journals nor clinical cardiology texts previously discussed the problem of angina among workers constantly exposed to nitroglycerin. Dr. Lange and his co-authors considered their publication to be a medical breakthrough on this facet of nitroglycerin exposure. Surprisingly, the basis of the article was derived from the cases which encompassed Mr. Coolidge's tentative "proof."

31. The BAAP doctor mischaracterized Dr. Lange's opinion and maintained that there existed no causal relation. Interestingly, one of Mrs. Stoleson's physicians, who previously stated that no causal relation existed, changed his opinion after he was confronted with Dr. Lange's proof. Brief for Appellant at 13, Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980).

viously requested, the BAAP physician recommended that Mrs. Stoleson be discharged as unfit to work.

Following her 1971 discharge, Mrs. Stoleson filed an administrative claim on August 16, 1972.[32] After an unsuccessful venture through the administrative process, she brought suit under the FTCA in federal district court.[33] She alleged that as a result of the Government's negligence in operating and maintaining BAAP, she ingested nitroglycerin which caused her heart problems. Upon the close of her case, the district court granted the Government's motion for involuntary dismissal.[34] The district court ruled that Mrs. Stoleson's claim was properly dismissed because the two-year statute of limitations barred her recovery for injuries before August 15, 1970.[35] Additionally, the court held that Mrs. Stoleson did not prove by a preponderance of the evidence that the Government's negligence proximately caused any new injuries after August 15, 1970.[36] Mrs. Stoleson appealed the district court ruling. By stipulation of the parties, the appeal was limited to the statute of limitations and the causation issues.[37]

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32. The filing of this claim effectively tolled the statute of limitations. 629 F.2d 1265, 1267 (7th Cir. 1980).

33. Mrs. Stoleson first had to file with the appropriate federal agency before she could bring suit under the FTCA. The purpose of this procedure was to settle promptly any meritorious claim without expensive and time consuming litigation. This would relieve unnecessary congestion in the courts. S. REP. NO. 1327, 89th Cong., 2d Sess. 2, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2515, 2517-18.

34. The district court granted the dismissal pursuant to FED. R. CIV. P. 41(b), which states in relevant part:

> Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

35. The court reasoned that if the discovery rule was not applicable, Mrs. Stoleson's claim accrued on her hospitalization for a myocardial infarcation on February 5, 1968, the first date of her demonstrable injury. Alternatively, if the discovery rule was applicable, her claim accrued in November 1969, when she read the union newspaper article and spoke with George Coolidge. The court concluded that since both these dates were prior to August 15, 1970, her claim was barred by the statute of limitations.

36. Stoleson v. United States, No. 74-C-297, at 22 (W.D. Wis. Oct. 18, 1979).

37. The parties stipulated that only the issues of limitations and causation be addressed. Brief for Appellant at ix-x, Brief for Appellee at 17, Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980). Other issues that may be raised on remand include actionable tort duty, breach of duty, the 'discretionary function' exception of 28 U.S.C. § 2680(a) (1966), and dam-

THE STOLESON DECISION

Applicability of the Discovery Rule

On appeal, the *Stoleson* court noted that while state law determines liability,[38] federal law determines when a claim accrues.[39] The court also acknowledged the statute of limitations general rule of accrual:[40] the statute begins to run at the time of injury. The court emphasized that this general rule, however, is often inapplicable to medical malpractice claims. In many cases, a plaintiff may not discover the existence or cause of his injury for many years.[41] The *Stoleson* court held that by properly applying the discovery rule, the statute of limitations does not begin to run until after the patient discovers or, in the exercise of reasonable diligence, should discover his injury and its cause.[42] The *Stoleson* court further concluded that the discovery rule may be applied to areas other than medical malpractice.[43]

In reaching its decision, the court relied on *Urie v. Thompson*,[44] an occupational disease case which first proffered the the-

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ages. Reply Brief for plaintiff at 1, Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980).

The Appellate Court stated that, because of their resolution of the statute of limitations issue, it need not reach the issue of causation. Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir. 1980).

38. *See, e.g.*, Steele v. United States, 599 F.2d 823, 825 (7th Cir. 1979) (liability under FTCA determined "in accordance with the law of the place where the act or omission occurred").

39. *See, e.g.*, Reilly v. United States, 513 F.2d 147, 148 (8th Cir. 1975) (when a claim "accrues" is a matter of federal law); Portis v. United States, 483 F.2d 670, 672 n.4 (4th Cir. 1973) (well settled that federal law determines when a claim accrues). *But see* Tessier v. United States, 269 F.2d 305, 309 (1st Cir. 1959) (a "claim accrues" when a private person similarly situated would become suable under the law of the state). *See generally* Annot., 7 A.L.R.3d 732 (1966).

