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Casenotes: Statute of Limitations — Medical Malpractice — Constitutional Law — Five Year Statute of Repose on Medical Malpractice Claims That Commences When an Injury Occurs Is Constitutional. *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985)

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CASENOTES

STATUTE OF LIMITATIONS — MEDICAL MALPRACTICE — CONSTITUTIONAL LAW — FIVE YEAR STATUTE OF REPOSE ON MEDICAL MALPRACTICE CLAIMS THAT COMMENCES WHEN AN INJURY OCCURS IS CONSTITUTIONAL. *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985).

In February of 1975, a physician misdiagnosed a patient as suffering from multiple sclerosis.¹ The physician continued to treat the patient based upon this misdiagnosis until November of 1975.² Thereafter, the patient's deteriorated condition continued and the patient sought the care of another doctor.³ On December 5, 1980, the second doctor performed surgery on the patient which revealed that the patient had actually been suffering from a spinal tumor. The tumor left the patient permanently paralyzed from the waist down.⁴

On December 2, 1983, the patient filed a malpractice action in the United States District Court for the District of Maryland against his initial physician for negligent misdiagnosis.⁵ The physician moved for summary judgment, contending that Maryland's medical malpractice statute of limitation, section 5-109 of the Court's Article, barred the patient's cause of action.⁶ The patient argued that section 5-109 was inapplicable because the misdiagnosis occurred before section 5-109 became effective.⁷

The federal court certified to the Court of Appeals of Maryland three questions of law to determine the applicability of section 5-109.⁸

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1. See *Hill v. Fitzgerald*, 304 Md. 689, 694, 501 A.2d 27, 29 (1985). The parties stipulated that "the initial misdiagnosis of multiple sclerosis was made not later than February of 1975." *Id.*
 2. *Id.* at 692, 501 A.2d at 28. The physician concluded treatment when he told the patient that he could do nothing more to correct the patient's multiple sclerosis. Brief for Appellee at 6, *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985).
 3. 304 Md. at 692, 501 A.2d at 28.
 4. Brief for Appellant, at 3, *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985).
 5. 304 Md. at 692, 501 A.2d at 28.
 6. *Id.* at 693, 501 A.2d at 28-29. The physician argued that the statute of limitations commenced on the last day of treatment, November 5, 1975. Because the patient failed to file his medical malpractice action within five years of that day, his claim was barred. *Id.* at 694, 501 A.2d at 28-29.
 7. *Id.* at 693, 501 A.2d at 29. The patient asserted that section 5-109 became effective on July 1, 1975. He reasoned that, because his "injury" occurred before section 5-109's effective date, section 5-101 should be the applicable statute. Under section 5-101, he had three years from the date of discovery to file his action. He discovered the misdiagnosis on December 5, 1980, and filed his action on December 2, 1983. Therefore, his action was filed within section 5-101's three year limitation period. *Id.*
 8. *Id.* at 691, 501 A.2d at 28. See Uniform Certification of Questions of Law Act, MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to -609 (1984 & Supp. 1987). The certified questions were as follows:
 1. Where there is a continuous course of medical treatment for a single medical condition, where such treatment begins before July 1, 1975, and concludes after July, 1975, is § 5-109 the applicable statute of limitations?
 2. If § 5-109 is the applicable statute of limitations under such circum-

The court of appeals held: (1) section 5-109 is only applicable to injuries occurring after July 1, 1975,⁹ (2) the limitations period of section 5-109 commences when the plaintiff suffers some harm caused by the defendant's negligent act,¹⁰ and (3) section 5-109 is constitutional even though it bars medical malpractice actions that are filed more than five years after the plaintiff's injury occurs.¹¹

Legislatures have enacted limitation statutes that restrict the amount of time a plaintiff may institute an action to insulate the judicial system from stale claims, to ensure actions are instituted promptly, and to treat defendants fairly.¹² Plaintiffs who fail to enforce their legal rights diligently within a reasonable time should be precluded from forcing another to defend against legal action for past acts.¹³ Otherwise, tort victims could bring legal action when "evidence has been lost, memories have faded, and witnesses have disappeared."¹⁴

Although legislatures, through limitation statutes, have attempted to treat plaintiffs and defendants fairly, public policy concerns for defendants traditionally have outweighed those of plaintiffs.¹⁵ Reflecting these concerns, limitation periods ran from one to three years in length¹⁶ and commenced when a cause of action "accrued."¹⁷ Under the traditional approach, accrual dates were strictly construed by the courts. Consequently, limitation periods began when the alleged negligent act or omission occurred.¹⁸ Claims brought after the specified period were

stances, when does the five (5) year portion of that statute begin to run, and when does the three (3) year portion of that statute begin to run?

