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STATUTES OF LIMITATIONS IN THE ERA OF COMPENSATION SYSTEMS: WORKMEN'S COMPENSATION LIMITATIONS PROVISIONS FOR ACCIDENTAL INJURY CLAIMS

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I. INTRODUCTION

A. *Scope of Article*

An understanding of limitations provisions in a functioning "no-fault" compensation system may be helpful in discussing limitations problems generally as courts and legislatures move toward "no-fault" compensation systems for other kinds of personal injury claims. This Article will examine the claim limitations provisions in state workmen's compensation statutes to determine (1) whether the traditional purposes of limitations provisions are consistent with the basic purposes of workmen's compensation legislation, (2) what practical problems have arisen in the application of different limitations provisions, and (3) which of the limitations provisions is preferable. The examination analyzes limitations provisions for accidental injury claims. Two other kinds of workmen's compensation limitations provisions—for notice[1]

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1. Most state workmen's compensation acts have two limitations provisions: the employee must give the employer notice of the injury or the accident within a specified

and for occupational disease claims[2]—will be discussed only when essential to an understanding of limitations for accidental injury claims.

A critical analysis of state workmen's compensation claim limitations requires a thorough understanding of the rationales for and present-day importance of statutes of limitations for personal injury claims outside the workmen's compensation system. The next section attempts to establish the background for critical analysis by examining a recent development in the interpretation of statutes of limitations for personal injury claims—the rise of the "discovery rule."

B. *Rise of the Discovery Rule*

Most statutes of limitations for personal injury actions bar recovery if suit is not brought within a specified time after the "cause of action accrues."[3] Courts have traditionally construed the quoted language to start the limitations period at the time all the elements of a cause of action first exist, that is, when the last of the events necessary to establish a right to recover has occurred.[4] To establish that right in a negligence action, the plaintiff must plead and prove actual injury caused by the defendant's negligent acts or omissions.[5] The limitations period cannot start to run, then, until the victim sustains some injury.[6] Once

time, and the employee must also file claim for compensation within a specified time. *See generally* 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.20 (1973) [hereinafter cited as LARSON].

2. By special statute or by judicial interpretation of the basic coverage provision, all states provide compensation for at least some industrial diseases. *See generally* 1A LARSON §§ 41.00-.90. Many states have special limitations provisions for claims for compensation for industrial diseases. Others apply the general limitations provision, with or without special statutory provisions specifying how the provision is to be applied in industrial disease cases. *See generally* Estep & Allan, *Radiation Injuries and Time Limitations in Workmen's Compensation Cases*, 62 MICH. L. REV. 259 (1963).

3. *See generally Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) [hereinafter cited as *Developments*]. The language derives, with little variation, from the first statute of limitations for actions of trespass and trespass upon the case, enacted by Parliament in 1623. 21 Jac. 1, c. 16, § 3 (1623). That act established limitations periods for all personal actions. It provided that all actions for trespass and upon the case "shall be commenced and sued . . . within six years next after *the cause of such actions* or suit, and not after . . . ." *Id.* (emphasis added). It also provided for tolling the limitations period if the prospective plaintiff was under twenty-one, *feme covert, non compos mentis*, imprisoned, or beyond the seas "at the time of any such *cause of action given or accrued* . . . ." *Id.* § 7 (emphasis added).

4. *See generally Developments* 1200-03.

5. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 144-45 (4th ed. 1971).

6. *See, e.g.*, White v. Schnoebelen, 91 N.H. 273, 18 A.2d 185 (1941); Theurer v. Condon, 34 Wash. 2d 448, 209 P.2d 311 (1949).

an injury, however slight, is sustained, the limitations period begins to run.[7]

The traditional approach leads to harsh results in some cases. Assume a limitations period of two years after the cause of action accrues; also assume a blow to the head that seems trivial at first but causes blindness more than two years later. The victim's claim for damages from blindness will be barred before he discovers the seriousness of the injury. As soon as the blow is struck, the claim accrues because the victim then has the legal right to recover damages for the apparently trivial injury.[8] Similarly, assume that a surgeon negligently leaves a sponge or surgical instrument in a patient's body. The patient's claim will be barred in two years even if he does not become aware of the presence of the foreign object until after the statutory period has run.[9] The cause of action for negligence accrues at the time of the operation.[10]

To avoid a harsh result in the foreign-object malpractice case, some courts in recent years have interpreted the language "when the cause of action accrues" to refer to the time when the patient knows or should know of the presence of the foreign object.[11] The "knowledge" test has been labeled the "discovery rule." Although arguments can be made to limit the discovery rule to foreign-object malpractice cases,[12] the following facts suggest that it may eventually be applied

7. *See, e.g.*, Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936).

8. *See, e.g.*, Christiani v. City of Sarasota, 65 So. 2d 878 (Fla. 1953).

9. The only difference between the two cases is that in the latent-serious-injury case the injured person knows immediately that he has been injured, although the full extent of the damage is not then known. In the foreign-object case, however, the injured person does not even know he has been injured.

10. *See, e.g.*, Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962).

11. *See, e.g.*, Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967). *See generally* Comment, *Medical Malpractice Statutes of Limitation: Uniform Extension of the Discovery Rule*, 55 IOWA L. REV. 486 (1969); 21 DEPAUL L. REV. 234 (1971); 35 MO. L. REV. 559 (1970).

12. The reasoning of some of the courts suggests that the discovery rule should be limited to foreign-object malpractice cases, which arguably are analogous to cases in which the defendant fraudulently conceals from the prospective plaintiff facts establishing a cause of action. *See, e.g.*, Allen v. Layton, 235 A.2d 261 (Del. Super. Ct. 1967), *aff'd*, — Del. —, 246 A.2d 794 (1968); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961). By statute or judicial interpretation, the limitations period in fraudulent concealment cases starts to run only upon the discovery of the concealed facts. *See generally* Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875 (1933); *Developments* 1220-22. Foreign-object malpractice cases are similar in that the

in all personal injury cases:[13] the extension of the discovery rule to other kinds of cases in some states,[14] the form of the rule as an interpretation of general limitations statutes, and the emphasis in the opinions on the injustice of precluding the plaintiff from recovery before he had the opportunity to discover his cause of action.[15] Already, in North Carolina[16] and England,[17] the discovery rule has been adopted by the legislature for all personal injury actions.

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negligent acts of the surgeon injure the patient and simultaneously conceal from the patient both the fact and the cause of the injury. The difference between fraudulent and negligent concealment is arguably unimportant, especially in light of the fiduciary relationship between surgeon and patient.

Arguments for limiting the application of the discovery rule to foreign-object malpractice cases have not proved persuasive. Several courts have applied the discovery rule in cases involving other kinds of professional malpractice. *See, e.g.*, Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1969) (doctor's negligent misdiagnosis); Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819 (1967) (hospital's negligent omission to maintain sterile conditions during operation); *cf.* Yoshizaki v. Hilo Hosp., 50 Hawaii 1, 18-21, 427 P.2d 845, 855-57 (1967) (dissenting opinion). Using these cases, it could be argued, in turn, that the discovery rule should be confined to injury caused by the negligence of one in a professional, fiduciary relationship to the injured plaintiff.

13. *See, e.g.*, Hornung v. Richardson-Merrill, Inc., 317 F. Supp. 183 (D. Mont. 1970) (foreign-object malpractice case and general malpractice case used as precedent for application of a discovery rule in products liability case).

14. *See, e.g.*, Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1969) (doctor's negligent misdiagnosis); Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819 (1967) (hospital's negligent omission to maintain sterile conditions during operation); *cf.* Yoshizaki v. Hilo Hosp., 50 Hawaii 1, 18-21, 427 P.2d 845, 855-57 (1967) (dissenting opinion).

15. *See, e.g.*, Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819 (1967).

