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THE STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE ACTIONS

Statutes of limitations occasionally give unjustifiable advantage to a malpracticing physician whose negligence is not discovered until several years after the negligent act occurred. Where an injury is not discoverable for many years,[1] an interpretation that the limitation period runs from the date of the negligent act may cut off the plaintiff's right to sue before he learns that he has an injury. Concomitantly, physicians may be immunized from liability for their wrongful acts. This Comment will examine the New Mexico statute of limitations for medical malpractice cases in the context of injuries not discovered until several years after the physician's wrongful act.

The Medical Malpractice Act[2] enacted by the 1976 legislature contains a three-year statute of limitations.[3] It applies only to claims arising out of acts of malpractice which occur after February 27, 1976, the effective date of the Act. Because the prior statute of limitations will continue to govern many actions not yet filed, this Comment will first discuss the prior statute of limitations and some of the cases interpreting it. The new statute of limitations will also be considered, along with its possible constitutional effects.

THE STATUTE OF LIMITATIONS PRIOR TO THE MALPRACTICE ACT

Prior to adoption of the Medical Malpractice Act, malpractice cases were subject to the three-year time limitation for personal injury actions,[4] which begins to run when the cause of action "accrues."[5] But the statute does not indicate when a cause of action

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1. The most common latent medical injury is a surgical instrument left in a patient's body during surgery. The facts in *Laughlin v. Forgrave,* 432 S.W.2d 308 (Mo. 1968), illustrate this problem. The plaintiff had an operation on her lower back in 1951. She suffered mild pain in her lower back after that operation. It was not until September 1962 when she again had surgery on her lower back, that the cause of the pain was discovered. A surgical instrument, a rubber dam, had been left in her back in the 1951 operation. The plaintiff had no means of discovering the injury and none of the several doctors she had seen from 1951 to 1962 had been able to discover the source of the pain.

2. Laws of N.M., 1976, Ch. 2.

3. Laws of N.M., 1976, Ch. 2, § 13.

4. N.M. Stat. Ann. § 23-1-8 (1953); *see generally* Roehl, The Law of Medical Malpractice in New Mexico, 3 N.M. L. Rev. 294 (1973).

5. N.M. Stat. Ann. § 23-1-1 (1953) provides:

The following suits or actions may be brought within the time hereinafter

accrues. Much malpractice case law is concerned with supplying a definition for accrual of a cause of action.

In most tort actions determining when the cause of action accrues is simple. The time of the defendant's wrongful act coincides with the time of the plaintiff's injury. The plaintiff has immediate knowledge of both the wrongful act and the injury; therefore, the cause of action accrues at this time.[6]

In medical malpractice actions, however, the wrongful act may not coincide with the plaintiff's discovery of injury. For example, consider the case in which a doctor negligently leaves a surgical instrument in the patient's body during an operation. The wrongful act occurs at the time of the operation, but the patient has no way of knowing that the instrument was left in him, and frequently the instrument will not cause him pain for considerable time.[7] Even if the patient feels pain shortly after the wrongful act, he may have no means of discovering that the cause of the pain is a foreign instrument left in his body.[8] The plaintiff may not sustain monetary damages because of the wrongful act until the cause of the pain is discovered. Thus, there are three distinct times when the cause of action could be said to have accrued:" when the wrongful act occurred, when the pain was first felt, or when the cause of the pain and, consequently, the wrongful act were discovered.

Courts have developed two basic rules for determining when a cause of action accrues: the wrongful act rule and the discovery rule. Under the wrongful act rule the cause of action accrues at the time of the wrongful act or omission. Once considered the general rule, it is now generally disfavored.[9] Under the discovery rule, the cause of action does not accrue until the patient discovers or using reasonable diligence should have discovered the injury.[10] This rule is now fol-

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limited, respectively, after their causes accrue, and not afterwards, except when otherwise specifically provided.

6. For a discussion of when a cause of action is considered to have accrued *see Developments in the Law, Statutes of Limitations,* 63 Harv. L. Rev. 1178, 1200-05 (1950) (hereinafter cited as *Developments*).

7. "Nature has a mysterious way at times of hiding mishaps in surgery, and cases are legion where foreign objects . . . have been inadvertently left in a surgical wound and the patient remained oblivious of it for years afterward." Ruth v. Dight, 75 Wash.2d 660, 453 P.2d 631, 632 (1969).