3. Is § 5-109 unconstitutional as being in violation of Article 19 of the Maryland Declaration of Rights?

9. 304 Md. at 698-99, 501 A.2d at 32.
10. *Id.* at 697, 501 A.2d at 31.
11. *Id.* at 703, 501 A.2d at 34.
12. See *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944); *New Market Poultry Farms, Inc. v. Fellows*, 51 N.J. 419, 425, 241 A.2d 633, 636 (1968); see also 1 WOOD, LIMITATIONS 8-9 (4th ed. 1916); *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments*].
13. See *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868); *Developments*, *supra* note 12, at 1185; see also W. PROSSER & W. KEETON, THE LAW OF TORTS 165 (5th ed. 1984) [hereinafter PROSSER & KEETON].
14. See *Railroad Telegraphers*, 321 U.S. at 349; see also WOOD, *supra* note 12, at 8-11; D. HARNEY, MEDICAL MALPRACTICE 259-60 (1973 & Supp. 1980) [hereinafter HARNEY].
15. See *Developments*, *supra* note 12, at 1205 ("As between the duly diligent plaintiff and the wrongdoer, the courts have been unnecessarily sympathetic towards the latter")
16. See, e.g., IND. CODE ANN. § 34-1-2-2 (Burns 1963) (two years); MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1957) (three years); N.D. CENT. CODE § 28-01-18 (1969) (two years); OHIO REV. CODE ANN. § 2305.11 (1974) (one year); TEX. REV. CIV. STAT. ANN. § 16.003 (Vernon 1985) (two years) (citing art. 5526).
17. See *Developments*, *supra* note 12, at 1200. R. Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 357-58 (1962).
18. *E.g.*, *Bolen v. Bolen*, 409 F. Supp. 1374 (W.D. Va. 1976); *Cappuci v. Barone*, 266

barred even if the delay in bringing the action was justified.¹⁹

Ordinarily, a tort victim knows he has a cause of action when he perceives some physical harm and links that harm to the negligent act of another.²⁰ In medical malpractice cases, however, a patient's injury often manifests in an injury that is identifiable only by those specially educated and trained in the health field.²¹ Patients who have sustained such "inherently unknowable" harm often fail to realize within the limitations period that a cause of action has accrued.²² Under the traditional approach, their actions were barred even though they had no indication that a cause of action existed.²³

To avoid this harsh result, courts began to liberally interpret the accrual date by implementing the "discovery rule."²⁴ Under this rule, the statutory period commences when the patient either knows or, through due diligence, should have known that a wrong was committed against him.²⁵ Consequently, the common law discovery rule furnishes medical malpractice plaintiffs with a longer, more equitable amount of time to bring suit.²⁶

The traditional limitation statute also was mitigated by the "continuing course of treatment rule."²⁷ When a physician's negligence consists

Mass. 578, 581, 165 N.E. 653, 654-55 (1929); *Tantish v. Szendey*, 158 Me. 228, 182 A.2d 660 (1962); 1976 N.M. Laws 13. See also Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417, 1429 ("an act or omission and not the resulting damage . . . gives rise to a cause of action") [hereinafter *Legislative Responses*]; 1 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* ¶¶ 13.06 n. 50 (1986) [hereinafter *LOUISELL & WILLIAMS*].

19. See *United States v. Reid*, 251 F.2d 691, 694 (5th Cir. 1958); see also *Legislative Responses*, *supra* note 18, at 1429; *Developments*, *supra* note 12, at 1200.
20. See *Reid*, 251 F.2d at 694; see also *Developments*, *supra* note 12, at 1203; *Abrahams, Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489, 501-02 (1977); Annotation, *Where Statute of Limitations Commences to Run Against Actions Against Physicians, Surgeons, or Dentists for Malpractice*, 80 A.L.R.2d 368, 372 (1961 & 1970 & Supp. 1986) [hereinafter Annotation, *Statute of Limitations*].
21. See *Developments*, *supra* note 12, at 1222.
22. *Id.*; see also *PROSSER & KEETON*, *supra* note 13, at 165; *Developments*, *supra* note 12, at 1201.
23. See, e.g., *Hill v. Hays*, 193 Kan. 453, 395 P.2d 298 (1964); *Tantish v. Szendey*, 158 Me. 228, 182 A.2d 660 (1962).
24. See, e.g., *Lipsey v. Michael Reese Hosp.*, 46 Ill. 2d 32, 262 N.E.2d 450 (1970); *Perrin v. Rodriguez*, 153 So. 555 (La. Ct. App. 1934); *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961); *Ruth v. Dight*, 75 Wash. 2d 660, 453 P.2d 631 (1969); see also 1 LOUISELL & WILLIAMS, *supra* note 18, at ¶ 13.07; Annotation, *Statute of Limitations*, *supra* note 18, at 387; *Legislative Responses*, *supra* note 18, at 1431-32.
25. See 1 LOUISELL & WILLIAMS, *supra* note 18, at ¶ 13.07.
26. See, e.g., *Yoshizaki v. Hilo Hosp.*, 50 Hawaii 150, 433 P.2d 220 (1967); *Lipsey v. Michael Reese Hosp.*, 46 Ill. 2d 32, 262 N.E.2d 450 (1970); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967); see also Annotation, *Statute of Limitations*, *supra* note 20, at 387; 1 LOUISELL & WILLIAMS, *supra* note 18, at ¶ 13.07; *Developments*, *supra* note 12, at 1200.
27. See *Lillich*, *supra* note 17, at 334-37; Annotation, *When Statute of Limitations Commences to Run Against Actions Against Physicians, Surgeons, or Dentists for Malpractice*, 74 A.L.R. 1317, 1322-24 (1931); Annotation, *When Statute of Limitations Commences to Run Against Actions Against Physicians, Surgeons, or Dentists for*