40. Ordinarily, the statute of limitations does not commence until the tort is complete, when there is "an invasion of a legally protected interest of the plaintiff." In negligence, the cause of action is complete "when the harm occurs." RESTATEMENT (SECOND) OF TORTS § 899, Comment c (1977). *See* Zeidler v. United States, 601 F.2d 527 (10th Cir. 1979).

41. Following medical treatment, a patient often has little or no reason to believe that his legal rights have been invaded. *See* Waits v. United States, 611 F.2d 550 (5th Cir. 1980) (patient did not realize his cause of action until hospital released his records).

42. 629 F.2d at 1269.

43. The court implied that the discovery rule should be adopted into an occupational disease context for purposes of the present decision. The *Stoleson* court cited Steele v. United States, 599 F.2d 823 (7th Cir. 1979), but distinguished the case for no clear reason. Perhaps the *Stoleson* opinion wanted to introduce the situations excepted from the general rule of accrual, yet only referred to these factors in a footnote. *See* notes 14-16 and accompanying text *supra*.

44. 337 U.S. 163 (1949).

ory of the discovery rule.[45] The *Stoleson* court concluded that there was no reason to ameliorate the harsh consequences of the statute of limitations in one area while excluding others. Rather, any plaintiff who is blamelessly ignorant of the existence or cause of his injury should be accorded the benefits of a more liberal discovery rule.[46]

Accrual of Stoleson's Claim

The court noted that the discovery rule had been greatly expanded since *Urie* to encompass all the elements of a cause of action.[47] This extension, however, was short-lived. The court

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45. In *Urie*, a railroad fireman sued under the Federal Employers' Liability Act (FELA) contending that he had contracted silicosis due to breathing silica dust for almost thirty years. The defendant argued that since Urie had been exposed to this dust for many years, he must have unknowingly contracted silicosis long before filing suit, thus filing outside the statute of limitations.

The Supreme Court rejected this analysis, preferring instead what has been generally recognized as the precursor of the discovery rule:

> If Urie were held barred from prosecuting this action because he must be said, as a matter of law to have contracted silicosis [more than three years prior to filing suit], it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability. **** We do not think the humane legislative plan intended such consequences to attach to blameless ignorance.

The *Stoleson* court reasoned that applicability of the discovery rule, as expressed in *Urie*, is not governed by the occupation of the defendant, but by the nature of the plaintiff's problems in discovering his injury and its cause. The rule in *Urie* was not created in a medical malpractice sense and is not limited to those cases. The *Stoleson* court followed *Urie* in holding that a plaintiff's claim does not accrue until after he discovers the existence, and consequently, the cause of his ailment.

46. Stoleson v. United States, 629 F.2d at 1269.

47. Several courts have held that a plaintiff's medical claim does not accrue until he has had a reasonable opportunity to discover all the elements of a possible cause of action: duty, breach, causation, and damages. They believed that the rule must be flexibly construed to promote the sound policy that "blameless ignorance" should not result in the loss of the right to assert a malpractice claim. *See* DeWitt v. United States, 593 F.2d 276, 279 (7th Cir. 1979), *aff'd on rehearing*, 618 F.2d 114 (1980) (court restated the limitations rule to encompass both a subjective and an objective test—that the statute of limitations does not run until the claimant has discovered, or has had a reasonable opportunity to discover, all the essential elements of a possible cause of action); Exnicious v. United States, 563 F.2d 418, 421 (10th Cir. 1977) (claim does not accrue where patient was given a "credible explanation" of his condition); Bridgford v. United States, 550 F.2d 978, 982 (4th Cir. 1977) (patient not barred from bringing claim even though he experienced nominal injury at the time of operation; severe injury occurred much

cited with approval *United States v. Kubrick*,[48] which held that a claim accrues when a plaintiff discovers or, in the exercise of reasonable diligence, should discover the critical facts of the existence and cause of his injury.[49]

The Government in *Stoleson* contended that under the *Kubrick* standard Mrs. Stoleson's suspicions formed sufficient knowledge to commence the statute of limitations. The *Stoleson* court rejected this argument and held that a layman's subjective belief is inadequate to constitute medical proof of cause and existence. The court concluded that not until Mrs. Stoleson consulted Dr. Lange did her suspicions form concrete knowledge of the missing element—causation.[50] Mrs. Stoleson diligently filed her claim within two years of Dr. Lange's publication.[51] Accordingly, the *Stoleson* court reversed the involuntary dismissal entered by the district court and remanded for trial on the merits.