8. *See* example cited in note 3, *supra.*

9. *See generally* Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224, 232 (1964); Ruth v. Dight, 75 Wash.2d 660, 453 P.2d 631, 634 (1969); D. Harney, Medical Malpractice at 267 (1973); Annot., 80 A.L.R.2d 368 (1961); 1 D. Louisell & H. Williams, Medical Malpractice, § 13.06 at 370 (1973); 15 Vand. L. Rev. 657 (1962); 21 DePaul L. Rev. 234 (1971).

10. The first case to adopt the discovery rule was *Haysman v. Kirsch,* 6 Cal.2d 302, 57 P.2d 908 (1936). For later cases *see:* Annot. 80 A.L.R.2d 368, § 7 (1961); 1 D. Louisell &

lowed by a majority of jurisdictions.[11]

In 1963 the New Mexico Supreme Court decided *Roybal v. White*,[12] adopting the wrongful act rule and rejecting the discovery rule. The physician in *Roybal* left a sponge in his patient which was not discovered until after the statute of limitations had run. In holding that the cause of action accrued at the time of the wrongful act, the Court relied on authority which has since been discredited.

The Court considered the wrongful act rule the "general rule" followed by the majority of other jurisdictions.[13] However, as discussed above,[14] the rule is no longer a majority position. The Supreme Court of Idaho, one year after the *Roybal* decision, said, "[T]he 'general rule' has little to recommend it. It is neither the position of the majority of the jurisdictions nor is it firmly based on considerations of reason or justice."[15]

Roybal v. White also relied on a Washington case, *Lindquist v. Mullen*,[16] which adopted the wrongful act rule rather than the discovery rule. The *Lindquist* decision was based in part on the Washington court's interpretation of legislative intent. Reexamining the interpretation because of "constant intellectual bombardment"[17] of the rule, the Washington Supreme Court overruled *Lindquist* in *Ruth v. Dight*[18] and adopted the discovery rule.

The Supreme Court in *Roybal* also looked to the possible intent of the New Mexico legislature. The legislature had specifically adopted the discovery rule in actions based on fraud,[19] but had not so provided in actions for personal injury.[20] This evidenced an intent, the court said, to reject the discovery rule for personal injury actions.

H. Williams, *supra* note 9, at § 13.07; Comment, *Recent Developments in Wisconsin Medical Malpractice Laws*, 1974 Wisc. L. Rev. 891; Comment, *Foreign Object Discovery and Misdiagnosis–Is There a Difference?*, 29 U. of Pitt. L. Rev. 341 (1967); Comment, *Medical Malpractice Statutes of Limitation: Uniform Extension of the Discovery Rule*, 55 Iowa L. Rev. 486 (1969); 1970 Wisc. L. Rev. 915; 18 N.Y.L.F. 491 (1972).

11. Teeters v. Currey, 518 S.W.2d 512, 517 (Tenn. 1974) lists twenty-nine (29) states following the discovery rule, twenty-two (22) of them adopting the rule since 1961.

12. 72 N.M. 285, 383 P.2d 250 (1963), discussed in Roehl, *supra* note 4, at 306-09.

13. The *Roybal* court relied on the statement of the general rule in Annot., 80 A.L.R.2d 268 (1961).

14. *See* text accompanying notes 9, 11 *supra*.

15. Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224, 232 (1964).

16. 45 Wash.2d 675, 277 P.2d 728 (1954).

17. Ruth v. Dight, 75 Wash.2d 660, 453 P.2d 631, 634 (1969).

18. 75 Wash.2d 660, 453 P.2d 631 (1969).

19. N.M. Stat. Ann. § 23-1-7 (1953) states:

> In actions for relief, on the ground of fraud or mistake, and in actions for injuries to, or conversion of property, the cause of action shall not be deemed to have accrued until the fraud, mistake, injury or conversion complained of, shall have been discovered by the party aggrieved.

20. N.M. Stat. Ann. § 23-1-8 (1953).

The Oregon Supreme Court in *Vaughn v. Langmack*[21] reasoned similarly to determine Oregon legislative intent and also adopted the wrongful act rule. However, the validity of this reasoning to determine legislative intent "is dependent upon the supposition that the legislature, in adopting the discovery principle as to fraud, had in mind undiscovered malpractice as well and nevertheless decided against the adoption of the discovery principle as to it."[22] In *Berry v. Branner*[23] the Oregon court rejected this supposition and overruled *Vaughn.*

The *Roybal* case also looked to a previous New Mexico decision, *Kilkenny v. Kenney,*[24] to determine legislative intent. *Kilkenny* was a wrongful death action, and the statute of limitations was held to run from the date of the wrongful act. This decision was based on language in the Wrongful Death Statute,[25] which the court interpreted as manifesting legislative intent that the cause of action accrued at the time of the wrongful act.[26] *Kilkenny* is readily distinguished from malpractice suits under the pre-1976 statute because it is based on specific statutory language applicable only to wrongful death suits.

