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Medical Malpractice Statute of Limitations in Washington

Darryl S. Vhugen

MEDICAL MALPRACTICE STATUTE OF LIMITATIONS IN WASHINGTON

Legislative responses to the medical malpractice insurance crisis of the last twenty years have taken many forms.[1] One form has been passage of statutes of limitations to govern medical malpractice cases, aimed at reducing the volume of litigation and, consequently, the cost of insurance. The Washington Legislature enacted such legislation in 1971,[2] and amended it in 1976.[3]

Generally, statutes of limitations run from the date of the alleged wrongful act.[4] Because the average person lacks a good understanding of medical science and may not be aware of a wrongful medical practice when it occurs, medical malpractice plaintiffs have a more difficult time filing their causes of action within the allotted period than do other plaintiffs. As a result, many courts have devised methods of extending the statutory period. Two common-law techniques have predominated in Washington: (1) the discovery rule, and (2) the continuing course of treatment rule.

This comment examines the Washington courts' use of these judicial techniques to avoid strict application of the statute of limitations in medical malpractice cases. Part I summarizes the development and application of the discovery rule and the continuing course of treatment rule before 1971. Part II analyzes the impact of Washington's current medical malpractice statute of limitations on these rules, with emphasis on the recent cases of *Ohler v. Tacoma General Hospital*[5] and *Bixler v. Bowman*.[6] This comment concludes that the statutory discovery rule, as amended in 1976, sharply restricts the judicially-created discovery rule, resulting in a clear pro-defendant bias. It concludes further that, despite language in *Bixler* to the contrary, the continuing course of treatment rule survives, albeit in a limited form.

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1. *See* Roth, *The Medical Malpractice Insurance Crisis: Its Causes, the Effects, and Proposed Solutions*, 44 INS. COUNSEL J. 469, 491–93 (1977) (review of the various legislative enactments in this area); *see also* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 763–69 (1977) (same).

2. Act of Mar. 23, 1971, ch. 80, 1971 Wash. Laws 194 (current version at WASH. REV. CODE § 4.16.350 (1981)), *reprinted in part in* note 36 *infra*.

3. Act of Feb. 21, 1976, ch. 56, 1975–76 Wash. Laws 2d Ex. Sess. 214 (codified at WASH. REV. CODE § 4.16.350 (1981)), *reprinted in part in* note 37 *infra*.

4. *See, e.g.*, Ruth v. Dight, 75 Wn. 2d 660, 665, 453 P.2d 631, 634 (1969).

5. 92 Wn. 2d 507, 598 P.2d 1358 (1979).

6. 94 Wn. 2d 146, 614 P.2d 1290 (1980).

I. JUDICIAL AVOIDANCE TECHNIQUES BEFORE 1971

Statutes of limitations serve two major objectives. The first and most important objective is to protect defendants from the unfair threat of liability arising from mostly forgotten incidents. The second objective is to rid the courts of stale, and possibly fraudulent, claims.[7] The legislature has determined that these objectives adequately justify barring otherwise valid claims.

Special problems arise when statutes of limitations are applied in medical malpractice cases. Because medical science is so complex, a patient often will be unable to recognize negligent treatment. Injuries resulting from such medical care may not be detected until years after the doctor-patient relationship has ended.[8] In addition, the unique, trusting relationship between doctor and patient discourages vigilant scrutiny by the patient of the care he receives.[9]

Because of these special problems, courts have created various techniques to extend the statutes of limitations in medical malpractice cases.[10] Two of these techniques, the discovery rule and the continuing course of treatment rule, have been used by the Washington courts.

A. The Discovery Rule

The discovery rule suspends the beginning of the statutory period until the plaintiff either discovers or, through the exercise of reasonable diligence, should have discovered that the injury was caused by a doctor's act or omission.[11] The primary reason for the rule is that it is unfair to require a plaintiff to bring a malpractice action when the plaintiff does not and perhaps cannot know that the injury was caused by a negligent physi-

7. *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); Ruth v. Dight, 75 Wn. 2d 660, 664–65, 453 P.2d 631, 634 (1969).

