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ACCRUAL OF THE CAUSE OF ACTION FOR MEDICAL MALPRACTICE: *PENROD v. HOSKINSON*

Jim Reynolds

A woman is told in 1963 that she has cancer of the soft palate as a result of x-ray treatments she received in 1952.[1]

A surgical gauze pad begins to ooze from the hip of a man in 1962. It was left there during surgery in 1955.[2]

A woman undergoes surgery for the removal of a section of gallbladder in 1965. Her gallbladder was to have been completely removed in 1949.[3]

In 1973, a surgical needle is discovered imbedded in the abdominal wall of a woman. Surgeons operating on her in 1971 left it there.[4]

In 1973, doctors find a surgical drain in the abdomen of a woman who had last undergone surgery in 1969.[5]

These incidents suggest some of the problems arising in the medical malpractice area. This note will focus on two aspects of accrual of a cause of action for medical malpractice. Specifically, this note will examine: a) the status of the so-called "discovery doctrine" of medical malpractice in Montana, and b) the accrual of a cause of action for medical malpractice for the purpose of determining which statute of limitation governs the action.

I. THE STATUS OF THE DISCOVERY DOCTRINE IN MONTANA

A. *Background*

In response to the perceived harshness[6] of statutes of limitation prescribing a flat time limit for medical malpractice actions,[7] courts in the majority of states[8] have devised various doctrines to soften the

1. Quinlan v. Gudes, 2 Mich. App. 506, 140 N.W.2d 782 (1966).
2. Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469 (1966).
3. Winfrey v. Farhat, 382 Mich. 380, 170 N.W.2d 34 (1969).
4. Stoner v. Carr, 97 Idaho 641, 550 P.2d 259 (1976).
5. Penrod v. Hoskinson, ___ Mont. ___, 552 P.2d 325 (1976).
6. *See, e.g.*, Yoshizaki v. Hilo Hosp., 50 Hawaii 150, 433 P.2d 220, 223 (1967): "The injustice of barring plaintiff's action before she could reasonably have been aware that she had a claim is patent." *Contra*, Graham v. Updegraph, 144 Kan. 45, 58 P.2d 475 (1936).
7. *See, e.g.*, D.C. CODE § 12-301 (1973) (within three years of injury); IND. CODE ANN. § 16-9.5-3-1 (Burns Supp. 1976) (within two years of date of act); MINN. STAT. ANN. § 541.07 (West 1947) (within two years of act); PA. STAT. ANN. tit. 12 § 34 (Purdon 1953) (within two years of act); S.D. COMPILED LAWS ANN. § 15-1-14.1 (Supp. 1976) (within three years of act); VA. CODE § 8-24 (Supp. 1976) (within two years of act); WIS. STAT. ANN. § 893.205 (West 1966) (within three years of act).
8. For a list of states adhering to one of the discussed doctrines at the time of publica-

impact of these statutes on putative plaintiffs. Although application of these doctrines vary, they can be grouped into four general categories.

The *date-of-act* doctrine is the most harsh and inflexible. Cases decided under this theory[9] hold that the cause of action accrues at the time of injury. This doctrine does not soften the impact of the statute of limitation and often results in injustice to the plaintiff.[10]

The *continuing treatment* doctrine, one of the earliest judicial doctrines developed to circumvent the *date of act* doctrine,[11] has never gained wide recognition as an acceptable alternative and is now followed in only a few states[12] and there only because of specific statutory language mandating it.[13] Under this doctrine, the cause of action does not accrue, and the statute of limitation does not run, until termination of the physician-patient relationship.[14]

The *fraudulent concealment* doctrine is the result of transplanting fraud concepts onto malpractice concepts. The result is a hybrid doctrine, universally applied when the facts justify it.[15] It holds that when a doctor employs artifice to prevent inquiry, to escape investigation, or to conceal information disclosing a patient's right of action,[16] the cause of action does not accrue, nor does the statute of limitation begin to run, until discovery of the facts by the owner of the cause of action.[17] This doctrine has been applied in several state courts which also adhere to one of the other doctrines,[18]

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tion, *see* Comment, 1 HOFSTRA L. REV. 277 (1973).

