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Viability of the Discovery Rule as a Criterion to Determine When a Cause of Action Accrues in Medical Malpractice Actions.

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STATUTORY NOTES

STATUTE OF LIMITATIONS—MEDICAL MALPRACTICE—VIABILITY OF THE DISCOVERY RULE AS A CRITERION TO DETERMINE WHEN A CAUSE OF ACTION ACCRUES IN MEDICAL MALPRACTICE ACTIONS. TEX. REV. CIV. STAT. ANN. art. 5526, § 6 (1960).

Within the developmental perspective of judicial-legislative law, statutes of limitation in medical malpractice actions have assumed a static, almost rigidly defiant posture. The traditional statutory interpretation in Texas, as well as in many other jurisdictions, has been simply that a cause of action accrues with the occurrence of the injury and not with its discovery. While the social utility of this century-old legal position has long been open to question, in the present era of commercial nuclear reactors and potential radiation injuries[1] such a rule of law becomes a judicial anachronism. This conclusion has its basis in an historical analysis of statutes of limitation.

Statutes of limitation refer to legislative acts which prescribe limitations of time beyond which no action at law can be brought. They are found in all systems of jurisprudence and are designed primarily to attain a degree of stability in the ordering of human affairs[2]—"to quiet titles, to suppress frauds, and to supply the deficiency of proofs from the ambiguity and obscurity of transactions."[3] In the United States, general statutes of limitation are found in every state, and while there is some variability in the language, most statutes provide that actions shall be brought within so many years after the cause of action has accrued.[4] These statutes, however, typically do not provide an operational definition for determining when a cause of action accrues. Inevitably, the troublesome question arises: How is the statutory period to be computed?

There are a variety of possibilities depending in part on the nature of the action brought and whether it is based on a theory of contract or tort. In

1. *See* Estep & Van Dyke, *Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases,* 62 MICH. L. REV. 753 (1964) for a discussion of the specific problem of the effect of statutes of limitations in tort cases involving radiation injuries.

2. Statutes of limitation appeared early in Roman law and are the basis of the limitations found in Continental codes. 14 ENCYCLOPEDIA BRITANNICA 41 (1968). "The Limitation Act of 1623 marks the beginning of the modern law of limitations on personal actions in the common law." *Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1177, 1178 (1950).

3. Ross v. Duval, 38 U.S. (13 Pet.) 45, 47, 10 L. Ed. 43, 45 (1839).

4. *Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1177, 1179 (1950). *See also* 1970 WIS. L. REV. 915.

most states medical malpractice actions are based on negligence and governed by a general tort statute of limitations,[5] usually being included in the statutory category of "injuries to the person."

Whatever the explanation for the statutory interpretation, the cause of action in a medical malpractice case has traditionally been held to commence from the date of the alleged act or its omission. No reference is made to the time of occurrence of plaintiff's knowledge or awareness of the resulting injury except in the case of fraud. This rule of law has inspired a history of criticism in which even the arguments have become stereotyped in their phraseology, the most common of which refers to "the harshness of a strict interpretation" of the statute of limitations.[6]

The judicial response to the consequent inequities of the "harshness" of this rule has varied not only across jurisdictions but within a single jurisdiction as well. In one approach, while the injustice is recognized in adhering to a strict statutory interpretation, relief has nonetheless been denied with or without the declaration that the solution lies with the legislature.[7] An alternative approach has been simply to escape the rule. This is accomplished by employing "benign fictions or adroit doctrinal devices."[8]

> Thus the negligent treatment, or at least the defendant's duty, is held to continue until the relation of physician and patient has ended; or the court finds fraudulent concealment of the damage, which tolls the running of the statute; or it finds "constructive" fraud in silence with probable knowledge; or the failure to discover and remove the sponge or other foreign object left in the plaintiff's body is held to be "continuing" negligence.[9]

These legal "mechanisms of defense," as with their psychological counterparts, do not lead to constructive solutions. There is, however, a progressive trend toward a more direct approach:

> Quite recently there have been a wave of decisions meeting the issue head-on, and holding that the statute will no longer be construed as intended to run until the plaintiff has in fact discovered that he has suf-

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5. 1970 WIS. L. REV. 915.