of a continuing course of misconduct or impropriety within a course of treatment, the continuing treatment rule tolls the limitation statute until treatment for the particular illness or condition has terminated.²⁸ The rule is inapplicable, however, when the patient knows or, through due diligence, should know that negligence occurred during treatment.²⁹

As a result of the discovery rule and the continuing course of treatment rule, the number of medical malpractice plaintiffs expanded substantially.³⁰ The insurance industry and medical profession claim that this expansion has contributed significantly to the current medical malpractice insurance crisis.³¹ By extending the amount of time between a medical treatment and final resolution of all claims connected with that treatment,³² the two rules create a "long tail" to medical malpractice actions.³³ Also, under these rules, the length of the limitations period

Malpractice, 144 A.L.R. 209, 227-34 (1943); Annotation, *Statute of Limitations*, *supra* note 20, at 384-86. New York codified this rule in N.Y. Civ. Prac. Law § 214-a (McKinney Supp. 1983-1984).

28. *E.g.*, *McDermott v. Torre*, 56 N.Y.2d 399, 437 N.E.2d 1108, 452 N.Y.S.2d 351 (1982); *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962). See 1 LOUISELL & WILLIAMS, *supra* note 18, at ¶ 13.08.

The continuing treatment rule is often applied when a surgeon leaves a foreign object in a patient's body and continues to treat the patient without discovering the object. See, *e.g.*, *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943); *Sly v. Van Lengen*, 120 Misc. 420, 198 N.Y.S. 608 (N.Y. Sup. Ct. 1923).

In some jurisdictions that recognize the continuing treatment rule, the statutes commence when the doctor-patient relationship terminates. See *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978); *Bowers v. Santee*, 99 Ohio St. 361, 124 N.E. 238 (1919). In other jurisdictions, the statutes commence when the last negligent act occurs. See *Tortorello v. Reinfeld*, 6 N.J. 58, 77 A.2d 240 (1950); *Hotelling v. Walther*, 169 Or. 559, 130 P.2d 944 (1942).

29. See, *e.g.*, *Hundley v. St. Francis Hosp.*, 161 Cal. App. 2d 800, 327 P.2d 131 (1958); *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978); *McFarland v. Connally*, 252 S.W.2d 486 (Tex. Civ. App. 1952). *But see* *Ishler v. Miller*, 56 Ohio St. 2d 447, 384 N.E.2d 296 (1978) (discovery rule should not apply to the period prior to termination of the doctor-patient relationship).
30. See *Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 760-01 (1977); *Abrahams, supra* note 20, at 490-92; 2 LOUISELL & WILLIAMS, *supra* note 18, at ¶ 20.07.
31. See *Annas, Katz, & Trakimas, Medical Malpractice Litigation Under National Health Insurance: Essential or Expendable?* 1975 DUKE L.J. 1335, 1336 n.7 [hereinafter *Annas*]; *Legislative Responses, supra* note 18, at 1417; *Redish, supra* note 30, at 759-60.

Commentators, however, have expressed doubt as to whether a "crisis" exists. See *Aitken, Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 INS. L.J. 90 (1976); 2 LOUISELL & WILLIAMS, *supra* note 18, at ¶ 20.07 n.55.

32. See *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 392 (Iowa 1982); *Ross v. Kansas City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397 (Mo. 1980). Modification of statutes of limitations is viewed by some commentators as having only a minor effect on the crisis. See also *Abrahams, supra* note 20, at 501. (Because statutes of limitation deal only with that portion of the tail that is between the negligent act and the filing of an action, the impact of limitation reform on the length of the tail is limited.); *White & McKenna, Constitutionality of Recent Malpractice Legislation*, 13 FORUM 312, 315 (1977) [hereinafter *White & McKenna*].
33. See *Redish, supra* note 30, at 760-01; *Comment, Recent Medical Malpractice Legislation — A First Checkup*, 50 TUL. L.R. 655-73 (1976) [hereinafter *Checkup*]. For

depends upon the facts of each case.³⁴ Insurers complain that, without a definite period in which liability can be predicted, they are unable to set affordable and adequate insurance premiums.³⁵ Consequently, while premiums have increased and availability has decreased, the additional cost has been passed to the patients³⁶ and some physicians have been forced to leave their profession.³⁷

