August 2015

Medical Malpractice - Statute of Limitations - Foreign Objects - The Adoption of the Discovery Rule - Legislative or Judicial Prerogative? Melnyk v. Cleveland Clinic

Alan J. Sobol

TORTS—MEDICAL MALPRACTICE—STATUTE OF LIMITATIONS—FOREIGN OBJECTS—THE ADOPTION OF THE DISCOVERY RULE—LEGISLATIVE OR JUDICIAL PREROGATIVE?

Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972).

ON JANUARY 29, 1958, the plaintiff underwent abdominal surgery at the defendant-hospital, the surgeon being a salaried employee of the hospital. The plaintiff was last seen by the defendant as an outpatient on May 7, 1958. On February 7, 1969, more than ten years after the operation and nearly ten years since their hospital-patient relationship had terminated, the plaintiff filed suit against the hospital alleging its employee-surgeon had negligently left a metallic forceps and a non-absorbent sponge inside his abdomen, and that he had been required to undergo additional surgery on October 9, 1968, for removal of the foreign objects. The plaintiff further alleged that he did not discover the presence of these objects until February 13, 1968.[1] The defendant filed a motion for summary judgment and the trial court granted said motion on the basis that the plaintiff had failed to file his action within the time permitted by the applicable statute of limitation.[2] The judgment was affirmed by the Court of Appeals. The Ohio Supreme Court reversed and remanded holding,

> Where a metallic forceps and a nonabsorbent sponge are negligently left inside a patient's body during surgery, the running of the statute of limitation governing a claim therefor is tolled until the patient discovers or by the exercise of reasonable diligence should have discovered the negligent act.[3]

The rationale of the Court was that *Melnyk* could be distinguished with the recent case of *Wyler v. Tripi*,[4] which held that a cause of action for medical malpractice accrues at the latest when the physician-patient relationship terminates, and which also recognized the legislature's authority to act in this area, on the basis that *Wyler* was not a foreign object case. Therefore, the Court felt it need not disturb the *Wyler* holding and could nevertheless hold the failure to remove the foreign objects

---

1 Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972).

2 OHIO REV. CODE § 2305.11 (Page 1953) [hereinafter cited as The Ohio Statute], which reads in part, "An action for . . . malpractice . . . shall be brought within one year after the cause thereof accrued. . . ."

3 Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972).

4 Wyler v. Tripi, 25 Ohio St.2d 164, 267 N.E.2d 419 (1971) [hereinafter cited as Wyler].

in *Melnyk* was negligence as a matter of law and that equity and public policy require an exception to the general rule.

The central issue in *Melnyk* is at what point in time such a cause of action accrues. Stated more precisely, did the cause of action accrue, and thus the statute commence to run, *at the time* of the negligent act (*i.e.*, the negligent failure to remove the foreign objects) or did the cause of action accrue at the time the patient *discovered* the negligent act? The determination of this issue invariably involves the interpretation of the phrase "after the cause of action thereof accrued."[5] The wording of the Ohio statute is similar to statutes of limitations in other jurisdictions in that it is phrased in general terms which require the commencement of the limitation's period merely "when the cause of action accrues."[6] The courts have been unable to define that phrase with any consistency.[7]

It is generally stated that a cause of action accrues when the wrongful act complained of is committed and not on the date which the damage is discovered.[8] Jurisdictions have interpreted the word "accrued" to mean the time of commission of the negligent act, not the time of discovery.[9] This interpretation is referred to as the general or traditional view and remains the majority rule, although the trend is quickly sweeping away from it.[10] The rationale behind this view is that it is the *act rather than the ensuing damage* which constitutes the basis for a cause of action.[11] If there is noticeable injury when the original act

---

[5] OHIO REV. CODE, § 2305.11 (Page 1953).

[6] Sixteen states have specific statutes pertaining to malpractice actions (Ala., Ark., Colo., Ind., Ky., Me., Mass., Mich., Mo., Neb., N.H., N.Y., N.D., Ohio, S.D.). However, in most instances the statutes of limitation relating to medical malpractice actions contain the exact same wording as the statutes governing negligence actions; *see* 55 IOWA L. REV. 486, 487 (1969). *See also* Note, 3 SUFF. L. REV. 597 (1969) for a general survey of the statutes.