6. "Especially where the plaintiff is unqualified to ascertain the imperfection, as in the case of negligent performance of expert or professional services, it seems harsh to begin the period at the time of the defendant's act." *Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1177, 1201 (1950); "Nowhere is operation of the law more harsh than in those instances of absolute denial of any redress to innocent victims of undiscovered malpractice." Sacks, *Statutes of Limitations and Undiscovered Malpractice,* 16 CLEV.-MAR. L. REV. 65 (1967).

7. In a 1964 Illinois case, the court stated a typical reason for rejecting the discovery rule: "We are not pleased with this result. The statute barred the plaintiff's claim before she knew she had been wronged. . . . Relief must come from the legislature and not from the courts." Mosby v. Michael Reese Hosp., 199 N.E.2d 633, 636 (Ill. Ct. App. 1964).

8. Sacks, *Statutes of Limitations and Undiscovered Malpractice,* 16 CLEV.-MAR. L. REV. 65, 67 n.8 (1967).

9. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 144 (4th ed. 1971).

fered injury, or by the exercise of reasonable diligence should have discovered it.[10]

In descriptive terms, this rule of law has been recognized as the discovery rule.[11] It has the merits of a realistic solution for the simple reason that it finds support in equitable logic as opposed to circuitous legal fictions. As the term is defined, the limitations statute will not begin to run until the plaintiff discovers his injury, or by the exercise of reasonable diligence should have discovered it. Apart from the logic implicit in the name of the rule itself, it finds additional support in the obvious and inescapable conclusion that a cause of action cannot exist until one becomes manifest.

The discovery doctrine where adopted does not necessarily mean that it is applied to all personal injury or, more particularly, all medical malpractice actions. The breadth of its legal applicability is, however, gaining greater support. By 1969, nine jurisdictions applied the discovery rule to cases where a foreign object had been negligently left in the patient's body, 11 had adopted the discovery test for all malpractice cases, and two states had adopted the discovery rule by statute.[12] The courts in 21 states did not apply the discovery rule, holding that the cause of action accrues from the commission of the malpractice.[13] Of those states which did not apply the discovery rule, some reached similar results through the use of one of the exceptions.[14]

State supreme court decisions continue to overturn previous rulings in favor of the discovery rule. In the face of this trend, any numerical accounting of the extent of its present judicial applicability is not altogether revealing.[15] Jurisdictions belonging to the traditional-interpretation school are growing fewer in number each year and may in the not too distant future

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10. *Id.* § 30, at 144 (4th ed. 1971).

11. This doctrine was first asserted in a Maryland case in 1917. 8 IDAHO L. REV. 370, 374 n.28 (1972), *citing* Hahn v. Claybrook, 100 A. 83 (Md. 1917).

12. These data were reported in Flanagan v. Mount Eden Gen. Hosp., 301 N.Y.S. 2d 23 (1969), to show the divided conflict in authorities on the issue in this country. In that case, the court's decision added New York to the states applying the discovery rule in foreign-object cases.

13. *Id.*

14. Among which were Colorado, Ohio, and Tennessee: Murphy v. Dyer, 260 F. Supp. 822 (D. Colo. 1966); Gillette v. Tucker, 65 N.E. 865 (Ohio 1902); Hall v. De Saussure, 297 S.W.2d 81 (Tenn. Ct. App. 1956). In Ohio the statute does not commence to run until the physician-patient relationship is terminated. Added to this exception, however, Ohio recently held that the discovery rule is to apply in actions for the negligent leaving of a metallic forceps and a nonabsorbent sponge inside a patient's body during surgery. Melnyk v. Cleveland Clinic, 290 N.E.2d 916, 918 (Ohio 1972).