9. *E.g.*, Williamson v. Edmondson, 257 Ark. 837, 520 S.W.2d 260 (1975); Blank v. Community Hosp., 143 Ind. App. 333, 240 N.E.2d 562 (1968); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962); Pasquale v. Chandler, 350 Mass. 450, 215 N.E.2d 319 (1966); Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

10. *Supra* note 8.

11. It was first applied in Gillette v. Tucker, 67 Ohio St. 106, 65 N.E.2d 865 (1902).

12. Hammond v. Weiss, 46 Mich. App. 717, 208 N.W.2d 578 (1973); Murray v. Fox, 300 Minn. 373, 220 N.W.2d 356 (1974); Borgia v. City of New York, 12 N.Y.2d 151, 237 N.Y.S.2d 319, 187 N.E.2d 777 (1962); Wyler v. Trippi, 25 Ohio St.2d 164, 267 N.E.2d 419 (1971).

13. *E.g.*, MICH. STAT. ANN. § 27A.5838 (Supp. 1976); N.Y. CIV. PRAC. & RULES LAW § 214-a (McKinney Supp. 1976).

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

15. *E.g.*, Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953); Allen v. Layton, 235 A.2d 261 (Del. 1967); Wilder v. Saint Joseph Hosp., 225 Miss. 42, 82 So.2d 651 (1955); Lakeman v. LaFrance, 102 N.H. 300, 156 A.2d 123 (1959); Coffman v. Hedrick, 437 S.W.2d 60 (Tex. Civ. App. 1968).

16. Annot., 80 A.L.R.2d 368 (1961); Draws v. Levin, 332 Mich. 447, 52 N.W.2d 180 (1952).

17. Annot., 80 A.L.R.2d 368 (1961).

18. *E.g.*, Crossett Health Center v. Croswell, 121 Ark. 874, 256 S.W.2d 548 (1953); Murray v. Fox, 300 Minn. 373, 220 N.W.2d 356 (1974); Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957). Montana has recognized the fraudulent concealment doctrine both by case law, Monroe v. Harper, 164 Mont. 23, 518 P.2d 788 (1974), and by statute, REVISED CODES OF MONTANA (1947) [hereinafter cited R.C.M. 1947], § 93-2624.

and has been codified in several states.[19]

The fourth doctrine is the *discovery* doctrine:

> Simply and clearly stated the discovery rule is: The limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act.[20]

This doctrine was first enunciated, though not applied to the facts before the court, in a 1917 Maryland decision.[21] Not until the 1950's and 1960's, however, was it seized upon by the courts as an equitable solution to the medical malpractice problem. By 1977, forty states had adopted some form of the doctrine, either judicially or legislatively.[22] Montana was among them.[23]

B. *The Development of the Discovery Doctrine in Montana*

Until the adoption of the discovery doctrine by the Montana Supreme Court,[24] the controlling Montana decision as to the accrual of a cause action for medical malpractice was an 1872 case, *Coady v. Reims*,[25] dealing with treatment of a fractured arm. This decision

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19. *E.g.*, ARIZ. REV. STAT. § 12-564 (Supp. 1976); CAL. CIV. PRO. CODE § 340.5 (West Supp. 1976); FLA. STAT. § 95.11 (1975); HAW. REV. STAT. § 657-7.3 (Supp. 1975); IDAHO CODE § 5-219 (Supp. 1975); NEV. REV. STAT. § 11.400 (1975); N.D. CENT. CODE § 28-01-18 (Supp. 1975).

20. Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785, 791 (1963).