8. "Nature has a mysterious way at times of hiding mishaps in surgery, and cases are legion where foreign objects such as sponges, scalpels, forceps and hemostats have been inadvertently left in a surgical wound and the patient remained oblivious of it for years afterward." Ruth v. Dight, 75 Wn. 2d 660, 661, 453 P.2d 631, 632 (1969).

9. *See* Janisch v. Mullins, 1 Wn. App. 393, 400–01, 461 P.2d 895, 899 (1969), *review dismissed by stipulation*, 78 Wn. 2d 997 (1970).

10. The two most prominent techniques are discussed in this comment. A third, the doctrine of fraudulent concealment, has also been employed by some courts. *See* note 58 *infra*.

11. *See* Ruth v. Dight, 75 Wn. 2d 660, 667–68, 453 P.2d 631, 636 (1969); Yerkes v. Rockwood Clinic, 11 Wn. App. 936, 941, 527 P.2d 689, 692 (1974); Janisch v. Mullins, 1 Wn. App. 393, 397, 461 P.2d 895, 897 (1969). This rule, with certain modifications, essentially has been codified in Washington. *See* notes 36–44 and accompanying text *infra*.

cian, or does not even know that the plaintiff has incurred any injury at all.[12]

Prior to 1971 there was no specific Washington statute limiting medical malpractice actions. Such claims were governed by the three-year statute[13] applicable to all tort actions. Before they adopted the discovery rule in 1969,[14] the Washington courts employed the "unavoidable hardship approach."[15] Under this approach, the statutory period began when the wrongful act caused the injury. Any hardship imposed on the plaintiff whose injury was not discovered within three years was considered "unavoidable."

The leading case illustrating this approach is *Lindquist v. Mullen*.[16] In *Lindquist*, plaintiff alleged that defendant negligently left a surgical sponge inside her body during a 1946 hernia operation. Plaintiff commenced her action seven years later when the sponge was discovered. The Washington Supreme Court held that the claim was barred by the three-year statute of limitations because the claim accrued on the date of the injury-causing wrongful act.[17] The court declined to adopt plaintiff's contention that her cause of action accrued upon her discovery of the negligence rather than at the time the injury occurred.[18]

In *Ruth v. Dight*[19] the Washington court adopted the discovery rule it had rejected in *Lindquist*. In *Ruth*, the question was when the statute of limitations began to run when a plaintiff did not, and with reasonable effort could not, discover the presence of a foreign substance left in her body by defendant doctor. Plaintiff in *Ruth* had a hysterectomy performed by the defendant in 1944. Exploratory surgery twenty-two years later revealed a sponge left from the earlier operation. Overruling *Lindquist*, the court announced that, in medical malpractice cases based upon the negligent failure to remove foreign substances from the body, the statutory period begins when plaintiff discovers, or reasonably should have discovered, the presence of the foreign substance.[20]

The Washington Court of Appeals extended the discovery rule to

12. *See, e.g.*, Lindquist v. Mullen, 45 Wn. 2d 675, 682–83, 277 P.2d 724, 728 (1954) (Finley, J., dissenting).

13. WASH. REV. CODE § 4.16.080 (1981).

14. *See* note 19 and accompanying text *infra*.

15. Janisch v. Mullins, 1 Wn. App. 393, 396, 461 P.2d 895, 896–97 (1969), *review dismissed by stipulation*, 78 Wn. 2d 997 (1970).

16. 45 Wn. 2d 675, 277 P.2d 724 (1954).

17. *Id.* at 676, 277 P.2d at 724.

18. *Id.* at 678, 277 P.2d at 725. *See generally* 30 WASH. L. REV. 181 (1955) (discussion of *Lindquist*).

19. 75 Wn. 2d 660, 453 P.2d 631 (1969).