16. Ch. 1157, § 1, [1971] N.C. Laws 1706 (codified at N.C. GEN. STAT. § 1-15(b) (Supp. 1973)).

17. Limitation Act 1963, c. 47. In 1962, the British Court of Appeal held that the limitations period commenced when plaintiff suffered serious physical harm, even though plaintiff had no apparent symptoms of serious physical harm. Cartledge v. E. Jopling & Sons, [1962] 1 Q.B. 189 (C.A. 1961), *aff'd*, [1963] A.C. 758. Before the House of Lords affirmed the Court of Appeal, a *Command Report* was issued recommending changes in the statute of limitations to avoid the *Jopling* result. REPORT OF THE COMMITTEE ON LIMITATION OF ACTIONS IN CASES OF PERSONAL INJURY, CMND. NO. 8809 (1962) (commonly referred to as the *Davies Committee Report*). The *Command Report* suggested an exception to the limitations bar for late claims if the plaintiff brought suit within one year after he could reasonably have been expected to discover the existence or cause of his injury. *Id.* at 19. The recommendations of the Davies Committee were adopted in a poorly drafted private member's bill that became the Limitation Act of 1963. The obscure language of the Act led the Court of Appeal to interpret it to excuse a late claimant who knew that he had been injured and what had injured him, but was justifiably ignorant that he had a valid claim. Pickles v. National Coal Bd., [1968] 1 W.L.R. 997 (C.A.), *followed in* Newton v. Cammell Laird & Co., [1969] 1 W.L.R. 415 (C.A.); *accord*, Knipe v. British R.R. Bd., [1972] 1 All E.R. 673

C. *Rationales for Statutes of Limitations*

Courts and commentators often say that statutes of limitations serve three separate purposes: (1) the evidentiary purpose—to prevent error or fraud that may result from deciding factual issues long after the events in question, when witnesses may have died, memories may have dimmed, and documents may have been lost or destroyed; (2) the personal certainty purpose—to assure a potential defendant that he will not be subject to court-imposed liability after a specified period of time; and (3) the diligence purpose—to discourage prospective claimants from "sleeping on their rights."[18]

The discovery rule seems inconsistent with both the evidentiary[19] and the personal certainty[20] purposes. It is arguably consistent with the diligence purpose, since a prospective claimant justifiably ignorant of the facts supporting his legal right is not "sleeping on his rights" by not suing. The fact that the diligence purpose may be consistent

(C.A.); Drinkwater v. Joseph Lucas (Elec.) Ltd., [1970] 3 All E.R. 769 (C.A.). The *Pickles* question finally reached the House of Lords in Central Asbestos Co. v. Dodd, [1972] 2 All E.R. 1135 (H.L.), but the opinions in that case did little to clarify the law. Two Law Lords supported *Pickles* and three opposed it, but one of the three voted with the two accepting *Pickles* on the basis of his unique factual inferences from evidence introduced in the trial court. Since the three Lords in the majority disagreed about the facts in the case, either the holding of the case must be limited to the precise evidence introduced in the trial court, on which the judges agree, or the case stands for no rule at all. *Compare* Watmore, *Personal Injuries—When Time Runs*, 122 NEW L.J. 672 (1972), *with* Woolf, *Personal Injury Limitations—House of Lords Interpretation*, 122 NEW L.J. 824 (1972). The Court of Appeal subsequently stated that it was unable to extract any clear *ratio decidendi* from *Dodd*. Harper v. National Coal Bd., [1974] 2 All E.R. 441, 445-47 (C.A. 1973). In the wake of *Dodd*, another committee was charged with reexamining the limitations question. LAW REFORM COMMITTEE, TWENTIETH REPORT (INTERIM REPORT ON LIMITATION OF ACTIONS: IN PERSONAL INJURY CLAIMS), CMND. NO. 5630 (1974). The *Committee Report* recommended that *Pickles* be overruled by statute, that the limitations period be extended in cases of late discovery of existence or cause of injury, and that an additional extension be allowed beyond the discovery-rule period if the court finds that the hardship to the plaintiff from barring his claim outweighs the prejudice to the defendant from the delay in filing claim.

18. *See, e.g.*, Jackson, *The Legal Effects of the Passing of Time*, 7 MELBOURNE U.L. REV. 407, 409 (1970).

19. Under the discovery rule, courts may be called on to determine facts long after the events in question took place.

20. A prospective defendant ordinarily cannot discover whether the discovery rule will be applied in his case, in part because the rule is not limited to specific types of plaintiffs or causes of action. Rather, it focuses on what the plaintiff knew or should have known—facts ordinarily beyond the prospective defendant's grasp. It is also unlikely that the prospective defendant will know that he has injured the plaintiff when the prospective plaintiff himself does not know that.

with the rule, however, does not alone support adoption of the discovery rule. The diligence purpose cannot be the primary purpose of a statute of limitations, since on its face it is not even an independent reason for a statute of limitations. There must be an underlying reason for wishing to encourage claimants to be diligent; sleeping on one's rights does not seem to be evil per se. Under the traditional analysis, then, adoption of the discovery rule can be justified only by a simple equitable judgment that protecting justifiably ignorant plaintiffs from the harsh limitations bar is more important than furthering the traditional limitations purposes. This simple equitable judgment defies rational analysis, at least under the traditional approach to limitations questions.

The traditional purposes of statutes of limitations can be reformulated to indicate their interrelationship and eliminate the analytical problems caused by characterizing the diligence purpose as an independent purpose, if one assumes that the evidentiary purpose of statutes of limitations is primary. Under this assumption, the basic function of statutes of limitations is to protect the court from becoming an unwitting tool of fraud and injustice when it cannot with certainty separate valid from invalid claims because of the passage of time.[21] This evidentiary purpose alone, however, does not lead necessarily to a statute of limitations in traditional form, because the dead witnesses, forgotten events, and missing documents may have favored either the plaintiff or the defendant. To support the traditional statute of limitations, some reason must be given for imposing the limitations bar on the *plaintiff*.

Two complementary reasons can be given. First, in our legal system the plaintiff chooses whether and when to sue. He can avoid the evidentiary problem by bringing suit promptly. Barring him from recovery after a specified time may encourage him to file promptly. Thus, the traditional view is that one "purpose" of limitations is to discourage the plaintiff from "sleeping on his rights." Similarly, since the plaintiff chooses whether and when to sue, he can time his claim to take advantage of defects in the defendant's evidence caused by the passage of time, the very abuse of the judicial system that statutes of limitations were intended to prevent. Secondly, the plaintiff is asking the court to disturb the status quo. People need to be able to rely on the way things are in order to carry on their affairs and plan for the future.

21. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948).

Thus, it makes sense to require the plaintiff to sue within a reasonable period of time. Both of these reasons for putting the burden of a limitations provision on the plaintiff depend on the traditional adversary structure of our system of adjudication, in which the plaintiff must begin legal proceedings and bear the burden of proof. Consequently, both reasons would appear to rest on the traditional assumption that litigation is socially desirable only as a peaceful alternative to violent means of resolving disputes.[22]

This reformulated rationale for statutes of limitations may not provide a better basis for analyzing the discovery-rule development than the traditional explanation of limitations purposes. First, the reformulation itself may be flawed. Some historical evidence supports the conclusion that the evidentiary purpose of statutes of limitations for personal injury claims is primary, but that evidence is not conclusive.[23]

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22. The close relationship between statutes of limitations and the traditional attitude toward litigation was expressed by Lord Simon of Glaisdale in his dissenting opinion in *Central Asbestos Co. v. Dodd*:

> Litigation is the resolution of civil contention by methods preferable to violence. But that does not mean that it is otherwise an inherently desirable activity. The rule of law is not to be equated with the reign of litigiousness. Litigation involves a call on scarce resources, and it is apt to set up emotional and social strains of its own; no one with experience of litigation would suppose that Miss Flite was a purely fanciful creation. Hence the desirability of forensic dispatch. There can be a few circumstances in which contentions within a society can be prolonged unresolved without risk to the fabric of that society. Moreover, dilatory procedures may defeat the very purpose of the judicial process, namely, to vouchsafe justice, since if litigation is prolonged, not only is there waste of time and money and moral energy, but circumstances may change in such a way that what would have been at the outset a just conclusion is in the end no longer so. Finally, delay will make it more difficult for the legal procedures themselves to vouchsafe a just conclusion—evidence may have disappeared and recollections become increasingly unreliable. Speedy rough justice will, therefore, generally be better justice than justice worn smooth and fragile with the passage of years.

[1972] 2 All E.R. at 1153.