Justice Noble in *Roybal* recognized the harshness of the wrongful act rule[27] but said adoption of the discovery rule is a legislative, not a judicial function. However, the legislature had adopted neither the wrongful act nor the discovery rule. The statute of limitations speaks only in the terms of accrual of causes;[28] determination of when the cause "accrues" has been a judicial function. The judiciary determined that a cause of action accrues at the time of the wrongful act.[29] Adoption of the discovery rule would no more have been

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21. 236 Or. 542, 390 P.2d 142 (1964).
22. Berry v. Branner, 245 Or. 307, 421 P.2d 996, 997-98 (1966).
23. 245 Or. 307, 421 P.2d 996 (1966).
24. 68 N.M. 266, 361 P.2d 149 (1961).
25. N.M. Stat. Ann. § 22-20-1 (1953) provides:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

26. However, the legislature amended this statute after *Kilkenny* and provided that the cause of action accrues as of the date of death. N.M. Stat. Ann. § 22-20-2 (Supp. 1975).
27. 72 N.M. at 287, 383 P.2d at 252.
28. N.M. Stat. Ann. § 23-1-1 (1953).
29. Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963).

judicial legislation than was adoption of the wrongful act rule.[30]

The court in *Roybal* made no independent determination of when a cause of action should be said to have accrued. Instead the court relied on *Kilkenny v. Kenney*[31] to hold that a cause of action for malpractice accrues at the time of the wrongful act. Yet, a cause of action does not accrue until a suit may be brought[32] and it is impossible to bring suit if neither the plaintiff nor the defendant has any knowledge of the injury.[33] As a Washington Supreme Court justice said:

> To say that the patient had a cause of action all the while, although no one *knew about it or suspected it,* may meet some tests of legal logic or theory, but the result would hardly meet the tests of abstract, generally applicable, or lay standards of justice.[34]

Perhaps because of some of these problems the *Roybal* wrongful act rule has not been applied to actions not based on medical malpractice.[35] In a malpractice action against an accountant, *Chisholm v. Scott,*[36] the Court of Appeals distinguished *Roybal* and adopted the discovery rule for an accountant's malpractice. The court said:

> . . . the trust and confidence that the client places in the professional person places him in a vulnerable position should that trust and confidence be misplaced. It is the policy of the law to encourage

30. Berry v. Branner, 245 Or. 307, 421 P.2d 996, 999 (1966). Morgan v. Grace Hospital, 149 W.Va. 783, 144 S.E.2d 156, 160 (1965).

31. 68 N.M. 266, 361 P.2d 149 (1961). The questionable authority of *Kilkenny* has been discussed. *See* text accompanying notes 24-26 *supra.*

32. *Developments, supra* note 6, at 1200-05 (1950).

33. In Berry v. Branner, 245 Or. 307, 421 P.2d 996, 998 (1966), the court stated:

> (A cause of action) accrues whenever one person may sue another. Black's Law Dictionary, 4th ed. . . . To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, "You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy," makes a mockery of the law. Rosane v. Senger, 112 Colo. 363, 149 P.2d 372, 375 (1944).

34. Dissent of Justice Finley in Lindquist v. Mullen, 45 Wash.2d 675, 277 P.2d 724, 728 (1954). *Lindquist* was overruled by Ruth v. Dight, 75 Wash.2d 660, 453 P.2d 631 (1969). (Emphasis in original). *See also* Frohs v. Greene, 253 Or. 1, 452 P.2d 564, 567 (1969) and Teeters v. Currey, 518 S.W.2d 512, 515 (Tenn. 1974):

> We find it difficult to embrace a rule of law requiring that a plaintiff file suit prior to knowledge of his injury or, phrasing it another way, requiring that he sue to vindicate a non-existent wrong, at a time when injury is unknown and unknowable.

35. E. O. Spurlin v. Paul Brown Agency, Inc., 80 N.M. 306, 454 P.2d 963 (1969). The Supreme Court held that a cause of action against an insurance agency accrues only when the injury materialized, not when the wrongful act occurred.

36. 86 N.M. 707, 526 P.2d 1300 (Ct. App. 1974).

> that trust and confidence; likewise it is the duty of the law to protect the client from the negligent acts of the professional person.[37]

The policy of encouraging trust and confidence applies equally to doctors as to accountants. In *Chisholm* the Court of Appeals may have been laying a foundation for the reexamination of the wrongful act rule in all situations of malpractice by professionals.