20. *Id.* at 667–68, 453 P.2d at 636.

claims of negligent diagnosis in *Janisch v. Mullins*.[21] In *Janisch*, defendant had examined plaintiff's eyes in 1958. The complaint, filed nine years after the examination, alleged that defendant's negligent reading of an X-ray resulted in plaintiff's blindness. The court, extending the *Ruth* discovery rule, held that the claim was not barred.[22] The court gave three reasons for its holding. First, it felt that the trusting relationship between doctor and patient should be fostered; the patient should not be compelled constantly to scrutinize a doctor to preserve a possible cause of action.[23] Second, the court noted that the added likelihood of legal action would encourage greater care by physicians in surgery and treatment generally.[24] Last, the court said that nothing in the rationale underlying the discovery rule supported a distinction between different kinds of malpractice.[25]

B. The Continuing Course of Treatment Rule

The continuing course of treatment rule starts the statute of limitations running either when the physician-patient relationship ends, or when the patient actually discovers the negligence, whichever occurs first.[26] The continuing treatment generally must be for the same condition that led to the injury.[27] Although some jurisdictions, including Washington,[28] require that the physician's negligence continue throughout the relationship, many require only continuing treatment after the initial negligence.[29]

The reason for the continuing course of treatment rule is grounded in the nature of the doctor-patient relationship and in the complexity of medical science generally. The patient must rely upon the physician's skill and knowledge in determining how best to treat an injury or illness. The patient lacks adequate expertise reasonably to challenge the doctor's judgment. Thus, a patient ordinarily will be unaware of the physician's

21. 1 Wn. App. 393, 461 P.2d 895 (1969), *review dismissed by stipulation*, 78 Wn. 2d 997 (1970).

22 *Id.* at 401–02, 461 P.2d at 899–900.

23. *Id.* at 400–01, 461 P.2d at 899.

24. *Id.* at 401, 461 P.2d at 899.

25. *Id.* Other Washington cases applying the common-law discovery rule include Fraser v. Weeks, 76 Wn. 2d 819, 456 P.2d 351 (1969); Denison v. Goforth, 75 Wn. 2d 853, 454 P.2d 218 (1969); Yerkes v. Rockwood Clinic, 11 Wn. App. 936, 527 P.2d 689 (1974).

26. *See, e.g.*, Hundley v. St. Francis Hosp., 161 Cal. App. 2d 800, 327 P.2d 131, 135 (1958); Annot., 80 A.L.R.2d 368, 379–83 (1961).

27. Samuelson v. Freeman, 75 Wn. 2d 894, 900, 454 P.2d 406, 410 (1969).

28. *See* Koenig v. Group Health Coop., 5 Wn. App. 836, 838, 491 P.2d 702, 703 (1971).

29. *See generally* Annot., 80 A.L.R.2d 368, 379 (1961) (review of rule in various jurisdictions).

negligent conduct while continuing to rely on the physician's advice.[30] Under these circumstances, tolling the statute of limitations until the end of the doctor-patient relationship is reasonable.

The continuing course of treatment rule was adopted by Washington courts in 1969.[31] Before then, the case of *McCoy v. Stevens*[32] controlled. Plaintiff in *McCoy* alleged injury from defendant's negligent operation of an X-ray machine in 1928. Defendant treated plaintiff for four years after that. Plaintiff brought her action in 1934, six years after the initial treatment but only two years after she stopped consulting defendant. Plaintiff argued that her cause of action did not accrue until defendant's services ended. The court rejected that contention, holding that the statutory period commenced at the time of the original X-ray treatments.[33]

In *Samuelson v. Freeman,*[34] the court overruled *McCoy* insofar as *McCoy* had rejected the continuing course of treatment rule. In *Samuelson,* the issue was whether the statutory period began with the first negligent act or did not begin until the end of a period of negligent treatment following the initial negligence. Defendant operated on plaintiff's broken leg in 1960. Plaintiff filed her complaint in 1964, initially alleging negligence by the defendant during the immediately preceding three years. She later attempted to amend her complaint to include negligence in performing the surgery. The trial judge denied the motion to amend because the claim was not brought within three years of the alleged wrongful act. Declaring the continuing course of treatment rule a "sensible corollary" to the discovery rule, the supreme court reversed. The court held that the statute of limitations is tolled until continuing negligent treatment is terminated,[35] thereby adding the second avoidance technique to the judicial repertoire.