ALTERNATIVE INROADS FOR *STOLESON*

The *Stoleson* court could have relied on three different theories to support its conclusion. First, *Stoleson* might have been decided as a direct extension of the rule of law expressed in *Urie*. Second, *Stoleson* could have been resolved through analogies to the discovery rule in the medical malpractice field. Finally, *Stoleson* might have been adjudicated by holding that the Government was estopped from raising the statute of limitations because of its assertion of inconsistent causal theories.

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later); Jordan v. United States, 503 F.2d 620, 624 (6th Cir. 1974) (although injury apparent, no reason to suspect malpractice).

48. 444 U.S. 111 (1979).

49. The accrual of a medical malpractice claim need not await the discovery of all the elements in a cause of action: duty, breach, causation, and damages. *Kubrick* explained that a plaintiff, with knowledge of his injury and its cause, is no longer dependent on the defendant's professional expertise. The plaintiff can now seek other professional advice to decide whether to bring suit. *Id.* at 122.

50. Despite or perhaps because of her diligence, this was the first point at which Mrs. Stoleson could have pursued her claim against the United States. Therefore, under *Kubrick*, this was the moment when the statute of limitations commenced. Stoleson v. United States, 629 F.2d at 1270-71.

Stoleson noted a factual distinction between the present facts and *Kubrick*. The Court in *Kubrick* noted that had Kubrick sought timely advice, he would have uncovered the physician's negligence. Since medical science acknowledged Kubrick's treatment as inadequate, Kubrick was not blameless for his ignorance and delay. This factual distinction does not detract from Mrs. Stoleson's allegations, but rather lends support for the law expounded in *Kubrick*.

51. The *Stoleson* decision does not make clear whether the date of consultation or the date of publication was used in commencing the statute of limitations. In some cases, a substantial disparity in time between consultation and publication may cause the courts much confusion. In either case, Mrs. Stoleson filed within the prescribed two-year limit.

Any of these methods would have achieved the desired result: procuring justice by preserving of Mrs. Stoleson's personal rights. The court, however, chose only to address the medical malpractice theory in a vague and unconvincing attempt to substantiate its ruling.

An Extension of URIE

The *Stoleson* court failed to recognize that this case might have been decided solely on the rationale of *Urie* and its non-medical malpractice progeny.[52] In *Urie*, the plaintiff filed suit under the Federal Employers' Liability Act (FELA)[53] for silicosis injury contracted through exposure to silica at work.[54] The Supreme Court rejected the defendant's contention that Urie's claim was untimely because of the long exposure to silica.[55] The Court reasoned that:

> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. . . . [C]onsequently the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves.[56]

Urie noted that the language of the FELA was liberally written to encompass the humanitarian purposes for which it was intended.[57] The humane legislative intent of the FELA is strik-

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52. Hammond v. United States, 388 F. Supp. 928 (E.D.N.Y. 1975) (negligent issuance of unsafe oral polio vaccine); Kuhne v. United States, 267 F. Supp. 649 (E.D. Tenn. 1967) (occupational disease—radiation exposure); Foote v. Public Hous. Comm'r of the United States, 107 F. Supp. 270 (W.D. Mich. 1952) (accident—coal stove explosion).

53. 45 U.S.C. §§ 51-60 (1977). Section 51 imposed liability on a railroad for anyone injured while employed by the railroad due to the negligence of the railroad or its agents or employees. Rights under the FELA are governed by federal law to guarantee homogeneity. Suits must be filed within three years of the injury. ART OF DISCOVERY, F.E.L.A. §§ 4.2-4.3 (Ill. Inst. for CLE 1975). For a brief discussion of when a claim accrues under FELA, see 11 AM. JUR. TRIALS *FELA Litigation* §§ 65-66 (1965).

54. Silicosis is a disabling lung ailment caused by inhaling dust containing silicon dioxide. The silicon dioxide eventually incapacitates the lungs from supplying oxygen to the blood. *Occupational Disease*, *supra* note 8, at 924. For a technical discussion of silicosis, see MERCK, *supra* note 23, at 623-25.

55. If Urie's cause of action was subjected to the general application of the discovery rule, it would have run at some undiscernible time when the injury inconspicuously manifested itself within Urie's lungs. This would be outside the scope of the three year limitations. Thus, denial of any similar cause of action where the injury could not be discovered before the statute ran would be grossly inequitable and unjust.

56. Urie v. Thompson, 337 U.S. 163, 170 (1949).

57. *Urie* noted the broad language in the FELA, providing that "any

ingly similar to the FTCA. Both acts serve to expand the rights of the individual against the tortious actions of the government.[58] An issue arises, however, whether "accrual" as used in both acts is to be defined similarly for purposes of their statutes of limitations.[59]

A resolution of this issue was enunciated in *Foote v. Public Housing Commissioner of the United States*.[60] *Foote*, an occupational accident case,[61] held that when Congress used substantially the same wording in the FELA and the FTCA, the legislative purpose was to construe the word "accrues" in the same manner. This conclusively demonstrated the similar legislative intent necessary for an integrated analysis of both Acts.