23. The historical evidence relating to the 1623 Act limiting personal actions, 21 Jac. 1, c. 16, leaves the question of the intended purpose of the Act somewhat obscure. The Act was passed in 1623, but the Bill was first introduced in the Parliament of 1614 where it was read twice but died when the King dissolved Parliament. *See* 1 H.C. JOUR. 486, 496 (1614); 2 S. GARDINER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 1603-1642, at 227-48 (1883). The Bill was reintroduced in the Parliament of 1621, where it was passed by the House of Commons after extensive debate but died in the House of Lords. *See* 4 W. NOTESTEIN, F. RELF & H. SIMPSON, COMMONS DEBATES: 1621, at 370-71 (1935) [hereinafter cited as NOTESTEIN]. The Bill was again introduced in the Parliament of 1623, where it was finally passed by both Houses and became law with the assent of King James I. *See* 1 H.C. JOUR. 671, 673, 678 (1623). Evidence from the internal structure of the Act, the other statutes passed by Parliament in the late Elizabethan and early Jacobean pe-

The emphasis on the evidentiary purpose may thus be simply arbitrary. Secondly, the reformulated rationale by itself provides no basis for analysis of the simple equitable judgment behind the discovery rules.

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riods, the recorded debates in Parliament, and the general legal history of that time can be used to support any of the following three theories about the primary purpose of the Act:

1) The primary purpose was to keep trivial litigation from cluttering up the King's courts and to encourage revival of the local courts. Other statutes passed in this period show that this was a continual concern of Parliament. *See, e.g.*, 43 Eliz. 1, c. 6 (1601) ("An act to avoid trifling and frivolous suits in law in her Majesty's courts in Westminster"); 4 Jac. 1, c. 3 (1606) (an act to give costs to the defendant upon a nonsuit of the plaintiff or verdict against him); 21 Jac. 1, c. 8 (1623) ("An act to prevent and punish the abuses in procuring process and supersedeas of the peace and good behavior, out of his Majesty's courts at Westminster, and to prevent the abuses in procuring writs of certiorari out of the said courts, for the removing of indictments found before justices of the peace in their general sessions"). In fact, the Limitations Act of 1623, besides imposing time limitations on the bringing of real and personal actions, included two additional provisions specifically aimed at discouraging trivial or frivolous suits: a provision making negligence or involuntariness or tender of damages a defense to trespass q.c.f. actions when not brought to try title, and a provision imposing costs on the plaintiff in all "actions upon the case for slanderous words" in which the jury assesses damages at less than forty shillings. 21 Jac. 1, c. 16, §§ 5, 6 (1623). That the time periods for real actions were much longer than those for personal actions also supports this theory, since real actions were thought to be the most important business of the King's courts. This conclusion finds support in the following comment by Sir Edward Coke, then a member of the House of Commons, during debate on the Bill in the 1621 Parliament: "Thanketh God, he was a Christian Man, Englishman, and a Norfolke Man.—Thinketh, that County may give the King a Subsidy yearly, for this Bill.—1700 Score Nisi prius, at one Assises there; and not the 5th Part worth 20s." 1 H.C. JOUR. 562 (1621). A diarist recorded a fragment of this statement, putting down the more believable figure of seventeen score nisi prius. 5 NOTESTEIN 50.

The problem with the assumption that discouragement of frivolous or trivial suits was the primary purpose of the 1623 Act is that the limitations provisions barring suits not brought within the allotted time seem poorly adapted to achieving that specific purpose, since they bar all suits after the time period, whether trivial or not.

2) The purpose was to provide certainty and protect the status quo.

The primary purpose of the limitations periods for the real actions in the 1623 Act was arguably to provide certainty to landholders and to protect the status quo. Joining the limitations provisions for personal actions in the same Act as the limitations provisions for real actions indicates Parliament's assumption that the purpose of the provisions are the same. The evidence supporting the first theory can also be viewed as supporting this second theory. The House of Commons' evident dislike for litigation could be seen as stemming from a belief that litigation threatens certainty and the status quo. In addition, the report of a speech made by Sir Henry Poole, member of the House of Commons, against the Bill, both as to real and personal actions, concludes: "And yet if it were like to procure peace, Evell is not to be done that good may come thereof. And it is *Malum per se* to give the goods from the true owners to others." 4 NOTESTEIN 370. This indicates that Poole thought the primary argument for the Bill was the need to "procure peace."

3) The primary purpose was to prevent injustice from jury determinations of fact

D. *Historical Perspective*

The rise of the discovery rule can best be understood and analyzed by placing in historical perspective the three important considerations underlying statutes of limitations for personal injury claims—the evidentiary and personal certainty purposes, and the general societal distaste for litigation. History may help explain why concern for hapless,

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based on stale testimony. This conclusion is supported by the fact that the need to control and limit the kinds of evidence submitted to the jury was at that time first becoming a critical practical problem. *See* 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 127-33, 185 (1926) [hereinafter cited as HOLDSWORTH]. In addition, some of the recorded discussion on the Bill supports this view. In the 1614 Parliament, a member of the House of Commons moved to amend the Bill by adding a provision "that all Actions may be laid in the proper County, where they originally grow." 1 H.C. JOUR. 496 (1614). For discussion of the venue problem see 5 HOLDSWORTH 140-43 (1924). This suggests that the member considered the purpose of his amendment to be the same as the purpose of the Bill. The purpose of the proposed amendment can be seen as the prevention of harassment and possible injustice from holding the nisi prius trial in a county far removed from where the defendant's witnesses live. If the main purpose of the Bill is similar, that purpose was to avoid harassment and possible injustice from holding the trial at a time when defendant's witnesses might not be available.

In 1621 Parliament considered a companion Bill to limit suits in Equity as well as actions at common law. This proposed Bill was read twice, but not a third time. In the course of arguing for the proposed Bill before it was sent to a committee, Sir Edward Coke reportedly said:

> My Lord Chancellor hath a power accordinge to the Common Lawe and a power according to Equitie. The first is lymmitted by the Bill already prepared. Fynes, Recoveryes, Deedes inrol'd appeare of Record, and yet all theis are limitted; much more reason is there for matters in equitie which consist not in matter of Record but in testimonie, which is ever best when it is greenest.

4 NOTESTEIN 43 (footnote omitted). This suggests that the basic purpose of the main Bill was evidentiary. The lengthier limitations for real actions, perhaps most often decided on documentary evidence, than for personal actions, most often decided on oral testimony, are consistent with this view.

The limitations solution to an evidentiary problem had been adopted by Parliament in another statute shortly before the first introduction of the limitation Bill in the 1614 Parliament. In 1609 Parliament passed a statute that forbade admitting into evidence a shopbook to prove the existence of a debt if the tradesman keeping the shopbook brought suit more than one year after the goods were delivered. 7 Jac. 1, c. 12 (1609). The statute explained that the purpose of the Act was to guard against the evil of merchants bringing actions against customers based on doctored shopbooks long after the delivery of the goods, which the customer cannot contradict,

> unless he or they can produce a sufficient proof by writing or witnesses, of the said payment, that may countervail the credit of the said shopbooks, which few or none can do in any long time after the said payment . . . .

Id.

The evidence arguably supports all three of these theories, and the safe course would be to say that all three purposes were behind the 1623 Act and that a search for a primary purpose is fruitless.

ignorant plaintiffs now seems to outweigh the fundamental purposes of statutes of limitations—why courts and legislatures in the twentieth century are willing to redraw the line between plaintiffs' and defendants' interests originally laid down by the first statute of limitations for personal actions in 1623.

Between 1500 and 1700, the jury gradually evolved from an independent method of proof into a trier of facts that heard witnesses in open court.[24] In 1623, when the first statute of limitations for personal actions was enacted, the problem of possible error from the jury's reliance on untrustworthy oral testimony was just becoming apparent. Courts in the sixteenth and seventeenth centuries gradually devised certain exclusionary rules (that later became the "law of evidence")[25] to limit the kinds of oral testimony presented to the jury. Because the problem was new to the courts, the precise nature and ultimate solution were not immediately obvious; other solutions besides exclusionary rules may have been tried. In historical context, then, the statute of limitations for personal actions can be viewed as an early legislative attempt to prevent stale testimony from getting to the jury, by the drastic expedient of barring the plaintiff's claim altogether.[26]

The 1623 statute was passed when the problem of stale testimony may have been particularly acute. At that time, parties to a lawsuit were not allowed to be witnesses,[27] and hearsay testimony was freely admitted as long as a witness testified that he actually heard a designated person say it.[28] A plaintiff could easily wait until the death or departure of adverse witnesses, to bring an action, perhaps based only on hearsay testimony, secure in the knowledge that the defendant could not himself rebut the charges by appearing as a witness. The need

24. *See* 9 HOLDSWORTH 127-33, 185.