To eliminate the insurers' inability to predict future claims, legislatures enacted medical malpractice statutes of repose.³⁸ These statutes place an absolute bar on the amount of time a patient may file an action for medical malpractice.³⁹ Running from two to ten years in length,⁴⁰ the new statutes of repose commence either when the negligent act oc-

other factors responsible for this medical malpractice crisis, see Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 145 (1981) [hereinafter *Compensation Schemes*].

34. See Redish, *supra* note 30, at 765. ("[T]he rate-determining process is dependent upon knowing with some degree of certainty the total potential losses for a policy year, and any extension of the statutory period makes rate-setting that much more difficult.") (quoting United States Dep't of Health, Educ. & Welfare, Pub. No. (OS) 73-88, *Medical Malpractice: Report of the Secretary's Comm'n on Medical Malpractice* 22, 30 (1973)); see also, *Legislative Responses*, *supra* note 18, at 1429.
35. See Redish, *supra* note 30, at 765; Abrahams, *supra* note 20, at 491-92.
36. See 2 LOUISELL & WILLIAMS, *supra* note 18, at ¶ 20.07; PROSSER & KEETON, *supra* note 13, at 168; Hirsh, *Malpractice Crisis of the '80s, Part 1*, 13 LEG. ASP. OF MED. PRAC. (10) 5-8 (1985); Redish, *supra* note 30, at 760-61.
37. See *Legislative Responses*, *supra* note 18, at 1429; *Compensation Schemes*, *supra* note 33, at 143; Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 200 n.16 (1985); Hirsh, *Malpractice Crisis of the '80s, Part 7*, 14 LEG. ASP. OF MED. PRAC. (4) 3, 4 (1986).
38. See, e.g., FLA. STAT. ANN. § 95.11(4)(b) (West 1982) (maximum four-year limit); IOWA CODE ANN. § 614.1.9 (West 1986) (maximum six-year limit); LA. REV. STAT. ANN. § 9.5628(A) (West 1983) (maximum three-year limit). See also Hallagan & Hirsh, *Statute of Limitations — On a Clear Day You Can See Forever*, 14 LEG. ASP. OF MED. PRAC. (1) 1, 3 (1986); *Legislative Responses*, *supra* note 18, at 1432-36; Redish, *supra* note 30, at 766; 1 LOUISELL & WILLIAMS, *supra* note 18, at ¶ 13.01-.02; 2 LOUISELL & WILLIAMS, *supra* note 18, at ¶ 20.07; PROSSER & KEETON, *supra* note 13, at 167.

Other forms of malpractice legislation include "(1) elimination of the ad damnum clause from pleadings; (2) modification of the collateral source rule; (3) limitations on the kind and amount of damages recoverable; (4) mandatory insurance; (5) abolition of punitive damages; and (6) establishment of screening panels or mandatory arbitration." White & McKenna, *supra* note 32, at 312 n.2.

39. See, e.g., CAL. CIV. PRO. CODE § 340.5 (West 1982) (action must be commenced within three years of injury or discovery, whichever is first); COLO. REV. STAT. § 13-80-105 (1973) (discovery rule with six-year cap); FLA. STAT. ANN. § 95.11(4)(a) (West 1982) (discovery rule with four-year cap); IOWA CODE ANN. § 614.1.9 (West Supp. 1986); KAN. STAT. ANN. § 60-513(c) (1983) (modified discovery rule with four-year cap); LA. REV. STAT. 9:5628A (West 1983) (modified discovery rule with three-year cap); MO. ANN. STAT. § 516.105 (Supp. 1986) (modified discovery rule with ten-year cap); OHIO REV. CODE ANN. § 2305.11 (1981) (within one year of accrual and four-year cap); TENN. CODE ANN. § 29-26-116 (1980); TEX. REV. CIV. STAT. ANN. art. 4590i § 10.01 (Vernon 1977) (two-year absolute limit).
40. See *supra* note 39.

curs or when the claimant suffers harm as a result of that act.⁴¹ Many of these statutes allow exceptions for minors and for others whose delay in filing an action was caused by the physician's fraudulent concealment or by the surgeon's failure to remove foreign objects.⁴²

Plaintiffs have argued that the absolute time limitation on the right of action violates, *inter alia*, due process, equal protection, and the right of access to the courts.⁴³ To determine the constitutionality of these statutes, courts have applied either the rational basis test or the strict scrutiny test.⁴⁴ When a statute discriminates against a suspect class or significantly interferes with a fundamental right, courts implement the strict scrutiny test.⁴⁵ Under the strict scrutiny test, a statute is upheld only if a compelling state interest is furthered and the regulation is necessary to achieve that state interest.⁴⁶ Under the rational basis test, however, a statute is upheld if it serves a legitimate state interest and the interference rationally furthers that interest.⁴⁷