The *Stoleson* court failed to use this integration to resolve the conflict. *Urie* established a more liberal limitations rule to safeguard those plaintiffs who could not, with reasonable dili-

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person suffering injury while he is employed", and "such injury or death resulting in whole or in part from the negligence" of any officer or employee, apparently made every injury suffered by any employee in the course of employment due to some negligence compensable. *Id.* at 181.

58. Similar to the railroad in the FELA, the Government in the FTCA is responsible for its negligence to an employee while engaged in work. *Compare* 45 U.S.C. § 51 (1939) *with* 28 U.S.C.§ 1346(b) (1966). *See also* Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408 (1976) (employee has common law right to safe working environment—issuance of smoking injunction); *Employment—Employee's Right to a Safe, Healthy Work Environment—Injunction Issued Prohibiting Tobacco Smoking in Offices and Customer Service Area on Employer's Premises*, 8 CUM. L. REV. 579 (1977); *Torts—Occupational Safety and Health—Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions*, 30 VAND. L. REV. 1074 (1977).

59. FELA: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56 (1939).

FTCA: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b) (1966).

Although the accrual clauses in both acts are substantially similar, one's wording is not a mirror image of the other. This raises the possibility of arguing differing interpretations of the clauses. If there is a difference, however, it would not aid the government for a "claim" would be at least as broad, if not broader, than the legalistic formula "cause of action". United States v. Reid, 251 F.2d 679, 693 (5th Cir. 1958).

60. 107 F. Supp. 270 (W.D. Mich. 1952).

61. American courts define "accident" as an unexpected event which is "traceable, within reasonable limits, to a definite time, place and occasion or cause." Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 543 (1954). Occupational diseases, however, are impairments of health resulting from conditions of employment. They may be extraordinarily difficult for the victim to prove. The onset of the illness can occur long after employment has begun, and even after it has terminated. *See* Comment, *Judicial Attitudes Towards Legal and Scientific Proof of Cancer Causation*, 3 COLUM. J. ENVT'L L. 344 (1977). Although this discussion is outside the scope of this article, the author feels it is necessary in differentiating for future applications.

gence, discover the cause or existence of the injury. Mrs. Stoleson sought the advice of several physicians and yet no causal relation was ascertained.[62] The *Urie* Court certainly would not have charged Mrs. Stoleson with the knowledge of the cause of her injury prior to any supporting medical proof. Only when the cause is medically recognized will *Urie* allow the statute of limitations to run against an injured plaintiff.[63]

Kuhne v. United States,[64] an occupational disease case, demonstrates when *Urie* permits the statute of limitations to commence in regard to a previously unverifiable cause. In *Kuhne*, the plaintiff alleged that exposure to radioactive materials during the course of his employment caused his disease. Fifteen years elapsed before the injury surfaced. Mr. Kuhne consulted a physician who initially stated that his disease was not causally related to radiation exposure. Two years later that physician reversed his opinion when an article was published which supported the causal connection.[65] The *Kuhne* court noted that under *Urie*, a claim does not accrue until the existence or cause of the injury is discovered or, by the exercise of reasonable care, should have been discovered. Thus, Kuhne could only have brought an action once supporting medical evidence was or should have been obtained.[66]

Similar to Mr. Kuhne, Mrs. Stoleson alleged that her exposure to a deleterious substance caused her illness. Both Kuhne and Stoleson consulted physicians who informed them of no medically known causal relationship. After medical proof was established, both physicians reversed their diagnoses and confirmed the causal correlation.[67]

Kuhne factually supports the direct application of *Urie* to *Stoleson*. Since *Kuhne* adhered to *Urie*'s standard of reason-

62. While Mrs. Stoleson's problem involved causation, Mr. Urie's dilemma encompassed the manifestation of his injury. This factual distinction, however, bears no weight in the holding. *Urie* implied that the absence of either cause or existence may generate use of the more liberal statute of limitations.

63. Mrs. Stoleson's claim accrued when she learned of medical support to substantiate her allegations. Urie's cause of action accrued when his illness emerged from its latency.

64. 267 F. Supp. 649 (E.D. Tenn. 1967).

65. The facts of *Kuhne* were strikingly similar to *Stoleson*. Here, as in *Kuhne*, after medical proof surfaced, the competent physician reconsidered his opinion and reversed his previous diagnosis. *See* note 33 *supra*.