THE FRAUDULENT CONCEALMENT EXCEPTION TO THE WRONGFUL ACT RULE

In *Hardin v. Farris*[38] the New Mexico Court of Appeals adopted the fraudulent concealment exception to the wrongful act rule for medical malpractice cases. The court did not consider the question of whether the discovery rule should have been adopted[39] but simply assumed that the cause of action accrued at the time of the wrongful act.

Under the exception stated in *Hardin* the statute of limitations is tolled until the right of action is discovered or should have been discovered when a defendant fraudulently conceals a cause of action from the plaintiff. If a confidential relationship exists, as between doctor and patient, fraudulent concealment occurs when the cause of action is known to the injuring party but conceals itself from the injured party.[40] If the defendant's conduct has prevented the plaintiff from bringing a cause of action within the statutory period, under the doctrine the defendant is deemed estopped from asserting the statute of limitations as a defense to the action.

Many jurisdictions[41] require the plaintiff to prove the defendant knew of the negligent act and intended to prevent or hinder the plaintiff from discovering the injury.[42] Frequently, this places a heavy burden on the plaintiff, since it is very difficult to prove that the physician knew of the injury and deliberately did not tell the

37. 86 N.M. at 709, 526 P.2d at 1302.

38. 87 N.M. 143, 530 P.2d 407 (Ct. App. 1974).

39. The discovery rule was not briefed by either party. The sole issue presented to the Court of Appeals was whether fraudulent concealment of the wrongful act would toll the statute of limitations once the cause of action had accrued.

40. 87 N.M. at 146, 530 P.2d at 410.

41. *See* cases collected in Annot., 80 A.L.R.2d 368, § 10(c) (1961); 1 D. Louisell & H. Williams, *supra* note 9, at § 13.11 at 380-381, n. 67, 68; Note, *Malpractice and the Statute of Limitations,* 32 Ind. L.J. 528, 537 (1957); Note, *The Statute of Limitations in Actions for Undiscovered Malpractice,* 12 Wyo. L.J. 30, 32-33 (1957); D. Harney, *supra* note 9, at § 8.4.

42. This issue was not present in the *Hardin* case, since it arose on a judgment on the pleadings in favor of the defendant. The court accepted the allegation that the defendant had knowledge of the injury as true.

patient.[43] But the fraudulent concealment exception has been extended in some jurisdictions to be essentially equivalent to a discovery rule. Actual knowledge of the injury by the defendant is not required if the defendant was negligent in not discovering the injury.[44] These jurisdictions note that a physician has a duty to discover injuries and to disclose them to the patient. Constructive fraud is found when the physician fails to disclose facts which, in the exercise of reasonable care, he should have known. Thus, the physician can be held to knowledge of his own malpractice, and his failure to disclose is considered constructive fraud. The statute is tolled until the physician discloses, or the patient discovers, the injury.

The *Hardin* case did not discuss whether the plaintiff would have to prove willful concealment by the physician, since there were suffi-

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43. A recent example of the problems a plaintiff has in proving fraudulent concealment is *Ray v. Scheibert*, 484 S.W.2d 63 (Tenn. Ct. App. 1972, appeal after remand). That case involved an operation on the plaintiff's back after which the plaintiff became partially paralyzed. The physician assured the plaintiff that the paralysis was due to muscle swelling and that it was just a matter of time before it would end. After the one-year statute of limitations had passed the plaintiff consulted another physician who indicated that the paralysis was due to the surgery performed by the first physician. The Tennessee Court of Appeals held that the statement concerning the cause of the paralysis did not amount to a fraudulent concealment but was simply an honest mistake. Thus the statute of limitations was not tolled.

44. Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503, 504 (1934):

> . . . [the doctor] performed the operation upon appellant and knew, or by the exercise of ordinary care might have known, that the foreign substance was left in her abdominal cavity.

The Arkansas statute of limitations was changed following the *Burton* case, Act 135 of 1935, but later cases have affirmed the *Burton* fraudulent (or negligent) concealment rule. *See* Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953), in which the court held that the jury could properly find that the doctor's negligent failure to find a foreign substance left in the patient amounted to a fraudulent concealment of the injury. *But see* Williams v. Edmonson, 520 S.W.2d 260, 267 (Ark. 1975). In Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590, 593 (1948), the court held that the conduct of the defendant was sufficient to amount to a constructive fraud which tolled the statute of limitations. The court held that there was no necessity of actual dishonesty or intent to deceive stating that:

> The defendant knew, or by the exercise of reasonable diligence should have known, that the instruments used by him had broken off during the operation, . . .