21. Hahn v. Claybrook, 130 Md. 179, 100 A. 83 (1917).

22. By judicial decision only: Jones v. Rogers Memorial Hosp., 442 F.2d 773 (D.C. Cir. 1971); Shillady v. Elliott Community Hosp., 114 N.H. 321, 320 A.2d 637 (1974); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Hardin v. Farris, 87 N.M. 143, 530 P.2d 407 (1974); Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 290 N.E.2d 569 (1973); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Coffman v. Hedrick, 437 S.W.2d 60 (Tex. Civ. App. 1968); Morgan v. Grace Hosp., 149 W.Va. 783, 144 S.E.2d 156 (1965). By statute: ALA. CODE tit. 7, § 25(1) (Supp. 1973); ARIZ. REV. STAT. § 12-564 (Supp. 1976); CAL. CIV. PRO. CODE § 340.5 (West Supp. 1976); COLO. REV. STAT. § 13-80-105 (Supp. 1976); CONN. GEN. STAT. § 52-584 (1977); DEL. CODE tit. 18, § 6856 (Supp. 1976); FLA. STAT. § 95.11(4)(b) (1975); GA. CODE ANN. §§ 3-1102, 3-1103 (Supp. 1976); HAW. REV. STAT. § 657-7.3 (Supp. 1975); IDAHO CODE § 5-219 (Supp. 1976); ILL. ANN. STAT. ch. 83, § 22.1 (Smith-Hurd Supp. 1977); IOWA CODE ANN. § 614.1 (West Supp. 1976); KAN. STAT. § 60-513 (1975); KY. REV. STAT. ANN. § 413.140 (Baldwin Supp. 1976); LA. REV. STAT. ANN. § 9.5628 (West Supp. 1976); MD. CTS. & JUD. PRO. CODE ANN. § 5-109 (Supp. 1976); MISS. CODE ANN. § 15-1-36 (Supp. 1976); MO. ANN. STAT. § 516.105 (Vernon Supp. 1977); NEB. REV. STAT. § 25-222 (1975); NEV. REV. STAT. § 11.400 (1975); N.Y. CIV. PRAC. LAW & RULES LAW § 214-a (McKinney Supp. 1976); N.C. GEN. STAT. § 1-15 (Interim Supp. 1976); N.D. CENT. CODE § 28-01-18 (Supp. 1975); OKLA. STAT. ANN. ch. 76, § 18 (West Supp. 1976); OR. REV. STAT. § 12.110 (1975); R.I. GEN. LAWS § 9-1-14.1 (Supp. 1976); TENN. CODE ANN. § 23-3415 (Supp. 1976); UTAH CODE ANN. § 78-12-28 (Supp. 1975); VT. STAT. ANN. tit. 12, § 512 (Supp. 1976); WASH. REV. CODE ANN. § 4.16.350 (Supp. 1975); WYO. STAT. § 1-18.1 (Interim Supp. 1976).

23. Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469 (1966), *discussed in* 28 MONT. L. REV. 121 (1966); R.C.M. 1947, § 93-2624.

24. Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469 (1966).

25. 1 Mont. 424 (1872).

applied the "date-of-act" doctrine — that the cause of action accrues on the day the act constituting malpractice is performed.

This decision lay relatively dormant until 1966 when Bror Johnson's case was presented to the supreme court.[26] A physician had left surgical gauze in Johnson's hip during surgery in 1955. In 1962, this gauze began to ooze from a sinus which had developed around it. The supreme court, faced with a three year statute of limitation on malpractice actions[27] and the "date-of-act" holding of *Coady*, and apparently desirous of allowing Johnson to prosecute his action, was forced to negate one or the other. It negated *Coady*,[28] and adopted the discovery doctrine from an Idaho case:[29]

> Where a foreign object is negligently left in a patient's body by a surgeon and the patient is in ignorance of the fact, and consequently of his right of action for malpractice, the cause of action does not accrue until the patient learns of or in the exercise of reasonable care and diligence should have learned of the presence of such foreign object in his body.[30]

Having determined when the cause of action accrued, the court then applied the Montana statute[31] which provides a cause of action shall be brought "[w]ithin three years . . . upon an obligation or liability, not founded upon an instrument in writing, other than a contract, account, or promise." Counting forward from the date Johnson discovered the gauze pad in his hip joint, the court found that he had filed a timely suit.

This rule apparently does not establish a maximum time period for bringing a malpractice action. In recognition of this apparent omission, the court in 1967, in *Grey v. Silverbow County*,[32] adopted equitable criteria which were set forth in 1965 by the Ninth Circuit Court of Appeals in *Owens v. White:*[33]

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26. Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469 (1966).
27. R.C.M. 1947, § 93-2605(3).
28. There is some question whether the court actually overruled *Coady*, or, in fact, whether it needed to overrule it, given the differences in the fact situations. *Coady* involved blatant malpractice, visible to the patient from time of treatment; Johnson's situation, on the other hand, involved hidden malpractice which became apparent only when the gauze began to come out of his hip. *See* Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469 (1966) (Doyle, J., dissenting).
29. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).
30. Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469, 473 (1966).
31. R.C.M. 1947, § 93-2605(3).
32. 149 Mont. 213, 425 P.2d 819 (1967).
33. 342 F.2d 817 (9th Cir. 1965). This decision purported to apply Idaho law in deciding the extent to which the discovery doctrine would be applied in Idaho. The Circuit Court held that the doctrine should be limited, under Idaho law, to cases involving foreign objects left in the body. In 1970, the Idaho Supreme Court rejected this limitation and extended the doctrine to cases involving misdiagnosis. In so doing, the Idaho court stated, "While *Owens*