66. 267 F. Supp. 649, 651-52 (E.D. Tenn. 1967).

67. These reversals in no way imply any hint of malpractice. At the time of the original diagnosis, there existed no generally recognized causal standard in the community. *Cf.* United States v. Kubrick, 444 U.S. 111, 123-24 (1979) (if community recognizes a generally applicable standard of care, competent advice would be readily available to plaintiff).

able diligence in discovering the existence or cause of an injury, and *Stoleson* is factually similar to *Kuhne*, the *Stoleson* court should have found *Urie* controlling. A plaintiff who diligently endeavors to discover the cause of his injury should be properly awarded the benefit of a more liberal and just discovery rule.

Analogies to the Discovery Rule in Medical Malpractice

Alternatively, the *Stoleson* court attempted to decide the case through medical malpractice analogies. Though the discovery rule did not evolve from medical malpractice decisions,[68] its adoption in that area was unchallenged.[69] The *Stoleson* court briefly mentioned two major reasons for this application.[70] First, the injury or consequence of the malpractice might often remain undiscovered for many years. Second, courts have recognized that even where an injury was apparent, the causal connection between the doctor's acts and the injury may be difficult to ascertain.[71] The *Stoleson* court concluded that, when applying either of these exceptions, the statute of limitations should begin to run only when the plaintiff discovered or, in the exercise of reasonable diligence, should have discovered the critical facts of his injury: its existence and cause.[72]

The *Stoleson* court failed to expressly state why the facts clearly conform to this second exception to the general rule. Mrs. Stoleson could not obtain sufficient causal proof since there was no medically recognized relation at the time of her injury. Without adequate evidence verifying a causal connection, her negligence suit would lack an essential element—causation.[73]

68. *See* Quinton v. United States, 304 F.2d 234, 240-41 (5th Cir. 1962) (the court expressly stated that its decision was supported by the ruling in *Urie*). *But see* Comment, *Federal Tort Claims Act—Interpretation of Two Year Period of Limitations*, 34 TENN. L. REV. 421, 430 (1967) (implies the discovery rule originated in medical malpractice cases through *Quinton* but not *Urie*).

69. *See* note 13 *supra*.

70. The *Stoleson* court did not hold that a plaintiff, unschooled in medicine, may reasonably await all the elements for his cause of action. This directly follows from the curtailment set forth in *Kubrick*. *See* note 49 *supra*.

71. *E.g.*, Portis v. United States, 483 F.2d 670, 673 (4th Cir. 1973) (injury soon apparent, but advice from approximately seven physicians within a five-year period did not establish the correlation of the negligent act to the injury); *see generally* Boyce v. Brown, 51 Ariz. 416, 77 P.2d 455 (1938) (accepted rule is that negligence of physician must be established by expert medical testimony, unless so grossly apparent that a normal person would have no difficulty in recognizing it).

72. 629 F.2d at 1269.

73. Mrs. Stoleson only needed the testimony of one doctor to support her suspicions. She need not establish that the nitroglycerin exposure was *the* cause, just *a* cause of her injury. *See* note 29 *supra*.

Although Mrs. Stoleson's suspicions were well-founded, hindsight does not transform mere speculation into hard-core fact. Congress, in the FTCA, did not intend the filing of a negligence claim prior to the establishment of its critical elements—existence and cause.

Although Mrs. Stoleson's occupational disease case fits the medical malpractice exception, the problem of bridging these two differing areas of law remains. The *Stoleson* court only vaguely alluded to this obstacle by acknowledging *Urie* as the precursor of the discovery rule. The court should have emphasized the ruling of *Quinton v. United States*,[74] which established the necessary correlation between the medical malpractice and occupational disease fields. *Quinton* was the first court which expressed the discovery rule and applied it in a medical malpractice context.[75] The *Quinton* court reasoned that the most sensible and just rule was to permit the statute of limitations to begin to run only when the plaintiff discovered or, in the exercise of reasonable diligence, should have discovered the acts constituting the allegations.[76] Thus, *Quinton* demonstrated that occupational diseases and medical malpractice injuries can be similarly treated with respect to the statute of limitations. This justifies the application of the reasonable diligence standard of the discovery rule to both areas of law.

The Supreme Court in *United States v. Kubrick*[77] defined the limits of the *Quinton* rationale[78] and held that the "accrual" of a claim need not await the plaintiff's awareness.[79] The Court

74. 304 F.2d 234 (5th Cir. 1962).

75. *Quinton* relied heavily on the rationale of *Urie* and *Foote* in rendering its decision. Other courts have followed this trend but have not expressly stated the applicability as clearly as *Quinton*. *See, e.g.*, Young v. Clinchfield R.R., 288 F.2d 499 (4th Cir. 1961); *see also* Bizer v. United States, 124 F. Supp. 949 (N.D. Cal. 1954).