[7] 30 OHIO ST. L.J. 425, 426-27 (1969). Only seven statutes specify when that accrual point is reached; *see* 28 MD. L. REV. 47, at 55 n. 7 (1968).

[8] Hill v. Hays, 193 Kan. 453, 395 P.2d 298 (1964); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962); *See* Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339 (1962); 45 ORE. L. REV. 73 (1965); 25 WASH. & LEE L. REV. 78, 79 (1968); 18 WEST. RES. L. REV. 1002 (1967).

[9] 45 ORE. L. REV., *supra* note 7.

[10] Lillich, *supra* note 7; *see* 8 IDAHO L. REV. 371, 372 (1972); *see* 25 WASH. & LEE L. REV., *supra* note 7, at n. 20. One exception to this trend is Hawks v. DeHart, 206 Va. 810, 146 S.E.2d, 187 (1966).

[11] This rule was well stated by the Supreme Judicial Court of Massachusetts:

> Any act of misconduct or negligence ... in the service undertaken ... gave rise to a right of action in contract or tort, and the statutory period began to run at that time, and not when the actual damage results or is ascertained.... The damage sustained by the wrong done is not the cause of action....

Cappuci v. Barone, 266 Mass. 578, 581, 165 N.E. 653, 654-55 (1919).

of negligence occurs, this rule usually leads to equitable results.[12] However, strict application of this doctrine presents difficulties when the statutory period expires before the plaintiff discovers he has been injured at all.[13] Application of this rule to medical malpractice actions has led to harsh results,[14] and the courts began making exceptions to the general rule to avoid unjust decisions.[15]

At one time, courts allowed an injured plaintiff to sue in *contract*[16] so that he could take advantage of the longer statute of limitations. However, today the contract basis has fallen into virtual disuse,[17] and it is generally conceded that the action lies in tort.

Another device adopted by the courts to allow relief from the harsh result of strict construction is the *fraudulent concealment* theory.[18] This theory is based upon the physician or surgeon's knowledge of an error committed while treating a patient and his attempt to conceal the error. Under this exception, the statute is tolled until the patient discovers, or with due diligence should have discovered, his injury.[19] This theory has

---

12 *See* Krantz & Schwartz, *Statutes of Limitation in Cases of Insidious Diseases,* 12 CLEVE.-MAR. L. REV. 225, 227 (1963).

13 *See* Anderson, *The Application of Statutes of Limitations to Actions Against Physicians and Surgeons,* 25 INS. COUNSEL J. 237 (1958); Lillich, *supra* note 7; Note, *Malpractice and the Statute of Limitations,* 32 IND. L.J. 528 (1957).

14 32 IND. L.J., *supra* note 12, at 528-29, 45 ORE. L. REV., *supra* note 7; 12 WYO. L.J. 30, at 31, n. 9 (1957); Hudson v. Moore (sponge not discovered for 14 years), 239 Ala. 130, 194 So. 147 (1940); Giambozi v. Peters (plaintiff contracted syphilis through doctor's failure to test blood used in a transfusion, although partial recovery was permitted on a contract theory), 127 Conn. 380, 16 A.2d 833 (1940); Lewis v. Shaver (unauthorized removal of an ovary and the tying of plaintiff's Fallopian tubes not discovered for 7 years), 236 N.C. 510, 73 S.E.2d 320 (1952).

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

> Indeed, it appears that most jurisdictions, when faced with the set of facts we have presented herein [surgical sponge] would, on one theory or another, allow appellants to come into court and present their claims. To apply the label of "general rule" to respondent's position and "minority rule" to the discovery doctrine is not only misleading but erroneous. If, however, it is necessary to apply labels, it appears that the so-called "general rule" as stated in A.L.R. is in fact the minority rule.

See also, 32 IND. L.J., *supra* note 12, 528, 529.