In *Seitz v. Jones*, 370 P.2d 300, 302 (Okla. 1962), the court said:

> . . . [the complaint] states facts sufficient to infer that the fact [of injury] was concealed by silence on the part of the defendant, though they knew or should have known of her condition and their negligence. Whether intentionally concealed or not, the concealment would work to their benefit and they owed a duty to investigate cause of pain and had they done so the needle would have been discovered in the body of the plaintiff. It was defendants' own wrong doings that prevented the plaintiff from knowing of her condition caused by their negligence, therefore they should not be permitted to take advantage of their own wrong by setting up the statute as a defense.

See also Adams v. Ison, 249 S.W.2d 791 (Ky. 1952); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944); Perrin v. Rodriguez, 153 So. 555 (La. App. 1934).

cient allegations of fraudulent conduct in the complaint. However, in order to avoid an unjust result because of the wrongful act rule, a future court might extend *Hardin* to include cases of negligent concealment under a theory of constructive fraud.[45] Even if fraudulent concealment were not so extended, allegations of fraudulent concealment may be sufficient to get the case to a jury in cases where the statute of limitations might otherwise bar the action.[46]

It would be unfortunate if the doctrine of fraudulent concealment were extended to include cases in which the defendant lacks actual knowledge of his error. Constructive fraud is a fiction which distorts fraudulent concealment to avoid the harsh results of the wrongful act rule in malpractice cases. Avoidance of unjust results is better accomplished by adoption of the discovery rule, leaving fraudulent concealment as a useful doctrine in areas of tort law[47] in which deceit is at issue.

POSSIBLE INTERPRETATIONS OF THE MEDICAL MALPRACTICE ACT STATUTE OF LIMITATIONS

The statute of limitations contained in the recently enacted Medical Malpractice Act appears on its face to be an adoption of the wrongful act rule.[48] There is some indication, however, that the legislature did not intend to adopt a strict wrongful act rule. The Act

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45. In dicta in Toth v. Lenk, Ind. App. , 330 N.E.2d 336 (1975), the Indiana Court of Appeals indicated its willingness to extend the doctrine of fraudulent concealment to that of a constructive fraud in order to avoid the wrongful act rule adopted by statute in Indiana.

46. Justice Harbison, in a concurring opinion in Teeters v. Currey, 518 S.W.2d 512, 518 (Tenn. 1974) in which Tennessee adopted the discovery rule, notes:

> Practitioners in the field of malpractice are aware that claimants frequently have added spurious "fraudulent concealment" allegations to complaints in order to attempt to circumvent the statute of limitations, when there was no basis in fact or law for charging the defendant with fraud. The adoption of the "discovery" rule regarding the statute of limitations should tend to minimize this practice and to protect reputable persons from reckless and indiscriminate charges of dishonorable conduct.

This Comment does not propose incorporation of spurious allegations into all malpractice complaints. The practice that has arisen in other jurisdictions where the discovery rule has not been adopted is merely being illustrated.

47. *See* Southwestern Investment Co. v. Cactus Motor Co., 355 F.2d 674 (10th Cir. 1966). *See also* Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875 (1933), fraudulent concealment has been used to toll statutes of limitations in cases based on misappropriation of funds by an employee or trustee, trespass to land, secret breach of contract, and fraudulent transfers of assets to avoid creditors.

48. Laws of N.M., 1976, Ch. 2, § 13 provides:

> Limitations—No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act may be brought against a health care provider unless filed within three years after the date the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file. This

as originally introduced in the New Mexico House of Representatives provided that the limitation period should start "from the date of the alleged act, omission or neglect. . . ."[49] The Act as passed was amended so the limitation period now runs from "the date that the act of malpractice occurred."[50] The issue raised is determining on which date the act of malpractice occurred. The Malpractice Act may be read to define "malpractice" as a negligent act causing recognizable injury.[51] If neither the patient nor the doctor knows or suspects that a wrongful act has occurred because no injury is discovered, an act of malpractice could be said not yet to have occurred. A court could thus determine that an act of malpractice occurs only when the resulting injury is sustained or discovered by the patient. This seems a strained reading of the statute, yet one court has suggested that to avoid injustice a statute which on its face mandates a wrongful act rule may be interpreted as imposing a discovery rule.[52]

Usually an act of malpractice would be deemed to occur at the time of the physician's wrongful act. But in cases in which the doctor-patient relationship is ongoing, there may be continuing acts of malpractice recognizable under theories of continuing treatment or negligence. Such situations may be interpreted in either of two ways: (1) if the course of treatment is ongoing, each treatment could be considered a separate wrongful act; or (2) if the patient continues

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subsection applies to all persons regardless of minority or other legal disability.