The constitutionality of the statutes of repose are usually upheld under the rational basis test.⁴⁸ Courts have held that the strict scrutiny

41. See, e.g., ARIZ. REV. STAT. ANN. § 12-564A (repealed 1985) (date of injury); IND. CODE ANN. § 16-9.5-3-1 (Burns Supp. 1986) (date of negligent act); ORE. REV. STAT. § 12.110(4) (1983) (date of negligent act); see also HARNEY, *supra* note 14, at §§ 8.5, 8.1(B) (1977 & Supp. 1980).

42. See, e.g., CAL. CIV. PRO. CODE § 340.5 (West 1982) (commencement of action may exceed maximum three-year limitation for fraud, intentional concealment, foreign object, or a minor); COLO. REV. STAT. § 13-80-105 (1973) (exceptions for foreign objects); ORE. REV. STAT. § 12.110(4) (1983) (action must be brought within two years after fraud discovered or should have been discovered).

43. See, e.g., *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984) (due process, equal protection, and access to courts); *Austin v. Lituak*, 682 P.2d 41 (Colo. 1984) (due process and equal protection); *Shessel v. Stroup*, 253 Ga. 56, 316 S.E.2d 155 (1984) (equal protection); *Holmes v. Iwasa*, 104 Idaho 179, 657 P.2d 476 (1983) (due process and equal protection); *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985) (access to courts). See also Smith, *supra* note 37, at 222; White & McKenna, *supra* note 32, at 312.

44. See Redish, *supra* note 30, at 769-70; Smith, *supra* note 37, at 214.

45. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 300, 338-339 (1972). A fundamental right is one which is "explicitly or implicitly guaranteed by the constitution." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

46. See *San Antonio*, 411 U.S. 1. Under this test, the Supreme Court usually will find the statute irrational.

47. See, e.g., *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

The interference is constitutional if it is reasonable, not wholly arbitrary or capricious. See, e.g., *West Coast Hotel Co. v. Parnish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502, 530 (1934); *Munn v. Illinois*, 94 U.S. 113 (1876). See also *Legislative Responses*, *supra* note 18, at 1420.

48. See, e.g., *Brubaker v. Cavanaugh*, 741 F.2d 318 (10th Cir. 1984); *Reese v. Rankin Fite Memorial Hosp.*, 403 So. 2d 158 (Ala. 1981); *Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976); *Kite v. Campbell*, 142 Cal. App. 3d 793, 191 Cal. Rptr. 363 (1983); *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979), *appeal dismissed sub nom.*, *Woodward v. Burnham City Hosp.*, 449 U.S. 807 (1980); *Laughlin*

test is inapplicable because statutes of repose are considered only a procedural bar to a remedial action, not a substantive bar to the underlying right to bring an action.⁴⁹ Notwithstanding, some courts have held that these statutes are constitutional under the rational basis test because no legitimate state interest existed.⁵⁰ Other courts have held that these statutes are constitutional under the strict scrutiny test because the statute barred the underlying right to bring an action and no compelling state interest justified the interference.⁵¹

In Maryland, before the alleged medical malpractice insurance crisis, medical malpractice actions were governed by section 5-101 of the Court's Article.⁵² Section 5-101 is a general statute of limitation that bars civil actions that are filed more than three years after the action has accrued.⁵³ As a general rule, limitations against civil actions commenced when the alleged wrong occurred, not when the alleged wrong was discovered.⁵⁴ Recognizing the inequity of this rule as applied to diligent

v. Forgrave, 432 S.W.2d 308 (Mo. 1968). *But cf.* American Bank & Trust v. Community Hosp., 33 Cal. 3d 674, 190 Cal. Rptr. 371, 660 P.2d 829 (1983) (damage statute invalidated because irrational); Boucher v. Sayeed, 459 A.2d 87, 89 (R.I. 1983) (medical malpractice statutes unconstitutional because alleged malpractice "crisis" no longer exists); *see also* Smith, *supra* note 37, at 208-09.

49. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945) (limit that bars only remedial right does not create a property right protected by the due process clause and therefore does not destroy the fundamental right of access); Hargraves v. Brackett Stripping Machine Co., 317 F. Supp. 676, 682-83 (E.D. Tenn. 1970) (if not arbitrary or capricious, statute of limitation does not violate due process); *see also* *Developments*, *supra* note 12, at 1186-88 (distinguishing between substantive and procedural effects of statutes of limitation).