16 Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923); Kennedy v. Parrot, 243 N.C. 355, 90 S.E.2d 754 (1956).

17 Billings v. Sisters of Mercy, 86 Idaho 485, 491, 389 P.2d 224, 228 (1964). The majority view as reflected by Huysman v. Kirchs, 6 Cal.2d 302, 57 P.2d 908 (1936) states injuries as a result of medical malpractice lie in tort.

18 *See* Lillich, *supra* note 7 for a more detailed explanation of this exception; *see also* 32 IND. L.J., *supra* note 12, at 535-40.

19 Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953); Saffold v. Scarborough, 91 Ga. App. 628, 86 S.E.2d 649 (1955); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956); Adams v. Ison, 249 S.W.2d 791 (Ky. 1952); Lakeman v. LaFrance, 102 N.H. 300, 156 A.2d 123 (1959). The determination of when the party discovers or should have discovered the injury is usually a jury question. *See, e.g.,* Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967).

been extended to *constructive fraudulent concealment* where liability is based upon the doctor's failure to inform his patient where the physician knew or should have known of such injury. Thus the element of actual knowledge has been eliminated.[20]

A more widely used theory is the *continuing treatment* theory (also referred to as the *end of treatment* theory or the *termination* rule). This theory has been used in situations where a doctor leaves a foreign object in the body of the patient and continues to treat him after the operation. The physician is said to be negligent not only in his initial action but also in allowing the object to remain in the patient's body, while the patient is still under his care. According to this analysis, the statute of limitations does not begin to run until the patient leaves the care of the physician.[21] The reasoning is that the patient is not usually aware of the error of the physician, upon whom he continues to rely for treatment. This doctrine was first adopted in the Ohio case of *Gillette v. Tucker*,[22] wherein the failure to discover and remove a sponge left in the patient's body was held to be "continuing negligence" on the part of the physician. Liability was grounded on a breach of an implied contract by the physician to exercise reasonable care. The breach was not deemed to have occurred until the relationship ended, and it was at that point, the statute began to run.[23]

The Ohio approach—the statute runs on the termination of the relationship[24]—[hereinafter referred to as the termination rule], as suggested in *Bowers v. Santee*[25] is said to strengthen the physician-patient relationship in three ways. It is said the patient should have the right to

---

[20] Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944).

[21] Ehlen v. Burrows, 51 Cal. App.2d 141, 124 P.2d 82 (1942); DeHaan v. Winter, 253 Mich. 293, 241 N.W. 923 (1932); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952). *See* Sacks, *Statutes of Limitations in Undiscovered Malpractice*, 16 CLEVE.-MAR. L. REV. 65, 67-68 (1967).

[22] 67 Ohio St. 106, 65 N.E. 865 (1902). The *Gillette* case was overruled by McArthur v. Bowers, 72 Ohio St. 656, 76 N.E. 1128 (1905) (*per curiam*, relying on dissent in *Gillette*), but was subsequently reaffirmed by Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919).

[23] This continuing negligence or treatment theory allows for two closely related interpretations: 1) that the statute of limitation commences to run from the *end of the treatment* as in Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966), or 2) from the *termination of the physician-patient relationship* as in Ohio. Some courts have held that the statute does not begin to run until the end of the treatment only if the subsequent treatment is *"continuingly negligent"* (*i.e.*, the continuing negligence theory); *see* Tortorello v. Reinfeld, 6 N.J. 58, 77 A.2d 240 (1950).

[24] The "termination rule" in the context used here, necessarily is inclusive of any modification of the continuing negligence or treatment theories.

[25] 99 Ohio St. 361, 124 N.E. 238 (1919).

rely on the doctor's ability until their relationship has ended; that the physician is thus protected from premature litigation, and that he has the opportunity to give full treatment, and even correct his errors.