15. In addition, not all court opinions applying the discovery rule explicitly define the boundaries beyond which the rule is to be limited, so classification is sometimes arbitrary. This is, in fact, a source of uncertainty in predicting what the law is in some states for a particular fact situation. *See, e.g.*, Acker v. Sorensen, 165 N.W.2d 74 (Neb. 1969) and Frohs v. Greene, 452 P.2d 564 (Ore. 1969).

be identified as the exceptions. Some recent examples of states which have joined the ranks of the *general* discovery rule include Kentucky,[16] Oregon,[17] and Nebraska,[18] although in the latter two, there was some uncertainty as to whether their earlier holdings already merited that membership status. In addition, the Idaho Supreme Court, by a 3-to-2 decision, extended its previously adopted discovery rule to cases involving negligent diagnosis.[19] Texas can also be added to the group of states which has extended the discovery rule to include an additional fact situation. In the recent case of *Hays v. Hall*,[20] the discovery rule has been extended from foreign-object cases to failure of vasectomy operations.

In Texas, the judiciary is called upon "to give a liberal construction" to statutes of limitation.[21] If this statement was once true, it has long since been negated by over a century of court rulings to the contrary—at least with respect to medical malpractice actions.

As to the form which statutes of limitations have taken, there has been little change since the Act of 1841.[22] In the revision of 1897, the limitations period was extended from 1 to 2 years:

> There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterwards, all actions or suits in courts of the following description: (1) Actions for injuries done to the person of another. . . .[23]

16. In Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970), the Court of Appeals of Kentucky changed its rule and held that a cause of action for medical malpractice does not accrue under the statute of limitations until the discovery of the injury. The plaintiff had undergone a sterilization operation and 11 months later delivered a child. One month and 3 days after the birth of the child, suit was brought. Action was barred at the trial court by the 1-year statute of limitations. In the subsequent case of Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971), the court stated that "[t]here should have been added to the rule in Tomlinson a further statement that the statute begins to run on the date of the discovery of the injury, *or from the date it should, in the exercise of ordinary care and diligence, have been discovered.* *Id.* at 379 (court's emphasis). *Hackworth v. Hart* is the principal case providing support for the recent decision in Hays v. Hall, 488 S.W.2d 412 (Tex. Sup. 1972).

17. In Frohs v. Greene, 452 P.2d 564 (Ore. 1969), the court held that a cause of action for medical malpractice based on negligent diagnosis or treatment accrues at the time it was or might reasonably have been discovered.

18. In Acker v. Sorensen, 165 N.W.2d 74, 77 (Neb. 1969), the situation involved the acceleration of an existing condition into an aggravated state. "This was 'the product of a period of time rather than a point of time' and in such circumstances, the plaintiff should be held to be 'injured' only when the accumulated effects manifest themselves."

19. Renner v. Edwards, 475 P.2d 530 (Idaho 1969).

20. 488 S.W.2d 412 (Tex. Sup. 1972).

21. McDougald v. Hadley, 1 Tex. 490, 493 (1846).

22. "All actions for injuries done to the person of another . . . shall be commenced and sued within one year next after the cause of such action or suit, and not after . . . ." Tex. Laws 1841, An Act of Limitations § 1, at 163, 2 H. GAMMEL, LAWS OF TEXAS 627 (1898).

23. Voight v. Gulf, W.T. & P. Ry., 94 Tex. 357, 365, 60 S.W. 658 (1901). Tex. Laws 1897, ch. 14, § 1, at 12, 10 H. GAMMEL, LAWS OF TEXAS 1066 (1897).

The current statute[24] is virtually the same with subdivision (1) being applicable to malpractice actions.[25]

The 1847 case of *Gautier v. Franklin*[26] might well be acknowledged as launching judicial interpretation of the statute of limitations in Texas.[27] Such statutes were held to be " 'statutes of repose to quiet titles, to suppress frauds and to supply the deficiencies of proof arising from the ambiguity, obscurity and antiquity of transactions,' "[28] and should "receive such interpretation consistent with their terms as would defeat the mischief intended to be suppressed, and advance the policy and remedy they were desigued [designed] to promote."[29]

A second 19th century Texas Supreme Court opinion which has had a prominent judicial history is the case of *Houston Water Works Co. v. Kennedy*.[30] *Houston* has been applied as authority for differential determination of when a cause of action accrues between two kinds of situations: those in which the act giving rise to the cause of action is originally lawful versus those in which the act constitutes an invasion of a legally protected interest.[31]

There is no doubt that *Houston* established a well-defined trend of judicial rulings. It has been cited and paraphrased in a wide variety of situational contexts.[32] The first case subsequent to *Houston* holding a note-

24. TEX. REV. CIV. STAT. ANN. art. 5526 (1958).

25. Thompson v. Barnard, 142 S.W.2d 238 (Tex. Civ. App.—Waco 1940), *aff'd*, 138 Tex. 277, 158 S.W.2d 486 (1942).

26. 1 Tex. 732 (1847).