76. Quinton v. United States, 304 F.2d 234, 240 (5th Cir. 1962).

77. 444 U.S. 111 (1979).

78. After *Quinton* but before *Kubrick*, there was a general expansion of the discovery rule to encompass all the elements of negligence. *E.g.*, DeWitt v. United States, 593 F.2d 276 (7th Cir. 1979), *aff'd on rehearing*, 618 F.2d 114 (7th Cir. 1980) (statute of limitations only allowed to run when plaintiff has reasonably discovered all the elements of the alleged negligence: duty, breach, causation, damages). *Kubrick* restricted this outgrowth considerably by only requiring cause and existence of the injury before allowing the statute to run. *Contra*, 23 TRIAL LAW GUIDE 555 (1980) (refuted *Kubrick* in favor of the *DeWitt* rationale).

79. *Kubrick* based this statement on Congressional intent of the FTCA. Congress intended the FTCA to supply a remedy for those injured as a result of governmental negligence. Congress also intended that the statute of limitations encourage prompt presentation of claims. The statute was enacted for the benefit of the government, not for the individual wronged. Congress aimed to thwart the claims of those not reasonably diligent. The government should not be overburdened in being obligated to defend long-

maintained that once the plaintiff has a reasonable opportunity to discover the "critical facts" of his injury, cause and existence, the statute of limitations would begin to run.[80]

The *Stoleson* court correctly concluded that *Kubrick* supported Mrs. Stoleson's claim against BAAP. Mrs. Stoleson must have reasonably established the existence and cause of her injury before the statute of limitations would begin to run. She knew of her injury no later than February 5, 1968, and diligently sought to discover the cause of her heart attack. Her suspicions, however well-founded, did not amount to that necessary to engage the statute of limitations. Only after Dr. Lange provided her with a supportable causal relationship did the statute begin to run. Mrs. Stoleson then had the "critical facts" necessary to file a valid and maintainable lawsuit. Since she filed within the time limits prescribed, the statute of limitations did not bar her otherwise valid claim.[81]

The Estoppel Argument

Although the *Stoleson* opinion briefly mentioned the Government's duty to its employees, it made no mention of the possibility that the Government could have been estopped from raising the statute of limitations as a defense.[82] The doctrine of equitable estoppel[83] can be argued when a plaintiff has demon-

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standing stale claims. 444 U.S. at 117. This imposed too great a burden in keeping records, finding witnesses, and testifying to remote and forgotten facts. *See* Railroad Tels. v. Railway Express Agency, 321 U.S. 342, 348-49 (1944). "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of [stale] claims. . . ."

80. 444 U.S. at 122. *See* Waits v. United States, 611 F.2d 550, 552 (5th Cir. 1980) (dealt only with ignorance of the underlying facts of cause and injury in a hospital malpractice case).

81. On remand, it may be discovered that some other issue, *e.g.*, causation, will invalidate Mrs. Stoleson's suit. For the purposes of the present decision, however, Mrs. Stoleson is said to have a maintainable cause of action.

82. Historically, governmental immunity was derived from the doctrine of sovereign immunity. Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 683 (1954). The government's welfare superseded the remedy of the injured individual. As representative of all people, the government is charged with the protection of financial stability and should not be estopped by a plaintiff who asserts his private financial interests. Saltman, *Estoppel Against the Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problem in Federal Procurements?*, 45 FORDHAM L. REV. 497, 500 (1976).

83. The doctrine of equitable estoppel is easily understood. It means that one is "barred" from asserting something because basic principles of equity and justice would otherwise be violated. Usually he is estopped from stating the true facts or asserting his valid lawsuit due to prior inconsistent statements or activities. REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.3 (Dobbs ed. 1973).

strated that (1) the employer or his agent (2) misinformed the plaintiff, and (3) thereby misled the plaintiff in respect to his cause of action.[84]

The facts of *Stoleson* conformed to these three elements. First, the BAAP doctor was acting on behalf of his employer, the United States government.[85] Second, the BAAP doctor told Mrs. Stoleson not only that nitroglycerin exposure was not causally related to her ailment, but that the exposure was beneficial to her health.[86] This diagnosis directly contradicted the government's earlier findings on the harmful effects of nitroglycerin.[87] Furthermore, although the BAAP doctor had continually stated that there was no causal relationship, the government contended in its defense that causation existed either at the time of her cardiac attack in 1968 or at the time of her discussion with Mr. Coolidge in 1969.[88] Finally, Mrs. Stoleson did not file her suit

84. Fletcher v. Union Pac. R.R., 467 F. Supp. 61, 64 (D. Neb. 1979). *Accord*, REMEDIES, DAMAGES—EQUITY—RESTITUTION § 2.3 at 42 (Dobbs ed. 1973) (basic elements are: (1) actor must have knowledge of true facts and communicate them in a misleading way; (2) the other relies upon that communication; and (3) the other would be materially harmed if actor is later permitted to assert that inconsistency).