> [T]he discovery doctrine is itself subject to some restraint as the time from the occurrence of the malpractice grows greater. In such circumstances, the considerations of fairness to the defendant underlying statutes of limitation become more insistent, while plaintiff's appeal to equity implicit in the discovery doctrine becomes less so. . . . Thus, the suit of a plaintiff who is reasonably diligent may be barred if the defendant shows undue prejudice because of an extreme lapse of time between the commission of the wrongful act and the commencement of the suit. To so conclude strikes us as a reasonable accommodation between the competing considerations noted in Billings (*sic*) of giving full scope to the statute of limitation on the one hand and according a reasonable measure of justice to the plaintiff on the other.[34]

The Montana court added that "[t]he 'discovery doctrine' has a very narrow field of application and can only be successfully and fairly applied if it retains the flexibility suggested in the *Owens* case. . . ."[35] The court has not gone beyond the *Grey* criteria to define specific time limits on the discovery doctrine.

Since the *Johnson* decision, other plaintiffs have urged the court to extend the discovery doctrine to causes of action not involving foreign objects left in the body. In *Grey*, the court applied the doctrine to extend the statute of limitation in a case filed three years and fifty-seven days after surgery when an infection did not become apparent until fifty-seven days after surgery.[36]

The federal district court for Montana, analogizing from the *Johnson* and *Grey* decisions, extended the doctrine to a products liability case in which prescribed medication had caused cataracts.[37] In deciding *Hornung v. Richardson-Merrill, Inc.*, Judge Russell Smith explained this broader discovery doctrine:

> Where a person is ignorant of the fact that he has been damaged by the defendant, and consequently ignorant of his right of action, the cause does not accrue until the person learns, or in the exercise of reasonable care and diligence should have learned, the cause of his damage, subject however, to the duty of the court to balance the diligence of the plaintiff as against the prejudice caused to the defendant by the delay.[38]

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v. White may have been a correct inference based on the then existing Idaho decisions, our opinion today renders that decision an incorrect prediction of the future actions of this Court." Renner v. Edwards, 93 Idaho 836, 475 P.2d 530, 531 (1970).

34. Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819, 821 (1967). The reference to "Billings" is to Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

35. Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819, 821 (1967).

36. *Id.*

37. Hornung v. Richardson-Merrill, Inc., 317 F. Supp. 183 (D. Mont. 1970).

38. *Id.* at 185.

Although not quarreling with the statement in *Hornung*, the Montana Supreme Court refused to extend the discovery doctrine to an action arising out of the destruction of a private water source by an oil company, where the damage was not apparent for a year after the company's activities ceased. Instead, the court applied the general rule concerning accrual of a cause of action:

> The fact that a person entitled to an action has no knowledge of his right to sue or of the facts out of which his right arises does not, as a general rule, prevent the running of the statute, or postpone commencement of the period of limitation, until he discovers or learns of his right thereunder.[39]

In 1971, the Montana Legislature enacted a statute of limitation to govern medical malpractice actions.[40] This statute extended the discovery doctrine to all types of medical malpractice actions but also imposed rigid time limits:

> Action for injury or death against a physician . . . based upon such person's alleged professional negligence, or for rendering services without consent, or for error or omission in such person's practice, shall be commenced within three (3) years after the date of injury or three (3) years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury whichever occurs last, but in no case may such action be commenced after five (5) years from the date of injury.[41]

In effect, the statute sets up a flat period of three years in which to bring an action for malpractice, then grants a two-year grace period in which to discover the action, but bars all actions after five years from the date of injury.[42] Under such a statute, the plaintiff in *Johnson*,[43] the case originally adopting the discovery doctrine in

39. Carlson v. Ray Geophysical Div., 156 Mont. 450, 481 P.2d 327, 329 (1971). A complicating factor entered into the *Carlson* decision. It was shown that the plaintiff knew about his injury when there was one year left to run on the statute of limitation.