27. The issue facing the court was defined in these words: "It becomes necessary to determine whether the space of time intervening between the old and new law is to be rejected from or included in the computation of time necessary to bar an action, the cause of which had accrued before the passage of the law." *Id.* at 743-44 (1847). The court admitted "great harshness" in a literal construction, and in its holding it applied principles most consonant with equity and reason. *Id.* at 745-47.

28. *Id.* at 739.

29. *Id.* at 739.

30. 70 Tex. 233, 8 S.W. 36 (1888).

31. In presenting its opinion, the court defined the following rule:

> When an act is in itself lawful as to the person who bases an action on injuries subsequently accruing from, and consequent upon, the act, it is held that the cause of action does not accrue until the injury is sustained.
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> . . . .
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> If, however, the act of which the injury was the natural sequence was a legal injury,—by which is meant an injury giving cause of action by reason of its being an invasion of a plaintiff's right,—then, be the damage however slight, limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar.

Id. at 235-36, 8 S.W. 36, 37 (1888).

32. Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942); Axcell v. Phillips, 473 S.W.2d 554 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.); Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); McFarland v. Connally, 252 S.W.2d 486 (Tex. Civ. App.—Fort Worth 1952, no writ); Crawford v. Davis, 148 S.W.2d 905 (Tex. Civ. App.—Eastland 1941, no writ).

worthy position in the judicial history of medical malpractice actions is *Carrell v. Denton.*[33] The cause of action in that case was against a surgeon for negligently leaving a gauze sponge in an incision. The court cited *Houston* and held that the statute of limitation began to run at the time the negligent act was committed and not when it was discovered.

When this same fact situation was presented to the appellate court in *Stewart v. Janes,*[34] the court felt compelled to follow the *Carrell* ruling. It rendered its explanation well protected behind the stare decisis shield: "We realize the hardship of this kind of case *but* settled principles of law . . . ."[35]

Houston continued to be the unqualified rule in all subsequent cases—medical malpractice and otherwise—[36]until the Texas Supreme Court decision of *Gaddis v. Smith*[37] in 1967. The reasoning employed by the majority dispensed with the stare decisis problem:

> We do not understand the Houston Water Works case as holding that inability to know of the act of negligence will not under any circumstances postpone the running of the statute of limitations.[38]

Against this interpretive backdrop, the court presented its ruling:

> Causes of action based upon the alleged negligence of a physician in leaving a foreign object in his patient's body are proper subjects for the "discovery rule."[39]

While this decision overruled *Carrell* and *Stewart*, until 1972 *Houston* continued to be the rule with the exception of the foreign-object fact situation.[40] Even the dissent in *Gaddis* expressed the opinion that "[t]he true

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33. 138 Tex. 145, 157 S.W.2d 878 (1942).

34. 393 S.W.2d 428 (Tex. Civ. App.—Amarillo 1965, writ ref'd).

35. *Id.* at 428 (emphasis added).

36. In *Crawford v. Davis* an action was brought for damages for the negligent delay in procuring issuance and service of process in an action on a promissory note in which plaintiff was interested. The court held: "A cause of action based upon a consummated legal wrong accrues immediately regardless of whether or not the injured party has knowledge of the wrong." Crawford v. Davis, 148 S.W.2d 905, 907 (Tex. Civ. App.—Eastland 1941, no writ) (citation omitted).

37. 417 S.W.2d 577 (Tex. Sup. 1967).