II. IMPACT OF THE WASHINGTON MEDICAL MALPRACTICE STATUTE OF LIMITATIONS ON THE JUDICIAL AVOIDANCE TECHNIQUES

A. The Statute Generally

The Washington medical malpractice statute of limitations was enacted

30. Bixler v. Bowman, 94 Wn. 2d 146, 152, 614 P.2d 1290, 1293 (1980) (Rosellini, J., dissenting).
31. Samuelson v. Freeman, 75 Wn. 2d 894, 454 P.2d 406 (1969).
32. 182 Wash. 55, 44 P.2d 797 (1935).
33. *Id.* at 58–61, 44 P.2d at 798–800.
34. 75 Wn. 2d 894, 454 P.2d 406 (1969).
35. *Id.* at 900–01, 454 P.2d at 410.

in 1971[36] and amended in 1976.[37] The current statute sets out three distinct limitation periods. First, the general rule is that medical malpractice actions must be brought "within three years of the act or omission alleged to have caused the injury or condition."[38] Second, if after the three-year period has elapsed the plaintiff "discovers or reasonably should have discovered that the injury or condition was caused by the [defendant's] act or omission," the plaintiff or her representative may bring an action within one year of the date of discovery.[39] Third, no claim may be filed more than eight years after the act or omission.[40] Only those under a legal disability[41] may commence an action after these three statutory periods have elapsed.[42]

B. *Impact On the Discovery Rule*

The Washington statute, as amended, restricts the judicially-created

36. Any civil action for damages against a hospital . . . or against the personnel of any hospital, or against a member of the healing arts including, but not limited to, a physician . . . , chiropractor . . . , or a nurse . . . , based upon alleged professional negligence shall be commenced within (1) three years from the date of the alleged wrongful act, or (2) one year from the time that plaintiff discovers the injury or condition was caused by the wrongful act, whichever period of time expires last.

Act of March 23, 1971, ch. 80, § 1, 1971 Wash. Laws 194 (current version at WASH REV. CODE § 4.16.350 (1981)).

37. Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976 against:

(1) A person licensed by this state to provide health care or related services . . . ;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, . . . ; or

(3) An entity, . . . facility, or institution employing one or more persons described in subsection (1) of this section . . . ; based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission. Any action not commenced in accordance with this section shall be barred: *Provided*, That the limitations in this section shall not apply to persons under a legal disability as defined in RCW 4.14.190.

Act of Feb. 21, 1976, ch. 56, § 1, 1975–76 Wash. Laws 2d Ex. Sess. 214 (codified at WASH REV. CODE § 4.16.350 (1981)).

38. WASH. REV. CODE § 4.16.350 (3) (1981).

39. *Id.*

40. *Id.* This eight-year overall bar, added in 1976, applies only to health care administered after June 25, 1976, the effective date of the 1976 amendment.

41. Washington law defines the following persons as legally disabled for purposes of the statutes of limitations: (1) persons under eighteen years of age when the cause of action accrues; (2) persons who are "incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings . . . ;" and (3) persons "imprisoned on a criminal charge . . . for less than his or her natural life." *Id.* § 4.16.190.

42. *Id.* § 4.16.350.

discovery rule and the original statute in three ways. First, it reduces the post-discovery period within which a plaintiff can bring an action from three years to one year. Second, it adds the eight-year overall bar where none existed before. Last, the current statute no longer includes the requirement in the 1971 version that plaintiff be aware that defendant's conduct was wrongful before the one-year period commences.[43] Instead, the one-year period begins to run once plaintiff discovers that defendant's act or omission caused plaintiff's condition.[44] Because plaintiffs often may know that defendant's acts caused their injuries long before they learn that such acts may have been tortious, the statutory period in many cases will begin long before it would have under the statute as initially enacted. Thus, the responsibility placed upon plaintiffs to promptly file their medical malpractice actions is significantly greater under the current statute than it was under both the judicially created discovery rule and the 1971 version of the statute.

The Washington Supreme Court interpreted the discovery rule included in the 1971 statute so as to provide much greater protection for plaintiffs seeking relief for health care administered before the 1976 amendment than is provided to those injured after that date. In *Ohler v. Tacoma General Hospital,*[45] the court adopted the "legal injury" test in malpractice cases involving the statutory discovery rule. The question in *Ohler* was whether the one-year post-discovery period begins when the plaintiff knows that defendant caused the injury, or whether it begins only when plaintiff realizes that defendant's conduct might have been wrongful. The court held that, under the 1971 version of the statute,[46] the period does not begin to run until plaintiff knows or should know[47] of all essential elements of the cause of action.[48] That is, plaintiff must be aware that plaintiff suffered a legal injury rather than just a physical injury.