25. *See id.* at 127-33; J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 1-5 (1898).

26. *See* note 23 *supra.*

27. 9 HOLDSWORTH 193-97. This rule grew out of an early conception of the jury. Originally, the jury decided disputes from its collective knowledge of the relevant facts. When witnesses were later allowed to testify before the jury, they were considered additional jurors. The parties to the dispute could not be witnesses because they could not be jurors.

28. *See id.* at 214-19. The hearsay rule was not developed until the end of the seventeenth century. Until then, the only comparable protection for the parties was the requirement that a witness speak "de visu et auditu," from his own personal knowledge. *Id.* at 214. This rule, however, did not preclude hearsay if the witness stated that he actually heard *X* say *Y*.

for the statute of limitations must have seemed greater in 1623 than it does today, when most hearsay testimony is excluded and parties can be witnesses.

The plight of a potential defendant, his earthly possessions continually in jeopardy of a possible adverse judgment, was perhaps more persuasive in 1623 than it is today. In 1623, liability insurance was unheard of.[29] It is now commonly assumed that any potential defendant with substantial assets will have liability insurance. For the defendant with liability insurance, the certainty of freedom from ultimate liability provided by insurance may be functionally equivalent to the certainty of freedom from an adverse judgment after expiration of the limitations period provided by the statute of limitations. Assuming full insurance coverage, the focus of the personal certainty purpose shifts from the need for individual certainty to the need for actuarial certainty sufficient to allow insurability of the risk of loss.[30] If the risk of loss is insurable under different statutes of limitations that do not themselves provide the traditional individual certainty, substitute certainty is still available through liability insurance.[31]

Personal injury litigation is no longer considered a necessary evil tolerable only as an alternative to violent resolution of disputes. Rather, present-day courts[32] and commentators[33] often say that the purpose of

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29. *See generally* H. RAYNES, A HISTORY OF BRITISH INSURANCE (2d ed. 1950).

30. The relationship between the personal certainty purpose of statutes of limitations and liability insurance was raised in a heated exchange between two British solicitors commenting on Central Asbestos Co. v. Dodd, [1972] 2 All E.R. 1135 (H.L.). Mr. Woolf stated:

> Unlike Mr. Watmore, I am more alarmed myself at the prospect of blameless injured workmen and their dependents going uncompensated than of insurance companies having to keep their files open.

Woolf, *supra* note 17, at 826. Mr. Watmore rejoined:

> Mr. Woolf says that he is more concerned at the prospect of injured workmen going uncompensated than that insurance companies should have to keep their files open indefinitely. I suspect that this remark betrays Mr. Woolf's innermost thoughts on this subject: he would probably abolish the Limitations Acts altogether.

Watmore, *Personal Injuries—A Reply*, 122 NEW L.J. 936, 936 (1972). *See also* LAW REFORM COMMITTEE, TWENTIETH REPORT, CMND. No. 5630, at 10 (1974).

31. A comprehensive evaluation of different kinds of limitations statutes would analyze the different costs of insurance under each. *See* text accompanying notes 354-58 *infra*. Assuming all defendants are insured, however, an evaluation of the different statutes solely from the standpoint of individual certainty leads to the conclusion that all statutes that allow insurability are equivalent.

32. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.

personal injury litigation is to alleviate the crushing burdens of injury by shifting the economic loss from the injured through insurance to others who share the same risk of loss, or through enterprise liability to the enterprise that profits from the injury-producing activity and can spread the cost of injuries among those who benefit from its operations. The purpose of adjudication in a compensation system based on such considerations is to shift the loss from the injured to those better able to bear it. This positive social goal can be achieved fully only if all who are injured and entitled to compensation make claims. Therefore, according to this theory, litigation is to be encouraged rather than discouraged.

The workmen's compensation system was the forerunner of other compensation systems in the United States. Based on the enterprise liability theory, state workmen's compensation statutes attempt to shift the economic burden of industrial accidents from the employee to the employer, and ultimately to the consumers.[34] Fault is no longer the basis for liability, and an administrative agency, not the jury, usually determines the facts of the case. If the above historical analysis of statutes of limitations is valid, the pressures for relaxation or elimination of statutes of limitations should be particularly strong within the workmen's compensation systems.

II. HISTORY OF "ACCIDENT" AND "INJURY" CLAIM LIMITATIONS PROVISIONS

In specifying the time when the limitations period for workmen's compensation claims begins, few state legislatures adopted the traditional "accrual" language.[35] Rather, most state legislatures adopted

2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

33. *See, e.g.*, Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 499-501, 517 (1961); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 549-51 (1948).

34. *See generally* NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 21-26 (1973) [hereinafter cited as NATIONAL COMM'N COMPENDIUM].

35. *See* ch. 98, § 26, [1923] Alas. Laws 256 (two years after cause of action accrues), *amended in 1946 to begin period on date of injury*, ch. 9, § 29, [1946] Alas. Laws 83; ch. 112, § 27(d), [1913] Ore. Laws 206 (one year after "the day upon which the injury occurred or the right accrued"), *amended to delete "right accrued" language*, ch. 288, § 13, [1917] Ore. Laws 559; ch. 74, § 12(d), [1911] Wash. Laws 365 (one year after "day upon which the injury occurred or the right thereto accrued"), *final phrase amended in 1927 to read "or the rights of dependents or beneficiaries accrued,"*

one of two alternatives, beginning the limitations period at the date of accident[36] or at the date of injury.[37] While there may not appear to be any difference between the date of the accident and the date of the injury, the two terms have been interpreted quite differently in cases of delayed or latent compensable injuries.[38]

The history of the "accident" and "injury" language suggests that the difference in wording was not originally related to the latent injury problem; instead, the "injury" language seems to have developed in response to the problem of coverage for occupational diseases under the workmen's compensation statutes with the "accident" language. The original British Workmen's Compensation Act of 1897[39] began the limitations periods for both notice and claim at the time of the accident.[40] In an early case,[41] the Court of Appeal relied on this provi-

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ch. 310, § 6, [1927] Wash. Laws 847; ch. 60, § 6, [1923] Wyo. Laws 77 (one year after "injury occurred or the right thereto accrued"), *amended to delete "right thereto accrued,"* ch. 124, § 1, [1925] Wyo. Laws 126.

Faced with workmen's compensation statutes without specific limitations provisions, three state courts applied a general statute of limitations that started the limitations period from the time the cause of action accrues. Maryland Cas. Co. v. Industrial Comm'n, 74 Utah 170, 278 P. 60 (1929), *specific statutory limitations provision added,* ch. 51, § 42-1-92, [1939] Utah Laws 73; Fitch v. Parks & Woolson Mach. Co., 109 Vt. 92, 191 A. 920 (1937); Federal Rubber Co. v. Industrial Comm'n, 185 Wis. 299, 201 N.W. 261 (1924), *specific statutory provision added,* ch. 453, § 3, [1929] Wis. Laws 694.

36. *See* text accompanying notes 70-76 *infra.*

37. *See* notes 147-53 *infra* and accompanying text. *See generally* Note, *"Accident" v. "Injury" in Workmen's Compensation: A Distinction With a Difference,* 58 YALE L.J. 495 (1949).

38. *See* text accompanying notes 86-91, 154 *infra.*

39. 60 & 61 Vict., c. 37 (1897). For the history of this Act see D. HANES, THE FIRST BRITISH WORKMEN'S COMPENSATION ACT, 1897 (1968).

40. The Act barred proceedings for the recovery of compensation unless the employee gave notice of the accident to the employer as soon as practicable after the accident and made claim for compensation "within six months from the occurrence of the accident causing the injury." 60 & 61 Vict., c. 37, § 2-(1) (1897). This provision of the 1897 Act was probably derived from a similar provision in the Employer's Liability Act of 1880, 43 & 44 Vict., c. 42, § 4, which read:

> An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

41. Steel v. Cammell, Laird & Co., [1905] 2 K.B. 232. The British Workmen's Compensation Act of 1906, 6 Edw. 7, c. 58, amended the 1897 Act and partially overturned *Steel* by requiring employers to pay compensation for certain occupational diseases listed in a schedule of compensable occupational diseases.

sion to construe the general coverage provision, which authorized compensation for "injury by accident," as not authorizing compensation for lead poisoning, an occupational disease contracted by continually handling lead at work. The court reasoned that the disease was not an "injury by accident" because there was no identifiable event of which notice could have been given as required by the notice and claim limitations provision.