50. *See* Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) (maximum limit unconstitutional under rational basis test because it placed an unreasonable condition on right of access). *Cf.* American Bank & Trust v. Community Hosp., 33 Cal. 3d 674, 190 Cal. Rptr. 371, 660 P.2d 829 (1983) (damages statute invalidated under rational basis test).

51. *See* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (the right to bring a medical malpractice action is a fundamental right; intermediate test used to invalidate statute); Carson v. Mauer, 120 N.H. 925, 936, 424 A.2d 825, 833 (1980) (statute of limitations cannot run until injury and cause are discovered; strict scrutiny applied to invalidate statute); Ayers v. Horgen, 397 Pa. 282, 294, 154 A.2d 788, 794 (1959) (without judicial discretion to apply discovery rule, statute of limitations is unconstitutional as a deprivation of due process); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984). *Cf.* White v. State, 661 P.2d 1272 (Mont. 1983) (damage cap unconstitutional under strict scrutiny). *See also* Comment, *Blasting the Cap: Constitutional Issues Arising from Maryland's Limitation of Noneconomic Damages in Personal Injury Claims*, 16 U. BALT. L. REV. 326 (1987).

52. *See* Lutheran Hosp. v. Levy, 60 Md. App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985); Decker v. Fink, 47 Md. App. 202, 422 A.2d 389 (1980); Walko v. Burger Chef Systems, Inc., 281 Md. 207, 378 A.2d 1100 (1977).

53. MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984) provides:

A civil action at law shall be filed within three years from the date it accrues unless another provision of the code provides a different period of time within which an action shall be commenced.

54. *See* Killen v. George Wash. Cemetery, 231 Md. 337, 190 A.2d 247 (1963).

medical malpractice plaintiffs,⁵⁵ Maryland courts applied the discovery rule and the continuing course of treatment rule where equity dictated.⁵⁶

In reaction to the medical malpractice crisis, however, the Maryland General Assembly passed section 5-109 of the Court's Article.⁵⁷ To limit health care provider liability and provide insurers with a predictable period of potential liability, section 5-109 places a five-year or three-year limitation period on medical malpractice actions:⁵⁸

An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider . . . shall be filed

- (1) within five years of the time the injury was committed, or
- (2) within three years of the date when the injury was discovered, whichever is the shorter.

The only express exception to section 5-109 is for claimants under the age of sixteen.⁵⁹

55. See *Waldman v. Rohrbaugh*, 241 Md. 137, 215 A.2d 825 (1966); *Hahn v. Claybrook*, 130 Md. 179, 100 A. 83 (1917).

56. See *Waldman*, 241 Md. 137, 215 A.2d 825.

57. 1975 MD. LAWS 545 (codified as MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1984)). See also Quinn, *The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis*, 10 U. BALT. L. REV. 74, 77-78 (1980); Note, *Poffenberger v. Risser-The Discovery Principle is the Rule, Not the Exception*, 41 MD. L. REV. 451, 459 n.63 (1982).

58. MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1984).

Although section 5-109 as originally enacted in 1975 was repealed and replaced by the Md. General Assembly 1987 MD. LAWS 592 (codified as MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (Supp. 1987)), the statutory language used in the new section 5-109 is similar to the old section 5-109. Therefore, the *Hill* court's interpretation of 5-109 is still relevant.

Subsection (a) of new section 5-109 provides:

An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider . . . shall be filed within the earlier of:

- (1) Five years of the time the injury was committed; or
- (2) Three years of the date the injury was discovered.

59. MD. CTS. & JUD. PROC. CODE ANN. § 5-109 states: "If the claimant was under 16 years of age at the time the injury was committed, the time shall commence when he reaches the age of 16."

New section 5-109 provides the following exceptions:

(b) *Actions by claimants under age 11.* — Except as provided in subsection (c) of this section, if the claimant was under the age of 11 years at the time the injury was committed, the time limitations prescribed in subsection (a) of this section shall commence when the claimant reaches the age of 11 years.

(c) *Exceptions to age limitations in certain actions.* —

(1) The provisions of subsection (b) of this section may not be applied to an action for damages for an injury:

- (i) To the reproductive system of the claimant; or
- (ii) Caused by a foreign object negligently left in the claimant's body.

In *Hill v. Fitzgerald*,⁶⁰ the Court of Appeals of Maryland determined the applicability, operation, and constitutionality of section 5-109. Under section 5-109, the three-year period begins upon the plaintiff's subjective discovery of an injury.⁶¹ The five-year period, however, begins when "injury" first occurs.⁶² Injury occurs when the alleged negligent act is first coupled with some harm.⁶³ The court determined that the five-year limitation is an absolute bar to medical malpractice actions⁶⁴ and cannot be extended by judicial mitigators.⁶⁵ Finally, the court held section 5-109 constitutional under Article 19 of the Maryland Declaration of Rights.⁶⁶ Applying the rational basis test, the court declared that the statute is a reasonable limitation rationally related to the statute's purpose — containing the long tail effect.⁶⁷

Section 5-109 modifies the common law discovery rule in two ways. First, section 5-109 allows a patient to file an action up to three years after he discovers an injury, but in no event longer than five years from the date the injury actually occurred.⁶⁸ Under common law, a patient had three years from discovery to institute an action regardless of when discovery occurred, as long as the discovery was reasonable.⁶⁹ This time period offered the patient a fair and equitable time to file suit.