On the other hand, the termination rule (and its modifications) has been subject to wide criticism.[26] Where there is no apparent injury contemporaneous with the negligent act, the application of a rule which uses as its basis the termination of treatment or the termination of the physician-patient relationship will not aid the patient or change the harsh result intended to be relieved. This basis merely extends the period of time before the statute of limitations commences to run by a factor which bears no logical relationship to any *injury* later discovered by a patient. Thus, in cases where the injury is one which requires a long developmental period before becoming dangerous and discoverable, the injured party would still be precluded from recovery, as a result of the statute running before he is even aware of the injury's existence.[27]

Since judicial application of exceptions has not alleviated the harshness of the traditional approach, the courts have begun to reevaluate when a cause of action accrues. The growing trend among the jurisdictions is the adoption of the discovery rule,[28] whereby the statute of limitations does not commence to run until the patient discovers or with due diligence should have discovered his injury.[29] Nineteen states today follow the general rule or a modification of it (*i.e.*, termination rule);[30]

---

[26] *See* Wilder v. St. Joseph Hosp., 225 Miss. 42, 82 So.2d 651 (1955), wherein the court barred the plaintiff's claim although she had suffered for over six years, having been unaware of the source of her pain. One case has specifically rejected the "end of treatment" doctrine: Tessier v. U.S., 269 F.2d 305 (1st Cir. 1959). *See also* 31 FORDHAM L. REV. 842 (1963); 32 IND. L.J., *supra* note 12, 528.

[27] 30 OHIO ST. L.J., *supra* note 6, 429-430.

[28] *See* 3 SUFF. L. REV., *supra* note 5, 614-615 for an excellent view of the growing trend as of 1969.

[29] The doctrine was first asserted in Hahn v. Claybrook, 130 Md. 179, 100 A. 83 (1917). For an excellent discussion of the discovery doctrine, *see* Note, 15 VAND. L. REV. 657 (1962). *See also* 55 IOWA L. REV., *supra* note 5 at 488.

[30] Acton v. Morrison, 62 Ariz. 139, 155 P.2d 782 (1945); Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953); Saffold v. Scarborough, 91 Ga. App. 628, 86 S.E.2d 649 (1955); Mosby v. Michael Reese Hospital, 49 Ill. App.2d 336, 199 N.E.2d 633 (1964); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956); Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917); Waddell v. Woods, 160 Kan. 481, 163 P.2d 348 (1945); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962); Pasquale v. Chandler, 350 Mass. 450, 215 N.E.2d 319 (1966); Wilder v. St. Joseph Hospital, 225 Miss. 42, 82 So.2d 651 (1955); Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943) (*see, also,* MISSOURI STATUTES, § 516.40 [actions for malpractice must be brought within two years from the date of the act]); Cloutier v. Kasheta, 105 N.H. 262, 197 A.2d 627 (1964); Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952); Hinkle v. Hargens, 76 S.D. 520, 81 N.W.2d 888 (1957); Bodne v. Austin, 156 Tenn. 366, 2 S.W.2d 104 (1928) (*See also,* Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 [1934]); Murray v. Allen, 108 Vt. 373, 154 A. 678 (1931); Hawks v. DeHart, 206 Va. 810, 146 S.E.2d 187 (1966); Lotten v. O'Brien, 146 Wis. 258, 131 N.W. 361 (1911).

eight jurisdictions have adopted the discovery rule but have specifically limited it to cases where a foreign object (*i.e.*, surgical sponge, gauze, forceps, etc.) have been negligently left in the patient's body,[31] and fourteen states have adopted the discovery rule for all malpractice cases, regardless of whether a foreign object is involved.[32] Two states have adopted the discovery rule by statute.[33]

The determination to adopt the discovery rule or remain with the traditional rule reveals a conflict between two basic policies of law: 1) The policy of discouraging the fostering of stale claims, and 2) The policy of allowing meritorious claimants an opportunity to present their claims.[34]

Those jurisdictions rejecting the discovery rule may feel that the statute of limitations was established to protect individuals from long and bothersome waiting periods, which 1) yield difficulty in obtaining evidence and defending due to the length of time, and 2) encourage stale claims.[35] This argument is answered by pointing out that the discovery rule when applied to foreign object cases is serving an equitable and just purpose since there is no issue of a stale claim present. Furthermore, statutes of limitations theoretically work against those who willingly