The draftsmen of the early state workmen's compensation acts looked to the British Act as their model, believing that judicial interpretation of the British Act would solve many problems of statutory construction and thus eliminate needless litigation in this country.[42] Some draftsmen simply copied the British "accident" language in the limitations provisions.[43] Other draftsmen, however, apparently determined to provide coverage for occupational diseases without alerting uninitiated legislators to their design, substituted the word "injury" for the word "accident" in the notice and claim limitations provision and deleted the words "by accident" from the basic coverage provision, thus eliminating the announced statutory basis for the British lead poisoning case. The historical evidence suggests that this was a deliberate choice by only a few draftsmen.[44] The reports of state commis-

42. *See* NEW YORK EMPLOYERS' LIABILITY COMM'N, REPORT 53-54 (1910).

43. *See, e.g.*, ch. 674, § 1, [1910] N.Y. Laws 1947.

44. A conference of commissioners on compensation for industrial accidents was held in Chicago on November 10-12, 1910. The conference discussed and voted on certain policy questions, but left the job of drafting a model act embodying their decisions to a drafting committee. After the formal conference had ended, the drafting committee met with the lawyers who had attended the conference. The proceedings of this meeting indicate that the chairman of the drafting committee (and presumably the other members of the drafting committee attending the rump drafting session, too) was well aware of the *Steel* case and the possible ways to avoid its result. *See* PROCEEDINGS OF THE CONFERENCE OF COMMISSIONS ON COMPENSATION FOR INDUSTRIAL ACCIDENTS 285-88 (1910) [hereinafter cited as CHICAGO CONFERENCE PROCEEDINGS]. The committee drafted an act that provided compensation for "all personal injuries received by . . . employee arising out of and in the course of . . . employment," eliminating the "by accident" restriction in the British Act of 1897. *Id.* at 319. The notice provision in the draft act dated the limitations period from the injury, not from the accident. *Id.* at 322-23. The report of the drafting discussions at the Chicago Conference indicate that the Chairman and the Secretary of the Massachusetts Commission charged with drafting an act for Massachusetts were also aware of the *Steel* decision and the ways to avoid its result. *Id.* at 285-88. The Massachusetts Commission submitted three alternative draft bills to the Massachusetts legislature. In each draft the coverage provision eliminated the "by accident" qualification, and the notice and claim period ran from the date of the injury, not from the date of the accident. MASS. HOUSE, No. 1925, at 9, 30, 44 (1911). Several other states, probably without awareness on the part of the local drafts-

sions charged with drafting compensation acts suggest that in most cases little attention was given to the notice and claim limitations provisions or the relationship between limitations provisions and the coverage provision.[45] The draftsmen often simply copied a limitations provision from a convenient model, such as the British Act of 1897,[46] another state's act,[47] or the proposed Uniform Workmen's Compensation

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men, also adopted an "injury" limitations provision together with a coverage provision that deleted the "by accident" qualification. *See, e.g.*, ch. 138, §§ 1, 21, [1913] Conn. Acts 1634, 1735; No. 10, Pt. II, §§ 1, 15, [1912] Mich. Laws 1st Extra Sess. 23, 27. For those few who were aware of these distinctions, the purpose of drafting the coverage language and the limitations language to eliminate any reference to an accident was to provide coverage for occupational diseases. The question of coverage for occupational diseases was soon extensively litigated. Of the state courts faced with an original coverage provision using the term "personal injury" alone and a limitations provision running from the time of the "injury," only the Massachusetts court accepted the argument that these changes in the language of the 1897 British Act indicated an intention to authorize compensation for industrial diseases. *In re* Hurle, 217 Mass. 223, 104 N.E. 336 (1914). It alone held that a disease contracted by continual exposure to disease-inducing working conditions was a "personal injury" compensable under a workmen's compensation act. Ohio, Michigan, Connecticut, and Oregon, with statutory language similar to that in Massachusetts, all rejected this argument and held that industrial diseases were not "personal injuries" covered under the act. Miller v. American Steel & Wire Co., 90 Conn. 349, 97 A. 345 (1916); Adams v. Acme White Lead & Color Works, 182 Mich. 157, 148 N.W. 485 (1914); Industrial Comm'n v. Brown, 92 Ohio St. 309, 110 N.E. 744 (1915); Iwanicki v. State Indus. Acc. Comm'n, 104 Ore. 650, 205 P. 990 (1922). Behind the technical arguments in these opinions, one can sense the courts' conviction that the legislature had not intended by use of this language to include occupational diseases under workmen's compensation. Refusing to turn statutory construction into a secret game played only by knowledgeable draftsmen and the courts, these courts left the question of coverage for occupational diseases to the legislature.

45. *See* [COLORADO] EMPLOYEES COMPENSATION COMM'N, REPORT 14 (1913); CONNECTICUT STATE COMM'N ON COMPENSATION FOR INDUSTRIAL ACCIDENTS, REPORT 16-18 (1912); EMPLOYERS' LIABILITY COMM'N OF THE STATE OF ILLINOIS, REPORT (1911); [IOWA] EMPLOYERS' LIABILITY COMM'N, REPORT (1912); EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION COMM'N OF THE STATE OF MICHIGAN, REPORT 34-39 (1911); NEBRASKA EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION COMM'N, PRELIMINARY REPORT 3-16 (1912); NEW JERSEY EMPLOYERS' LIABILITY COMM'N, REPORT (1911); OHIO EMPLOYERS' LIABILITY COMM'N, REPORT 1, at viii-ix, lxii (1911); [OREGON] COMM'N TO DRAFT A WORKMEN'S COMPENSATION BILL, REPORT 2-8 (1913); [PENNSYLVANIA] INDUSTRIAL ACCIDENTS COMM'N REPORT 1-16 (1912); [WASHINGTON] COMM'N TO INVESTIGATE THE PROBLEMS OF INDUSTRIAL ACCIDENTS AND TO DRAFT A BILL ON THE SUBJECT OF EMPLOYERS' COMPENSATION, REPORT 3-7 (1910); BUREAU OF LABOR AND INDUSTRIAL STATISTICS, STATE OF WISCONSIN, THIRTEENTH BIENNIAL REPORT 105-16 (1909) (section entitled "Industrial Accidents and Employer's Liability in Wisconsin"). *See also* NEW YORK EMPLOYERS' LIABILITY COMM'N, *supra* note 42, at 52-54.

46. *See, e.g.*, NEW YORK EMPLOYERS' LIABILITY COMM'N, *supra* note 42, at 53-54.

47. *See, e.g.*, [OREGON] COMM'N TO DRAFT A WORKMEN'S COMPENSATION BILL, REPORT 5 (1913) (recommending adoption of Washington Act, note 35 *supra*).

Act.[48]

Most state commissions and other early draftsmen did not foresee the problem presented by latent or progressive injuries. The problem was soon revealed, however, as the workmen's compensation systems went into operation. Since not every accidental injury is immediately compensable under workmen's compensation, starting the limitations period from the date of the initial injury might bar an employee's claim before a latent or progressive injury became compensable. Only Massachusetts,[49] New Hampshire,[50] North Dakota,[51] Texas,[52] and Vermont[53] had provisions in their early acts excusing a late claim for specified reasons that could be stretched to aid the employee in a latent compensable injury case. Other state courts faced the latent compensable injury problem guided only by the bare language specifying the date the limitations period commenced. With only two exceptions,[54] the courts construing "accident" provisions started the limitations period at the time of the specific work incident that ultimately caused the compensable condition,[55] thus barring some claims before the right to compensation ever arose. Late claimants fared somewhat better in "injury" states. Although courts in eight "injury" states construed the date of injury as the date of the initial injury concomitant with the accident,[56] the courts in fifteen other "injury" states construed the date of injury more liberally, starting the limitations period from one of the following times: (1) the time the injury became manifest,[57] (2) the time the

48. A Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws in 1914, after many states had already adopted workmen's compensation acts. *See* C. TERRY, UNIFORM STATE LAWS IN THE UNITED STATES ANNOTATED 445-46 (1920).