40. R.C.M. 1947, § 93-2624 (Supp. 1975).

41. *Id.* The omitted section is a listing of various occupations and institutions to which the section applies. The statute also has a sentence having to do with fraudulent concealment: "However, this time limitation shall be tolled for any period during which such person has failed to disclose any act, error, or omission upon which such action is based and which is known to him, or through the use of reasonable diligence subsequent to said act, error, or omission would have been known to him." A single Montana case relying on this provision has been decided. In it, the Montana Supreme Court held that where the plaintiff himself should have known of his cause of action by virtue of his continued disability, there could be no fraudulent concealment. Monroe v. Harper, 164 Mont. 23, 518 P.2d 788 (1974).

42. R.C.M. 1947, § 93-2624.

43. Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469 (1966).

Montana, would have been barred from recovery because he did not discover the gauze pad in his hip until seven years after surgery. The plaintiff in *Grey*,[44] on the other hand, would have been allowed to prosecute his claim.

C. *The Status of the Discovery Doctrine in Montana*

With the enactment of the 1971 statute,[45] it would seem that the status of the discovery doctrine in Montana is clear. R.C.M. 1947, § 12-201 provides "[n]o law . . . is retroactive unless expressly so declared." The 1971 statute does not contain an express declaration of retroactivity. The discovery doctrine in Montana can thus be summarized:

(1) For malpractice actions accruing before July 1, 1971,[46] the discovery doctrine as laid down in *Johnson* and modified in *Grey*, will apply; the cause of action will accrue and the statute of limitation will start to run as of the date the plaintiff discovers or should have discovered his injury. The applicable statute of limitation is section 93-2605(3).[47]

(2) For malpractice actions accruing after July 1, 1971, the provisions of section 93-2624 will govern; the action must be brought within three years of the date of injury or within three years of the date of discovery (or date discovery should have been made), but not more than five years from the date of injury regardless of the date of discovery.

II. Accrual of a Cause of Action for Medical Malpractice

A. *Penrod v. Hoskinson*[48]

The two versions of the discovery rule noted above suggest a problem in deciding which version should be used to decide a case. This problem was presented to the Montana Supreme Court by the certification of the question by Judge Battin of the United States District Court for the District of Montana:

> Is § 93-2624, R.C.M. 1947, as amended, enacted in 1971, or is § 93-2605, R.C.M. 1947, the applicable statute of limitation in a medical malpractice action in which the alleged negligent act took place

44. Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819 (1967).
45. R.C.M. 1947, § 93-2624.
46. R.C.M. 1947, § 93-507, provides: "Every statute, unless a different time is prescribed therein, takes effect on the first day of July of the year of its passage and approval." The malpractice statute, R.C.M. 1947, § 93-2624, had no contrary provision and therefore became effective on July 1, 1971.
47. R.C.M. 1947, § 93-2605(3).
48. Penrod v. Hoskinson, ___ Mont. ___, 552 P.2d 325 (1976).

in May of 1969, the plaintiff allegedly having discovered the negligence in September of 1973, and the action having been filed on April 23, 1975?[49]

The facts of the case were simple. In 1969, plaintiff underwent a hysterectomy, gallbladder removal, and incidental appendectomy. In 1973, during a routine physical examination, she was told that she had a surgical drain in the area of her spleen. In 1974, the drain was removed. In 1975, she filed a malpractice action against the physician who had performed the original surgery in 1969.

Thus, the events of the case clearly straddled the demarcation line of the 1971 enactment of Montana's medical malpractice statute of limitation; plaintiff was operated on in 1969, before the statute was effective, but did not discover her injury until 1973, after the effective date of the statute.[50] The question facing the court, simply put, was: Which of the two versions of Montana's discovery doctrine applied — the judicial rule in force at the time of the alleged negligent act or the statutory rule in force at the time of discovery of the injury?

The answer, of course, had important ramifications for Jeanette Penrod. If the court held her cause of action accrued on the date of her first surgery in 1969 and that section 93-2624 was the applicable statute, then the five-year outer limit of the statute would bar her claim filed in 1975. On the other hand, if her cause of action were held to accrue in 1969 and if section 93-2605 were held to be the applicable statute, then the three-year limit of this statute in conjunction with the discovery doctrine of *Johnson*[51] would permit her action.