38. *Id.* at 579. Justices Griffin and Walker dissented. The conclusions reached in the dissent were that "[t]his 'discovery' doctrine will lead to hopeless confusion" and that in similar cases the court has "simply held that the cause of action accrued when it did accrue and then gave effect to the plain provisions of Article 5526." *Id.* at 583.

39. *Id.* at 580.

40. In Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.), an action for defective roof framing, the court did not depart from *Houston*: "The period of limitations on actions for negligence begins to run from the commission of the negligent act, and not from the time of the ascertainment of damages, if the negligent act constitutes the invasion of a legally protected interest of another, even in the absence of knowledge by the one who is injured . . . ." *Id.* at 98. The court further reasoned: "We are then urged to depart from 'an unjust rule toward justice' and apply the statute of limitations in such a manner as to achieve a just result . . . by application of the 'discovery rule'. . . .

rule is that quoted by the majority opinion from the case of Houston . . . ."[41]

When the most recent case of *Hays v. Hall* reached the court of civil appeals,[42] its opinion was consistent with this history. This case involved an unsuccessful therapeutic sterilization by an osteopath against whom suit was brought for malpractice on the basis of a subsequent pregnancy. While suit was filed within the 2-year statutory period of the discovery of the pregnancy, more than 2 years had elapsed from the time of the operation. The appellate court simply ruled that the case was barred by the statute of limitations. It acknowledged the decision in *Gaddis* but pointed out that the holding was restricted to foreign-object cases. On appeal[43] the supreme court was apparently in agreement with the decision of the appellate court. In its only reference to the ruling by the court of civil appeals, it commented:

> The court of civil appeals correctly noted that our holding in Gaddis v. Smith . . . is expressly limited to causes of action in which a physician leaves a foreign object in the body of his patient.[44]

If the prevailing rule is to be abrogated, it is the exclusive prerogative of our Supreme Court to announce the modification." *Id.* at 99. Neither did it do so in Axcell v. Phillips, 473 S.W.2d 554 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) where the cause of action was for medical malpractice. "When the act causing the damage to another is originally lawful, the cause of action does not accrue until the injury occurs; but where the act is originally unlawful, the cause of action accrues at the time of the act." *Id.* at 559.

41. Gaddis v. Smith, 417 S.W.2d 577, 582 (Tex. Sup. 1967).

42. Hays v. Hall, 477 S.W.2d 402 (Tex. Civ. App.—Eastland 1972), *rev'd,* 488 S.W.2d 412 (Tex. Sup. 1973).

43. Hays v. Hall, 488 S.W.2d 412 (Tex. Sup. 1973).

44. *Id.* at 413. A second issue raised at the appellate court level and ruled against appellants formed no part of the supreme court's opinion. This issue was deserving of explicit recognition by the supreme court and a reversal. Briefly, the facts are these:

Immediately following the discovery of his wife's pregnancy, the patient was reexamined by his doctor and told that the original vasectomy had been successful, that the pregnancy of his wife was probably caused by trapped sperm cells. Shortly thereafter, his wife became pregnant for the second time. Plaintiffs' suit included damages for the birth of the second child pleading fraudulent concealment at the time of the reexamination. (This action did not involve, of course, the limitations issue.) The court of civil appeals ruled that appellants should have known after the first pregnancy that the operation had not been a success and, therefore, they could not have been deceived by anything told them thereafter by the doctor. Hays v. Hall, 477 S.W.2d 402 (Tex. Civ. App.—Eastland 1972).

Apart from the question of just how medically sophisticated the patient must be to pass the reasonable man test, the facts of this case justify on the basis of medical research data that the doctor's representations were credible. It was possible that between the time of his wife's pregnancy, which was 8 months following the operation, and the second test, which was 14 months after the operation, that the patient could have become sterile.