49. Ch. 14, § 5, [1912] Mass. Acts 578-79 (delay in filing claim excused if occasioned by "mistake or other reasonable cause").

50. Ch. 163, § 5, [1911] N.H. Laws 455 (later notice excused unless employer proves prejudice), *interpreted to apply to late claims in* Mulhall v. Nashua Mfg. Co., 80 N.H. 194, 115 A. 449 (1921) (dictum).

51. Ch. 162, § 15, [1919] N.D. Laws 270 (claims must be filed within sixty days after injury, but Bureau may, "for any reasonable cause shown," allow claims to be made at any time within one year).

52. Ch. 103, § 4a, [1917] Tex. Acts 283 ("for good cause the Board may, in meritorious cases, waive . . . strict compliance with . . . limitations as to notice . . . and . . . filing").

53. No. 101, [1925] Vt. Acts 138 (delay in making claim excused if employer had not been prejudiced by delay).

54. Nebraska and Tennessee. *See* notes 103-10 *infra* and accompanying text.

55. *See* note 86 *infra* and accompanying text.

56. *See* state court cases cited notes 155, 157 *infra.*

57. Johansen v. Union Stockyards Co., 99 Neb. 328, 156 N.W. 511 (1916).

injury became compensable,[58] or (3) the time the employee knew or should have known the compensable nature of his injury.[59] The courts in six "injury" states have evidently never construed the date of the injury in their states' claim limitations provisions.[60]

State legislatures often reacted to judicial interpretation of limitations provisions. Ten state legislatures switched once from an "injury" provision to an "accident" provision,[61] in most cases after a liberal judicial interpretation of the "injury" provision.[62] Three other legislatures[63]

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58. *Arkansas*: Donaldson v. Calvert-McBride Printing Co., 217 Ark. 625, 232 S.W.2d 651 (1950); *Connecticut*: Esposito v. Marlin-Rockwell Corp., 96 Conn. 414, 114 A. 92 (1921); *Louisiana*: Guderian v. Sterling Sugar & Ry., 151 La. 59, 91 So. 546 (1922); *Maine*: Hustus' Case, 123 Me. 428, 123 A. 514 (1924); *Rhode Island*: Rosa v. George A. Fuller Co., 74 R.I. 215, 60 A.2d 150 (1948). In all the states except Rhode Island, the legislature subsequently switched to an "accident" provision. *See* notes 62 & 67 *infra*.

59. *Arizona*: English v. Industrial Comm'n, 73 Ariz. 86, 237 P.2d 815 (1951); *California*: Marsh v. Industrial Acc. Comm'n, 217 Cal. 338, 18 P.2d 933 (1933) (occupational disease); Continental Cas. Co. v. Industrial Acc. Comm'n, 11 Cal. App. 2d 619, 54 P.2d 753 (1936) (accidental injury), *overruled by implication*, ch. 1034, § 5, [1974] Cal. Stat. 2307; *Colorado*: City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); *Indiana*: International Detrola Corp. v. Hoffman, 224 Ind. 613, 70 N.E.2d 844 (1947); *Mississippi*: Tabor Motor Corp. v. Garrard, — Miss. —, 233 So. 2d 811 (1970); *Missouri*: Marie v. Standard Steel Works, 319 S.W.2d 871 (Mo. 1959) (occupational disease); Crites v. Missouri Dry Dock & Repair Co., 348 S.W.2d 621 (Mo. Ct. App. 1961); *Nebraska*: Williams v. Dobberstein, 182 Neb. 862, 157 N.W.2d 776 (1968); *Tennessee*: Burcham v. Carbide & Carbon Chem. Corp., 188 Tenn. 592, 221 S.W.2d 888 (1949); Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909 (1947); *Washington*: Fee v. Department of Labor & Indus., 151 Wash. 337, 275 P. 741 (1929), *"accident" language adopted by legislature*, ch. 310, § 2, [1927] Wash. Laws 818, 847 (now WASH. REV. CODE ANN. §§ 51.08.100-.28.050 (1962)). *See also* notes 324-27 *infra* and accompanying text (discussion of Minnesota's interpretation of its notice provision).

60. Alaska, Florida (*but cf.* interpretation of "reasonable excuse" exception to notice limitations provision in Escarra v. Winn-Dixie Stores, Inc., 131 So. 2d 483 (Fla. 1961), and Stoner v. Hialeah Race Course, Inc., 218 So. 2d 448 (Fla. 1969)), Pennsylvania ("injury" provision first adopted in 1972, Act No. 223, § 4, [1972] Pa. Sess. Laws Serv. 696-97), South Dakota, Vermont, and West Virginia.

61. Ch. 307, § 5, [1927] Conn. Acts 4401; no. 116, § 1, [1963] Hawaii Laws 119; ch. 106, § 9, [1927] Idaho Laws 143; ch. 162, § 2, [1947] Ind. Acts 257; no. 85, § 31, [1926] La. Acts 124; ch. 300, § 32, [1929] Me. Acts 296; ch. 233, § 10, [1917] Nev. Stats. 448; ch. 139, § 1, [1935] Ore. Laws 215; ch. 310, § 6, [1927] Wash. Laws 84 (by definition); ch. 102, § 102.12, [1931] Wis. Stat. 1196 (by definition).

62. *Connecticct*: Esposito v. Martin-Rockwell Corp., 96 Conn. 414, 114 A. 92 (1921); *Indiana*: International Detrola Corp. v. Hoffman, 224 Ind. 613, 70 N.E.2d 844 (1947); *Louisiana*: Guderian v. Sterling Sugar & Ry., 151 La. 59, 91 So. 546 (1922); *Maine*: Hustus' Case, 123 Me. 428, 123 A. 514 (1924); *Washington*: Stolp v. Department of Labor & Indus., 138 Wash. 685, 245 P. 200 (1926); *Wisconsin*: Acme Body

switched to an "accident" provision from a previous provision that did not contain the "injury" language but which nevertheless had been construed liberally.[64] New York[65] and California[66] switched twice, ending with "accident" provisions. Arkansas also switched twice, but ended with an "injury" provision.[67] Four states switched from an "accident" provision to an "injury" provision,[68] and one state switched from an "accident" provision interpreted harshly to an "injury" provision.[69]

III. "ACCIDENT" JURISDICTIONS

The statutes of twenty-four states by a simple provision start the limitations period for claims for compensation for accidental injuries at the time of the "accident."[70] California, Washington, and Wisconsin

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Works v. Industrial Comm'n, 204 Wis. 493, 234 N.W. 756, *rehearing denied*, 204 Wis. 500, 236 N.W. 378 (1931).

63. Ch. 814, § 37(a), [1957] Md. Laws 1504 (changing prior "disability" language); ch. 77, § 1, [1951] N.H. Laws 249 (changing prior unlimited claim provision); ch. 51, § 42-1-92, [1939] Utah Laws 73 (changing prior "cause of action accrues" provision).

64. Baltimore Steel Co. v. Burch, 187 Md. 209, 49 A.2d 542 (1946); Mulhall v. Nashua Mfg. Co., 80 N.H. 194, 115 A. 449 (1921); Salt Lake City v. Industrial Comm'n, 104 Utah 436, 140 P.2d 644 (1943).

65. Ch. 816, § 28, [1913] N.Y. Laws Extra Sess. 2292-93 (switch from "accident" to "injury"); ch. 634, § 4, [1918] N.Y. Laws 2020 (switch from "injury" to "accident").

66. Ch. 607, § 5, [1915] Cal. Stat. 1085 (switch from "accident" to "injury"); ch. 1034, §§ 3-5, [1947] Cal. Stat. Extra Sess. 2307 (switch from "injury" to "accident," by definition).

67. [1948] Arkansas Initiated Measure No. 14, § 18, *summarized in* [1949] Ark. Acts 1420 (switch from "injury" to "accident"); [1968] Arkansas Initiated Measure No. 1, § 5 ("accident" to "injury"). The 1948 switch to a harsher provision may have been unintentional, for the provision was included in a generally more liberal initiated measure which redrafted the entire workmen's compensation act.

68. Ch. 103, § 81, [1921] Ariz. Laws 223; ch. 201, § 15, [1923] Colo. Laws 744; ch. 287, § 4, [1963] Neb. Laws 863; Act No. 223, § 4, [1972] Pa. Sess. Laws Serv. 696-97.