There is also a tolling provision written into the Medical Malpractice Act:

> Section 22. Tolling of Statute of Limitation—The running of the applicable limitation period in a malpractice claim shall be tolled upon submission of the case for the consideration of the panel and shall not commence to run again until thirty days after the panel's final decision is entered in the permanent files of the commission and a copy is served upon the claimant and his attorney by certified mail.

49. N.M. H. B. 29, 32d Legislature, 2d Sess. § 12 (1976).

50. Laws of N.M., 1976, Ch. 2, § 13.

51. In Section 3(C) of the Medical Malpractice Act "malpractice claim" is defined as:

> any cause of action against a health care provider for medical treatment, lack of medical treatment, or other claimed departure from accepted standards of health care *which proximately results in injury to the patient,* whether the patient's claim or cause of action sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death; (emphasis added).

There is thus an inference in the Act that an act of malpractice includes an injury to the patient. Black's Law Dictionary, 4th ed. (1968) defines malpractice in part as:

> bad, wrong, or injudicious treatment of a patient, professionally and in respect to the particular disease or injury, *resulting in injury, unnecessary suffering, or death to the patient,* and proceeding from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, neglect, or a malicious or criminal intent. (Emphasis added, citations omitted).

However, since a malpractice claim is comprised of both an act and an injury, Section 3(C) may signify only that injury is an element of plaintiff's case.

52. Toth v. Lenk, Ind. App. , 330 N.E.2d 336 (1975).

under the doctor's care, the doctor's failure to discover the injury could be considered a second negligent act.[53]

Both theories acknowledge that the patient's trust in his doctor may render the patient unable to discover the wrongful act unless the doctor informs him of it.[54] If the patient relies on the advice of his doctor, the incorrect advice itself is an act of malpractice.[55] The physician has a duty to discover his mistakes and to inform the patient, and omission to inform the patient of wrongful acts that should have been discovered is an act of malpractice.[56] As long as the patient is under the physician's care the physician may discover the wrongful act, and there is continuing negligence if he fails to discover it. When the doctor-patient relationship terminates, the physician no longer has the opportunity to discover his wrongful act. The cause of action then accrues and the statute of limitations begins to run. Both the continuous treatment theory and continuing negligence theory are of limited value when an operation is performed by a specialist who rarely sees the patient after completion of the operation.

The New Mexico Court of Appeals has rejected the continuous treatment or negligence theories as a means of determining when the cause of action accrues in a medical malpractice action.[57] This decision may be reexamined in light of the new statutory language referring to the time when an act of malpractice occurs rather than when a cause of action accrues used in the old statute of limitations.

POSSIBLE CONSTITUTIONAL PROBLEMS WITH THE NEW STATUTE OF LIMITATIONS

If the new statute of limitations is construed to impose the wrongful act rule, the only remedy remaining to persons whose causes of

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53. The continuous treatment theory and the continuing negligence theory are discussed in Annot., 80 A.L.R.2d 368 § 6 (1961); 1 D. Louisell & H. Williams, *supra* note 9, at § 13.08, § 13.09; D. Harney, *supra* note 9, at § 8.3; Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions,* 47 Cornell L.Q. 339, 361 (1962); Sacks, *Statutes of Limitations and Undiscovered Malpractice,* 16 Clev. Mar. L. Rev. 65, 67 (1967); Note, *Medical Malpractice: A Survey of Statutes of Limitation,* 3 Suffolk L. Rev. 597, 611 (1969).

54. Swang v. Hauser, 288 Minn. 306, 180 N.W.2d 187 (1970).

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

56. Note the similarity between the continuing negligence theory and the constructive fraud extension of the doctrine of fraudulent concealment discussed in note 47 *supra.*

57. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1973). There are, however, other New Mexico cases which indicate approval of these theories. In E. O. Spurlin v. Paul Brown Agency, Inc., 80 N.M. 306, 454 P.2d 936 (1969), the Supreme Court used a continuing negligence theory in holding that a cause of action accrued against an insurance agency when injury was sustained. In Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963), the Supreme Court did not reject the continuous treatment or continuing negligence theories but distinguished cases relying on them, since there was no allegation of continuous treatment in those cases.

action against malpracticing physicians are barred because discovered after the statute has run is attacking the statute on constitutional grounds.