Dr. Philip M. Alderman reports that "[s]ome men, in my experience, have taken ten or eleven months to obtain two consecutive negative monthly tests (my criterion for success)." THE LANCET (London) at 1138 (1968). Though many examples could be cited from medical journals, one paper presented in the year suit was filed is worth noting, particularly from the point of view of professional standards of practice:

Despite this agreement, the supreme court nonetheless reversed, observing that

> in certain situations it is difficult if not altogether impossible to discover the existence of a legal injury. This recognition gave rise to the holding in *Gaddis* and to the application in other jurisdictions of what has been called the "discovery rule" . . . .[45]

The court then cited a recent application of the discovery rule in the Kentucky case of *Hackworth v. Hart*[46] in which the fact situation was similar to that of *Hays*. The Kentucky court announced the rule that "the cause of action in malpractice cases, where pregnancy is the critical question, commences to run from the time the pregnancy was or should have been discovered . . . ."[47]

The Texas Supreme Court accepted the *Hackworth* rule as a "wise and proper rule," noting that if fertility is discovered after the period of limitations has run, legal remedy is unavailable. The court concluded that "[a] result so absurd and so unjust ought not to be possible."[48] A second fact situation in which the discovery rule can be applied in medical malpractice cases was thus given judicial sanction. It placed Texas in that category of states which applies the strict interpretation of the statute with exceptions. There are now two exceptions, foreign-object cases and those involving a vasectomy when the evidence shows pregnancy.

The importance of the *Hays* decision is not to be found, however, in the mere extension of the discovery rule to another relatively limited and circumscribed fact situation. Its importance is to be viewed from a broader perspective. With a second exception following relatively close behind a first after more than a century of traditional rulings, one is deductively led to a judicial policy which was only suggested following the foreign-object ruling of *Gaddis*. The conclusion to be drawn is that the Texas Supreme Court has taken the position that in a medical malpractice action it will not hold to a strict interpretation of the limitations statute when the facts dictate an equitable solution to the contrary. At the same time, however, it has reserved for itself the exclusive prerogative of making this subjective determination.

> While most patients eliminate stored spermatozoa within 1-2 months of operation, others retain them for surprisingly long periods. . . . Both Reiser and Rugna cited cases in which spermatozoa were seen 1 year after vasectomy . . . . Because of the possibility of persistence of spermatozoa, the patient's seminal fluid should be periodically examined until all spermatozoa are gone.

Schmidt, *Technics and Complications of Elective Vasectomy*, 17 FERTILITY & STERILITY No. 4, at 467, 477 (1966).

45. Hays v. Hall, 488 S.W.2d 412, 413 (Tex. Sup. 1973).

46. 474 S.W.2d 377 (Ky. 1971). The court could have referred to the earlier Kentucky case of Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970).

47. Hays v. Hall, 488 S.W.2d 412, 414 (Tex. Sup. 1973).

48. *Id.* at 414.

Resolution of these issues on an equitable basis at the highest state judicial level imposes obvious practical limitations. The opportunity for legal redress requires that a litigant expend resources of both time and money in pursuing a protracted cause of action. Take, for example, a fact situation which does not fall within either of the two exceptions such as an injurious negligent diagnosis. The trial and appellate courts would undoubtedly bar the action by a strict application of the limitations statute,[49] but with the same reasoning and logic as applied in the first two exceptions, the supreme court might well rule a third exception for application of the discovery rule.[50] Nonetheless, the appellant is predictably forced to pursue this procedural course.[51]

Whether or not the law should develop through an empirical process of exceptions, sheer practical considerations dictate otherwise. Costs of prolonged litigation and progressively growing court dockets—not to mention the mere physical limitations of law library space—demand that rules of law be defined in terms other than on a piecemeal, case-by-case basis. At that low level of descriptive analysis, the law necessarily becomes indeterminate. Why then in Texas do we not have a general discovery rule?

> This result could be obtained generally by judicial decision, in the absence of explicitly conflicting legislation, if it were recognized that the "cause of action" which commences the limitations period should not refer to the "technical" breach of duty which determines whether the plaintiff has any legal right, but to the existence of a practical remedy.[52]

The reasons the Texas Supreme Court has not made such a decision is open to conjecture. One obvious source of information for arriving at an inferential conclusion is, of course, the opinions expressed by the court itself. Of the two most recent cases, the strong dissenting opinions in *Gaddis* in addition to the majority opinion were suggestive in revealing the composite philosophy of the court.[53] However, in *Hays* there was no dissent. The

49. An appellate court might well use the same reasoning as was used in Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.): "That the old rule we have followed here is still the law in Texas in this type of negligence action is made manifest in the *Gaddis* case." *Id.* at 99.