In deciding for the plaintiff, the court focused on the lack of retroactivity of section 93-2624. Noting that section 12-201[52] provides that no law is retroactive unless expressly so declared by the legislature and finding "nothing in R.C.M. 1947, § 93-2624 exhibiting a legislative intent that it be applied retroactively,"[53] the court held:

> [S]ection 93-2605, R.C.M. 1947, is the applicable statute of limitation in a medical malpractice in which the alleged negligent act took place in May, 1969, the plaintiff allegedly having discovered the negligence in September, 1973, and the action having been filed on April 23, 1975.[54]

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49. *Id.* at ____, 552 P.2d at 325-26.
50. *See* note 45, *supra*.
51. Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469 (1966).
52. R.C.M. 1947, § 12-201.
53. Penrod v. Hoskinson, ____ Mont. ____, 552 P.2d 325, 327 (1976).
54. *Id.* at ____, 552 P.2d at 328.

At first reading, the opinion and the result reached by the court produce a satisfying resolution to this case. The plaintiff's cause of action was preserved under the discovery doctrine and she was allowed to pursue her claim for damages. The result neither unfairly burdens the defendant nor violates the equitable criteria of *Grey*.[55]

This resolution does not withstand closer scrutiny, however. To reach its conclusion, the court accepted the argument of both sides that the alleged malpractice occurred on May 6, 1969.[56] The court then rejected the defendant's argument that section 93-2624 should be "applied to *claims arising* prior to 1971, the date of its enactment."[57] (emphasis added). The court's holding that plaintiff's claim accrued in 1969 conflicts with language of other Montana statutes of limitation, with its own decisions interpreting those statutes, with the language of the discovery doctrine itself, and with the decisions on this question by courts of other states. The conflict with each of these will be examined below.

Montana's statutes of limitation, including section 93-2605, often are not specific as to when the statute begins to run on various actions.[58] Many that do specify a time provide that the actions must be commenced within the statutory period after "the cause of action shall have accrued."[59] The Montana Supreme Court has held that a statute of limitation does not begin to run until a cause of action accrues.[60] If this concept were applied to section 93-2605 and the situation in *Penrod*, then the statute should have begun to run as of May 6, 1969, the date the court held the cause accrued, and should have expired as of May 6, 1972, nearly three years before plaintiff filed her action.

The language of the discovery doctrine itself suggests that the court's view that Penrod's cause of action accrued in 1969 is incorrect: "[In cases where foreign objects are negligently left in a patient's body by a surgeon], *the cause of action does not accrue until the patient learns of* or in the exercise of reasonable care and diligence should have learned of *the presence of such foreign object in his body*."[61] (emphasis added).

Under the language of the discovery doctrine, then, Penrod's cause of action accrued in 1973 at the time of discovery of the surgical drain left in her body. The statute of limitation then applicable

55. Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819 (1967).
56. Penrod v. Hoskinson, ___ Mont. ___, 552 P.2d 325, 326 (1976).
57. *Id.* at ___, 552 P.2d at 327.
58. *See, e.g.*, R.C.M. 1947, §§ 93-2602, 93-2603, 93-2604, 93-2606.
59. *See, e.g.*, R.C.M. 1947, §§ 93-2610, 93-2613.
60. State *ex rel.* Clark v. Bailey, 99 Mont. 484, 94 P.2d 740 (1935).
61. Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469, 473 (1966).

would be section 93-2624, the specific malpractice statute, which became effective in 1971. Because the plaintiff did not file her action within five years of the date of injury as required by this statute, she would be barred from prosecuting it.

Thus, though the court reached a just result, it created a new rule inconsistent with the discovery doctrine. To determine *which* statute of limitation governs an action for malpractice, the cause of action will be deemed to accrue at the time of injury.[62] To determine *when* the statute of limitation begins to run against that action, the cause of action will be deemed to accrue at the time of discovery of the injury.[63]

B. The View in Other States

In *Stoner v. Carr*,[64] decided barely two months before *Penrod*,[65] the Idaho Supreme Court, from which Montana adopted its discovery doctrine, reached a result exactly opposite that reached in *Penrod*. In *Stoner*, the plaintiff had surgery in 1971, and in 1973 discovered a surgical needle had been left in her abdomen. In the interval, the Idaho Legislature had amended the statute of limitation governing medical malpractice actions, reducing the time allowed for such actions from two years to one year following discovery of the foreign object.[66] This amendment became effective on March 24, 1971. Plaintiff filed her action in December, 1974, seventeen months after discovery of the needle.