85. Since the United States was in control of BAAP, the doctor was the company physician-employee of the government. *See* note 22 *supra*. The United States waived its sovereign immunity by the FTCA, and thus can be estopped from asserting the statute of limitations in the same manner as a private individual. *See* United States v. Certain Parcels of Land, 131 F. Supp. 65 (S.D. Cal. 1955) (in cases where sovereign immunity has been waived, government can be estopped by conduct of its agents in the same circumstances as a private individual, partnership, or corporation); Small & Robinson, Inc., v. United States, 123 F. Supp. 457 (S.D. Cal. 1954) (Government can be bound by doctrine of equitable estoppel where (1) it has waived its sovereign immunity, (2) its agent acted within his authority, and (3) the estoppel claimed would give the citizen his substantive rights); *see generally* Annot., 27 A.L.R. FED. *Estoppel Against Federal Government* § 6 (1976).

86. The mistake of the BAAP doctor goes to the heart of equitable estoppel. *See* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232 (1959) (maxim that no man may take advantage of his own wrong is deeply rooted in the American system of jurisprudence); R.H. Stearns Co. v. United States 291 U.S. 54, 61-62 (1934) ("[no] one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong.").

87. There were previous standards set forth by various agencies regarding safety and health regulations in handling nitroglycerin powder. Stoleson v. United States, No. 74-C-297 at 2-6 (W.D. Wis. Oct. 18, 1979). The district court found that these regulations and guidelines had not been properly followed. *Id.* at 8-10.

88. Equitable estoppel would prevent the government from assuming inconsistent positions to the detriment of Mrs. Stoleson. Estoppel is based on public policy and good faith. It is intended to protect against injustice and fraud. *See* Saltman, *Estoppel Against the Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problem in Federal Procurements?*, 45 FORDHAM L. REV. 497, 499-500 (1976). The inconsistency or misinformation need not be intentional, so long as the employee relies on it in good faith. *See, e.g.*, Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231

earlier since she had no reason to doubt the competent diagnosis of the BAAP doctor.[89]

The Government should have been barred from asserting the statute of limitations as a defense because of its prior inconsistent statements.[90] It would have been inequitable for the Government to argue causation when its own doctor professed the contrary. Therefore, Mrs. Stoleson should have been allowed to sue for injuries under the doctrine of equitable estoppel.

FUTURE RAMIFICATIONS OF *STOLESON*

The discovery rule is, in essence, a balancing factor of the government/individual tort conflict. While justice mandates a remedy for the injured plaintiff, it must yet attend to the rights of the defendant United States. As *Kubrick* adjusts the blinders of justice for parity in medical malpractice actions, *Stoleson* harmonizes the competing forces in occupational disease conflicts.

Yet *Stoleson* does more. It provides a pathway for the "accrual" rule of *Urie* and *Kubrick* in tort claims arising under other statutes.[91] Additionally, the discovery rule of the FTCA

(1959) (Court employed broad language applying to all cases of estoppel and did not limit its holding to intentional fraud); Louisville & Nashville R.R. v. Disspain, 275 F.2d 25, 26-27 (6th Cir. 1960) (unintentional misrepresentations of doctor sufficient to toll the statute of limitations). *Cf.* Fletcher v. Union Pac. R.R., 467 F. Supp. 61, 63 (D. Neb. 1979) (although doctor misinformed plaintiff of back injury while working for railroad, plaintiff was not reasonably diligent after he conclusively knew of his injury). *See generally* Annot., 24 A.L.R. 2d *Estoppel to Rely on Statute of Limitations* § 19 (1952).

89. There was nothing which would have led Mrs. Stoleson to doubt the competence of the BAAP doctor. Neither the district court opinion nor the appellant's briefs implied incompetence. The circuit court decision even alluded to the competence of the BAAP doctor's diagnosis. Stoleson v. United States, 629 F.2d 1265, 1271 (7th Cir. 1980).

90. The Government's claim to an immunity from the doctrine of equitable estoppel would be "a claim to exemption from the requirements of morals and justice." Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 683 (1954).

91. *See* RESTATEMENT (SECOND) OF TORTS § 899, Comment c (1979) which proposes that a similar discovery rule be applied to other professional malpractice situations.