---

[31] Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957) (*Compare,* Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 [1944]); Layton v. Allen, 246 A.2d 794 (Del. 1968); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961) (*See also,* Rothman v. Silber, 90 N.J. Super. 22, 216 A.2d 18 [1966]); Flanagan v. Mt. Eden General Hospital, 24 N.Y.2d 427, 248 N.E.2d 871 (1969); Seitz v. Jones, 370 P.2d 300 (Okla. 1961); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967); Christiansen v. Rees, 20 Utah 2d 199, 436 P.2d 435 (1968); Morgan v. Grace Hospital, 149 W. Va. 783, 144 S.E.2d 156 (1965).

[32] Urie v. Thompson, 337 U.S. 163 (1949); Stafford v. Shultz, 42 Cal.2d 767, 270 P.2d 1 (1954); Yoshizaki v. Hilo Hospital, 433 P.2d 220 (Haw. 1967); Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1969); Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970); Springer v. Aetna Cas. & Surety Co., 169 So.2d 171 (La. App. 1964) (*see* Phelps v. Donaldson, 243 La. 1118, 150 So.2d 35 [1963]; Perrin v. Rodriguez, 153 So. 555 [La. App. 1934]); Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966) (*see* Hahn v. Claybrook, 130 Md. 179, 100 A. 83 [1917]); Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1962); Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819 (1967), citing Johnson v. St. Patrick's Hospital, 148 Mont. 125, 417 P.2d 469 (1966); Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968); Berry v. Branner, 245 Ore. 307, 421 P.2d 996 (1966), overruling Vaughn v. Langmack, 236 Ore. 542, 390 P.2d 142 (1964); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Wilkinson v. Harrington, 243 A.2d 745 (R.I. 1968); Ruth v. Dight, 75 Wash.2d 660, 453 P.2d 631 (1969); United States v. Reid, 251 F.2d 691 (5th Cir. 1958); Brush Beryllium Co. v. Meckley, 284 F.2d 797 (6th Cir. 1960).

[33] ALA. CODE tit. 7, § 25(1); CONN. GEN. STAT. ANN. § 52-58 4 (1958).

[34] Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 489, 389 P.2d 224, 226 (1964).

[35] Owens v. White, 380 F.2d 310, 316 (9th Cir. 1967); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962). The court, in Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 145, 237 N.Y.S.2d 714 (1963) said, "[S]ociety is best served by a complete repose after a certain number of years even at the sacrifice of a few unfortunate cases."

"sleep on their rights," but one who is unaware of any right cannot be said to have done so.[36]

A more difficult and persuasive argument against the adoption of the discovery rule is that statutes of limitations are creatures of the legislature and the clear intent of the legislature should not be cast aside by judicial fiat simply because "it may be considered harsh in its application to malpractice cases."[37] Consequently, it is argued that the adoption of the discovery rule in effect amends the statute of limitations, a function purely legislative in character.[38] Support for this view is found in states where the legislatures have amended the statute of limitations to include the discovery rule for fraudulent concealment but not to malpractice in general,[39] and where there have been unsuccessful attempts by legislative members to do away with the old rule.[40]

Ohio has consistently placed itself with the jurisdictions opposing adoption of the discovery rule, favoring the termination rule.[41] The court's decision to employ the discovery rule rationale is contrary to Ohio's long established position of opposing the adoption of the discovery rule, and which was recently reexamined and reaffirmed by this very court in *Wyler v. Tripi*,[42] which held, "A cause of action for medical malpractice accrues at the latest, when the physician-patient relationship finally terminates."[43]

In *Wyler*, the court referred to the termination rule as a marked departure from the general rule, but conceded nevertheless that in cases where the injury is one which required a long developmental period before becoming dangerous and discoverable, the termination rule affords

---

36 Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224 (1964). *See also* 59 KY. L.J. 990 at 995, where the writer stated, "to deny recovery to the plaintiff when he could not possibly discover the negligent act until after the statute had run would be a far greater injustice than the resulting disadvantage to the defendant."