In holding that the 1971 amendment barred the action, the supreme court said:

> [K]nowledge (actual or constructive) of a foreign object left in the body is required before the cause of action can be deemed to accrue in such cases. *The statute of limitation in effect when the right of action is deemed to accrue defines that statutory period unless the legislature provides otherwise*. The plaintiff's cause of action here is deemed to accrue July 31, 1973, when the surgical needle was discovered in Mrs. Stoner's abdomen. Thus, the statute of limitation began to run at this time.[67] (emphasis added).

As to whether the decision involved a retroactive application of the 1971 amendment, the Idaho court stated:

> A law is not retroactive merely because part of the factual situation

62. Penrod v. Hoskinson, ___ Mont. ___, 552 P.2d 325 (1976).
63. Johnson v. Saint Patrick's Hosp., 148 Mont. 125, 417 P.2d 469 (1966).
64. 97 Idaho 641, 550 P.2d 259 (1976).
65. *Stoner* was decided on May 3, 1976; *Penrod* was decided on July 21, 1976.
66. Idaho Code, § 5-219(4) (Supp. 1976).
67. Stoner v. Carr, 97 Idaho 641, 550 P.2d 259 (1976).

to which it is applied occurred prior to its enactment. . . . In cases such as the present, the right to compensation does not accrue and the rights of the parties do not become fixed until the occurrence of the event . . . which gives rise to a cause of action.[68]

Idaho thus adopted a consistent approach as to when a cause of action for malpractice accrues; in determining both which statute of limitation governs and when the statute begins to run, the cause of action accrues on discovery.

Courts in Colorado[69] and New Hampshire[70] have reached the same result as the Idaho Supreme Court.

Two decisions by Michigan courts[71] support the Montana Supreme Court's decision. In *Quinlan v. Gudes*,[72] the plaintiff received x-ray treatments for facial skin eruptions during 1952-1954. In January, 1963, she was informed she had cancer of the soft palate, caused by the x-ray treatments. She brought an action twenty-three months later. On January 1, 1963, Michigan statutorily adopted the continuing treatment rule,[73] allowing actions to be initiated within a two-year period following the last treatment by the doctor inflicting the injury. This statute, if applied, would have barred plaintiff's action as of 1956.

The Michigan Court of Appeals refused to apply the statute, instead adhering to the discovery doctrine enunciated in *Johnson v. Caldwell*,[74] and giving the plaintiff two years from the time of discovery to file her action. "Though the plaintiffs did not discover their rights to a cause of action in this case until the [new statute] was in effect, it is the Court's view they had acquired these rights prior to January 1, 1963."[75]

The statute of limitation governing the cause of action thus attached at the time of the wrongful act, but its running was postponed until time of discovery. The Michigan Supreme Court adopted this rule in 1969.[76] Neither of these Michigan decisions are cited by the Montana Supreme Court in *Penrod*.

Some jurisdictions have adopted a third approach to this prob-

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68. *Id.* at 643, 550 P.2d at 261, *quoting* Arnold v. Woolley, 95 Idaho 604, 514 P.2d 599, 601 (1973).

69. Valenzuela v. Mercy Hosp., 521 P.2d 1287 (Colo. App. 1974).

70. Patrick v. Morin, ___ N.H. ___, 345 A.2d 389 (1975).

71. Quinlan v. Gudes, 2 Mich. App. 506, 140 N.W.2d 782 (1966); Winfrey v. Farhat, 382 Mich. 380, 170 N.W.2d 34 (1969).

72. 2 Mich. App. 506, 140 N.W.2d 782 (1966).

73. Mich. Stat. Ann. § 27A.5838 (Supp. 1976).

74. 371 Mich. 368, 123 N.W.2d 785 (1963).