Two major areas under scrutiny are the following:

Attorneys: *See, e.g.*, Woodruff v. Tomlin, 511 F.2d 1019 (6th Cir. 1975) (held that cause of action did not accrue until after plaintiff discovered or reasonably could have discovered the legal malpractice, *i.e.*, after judgment of circuit court had been made final); Budd v. Nixen, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971) (claim in tort does not accrue until the client (1) sustains some extent of injury, and (2) discovers or should discover his cause of action). *See generally* Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA L. 257 (1970); Annot., 18 A.L.R. 3d *Limitations—Attorney's Malpractice* 978 (1968).

Accountants: *See, e.g.*, Cook v. Redwood Empire Title Co., 257 Cal. 2d

may be applicable to numerous other legislative acts intended to compensate an individual for the tortious conduct of a governmental entity.[92] Though these applications might open the floodgates to future litigation,[93] one must remember the dual purpose of the rule. The law affords the plaintiff a just remedy while simultaneously protecting the defendant from stale claims. In its proper perspective, this rule will aid both the gov-

452, 79 Cal. Rptr. 888 (1969) (title company—two successive mistakes of acreage, claim accrued only when grantees refused to return property not properly theirs); Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967) (tax accountant changed methods without prior approval of Commissioner, claim accrues when deficiency assessed by IRS). *See generally* Annot., 26 A.L.R. 3d *Limitations—Accountant's Negligence* 1438 (1969).

92. Many other acts passed by Congress may be expanded to the justifiable limits of *Stoleson*. The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1970), articulated a prevention policy of occupational hazards but failed to provide for actions by employees to ensure a safe working environment. *Stoleson* may be used as support for the satisfaction of an individual's rights in state or federal court under the traditional notions of equity. *See generally* Article, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CALIF. L. REV. 702 (1976).

Many claims for occupational diseases are made under federal or state workmen's compensation acts. All the states, as well as the federal government, enacted various types of occupational disease statutes. Courts have held that the appropriate statute of limitations begins either at the time of (a) the wrongful conduct, (b) the last injurious exposure, (c) a disability or (d) the discovery of the occupational nature of the disease. *Stoleson* would act as persuasive authority to sway courts to (d) the discovery of the cause of one's injury. This would procure the most equitable solution against an otherwise limiting workmen's compensation act. *See generally Occupational Carcinogenesis*, *supra* note 11, at 128-34.

In products liability, a plaintiff must demonstrate an injury, a defective product, and the causal relationship. The statute of limitations may sometimes bar recovery because of the traditional focus on accidental injuries. *Stoleson* might lend support to a change which allows a manufacturer's liability to encompass the useful life of the product and a limited period thereafter. Courts may even extend the limitations rule to the date when the injury first manifests itself. This extension will justify any claim of latent carcinogenesis or other dormant disease. *See generally Occupational Disease*, *supra* note 8, at 926-28.

93. The crushing overabundance of claims congesting the courts has not yet materialized, though some cases signal a possible future onslaught. *E.g.*, Sindell v. Abbott Labs., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 48 U.S.L.W. 3270 (1980). DES was given to a mother and her daughter sued for injury. Since the daughter did not know which company manufactured the drug, all manufacturers who contributed substantially to the market in that area were held liable in proportion to their market share. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 1007 (1978) (in conceding the widespread consequences of industry-wide liability, commented that "[t]he DES cases are only the tip of an iceberg"); *See* Note, *Industry-Wide Liability*, 13 SUFFOLK L. REV. 980, 998 (1979) ("Elimination of the burden of proof as to identification [of the manufacturer whose drug injured the plaintiff] would impose a liability which would exceed absolute liability.").

ernment and the individual in ameliorating the harsh consequences found in these other areas of law.

The two-year statute of limitations in the FTCA poses a severe problem in occupational disease actions. Often, the existence or cause of the injury is not readily apparent. Rather than permit the plaintiff to assume an unjust burden in asserting his claim, compelling equitable considerations require that the courts modify the general rule for when the statute of limitations "accrues". In cases such as *Stoleson* the plaintiff now has three alternative arguments to support the timeliness of his action. First, he may support his claim directly under *Urie*. Second, the plaintiff may analogize his injury to similar situations where the discovery rule is applicable. Finally, he may argue that the defendant is equitably estopped from asserting a statute of limitations defense.

These three options, however, are not limited solely to occupational disease situations. The *Stoleson* decision, though analytically vague, impliedly postulates a feasible solution to the issue of collateral application of the discovery rule to other areas of the law. This decision enables other claimants to utilize the rule in procuring a just and sensible resolution. *Stoleson* enhances the trend of judicial consideration in alleviating certain inequities of law which unforseeably arise as an unwanted consequence of legislative enactments.

John Wm. Aniol