37 Billings v. Sisters of Mercy of Idaho, 86 Idaho 485 at 506, 389 P.2d 224 at 238 (1964).

38 Hill v. Hays, 193 Kan. 453, 395 P.2d 298 (1964); Philpot v. Stacy, 371 S.W.2d 11 (Ky. 1963).

39 ILL. ANN. STAT. ch. 83 § 23 (Smith-Hurd 1965); *See* N.M. STAT. ANN. § 23-1-7 (1953), WISC. STAT. ANN. § 102.12 (1957).

40 Pasquale v. Chandler, 350 Mass. 450, 215 N.E.2d 319 (1966), where the court cited the legislative history of the statute of limitation and the unsuccessful attempts to modify it which indicated, the court said, "reaffirmation and strengthening of what has been legislative policy...."

41 Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919).

42 Wyler v. Tripi, 25 Ohio St. 164, 267 N.E.2d 419 (1971) in which the plaintiff claimed a negligent diagnosis of x-rays by the doctor resulting in the replacement of her right hip and the subsequent removal of her right leg. Held: Barred by the statute of limitation under the termination of the physician-patient relationship.

43 *Id.* at 164, 267 N.E.2d 419.

little relief.[44] After examining the different jurisdictions on this point and viewing the growing trend away from the general rule and towards the adoption of the discovery rule, the *Wyler* court stated,

> Although an examination of the cases reveals that there is much to recommend the adoption of the discovery rule, we reluctantly conclude the courts of Ohio should not decree such an adoption. We are convinced that to do so would place us in the obvious and untenable position of having not only legislated, but of having done so directly in the face of a clear and opposite legislative intent.[45]

The *Wyler* court then emphasized legislative opposition to the discovery rule by citing several bills that had been before the legislature, including one specifically adopting the discovery rule, but had not been passed. Moreover, the court pointed out the legislature had nevertheless created certain exceptions to the general termination rule and tolled the statute. Furthermore, the court pointed to three states which had adopted the discovery rule by legislative enactment and noted this as an affirmation of their belief that adoption of the discovery rule was a legislative prerogative. The court concluded its rejection of the discovery doctrine by stating, "[We] refrain from judicially adopting that which has so clearly been legislatively rejected."[46]

Notwithstanding this very analytical and recent pronouncement of the court's position, this same court in the instant case employed the discovery rule rationale, holding the statute of limitation would be tolled until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the negligent act.[47] However, the court limited the holding to the particular facts of *Melnyk*, distinguished the case with *Wyler*, and refused to adopt the discovery rule, either in general, or even specifically, in foreign object cases. Apparently, in view of the *Wyler* rationale, the court was only prepared to go as far as it felt it had to go in order to insure an equitable result.

The *Melnyk* court has completely abandoned the rationale which served as the basis and justification for the *Wyler* decision, namely, that of legislative prerogative in this area. However, in so doing, the court did not adopt the natural conclusion such an abandonment inevitably implies—the adoption of the discovery rule—at least limited to foreign object cases. While the Ohio Supreme Court took great pains to distinguish *Melnyk* and *Wyler*, based upon the absence of foreign objects

---

[44] *Id.* at 168, 267 N.E.2d at 421.

[45] *Id.* at 170-171, 267 N.E.2d at 423. The court referred to Pasquale v. Chandler, *supra* note 40, for support.

[46] Wyler v. Tripi, 25 Ohio St. 164, 171-172, 267 N.E.2d 419, 424.

[47] Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972).

in the latter, and therefore the problems of the defense of stale claims does not exist[48] (such is not an issue in a foreign object case for the objects themselves are evidence of a true and realistic claim) the distinction in essence is an artificial one. This is evident because the Court's sole basis for its decision in *Wyler* was the recognition of the legislative prerogative in this area—a basis equally applicable in *Melnyk*. The *Wyler* Court's holding against adopting the discovery rule rests completely on the legislative prerogative rationale, and no mention was made at all of the policy of discouraging stale claims with their ensuing burden on the defendant in gathering evidence.