Due Process Challenge

Statutes of limitation are not generally deemed to deny substantive rights to a cause of action, but rather are considered procedural measures to prohibit an action being brought to court too long after it accrued. There is no violation of due process, therefore, as long as the statute allows a reasonable time in which the action may be brought.[58] However, the statute of limitations in the medical malpractice situation may be more than a procedural bar. In cases of undiscovered malpractice it affects substantive rights, since it precludes an opportunity to bring suit for redress of injury. In practical terms the cause of action cannot be said to accrue until the patient discovers or should have discovered the injury, yet the statute may bar bringing the action before it was discovered. For such plaintiffs, the statute denies completely access to the courts.

Justice McBride in his concurring opinion in *Ayers v. Morgan*[59] asserted that the Pennsylvanian Constitution prohibited the denial of access to the courts by the statute of limitations in a malpractice case. Article I, Section II of the Pennsylvania Constitution provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law . . .

There may be a similar access to courts provision implied in the New Mexico Constitution.

Section Four of the Kearny Code Bill of Rights provides:

> The courts of justice shall be open to every person; just remedy given for every injury to person or property, and that right and justice shall be administered without sale, denial, or delay, and that no private property shall be taken for public use without just compensation.[60]

This provision was not specifically included in the Bill of Rights of the New Mexico Constitution; however, it may have been incorporated into the New Mexico Constitution through other clauses in the

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58. *See Developments, supra* note 6, at 1186-88.

59. 397 Pa. 282, 154 A.2d 788, 794-795 (1959).

60. Brigadier General Stephen W. Kearny with a force of about 1700 men made a bloodless conquest of New Mexico and on August 18, 1846, put the city of Santa Fe and the territory of New Mexico under the military control of the United States. General

Bill of Rights.[61] Even without this provision, denying access to the courts may be prohibited by the due process clause.[62]

Equal Protection Challenge

The new statute of limitations operates as a grant of immunity to physicians for certain types of negligence. If the wrongdoing is such that it remains undiscovered for some years, as in negligent surgery, the physician is completely protected from having to account for his negligence. The statute thus creates a class of tort plaintiffs who may never recover for their injuries simply because of the type of their injuries: those whose injuries remain undiscovered for three years. There is also the broader classification of tort-plaintiffs in medical malpractice actions as compared with tort-plaintiffs in other professional malpractice actions[63] and the class of physicians who as a class receive the benefit of special legislation which other professional persons do not receive.[64]

In *McGeehan v. Bunch*[65] the New Mexico Supreme Court held that New Mexico's guest statute[66] violated the equal protection

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Kearney on September 22, 1846, published a Code of Laws to govern the citizens of New Mexico which is now known as the Kearny Code. H. Bancroft, History of Arizona and New Mexico 410-426 (1889, Republished 1962). The Kearny Code along with its Bill of Rights is printed in Volume 1 of the New Mexico Statutes Annotated at 64-126 (N.M. Stat. Ann. Repl. Vol. 1, 1969).

61. N.M. Const. art. 2, § 4 provides:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and seeking and obtaining safety and happiness.

A tort action may be considered a property right under this provision. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

N.M. Const. art. 2, § 23 provides:

> The enumeration in this Constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people.

Rights the people had under the Kearny Code Bill of Rights could be considered to be retained by the people even though they are not enumerated in the Constitution. Also, the Kearny Code Bill of Rights did not contain any express due process or equal protection clauses. Therefore, section four of the Kearny Code Bill of Rights may have been incorporated through these clauses in N.M. Const. art. 2, § 18 by the members of the Constitutional Convention.

62. *See, e.g.,* Boddie v. Connecticut, 401 U.S. 371 (1971). *But see* United States v. Kras, 409 U.S. 434 (1973). *See also Developments, supra* note 6, at 1190-92 (1950). Note the conflicting views on due process between Judge Garrard writing for the majority in Toth v. Lenk, Ind. App. , 330 N.E.2d 336 (1975), and the concurring opinion of Judge Hoffman.

63. *See* Chisholm v. Scott, 86 N.M. 707, 526 P.2d 1300 (Ct. App. 1974) (malpractice action against accountant accrues at time of discovery of injury).

64. There may be a violation of the ban of special legislation or immunity contained in N.M. Const. art. 4, § 24 and § 26.

65. 88 N.M. 308, 540 P.2d 238 (1975).

66. N.M. Stat. Ann. § 64-24-1 (Repl. Vol. 9, Pt. 2, 1972).

clause. The court followed the test enunciated in *Reed v. Reed*[67] that:

> A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[68]

Statutes of limitations have two basic objectives: (1) preventing revival of stale claims where "evidence has been lost, memories have faded, and witnesses have disappeared,"[69] and (2) acting as statutes of repose by creating a time when "one is freed from the fears and burdens of threatened litigation."[70] The first objective does not support the classification that the malpractice legislation creates. In an undiscovered malpractice case the possibility of lost evidence or witnesses is not a major detriment. Laches-like notions of equitable estoppel are not persuasive when the delay has not been plaintiff's fault. And the existence of a foreign instrument in the plaintiff's body may establish negligence *per se.*

The second objective, however, does serve a reasonable purpose. Society benefits if there is a time at which ancient obligations and rights are finally terminated. But the protection offered by such termination is more easily justified when the plaintiff has allowed the claim to slumber.