50. Certainly if support is needed, case citations from other jurisdictions are amply available, to say nothing of those closer to home under the Texas Workmen's Compensation Insurance Law which applies the discovery rule. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967). Since the 1947 amendment, this section requires that notice of injury be given to the insurance association within 30 days after the happening of an injury or the first distinct manifestation of an occupational disease. While the Texas Supreme Court cited in *Gaddis* the Federal Employers' Liability Act case of Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949), reference has not been made to the Texas Workmen's Compensation Insurance Law.

51. Assuming the same course of litigation as in *Hays,* it would take a plaintiff-patient only 4 years to be informed that the action was not barred.

52. *Developments in the Law—Statutes of Limitation,* 63 HARV. L. REV. 1177, 1205 (1950).

53. One comment in a dissenting opinion is worth noting as a sampling of judicial attitude: "This 'discovery' doctrine will lead to hopeless confusion and leave liability

opinion was short and simple. Consequently, any possible explanation can just as logically be approached from the abstract. Viewed more diagnostically, the question to be asked is why has the supreme court, along with many other jurisdictions, put itself in this judicial limbo—between a strict interpretation of the limitations statute and a general discovery rule?

Most of the reasons given against the adoption of a general discovery rule, if not already apparent, relate to defeating the purpose for which the statutes were designed. The rebuttal against many of these arguments is that the burden of proof is on the plaintiff-patient, and there seems to be no indication that the defendant-physician will be unable to meet the challenge.[54]

Still holding a strong position, of course, is the *Houston* judicial interpretation of the limitations statute.[55] But if *Houston* is to remain with us to eternity under the support of stare decisis, it would be a judicial advance to return to the earlier 1847 case of *Gautier* which admitted "great harshness" in a literal construction to the constitution and applied instead "principles most consonant with equity and reason,"[56] or possibly even the earlier case of *Hall v. Phelps*[57] where the limitations rule is defined that in cases of trust, fraud or oppression, "the bar is not allowed to intervene."[58]

Certainly the inevitable flood-of-litigation cries will be heard outside the judiciary—to whatever extent their influence is felt within. In fact, the pandora box demons have already been let loose for the counteroffensive.[59]

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open without any limitation 'cut off' point." Gaddis v. Smith, 417 S.W.2d 577, 583 (Tex. Sup. 1967).

54. "Add to this the celebrated reluctance of other doctors to testify at medical malpractice trials, and the burden of the plaintiff becomes quite onerous." 1970 WIS. L. REV. 915, 921.

55. In more than one jurisdiction, recognition is not always given by the judiciary that it was they who initially gave a limitations statute its legal interpretation. In Texas, *Houston* was a product of the supreme court and not the legislature. Yet the argument is given that "[t]he Legislature has established a 'cut-off' point, and this Court has no right to pass legislation changing the statute of limitations." Gaddis v. Smith, 417 S.W.2d 577, 583 (Tex. Sup. 1967). Another recent judicial interpretation of article 5526 is that it "produces harsh results in some instances, but the statute is not ambiguous and its application . . . has been squarely and repeatedly decided in a manner that seems to carry out the legislative intent . . . . In my opinion that should put the matter at rest as far as the courts are concerned. It is then for the Legislature to determine whether and how the statute is to be amended . . . ." *Id.* at 583-84.

56. 1 Tex. 732, 747 (1847).

57. Dallam 435 (1841).

58. *Id.* at 436.

59. Only recently a defendant-physician argued that "to extend the 'discovery rule' would be to 'open a Pandora's Box and release countless demons for this court to grapple with' . . . ." Renner v. Edwards, 475 P.2d 530, 534 (Idaho 1969). After researching that argument, the only rebuttal which can be made is to point out that although the whole contents of the box had escaped, "one thing only excepted, which lay at the bottom, and that was *hope*." BULFINCH'S MYTHOLOGY, THE AGE OF FABLE 15 (1968).