Plaintiff in *Ohler* knew from an early age that her blindness was caused by excessive oxygen administered at defendant hospital immediately after her birth. She alleged that she believed the oxygen was necessary because

43. The Washington Supreme Court so interpreted the 1971 statute in Ohler v. Tacoma Gen. Hosp., 92 Wn. 2d 507, 598 P.2d 1358 (1979). *See* note 47 and accompanying text *infra*.

44. *See generally* note 19 and accompanying text *supra* (discussion of the Washington discovery rule prior to 1971); note 37 *supra* (current statutory language).

45. 92 Wn. 2d 507, 598 P.2d 1358 (1979).

46. The 1971 version applied because the relevant treatment was administered prior to June 25, 1976, the effective date of the 1976 amendment.

47. *But see* Teeter v. Lawson, 25 Wn. App. 560, 610 P.2d 925 (1980). In *Teeter*, the court of appeals held that the 1971 statute did not include the constructive knowledge requirement of the common-law rule. That is, only actual knowledge of defendant's wrongful act, rather than knowledge of facts from which plaintiff reasonably should have discovered the wrongful nature of such act, causes the one-year period to begin. *Id.* at 561, 610 P.2d at 925.

48. 92 Wn. 2d at 511, 598 P.2d at 1360.

of her premature birth. She first became aware at age twenty-one that the oxygen may have been administered improperly. She filed her action six months later. The trial court granted defendant's motion for summary judgment, holding that plaintiff had discovered defendant's wrongful conduct as a young girl. Therefore, her cause of action accrued when she reached eighteen, the age of majority, and was barred when she turned nineteen. In reversing, the supreme court reasoned that one cannot discover a wrongful act until one realizes that a breach of duty has occurred.[49] The court refused to hold plaintiff responsible for not having recognized, at the young age when she first learned the cause of her blindness, that the hospital's acts may have comprised a breach of legal duty.[50]

In light of the new language of the 1976 amendment,[51] one can only speculate whether the *Ohler* legal injury interpretation remains current. Neither the supreme court nor the court of appeals has ruled on the matter.[52] The plain meaning of the statutory language indicates that *Ohler* will not be followed in cases falling under the current discovery rule. The 1971 statute referred to plaintiff's discovery of defendant's "wrongful act."[53] The word "wrongful" was construed by the court in *Ohler* to mean a legal wrong. The current provision omits any reference to a wrongful act. Instead, the one-year limitation applies when plaintiff discovers "that the injury . . . was caused by [defendant's] act or omission."[54] Unless the court construes the phrase "act or omission" to mean *wrongful* act or omission,[55] the *Ohler* rule cannot survive. The "legal injury" test has been replaced by a "physical injury" test under which the one-year discovery period now runs from the time that a patient discovers that a physician's act or omission caused the patient's injury. It is no longer relevant whether the patient knew the conduct was tortious.

In addition to foreclosing the legal injury test, the current statute precludes *any* action brought more than eight years after the act or omission alleged to have caused plaintiff's injury.[56] The discovery rule thus is inapplicable if a patient does not discover the fact of injury within eight years of treatment.

This provision may prove especially burdensome to plaintiffs because an action is barred even if an injury *could not possibly* have been discovered within eight years. This is often the result in cases involving foreign

49. *Id.*
50. *Id.* at 510-11.
51. *See generally* note 37 *supra* (partial statutory text).
52. Indeed, neither court has had occasion to apply any aspect of the amended discovery rule.
53. *See* note 36 *supra*.
54. *See* note 37 *supra*.
55. There appears to be no authority in Washington to support this proposition.
56. *See* note 37 *supra*.

substances which may remain hidden for many years after surgery, a fact which has induced some states to exempt foreign substance cases from their overall time limits.[57] Moreover, this provision also bars an action against a physician who has knowingly and fraudulently concealed the physician's negligence from the patient for eight years or more.[58] The statutory language suggests that these results, intended or not, must be tolerated absent action by the legislature.