75. Quinlan v. Gudes, 2 Mich. App. 506, 140 N.W.2d 782, 784 (1966).

76. Winfrey v. Farhat, 382 Mich. 380, 170 N.W.2d 34 (1969).

lem. In *Greenhalgh v. Payson City*,[77] the Utah Supreme Court stated this approach:

> It is well established that the Legislature may reduce a period of limitations and apply a new and shorter period to previously accrued causes of action, so long as a reasonable time is allowed to bring such an action. . . . The result of this is actually prospective in that the statutory change relates to procedure to occur in the future.[78]

The determinative inquiry of this approach is whether the person, who, prior to the modification of the applicable statute of limitation, had a valid cause of action, still has a reasonable period of time in which to file the action. The Nebraska Supreme Court has held a reasonable period of time in which to file to be four months following accrual of the cause of action.[79]

The Montana Supreme Court in *Penrod* rejected the "reasonable time to file" approach argued by the defendant:[80]

> The [approach] is based on the proposition that a statute of limitation affects the remedy, not the right, and is to be applied to all cases thereafter brought irrespective of when the cause of action arose, subject to a reasonable period thereafter in which the right can be asserted. This is directly contrary to Montana's statute, section 12-201, which prohibits retroactive operation of statutes "unless expressly so declared."[81]

The court then cited decisions of two Florida Courts of Appeals[82] to support its rejection of this doctrine. These two courts have since reversed their positions and adopted the "reasonable time to file" doctrine.[83] The result of these reversals is to weaken the rejection in *Penrod* of the "reasonable time to file" approach.

Had the Montana Supreme Court in *Penrod* accepted the "reasonable time to file" approach, it may have decided that plaintiff's cause of action was barred, especially in view of the ruling in

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77. 530 P.2d 799 (Utah 1975).

78. *Id.* at 803.

79. Educational Services Unit No. 3 v. Mammel, Olson, Shropp, Horn, & Swartzbaugh, Inc., 192 Neb. 431, 222 N.W.2d 125 (1974).

80. Defendant based his argument of this principle on Steele v. Gann, 197 Ark. 480, 123 S.W.2d 520 (1939).

81. Penrod v. Hoskinson, ___ Mont. ___, 552 P.2d 325, 328 (1976).

82. Maltempo v. Cuthbert, 288 So.2d 517 (Fla. App. 1974); DeLuca v. Mathews, 297 So.2d 854 (Fla. App. 1976).

83. The Second District Court of Appeals, which had decided *Maltempo*, reversed its position in Foley v. Morris, 325 So.2d 37 (Fla. App. 1976). The Fourth District Court of Appeals, which had decided *DeLuca*, reversed its position in Harris v. Miles, 330 So.2d 181 (Fla. App. 1976).

Nebraska[84] that four months was a reasonable time to which to file. Under this rule, section 93-2624 would have been the applicable statute. Penrod, then, had eight months — from September 21, 1973, the date she discovered the presence of the surgical drain, until May 6, 1974, when the five-year limit of section 93-2624 expired — to file her action. This seems to be within the bounds of reasonableness as far as time to file.[85] Her action, filed on April 23, 1975, would therefore have been barred.

III. Conclusion

With its decision in *Penrod*, the Montana Supreme Court has created a dual standard to determine when a cause of action for medical malpractice accrues: one to determine which statute of limitation governs (time of injury), and another to determine when the statute begins to run (time of discovery). The desirability of such a dual standard is questionable.

The result reached in Idaho, on the other hand, where time of discovery determines both which statute of limitation governs and when the statute begins to run, is conceptually consistent. It also has the benefit of avoiding any retroactivity problems.

The "reasonable time to file" approach has the least to commend it. Though courts have disavowed any arguments that they are retroactively applying the new statute, in fact this is exactly what they are doing. The appearance is one of unfairness, of stripping a party of his action by applying a new statute to an old situation. This unfairness justifies rejection of the approach.

Perhaps the real problem in the *Penrod*-type case is in section 93-2624 itself. By imposing a five-year maximum time limit from the date of injury for filing a malpractice action, the statute can be expected to deprive persons legitimately injured by medical negligence of their causes of action if the damaging effects of such negligence are concealed for more than five years. As indicated by the incidents discussed in this note, five years is not long enough for discovery of some types of malpractice. It may have been in response to this harshness that the Montana Supreme Court devised its rule in *Penrod*. If so, then we have come full circle on the question of when the cause of action accrues in medical malpractice cases.

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84. Educational Services Unit No. 3 v. Mammel, Olson, Shropp, Horn, & Swartzbaugh, Inc., 192 Neb. 431, 222 N.W.2d 125 (1974).

85. *See* Ala. Code tit. 7, § 25 (Supp. 1975), providing that the action be brought within six months after discovery of the injury.