Under section 5-109, however, the common law discovery rule and its underlying equitable principles are cut off after a period of only five

(2) In an action for damages for an injury described in this subsection, if the claimant was under the age of 16 years at the time the injury was committed, the time limitations prescribed in subsection (a) of this section shall commence when the claimant reaches the age of 16 years.

(d) *Effect of filing claim.* — For the purposes of this section, the filing of a claim with the Health Claims Arbitration Office in accordance with § 3-2A-04 of this article shall be deemed the filing of an action.

(e) *Effect of other provisions.* — The provisions of § 5-201 of this title that relate to a cause of action of a minor may not be construed as limiting the application of subsections (b) or (c) of this section.

(f) *Application.* — Nothing contained in this section may be construed as limiting the application of the provisions of:

(1) § 5-201 of this title that relate to a cause of action of a mental incompetent; or (2) § 5-203 of this title (fraud).

60. 304 Md. 689, 501 A.2d 27.

61. See *Hill v. Fitzgerald*, 304 Md. 689, 699, 501 A.2d 27, 39 (1985).

62. *Id.* at 696-97, 501 A.2d at 30-32. In *Oxtoby v. McGowan*, 294 Md. 83, 447 A.2d 860 (1982), the Court of Appeals of Maryland interpreted the term "injury" in the context of the Health Care Malpractice Claims Act contained in the Court's Article.

63. *Hill*, 304 Md. at 699-700, 501 A.2d at 32.

64. *Id.*

65. *Id.*

66. *Id.* at 703, 501 A.2d at 34. Article 19 guarantees the right of access to the courts. See MD. CONST. D. OF R., art. 19.

67. *Id.* at 703, 501 A.2d at 34.

68. *Hill*, 304 Md. at 699, 501 A.2d at 32. "The five-year maximum period . . . will run its full length only . . . where the three-year discovery provision does not operate to bar an action at an earlier date." *Id.* at 700, 501 A.2d at 32-33.

69. See *supra* note 25 and accompanying text.

years.⁷⁰ Neither physical manifestation of injury nor knowledge of the cause of action is relevant.⁷¹ Consequently, the absolute maximum time limit may bar remedial action at law before the patient discovers or could discover that a wrong occurred.⁷² Therefore, the discovery rule under section 5-109 is useless to an injured patient who is unable to detect any harm or distinguish between residual effects and negligently caused results.

Second, under section 5-109, "discovery" of a cause of action apparently occurs when the patient actually discovers his injury.⁷³ Under this subjective standard, the patient's failure to act reasonably is irrelevant. Under common law, discovery occurred when a reasonable person in the same or similar circumstances would have or should have discovered the injury.⁷⁴ By replacing the objective standard with a subjective standard, section 5-109 provides patients, who unreasonably fail to discover their injury, the benefit of additional time.

Notwithstanding, this subjective standard is insignificant to those patients whose injuries fail to manifest within five years after the malpractice occurs, whether that patient acts reasonably or not. Even a patient who acts reasonably will not discover an injury that is identifiable only by those who are specially educated and trained in the health field. Therefore, a patient who sustains an inherently undiscoverable injury must either bring an action in the absence of discovered injury or risk being barred from recovery.

Finally, section 5-109 also deviates from the common law by abrogating the continuing course of treatment rule.⁷⁵ Despite the need to rely upon the special skill, knowledge, and judgment of physicians,⁷⁶ patients no longer will be able to rely upon the confidential relationship they have with their physicians as a means to postpone the running of the limitations statute.⁷⁷ The *Hill* court apparently concluded that the need to limit the amount of time in which medical malpractice claims are filed outweighs the patient's need to rely upon the confidential relationship he

70. *Hill*, 304 Md. at 699-700, 501 A.2d at 32.

71. *Id.* at 700, 501 A.2d at 33.

72. *See Developments, supra* note 12, at 1201 ("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.").

73. MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1984).

74. *See supra* note 25 and accompanying text.

75. *See Hill*, 304 Md. at 700, 501 A.2d at 32. The express language of section 5-109 does not allow for judicially implied exceptions. *Id.* New subsection (f) of section 5-109 makes clear that section 5-109 does not limit either section 5-201, relating to mental incompetency, or section 5-203, the general fraud statute. MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (Supp. 1987).