Besides the objectives common to most statutes of limitations, the medical malpractice statute also responds to the recent increase in medical malpractice claims and insurance rates.[71] The discovery rule in statutes of limitations has frequently been blamed for increased malpractice litigation.[72] Yet, California data compiled in 1970 show

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67. 404 U.S. 71 (1971).

68. 404 U.S. at 76.

69. Order of R. R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944).

70. Ruth v. Dight, 75 Wash.2d 660, 453 P.2d 631, 632 (1969).

71. N.M. H. B. 29, 32d Legislature, 2d Sess. § 2 (1976) provided:

> Purpose of Act.–The legislature of the state of New Mexico, in recognition of the fact that medical liability insurance premiums have increased substantially, causing the procurement of needed medical services to become critically expensive in this state, enacts the Medical Malpractice Act. The purpose of the Medical Malpractice Act is to promote the health and welfare of the people of New Mexico by placing certain restrictions on medical malpractice actions initiated in the courts of this state, in the hope that such restrictions shall have the salutary effect of reducing medical liability insurance premiums to practitioners and consequently to assure the continued reasonable availability of necessary medical services in the state of New Mexico.

72. Comment, *A Four Year Statute of Limitations for Medical Malpractice Cases: Will Plaintiff's Case be Barred?* 2 Pac. L.J. 663, 668 (1971); *Malpractice Fever–A Social Disease,* 61 J. Fla. Medical Ass'n. (Dec. 1974); Dep't of Health, Education & Welfare, Medical Malpractice, Report of the Secretary's Commission on Medical Malpractice (1973).

that changing California's discovery rule to a wrongful act rule would bar only about 10 per cent of California malpractice claims.[73] More importantly for the equal protection claim, the wrongful act rule disproportionately places the burden of reducing total malpractice claims on one class of plaintiffs: those whose injuries are discovered late. As for guest passengers, victims of late-discovered malpractice injuries seem insufficiently different from other malpractice victims to justify barring their recovery.

These constitutional issues arise only if the medical malpractice statute of limitations is construed as imposing a wrongful act rule. Construing the statute to provide a discovery rule would avoid any constitutional infirmity.[74]

CONCLUSION

Two statute of limitations problems will arise in New Mexico malpractice cases. For those cases in which the act of malpractice occurred prior to the effective date of the malpractice statute, the prior statute of limitations must be interpreted in light of the discredited *Roybal* rule. The discovery rule should be adopted to govern these cases. Yet, New Mexico courts may be reluctant to adopt the discovery rule if they find a contrary legislative intent in the new statute. For those cases arising under the new statute, courts must determine when an "act of malpractice" occurs. The wrongful act rule's harsh results and its possible constitutional deficiencies could be avoided by judicial construction that the act comprehends a discovery rule. Failing such a construction,[75] the legislature should expressly adopt the discovery rule.

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73. *See* Comment, *supra* note 72, at 668 (1971).

74. Of course the equal protection problems with the Medical Malpractice Act as a whole would still remain. In two of the states that have adopted similar malpractice acts, trial courts have found that they violated equal protection: Pollard v. Hendry County Hospital Authority, Fla., Hendry Co. Cir. Ct., No. 75-11; Wright v. Central Dupage Hospital, Ill., Cook Co. Cir. Ct., No. 75 L 21088. Both cases are reported in 19 A.T.L.A. Newsletter 18, February, 1976.

75. In a 4-3 decision, the Missouri Supreme Court held that it could not adopt the discovery rule where the legislature had provided that the limitation period commenced "from the date of the act of neglect complained of." Laughlin v. Forgrave, 432 S.W.2d 308, 314 (Mo. 1968). After noting that the plaintiff could not have discovered the injury prior to the running of the statute of limitations, the court stated:

> This argument is appealing and has some force, so far as justice is concerned; in that respect the conclusion we reach is distasteful to us. But, the legislative branch of the government has determined the policy of the state and clearly fixed the time when the limitation period begins to run against actions for malpractice. This argument addressed to the court properly should be addressed to the General Assembly. Our function is to interpret the law, it is not to disregard the law as written by the General Assembly.