The current medical malpractice statute of limitations has tipped the discovery rule in favor of health-care providers. For actions arising under the 1971 statute, the legal injury test set forth in *Ohler* reduces the impact of the move from a three-year to a one-year period. But the statute after 1976 signals the demise of the *Ohler* rule in favor of a more conservative physical injury test, and adds the eight-year overall limitation as well. In view of these changes, health-care recipients must be increasingly vigilant to preserve their rights when relying on the discovery rule.

C. *Impact On the Continuing Course of Treatment Rule*

The supreme court has stated that the 1971 statute significantly limited

57. *E.g.*, CAL. CIV. PROC. CODE § 340.5 (West Supp. 1979); UTAH CODE ANN. § 78-14-14 (1979).

58. The doctrine of fraudulent concealment (also referred to as "equitable estoppel") has been applied to medical malpractice cases in many jurisdictions. The doctrine provides essentially that a physician who has intentionally concealed his negligence from his patient is barred from invoking the statute of limitations on grounds of equitable estoppel. *See* Stafford v. Schultz, 42 Cal. 2d 767, 270 P.2d 1, 8 (1954); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891, 894-95 (1956); Lakeman v. La France, 102 N.H. 300, 156 A.2d 123, 126 (1959); Hardin v. Farris, 87 N.M. 143, 530 P.2d 407, 410 (1974); Simcuski v. Saeli, 44 N.Y. 2d 442, 377 N.E.2d 713, 716 (1978); Schaffer v. Larzelere, 410 Pa. 402, 189 A.2d 267, 269 (1963).

The Washington Supreme Court declined to apply the fraudulent concealment doctrine to medical malpractice cases in McCoy v. Stevens, 182 Wash. 55, 44 P.2d 797 (1935). The court in *McCoy* relied upon two earlier cases involving attorney malpractice, Smith v. Berkey, 134 Wash. 348, 235 P. 793 (1925), and Cornell v. Edsen, 78 Wash. 662, 139 P. 602 (1914), for its holding. Plaintiff in *McCoy* sought to have the court apply a statute which tolled the limitations period on an action for fraud until the discovery by plaintiff of facts from which plaintiff could discover the fraud. The court refused to so hold because the action was not one for fraud. 182 Wash. at 57-59, 44 P.2d at 799.

Washington courts have used the doctrine of equitable estoppel to defeat a statute of limitations defense in other contexts. Equitable estoppel arises when defendant's acts or statements induce plaintiff reasonably to act or fail to act to plaintiff's detriment. Marsh v. General Adjustment Bureau, 22 Wn. App. 933, 935, 592 P.2d 676, 678 (1979); *see also* Murphy v. Huntington, 91 Wn. 2d 265, 588 P.2d 742 (1978) (stating that prior inconsistent statements of defendants are primary element of an estoppel); Central Heat, Inc. v. Daily Olympian, Inc., 74 Wn. 2d 126, 443 P.2d 544 (1968) (estoppel applies where defendant conceals facts or otherwise induces plaintiff not to bring suit).

Given the Washington courts' willingness to apply equitable estoppel in cases involving other factual settings, the prudent counsel should recognize the possibility that the courts might extend the doctrine in an appropriate medical malpractice case. *See* Matthies v. Knodel, 19 Wn. App. 1, 6, 573 P.2d 1332, 1336 (1977) (suggesting that equitable estoppel may foreclose a statute of limitations defense in an attorney malpractice action).

the continuing course of treatment rule, implying that the rule was all but eliminated.[59] The courts have yet to consider the impact of the current statute upon the rule. The supreme court's analysis of the 1971 statute, however, appears unaffected by the current language. And despite the court's statement, the continuing course of treatment rule, though limited, retains considerable vitality.