76. *See Comment, The Continuous Treatment Doctrine: A Toll on the Statute of Limitations for Medical Malpractice in New York*, 49 ALB. L. REV. 70 (1984).

77. 1 J. Dooley, MODERN TORT LAW § 4.18, at 115 n.1 (1982) ("As a general proposition, a plaintiff is not bound to anticipate negligent conduct on the part of others. Rather, he may assume that others will fulfill their duties.").

has with his physician. Consequently, patients are forced to anticipate malpractice and institute premature actions to protect their potential recovery.⁷⁸ Also, physicians who discover their negligence may conceal it intentionally from their patients until the limitations period expires.⁷⁹

The constitutionality of section 5-109 was upheld under the rational basis test.⁸⁰ The *Hill* court recognized that the legislature's purpose in enacting the statute was to remedy the current medical malpractice insurance crisis.⁸¹ Section 5-109 reduces the time claimants have to file suit and establishes a definite period of liability for health care providers.⁸² Consequently, the actual number of claims filed is reduced. Implicitly, the court concluded that reducing the number of claims is a reasonable means of containing the insurance crisis. Nevertheless, section 5-109 penalizes innocent malpractice victims while immunizing negligent health care providers from liability.⁸³ These results were recognized by the legislature and the court, but in light of the crisis, the court believed that the balance between the competing interests was fair and reasonable.⁸⁴

In rejecting the strict scrutiny test, the court found that no "significant interference" with a fundamental right had occurred.⁸⁵ The court explained that a limitation statute that merely restricts the plaintiff's remedy, not his general right to bring an action, is constitutional provided the restriction is reasonable.⁸⁶ Following this premise, both the three and five-year periods were deemed reasonable in relation to the legislature's purpose.⁸⁷

Although the court's reasoning is supported by precedent, section 5-109 significantly interferes with the right of access for potential plaintiffs who fail to discover their injuries within the maximum limitation pe-

78. See Annas, *supra* note 31, at 1343.

79. HARNEY, *supra* note 14, at 250.

80. See *Hill*, 304 Md. at 700-04, 501 A.2d at 33-34.

81. See *id.* at 700, 501 A.2d at 32.

82. See *id.* at 703, 501 A.2d at 34. See Abrahams, *supra* note 20, at 501.

83. See *Checkup*, *supra* note 33, at 674. "The danger in legislation of 'this type' is that it is designed to reduce malpractice claims by indiscriminately barring causes of action without regard to their validity." *Id.* at 673.

84. See *id.* Only if the court had found the statute completely irrational could it have substituted its judgment for that of the legislature. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) ("[I]t is up to the legislatures, not courts, to decide on the wisdom and utility of legislation."); *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48-49, 300 A.2d 367, 378 (1973) ("The wisdom and expediency of a law adopted in the exercise of police power of the State is not subject to judicial review . . .").

85. See *Hill*, 304 Md. at 701, 501 A.2d at 33.

86. See *id.* at 702-03, 501 A.2d at 33-34; see also *Allen v. Dovell*, 193 Md. 359, 66 A.2d 795 (1949).

87. See *id.* at 703, 501 A.2d at 34. Although the discovery rule seems more fair, claimants have no vested interest in any common law rule. See *Munn v. Illinois*, 94 U.S. 113, 134 (1876); *Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 340, 360, 499 A.2d 178, 189 (1985). Statutes of limitation should not be held unconstitutional unless plainly unreasonable. See *WOOD*, *supra* note 12, at 54.

riod.⁸⁸ The only method by which medical malpractice victims can be compensated for their injuries is through the judicial process. By bringing action against a negligent health care provider, money damages can be awarded and victims can be made as close to whole as possible. Under section 5-109, however, five years after the negligent act causes some harm, the right of access to the courts is extinguished.⁸⁹ Nevertheless, because statutes of limitation are considered imperative to fulfill important public policy, the court believed that the disadvantage caused is an unfortunate but inevitable consequence.⁹⁰

Under *Hill*, the limitations period for filing medical malpractice actions is, at most, five years from the date a negligent act first causes harm. The patient who fails to discover his injury and institute an action during this period is barred from remedial action. In spite of this harsh result, section 5-109 is constitutional as a reasonable legislative response to the alleged medical malpractice insurance crisis. The need to curb physician's insurance premiums is an important public policy goal. Unfortunately, the meritorious claims of innocent malpractice victims are sacrificed while negligent health care providers are immunized from liability.

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88. See *Phelan v. Hanft*, 471 So. 2d 648 (Fla. Dist. Ct. App. 1985), *appeal dismissed*, 488 So. 2d 531 (Fla. 1986).

89. *Hill*, 304 Md. at 699-700, 501 A.2d at 32.

90. See *Wood supra* note 12, at 9; see also PROSSER & KEETON, *supra* note 13, at 165; 51 Am. Jur. 2d § 138 (1970 & Supp. 1986).