69. Ch. 9, § 29, [1946] Alas. Laws 83.

70. ALA. CODE tit. 26, § 296 (1958) (complaint must be filed within one year "after the accident"); CONN. GEN. STAT. REV. § 31-294 (1973) (notice of claim or request for hearing must be given within one year from "date of the accident"); DEL. CODE ANN. tit. 19, § 2361 (Supp. 1970) (appeal to Board allowed within two years "after the accident"); GA. CODE ANN. § 114-305 (1973) (claim must be filed "within one year after the accident"); HAWAII REV. STAT. § 386-82 (1968) (claim must be made within two years of date effects of injury become manifest and within five years "after the date of the accident or occurrence which caused the injury"); IDAHO CODE § 72-701 (1973) (claim must be made within one year "after the date of the accident"); ILL. ANN. STAT. ch. 48, § 138.6 (Smith-Hurd 1966) (application for compensation must be made "within one year after the date of the accident"); IND. CODE § 22-3-3-3 (Burns 1974) (claim

start the period at the time of the injury,[71] but separately define injury or date of injury as the date of the accident.[72] Both Nebraska and Tennessee have two provisions purporting to limit claims. Nebraska in one provision requires claim for compensation to be made within six months after the occurrence of the injury,[73] and in another provision

must be filed "within two years after the occurrence of the accident"); KAN. STAT. ANN. §§ 44-520a, -535 (Supp. 1972) (claim must be made "within two-hundred (200) days after the accident"); KY. REV. STAT. § 342.185 (1973) (claim must be made "within two years after the date of the accident"); LA. REV. STAT. ANN. § 23:1209 (1964) (proceedings must be begun "within two years from the date of the accident" and within one year "from the time the injury develops"); ME. REV. STAT. ANN. tit. 39, § 95 (Supp. 1973) (petition must be filed "within 2 years after the date of the accident," or, if failure to file petition because of "mistake of fact as to the cause and nature of the injury," within reasonable time); MD. ANN. CODE art. 101, § 39(a) (Supp. 1973) (application must be filed "within two years from the date of the accident"); MINN. STAT. ANN. § 176.151 (Supp. 1974) (proceedings must be begun within two years after employer has made written report of injury to commission and within "six years from the date of the accident"); MONT. REV. CODES ANN. § 92-601 (Supp. 1973) (claim must be made within "twelve months from the date of the happening of the accident," or if lack of knowledge of disability shown, commission may waive time requirement "up to an additional twenty-four (24) months"); NEV. REV. STAT. § 616.500 (1973) (claim must be filed "within 90 days after the happening of the accident"); N.H. REV. STAT. ANN. § 281.17 (1966) (claim barred unless notice of injury given to employer "within one year from the date of the accident"); N.J. STAT. ANN. § 34:15-51 (1959) (petition must be filed "within two years after the date on which the accident occurred"); N.Y. WORKMEN'S COMP. LAW § 28 (McKinney Supp. 1973) (claim must be filed "within two years after the accident"); N.C. GEN. STAT. § 97-24 (1972) (claim must be filed "within two years after the accident"); ORE. REV. STAT. § 656.319 (1973) (request for hearing must be filed within "one year after the date of the accident"); no 1059, § 13, [1974] S.C. Acts 2272 (claim must be filed "within two years after the accident"); UTAH CODE ANN. § 35-1-99 (1953) (claim must be filed "within three years from the date of the accident"); VA. CODE ANN. § 65.1-87 (1973) (claim must be filed "within one year after the accident").

71. CAL. LABOR CODE § 5405 (Deering 1964) (proceedings must be commenced "one year from . . . [t]he date of injury"); WASH. REV. CODE ANN. § 51.28.050 (1962) (application must be filed "within one year after the day upon which the injury occurred"); WIS. STAT. ANN. § 102.12 (1973) (application must be filed "within 2 years from the date of the injury" or "from the date the employee . . . knew or ought to have known the nature of the disability and its relation to the employment").

72. CAL. LABOR CODE § 5411 (Deering 1964) ("date of injury, except in cases of occupational disease, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed"); WASH. REV. CODE ANN. § 51.08.100 (1962) (" 'Injury' means a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom"); WIS. STAT. ANN. § 102.01(f) (1973) (" 'Time of injury', 'occurrence of injury', or 'date of injury' means the date of the accident which caused the injury, or in the case of disease, the last day of work for the last employer whose employment caused disability").

73. NEB. REV. STAT. § 48-133 (1968).

requires petition to be filed within one year after the accident.[74] Tennessee in one provision requires claim to be filed within one year after the accident,[75] and in another provision requires proceedings to recover compensation within one year after the occurrence of the injury.[76]

Several "accident" states have additional provisions that affect the application of the claim limitation. Hawaii,[77] Louisiana,[78] and Minnesota[79] date only their final limitations cutoff from the time of the accident. The final cutoff operates only if an initial, shorter limitations period, dated from a different event,[80] has not precluded the claim. Montana gives the workmen's compensation agency discretion to extend the initial one-year "accident" limitations period for up to two years if the claimant shows prior lack of knowledge of disability.[81] Maine dates the limitations period from the time of the accident, but provides an open-ended alternative of a "reasonable time" if failure to make claim is occasioned by "mistake of fact as to the cause and nature of the injury."[82] On its face, the Wisconsin statute seems similar to the Maine statute.[83] The language of the Wisconsin provision bars recovery if the application is not filed within two years from the date of the injury or from the date the employee knew or ought to have known the nature of the disability and its relation to his employment.[84] Shortly after this provision was enacted, the legislature enacted an amendment that defined the date of the injury as the date of the accident. The legislative history of the amendment establishes that the legislature intended the limitations period for accidental injuries to run without exception from the date of the accident, and that the exception for late knowledge was intended to remain applicable only to occupa-

74. *Id.* § 48-137.
75. TENN. CODE ANN. § 50-1003 (1966).
76. *Id.* § 50-1017(1).
77. HAWAII REV. STAT. § 386-82 (Supp. 1973).
78. LA. REV. STAT. ANN. § 23:1209 (1964).
79. MINN. STAT. ANN. § 176.151(1) (Supp. 1974).
80. HAWAII REV. STAT. § 386-82 (Supp. 1973) (two years from date effects of injury for which employee is entitled to compensation have become manifest); LA. REV. STAT. ANN. § 23:1209 (1964) (one year from time the injury "develops"); MINN. STAT. ANN. § 176.151(1) (Supp. 1974) (two years after employer has made written report of injury to commission).
81. MONT. REV. CODES ANN. § 92-601 (Supp. 1973).
82. ME. REV. STAT. ANN. tit. 39, § 95 (Supp. 1974).
83. WIS. STAT. ANN. § 102.01 (1973).
84. *Id.* § 102.12.

tional disease claims.[85] Otherwise, the enactment adding the separate definition would have been pointless.

Except for Tennessee and Nebraska, every "accident" state court that has faced the problem of limitations in a case of delayed, latent or undiscovered compensable injury caused by a single incident at work has held that the limitations period runs from the date of the causative incident, the "accident."[86] The courts in these cases have ad-