The Washington Supreme Court has had only one opportunity since the 1971 statute was enacted to consider its effect on the continuing course of treatment rule. *Bixler v. Bowman*[60] involved defendant's allegedly negligent failure to detect plaintiff's breast cancer. The question before the court was whether the three-year statutory period began when plaintiff last visited defendant, when she consulted another physician, or some time in between when the first doctor-patient relationship was deemed terminated. The court held that the period commenced when plaintiff last consulted with defendant, stating that that was when the "alleged wrongful act" took place.[61]

Plaintiff in *Bixler* first notified defendant of the presence of a lump in her breast in January of 1975.[62] She followed his prescription of self-examination and again consulted defendant in April of the same year. Defendant once again recommended self-examination. Plaintiff consulted another doctor in August of 1975, never seeing defendant again. The second doctor diagnosed her cancerous condition and removed plaintiff's breast three days later.[63] Plaintiff brought suit in June of 1978, more than three years after last seeing defendant, but less than three years after first visiting the second doctor. The trial court ruled that the action was barred by the statute of limitations. The court of appeals reversed, relying in part on *Samuelson v. Freeman*,[64] and holding that the date the physician-patient relationship terminated was a question of fact for the jury.[65] The supreme court reinstated the decision of the trial court, finding that the statute "substantially modified" the continuing course of treatment rule by replacing that concept with one requiring a finding of the date of the alleged wrongful act. The court decided, without further explanation, that

59. Bixler v. Bowman, 94 Wn. 2d 146, 150–51, 614 P.2d 1290, 1292 (1980).

60. 94 Wn. 2d 146, 614 P.2d 1290 (1980).

61. *Id.* at 150, 614 P.2d at 1292. The court applied the 1971 version of the statute because defendant's last allegedly negligent treatment of plaintiff was prior to June 25, 1976, the effective date of the 1976 amendment.

62. Plaintiff had been defendant's patient since 1957. *Id.* at 147, 614 P.2d at 1290.

63. In addition, the cancer spread, necessitating a second radical mastectomy in 1977. *Id.* at 147, 614 P.2d at 1290–91.

64. 75 Wn. 2d 894, 454 P.2d 406 (1969), *discussed in* notes 34 & 35 and accompanying text *supra*.

65. Bixler v. Bowman, 24 Wn. App. 815, 817, 604 P.2d 188, 189 (1979).

the date of the wrongful act was plaintiff's last visit to defendant, barring her claim.[66]

Bixler gives rise to two major questions regarding the vitality of the continuing course of treatment rule. First, because the *Bixler* court interpreted the 1971 statute, is the court's holding still applicable under the current statutory language? Second, if the *Bixler* holding is still valid, what remains of the continuing course of treatment rule?

Although the change of the statutory language from "wrongful act" to "act or omission . . . caus[ing] the injury or condition" affected analysis of the discovery rule, that change is without significance for the continuing course of treatment rule. The label of "wrongful act" or "act or omission" is irrevelant because the continuing course of treatment rule concerns only when the alleged negligence occurred, not whether an act is recognized as negligent. The *Bixler* court decided that the wrongful act occurred the last time defendant saw plaintiff. It undoubtedly would have reached the same result had it been called on to decide the date of the act or omission which caused plaintiff's condition. Therefore, the *Bixler* holding is unaffected by the language changes incorporated in the current malpractice statute.

Assuming *Bixler's* continuing vitality, the question remains of the extent of its impact on the continuing course of treatment rule. The court in *Bixler* noted that the statute "substantially modified" this rule.[67] The actual result reached in the case indicates that the rule has not been significantly restricted, however.

In *Bixler,* the three-year statute of limitations commenced when the patient last visited the defendant doctor. This, according to the court, was when the alleged wrongful act occurred, or, more precisely, when the *last* alleged wrongful act occurred. Because the physician-patient relationship reasonably may be viewed as terminating at that point, the *Samuelson* rule is narrowed only insofar as it was possible under *Samuelson* to find that this relationship continued until sometime after the last actual con-

66. 94 Wn. 2d at 150–51, 614 P.2d at 1292. Justice Rosellini wrote for the four dissenting justices. He argued, essentially, that the defendant's alleged negligence consisted of ongoing acts of omission. Citing Gray v. Davidson, 15 Wn. 2d 257, 130 P.2d 341 (1942), Justice Rosellini pointed out the physician's duty to continue treatment until either medical care becomes unnecessary, he is discharged, or he has informed his patient that he will no longer serve as treating physician. In *Bixler,* therefore:

> [E]very day that the defendant failed to contact the plaintiff and advise her to come in for tests was a day of continuing acts of negligent omission. His duty continued until she manifested an intent to rely on other medical help by seeking the advice of another doctor. Thus . . . the day of the defendant's last wrongful act was August 3, 1975, a date within the period of limitation.