It is clear from a thorough analysis of *Wyler* and *Melnyk* that the Ohio Supreme Court has sidestepped its own judicial function in fear of encroaching upon her sister branch. The Supreme Court of Ohio stated in *DeLong v. Campbell*,[49] with regard to the issue of the statute of limitation, that the court's "sole function is to interpret and enforce legislative enactment." The Ohio statute in issue is phrased in general terminology and requires only that the statute of limitation commences running "after the cause of action thereof accrued."[50] The statute set the limit within which to sue but left undetermined the question of when the cause of action actually accrues. What the Ohio Supreme Court has refused to recognize is that it, the Court, has already determined in *Gillette v. Tucker*,[51] when a cause of action accrues. Ohio's adoption of the termination rule has always been the product of judicial interpretation, not legislative promulgation. The Judiciary has always been the branch of government to determine at what point in time a cause of action actually accrues and when a statute commences to run. The instant case reaffirms this fact.

Strong support for the judicial role in the interpretation of statutory language involving statutes of limitation is found in other jurisdictions. The Supreme Court of Oregon, when recently confronted with this issue (it is to be noted the legislative history is very similar to the Ohio legislative history explored in *Wyler*) stated:

> It is contended that the failure of the legislature to pass bills . . . which would have ameliorated the harshness of the [general] rule shows the legislature is cognizant of the problem and desires no change. The fallacy in this argument is that no one knows why the legislature did not pass the proposed measures. . . . Legislative inaction is weak reed upon which to lean in determining legislative intent.[52]

---

[48] *Id.* at 200, 290 N.E.2d at 917.

[49] DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952).

[50] OHIO REV. CODE § 2305.11 (Page 1953).

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

[52] Berry v. Branner, 421 P.2d 996, 998 (Ore. 1966).

The Court further stated:

> The contention is made that a decision of this kind amounts to judicial legislation. The legislature, however, did not provide that the time of accrual was when the physician performed the negligent act. This Court did. The legislature left the matter undetermined. A determination that the time of accrual is the time of discovery is no more judicial legislation than it is the time of the commission of the act.[53]

In *Fernandi v. Strully*,[54] the New Jersey Supreme Court, in adopting the discovery rule, stated:

> The rather obscure nature of the legislative phraseology is amply attested by the frequency of the cases in which courts have been required to pass on when the cause of action may properly be said to have accrued. . . . [T]he question when a cause of action accrues is a judicial one, and to determine it in any particular case is to establish a general rule of law for a class of cases, which rule must be founded on reason and justice.[55]

In a factual situation virtually the same as the instant case, the Supreme Court of Appeals of West Virginia held in adopting the discovery rule that: "We are merely called upon to construe the statute as it was enacted by the legislature and that function is one peculiarly for the judicial branch of government."[56]

Considering the above support from other jurisdictions, and a proper analysis of the role of the judiciary in formulating the "termination rule" in Ohio in the past, there is no reason why one judicial pronouncement (the termination rule) should be given any more weight than another.[57] This is especially true in light of the fact that the reasons behind that decision are no longer valid.[58] The discovery rule should be adopted in Ohio, if not completely, then definitely in all foreign object cases.

ALAN J. SOBOL

---

[53] *Id.* at 999. The court also answered the argument concerning the legislature's expressed adoption of discovery for fraud and deceit and not for malpractice in general. *See* 421 P.2d 996, 997-999.

[54] Fernand v. Strully, 35 N.J. 434, 173 A.2d 277 (1961).

[55] *Id.* at 449, 173 A.2d at 285.

[56] Morgan v. Grace Hospital, 149 W. Va. 783, 144 S.E.2d 156 (1965).

[57] 30 OHIO ST. L.J., *supra* note 6, at 432.

[58] The contractual basis upon which the physician-patient relationship approach rests was all but ignored by the Ohio Supreme Court in the *DeLong* case. It was completely done away with in the case of Swankowacha v. Dicthelm, 98 Ohio App. 271, 129 N.E.2d 182 (1953).