94 Wn. 2d at 153–54, 614 P.2d at 1293–94; *see also* 16 GONZ. L. REV. 825 (1981) (examination of *Bixler*).

67. 94 Wn. 2d at 150–51, 614 P.2d at 1290.

tact. The facts in *Samuelson* did not require the court to decide this question.[68] Indeed, prior to *Bixler* the Washington Supreme Court had never had occasion to confront the issue. One can argue plausibly that the court would have declined to so extend the statutory period[69] because of the difficulty in deciding the precise point at which the relationship was severed. Had *Samuelson* been so construed and applied in the *Bixler* case, the court would have reached the same result. Given that interpretation of the *Samuelson* rule, the limitation on the continuing course of treatment rule announced in *Bixler* is insignificant.

The Washington courts have yet to decide under either the 1971 or current versions of the statute a case involving negligent treatment (as opposed to negligent diagnosis as in *Bixler*) and continuing treatment by the doctor thereafter. In applying the statute of limitations to such a case, two alternative constructions are available under *Bixler:* (1) the statute runs from the time of the initial negligent act; or (2) the statute runs from the last time plaintiff consults defendant.

The latter is the better rule for several reasons. First, it is consistent with the holding of *Bixler*. The court in *Bixler* held, in effect, that the statute runs as of the last wrongful act.[70] There, the last wrongful act was defendant's second failure to detect or make reasonable efforts to detect plaintiff's cancer. In the case of a negligently performed operation, for example, the trier of fact may well find that the doctor's failure to discover his earlier surgical negligence constitutes an ongoing negligent act or omission. Under such circumstances, the last act or omission should be deemed to take place when the patient last visits the doctor, just as in *Bixler*.[71]

In addition, this rule places no potentially burdensome duty on a physician to monitor a patient who is no longer under the physician's care, a result obtained if the doctor-patient relationship is held to continue until some time after the patient's final visit. Last, the weight of authority in other jurisdictions supports this view.[72]

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68. In *Samuelson*, plaintiff last consulted defendant within three years of the filing of plantiff's complaint. 75 Wn. 2d at 895, 454 P.2d at 407. The court, thus, was not called on to decide whether the doctor-patient relationship could continue after the last contact.

69. The dissenters in *Bixler* argued in favor of interpreting both *Samuelson* and the 1971 statute as allowing a finding that the doctor-patient relationship could in some cases continue after the last contact. *See* note 66 *supra*. The court of appeals made a similar argument. Bixler v. Bowman, 24 Wn. App. 815, 818–19, 604 P.2d 188, 190 (1979).

70. The court conceivably could have held that the statute runs as of the *first* wrongful act. Such a holding would have totally obliterated the common-law continuing course of treatment rule.

71. If the trier of fact finds no ongoing negligence, the action would have to be barred under *Bixler* because the last wrongful act necessarily would be the original negligent operation.

72. *See* Annot., 80 A.L.R.2d 368, 379 (1961).

The holding in *Bixler,* then, does little to limit Washington's judicially-created continuing course of treatment rule. In effect, it merely determines that the physician-patient relationship ends at the time of the last visit by the patient. The *Samuelson* rule is limited only insofar as that rule could have been extended to allow plaintiffs to argue successfully that the statutory period begins sometime after the plaintiff's last contact with the physician. Since the Washington courts never so extended *Samuelson,* the continuing course of treatment rule appears to have survived virtually intact.

III. CONCLUSION

The Washington medical malpractice statute of limitations, as currently formulated, significantly restricts the judicially-created discovery rule. This results from the statutory language precluding judicial application of the legal injury test, creating an eight-year overall limitation period, and reducing from three years to one year the post-discovery period allowed plaintiffs. The continuing course of treatment rule, on the other hand, has been affected only slightly. The supreme court's decision in *Bixler v. Bowman* holds only that the doctor-patient relationship ends with the patient's last visit with the doctor. The crux of the rule, that the statute is tolled during a continuing negligent course of treatment, endures.

Darryl S. Vhugen