85. Wisconsin's initial statute required written notice to the employer within thirty days of the occurrence of the accident, and set out specific excuses for failure to give notice within that time. Ch. 50, § 11, [1911] Wis. Laws 50. The right to compensation was completely cut off if notice was not given and compensation was not paid within two years of the accident. There was no specific time limitation on filing claims, but the Wisconsin court held that the general six-year limitation from the time the cause of action accrued for personal injury claims applied to an otherwise unlimited claim for compensation in a case where the employer had originally paid compensation for temporary disability. The notice limitation therefore did not bar the later claim. Federal Rubber Co. v. Industrial Comm'n, 185 Wis. 299, 201 N.W. 261 (1924). In 1929, a specific claim limitation was added that required claim within two years from the date of injury or the date the employee knew or should have known the nature of his disability and its relation to his employment. Ch. 453, § 3, [1929] Wis. Laws 694. In January of 1931, the Wisconsin Supreme Court seemed to interpret "injury" as "compensable injury" in a latent-compensable-injury case. Acme Body Works v. Industrial Comm'n, 204 Wis. 493, 234 N.W. 756, *rehearing denied*, 204 Wis. 500, 236 N.W. 378 (1931). In response to a motion for rehearing based on the fact that the 1929 statute was irrelevant and inapplicable to the case because all the events occurred before the 1929 statute was passed, the court emphasized that it had merely interpreted the six-year "cause of action accrued" statute applicable under the *Federal Rubber* case. Evidently reacting to the *Acme* case, the Wisconsin legislature, later in 1931, passed a statute specifically defining the time of injury as the "date of the accident which caused the injury or the date when the disability from the occupational disease first occurs." Ch. 403, § 2, [1931] Wis. Laws 636. The obvious legislative intention to limit the *Acme* holding to occupational disease cases would be frustrated by giving independent force to the unrepealed discovery exception in the 1929 claim limitation, and suggests that this is one of those rare instances when a court interpreting a statute, faithful to the obvious legislative intent, must ignore the plain meaning of a provision in the statute. *Cf.* Markham v. Cabell, 326 U.S. 404 (1945). The Wisconsin Supreme Court subsequently limited the discovery exception in the 1929 statute to occupational disease cases, consistent with the legislative history of the 1931 Act. Larson v. Industrial Comm'n, 224 Wis. 294, 271 N.W. 835 (1937) (alternative holding); Andrzeczak v. Industrial Comm'n, 248 Wis. 12, 20 N.W.2d 551 (1945); Zabkowicz v. Industrial Comm'n, 264 Wis. 317, 58 N.W.2d 677 (1953). A more recent case suggests in dicta that the court may soon overrule this line of cases and apply the plain meaning of the statute, regardless of legislative intent. Boyle v. Industrial Comm'n, 8 Wis. 2d 601, 99 N.W.2d 702 (1959).

86. *Alabama*: Davis v. Standard Oil Co., 261 Ala. 410, 74 So. 2d 625 (1954); *Connecticut*: Gavigan v. Visiting Nurses Ass'n, 125 Conn. 290, 4 A.2d 923 (1939); *Georgia*: Thomas v. Lumberman's Mut. Cas. Co., 57 Ga. App. 434, 195 S.E. 894 (1938); *Idaho*: Moody v. State Highway Dep't, 56 Idaho 21, 48 P.2d 1108 (1935); *Illinois*: Central Car Works v. Industrial Comm'n, 290 Ill. 436, 125 N.E. 369 (1919); *In-*

vanced the following arguments: (1) the statutory term "accident" under these circumstances is clear and unambiguous, so there is no room for construction;[87] (2) other states with "accident" statutes reach the same result;[88] (3) there are persuasive reasons for this legislative judgment in the need to bar stale and possibly fraudulent claims and the need to assure employers that they will not be sued after a specified

diana: Huffman v. State Sign Co., 145 Ind. App. 486, 251 N.E.2d 489 (1969); *Kansas*: Rutledge v. Sandlin, 181 Kan. 360, 310 P.2d 950 (1957); Long v. Watts, 129 Kan. 489, 283 P. 654 (1930); *Kentucky*: Fiorella v. Clark, 298 Ky. 817, 184 S.W.2d 208 (1944) (*but cf.* Goode v. Fleischmann Distilling Corp., 275 S.W.2d 903 (Ky. 1955) (distinguishing claim limitations case from discovery-rule-notice-limitations case in terms that assume applicability of discovery rule in claim limitations case)); *Louisiana*: Carroll v. International Paper Co., 175 La. 315, 143 So. 275 (1932); *Maine*: Thibodeau's Case, 135 Me. 312, 196 A. 87 (1938); *Maryland*: Dintaman v. Board of Comm'rs, 17 Md. App. 345, 303 A.2d 442 (1973); *Minnesota*: Bergstrom v. O'Brien Sheet Metal Co., 251 Minn. 32, 86 N.W.2d 82 (1957); Lunzer v. W.F. Buth & Co., 195 Minn. 29, 261 N.W. 477 (1935); *New Hampshire*: Levesque v. Bronze Craft Corp., 104 N.H. 195, 182 A.2d 603 (1962); *New Jersey*: Schwarz v. Federal Shipbldg. & Dry Dock Co., 16 N.J. 243, 108 A.2d 417 (1954); Cristo v. Standard Oil Co., 98 N.J.L. 871, 121 A. 609 (Ct. Err. & App. 1923); *New York*: Lissow v. Mabbett Motors, Inc., 279 N.Y. 585, 17 N.E.2d 450 (1938) (mem.); Britton v. Mayersohn, 274 App. Div. 862, 81 N.Y.S.2d 698 (1948); Duquette v. General Elec. Co., 257 App. Div. 881, 11 N.Y.S.2d 999 (1939); *North Carolina*: Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948); *Oregon*: Landauer v. Industrial Acc. Comm'n, 175 Ore. 418, 154 P.2d 189 (1944) (exhaustive survey of other states); *Utah*: McKee v. Industrial Comm'n, 115 Utah 550, 206 P.2d 715 (1949); *Washington*: Ferguson v. Department of Labor & Indus., 168 Wash. 677, 13 P.2d 39 (1932); *Wisconsin*: Labkowicz v. Industrial Comm'n, 264 Wis. 317, 58 N.W.2d 677 (1952); Andrzeczak v. Industrial Comm'n, 248 Wis. 12, 20 N.W.2d 551 (1945) (*but cf.* Boyle v. Industrial Comm'n, 8 Wis. 2d 601, 99 N.W.2d 702 (1959) (dictum)). The courts in seven states—California, Delaware, Hawaii, Montana, Nevada, South Carolina, and Virginia—have not faced the issue directly. *But cf. California*: Fruehauf Corp. v. Workmen's Comp. App. Bd., 68 Cal. 2d 569, 440 P.2d 236, 68 Cal. Rptr. 164 (1968) (court-implied exception to harsh accident provision); Hanna v. Workmen's Comp. App. Bd., 32 Cal. App. 3d 719, 108 Cal. Rptr. 227 (1973) (stretching definition of occupational disease to avoid harsh accident provisions); *Delaware*: Bethlehem Shipbldg. Corp. v. Mullen, 32 Del. 55, 119 A. 314 (1922) (implicit harsh interpretation); *Montana*: Vetsch v. Helena Transf. & Storage Co., 154 Mont. 106, 460 P.2d 757 (1969); Dean v. First Trust Co., 152 Mont. 469, 452 P.2d 81 (1969); *South Carolina*: Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 154 S.E.2d 845 (1967) (avoiding interpretation question, holding for employee on waiver grounds); Burnhart v. Düneau Mills, 214 S.C. 113, 51 S.E.2d 377 (1949) (implicit harsh interpretation); *Virginia*: American Mut. Liab. Ins. Co. v. Hamilton, 145 Va. 391, 135 S.E. 21 (1926) (seemingly assuming harsh interpretation in estoppel case).

87. *See, e.g.*, Thomas v. Lumberman's Mut. Cas. Co., 57 Ga. App. 434, 195 S.E. 894 (1938); Moody v. State Highway Dep't, 56 Idaho 21, 48 P.2d 1109 (1935); Fiorella v. Clark, 298 Ky. 817, 184 S.W.2d 208 (1944).

88. *See, e.g.*, Davis v. Standard Oil Co., 261 Ala. 410, 74 So. 2d 625 (1954); Schwarz v. Federal Shipbldg. & Dry Dock Co., 16 N.J. 243, 108 A.2d 417 (1954); Landauer v. Industrial Acc. Comm'n, 175 Ore. 418, 154 P.2d 189 (1944) (exhaustive review of subject). The courts often cite to Annot., 108 A.L.R. 316 (1937). *See, e.g.*, Davis v. Standard Oil Co., *supra* at 415, 74 So. 2d at 629.

period of time;[89] and (4) the remedy for this harsh result lies with the legislature and not the courts.[90] In states where the legislature has changed from a limitations provision that had been liberally interpreted, the courts have emphasized the apparent legislative intent to overturn the prior rule.[91] The arguments, taken together, are convincing as a matter of statutory construction, although the result may leave something to be desired.

The only significant argument to the contrary is contained in Professor Larson's influential treatise on workmen's compensation law. Professor Larson states that

> [e]ven under a statute dating the claim period from "the accident," it is perfectly possible to achieve by judicial decision the rule dating the period from the time claimant knows he has a compensable disability, as a number of states have done [citing cases from Georgia,[92] Louisiana,[93] Nebraska,[94] New Jersey,[95] Pennsylvania,[96] South Carolina,[97] and Ten-

89. *See* Long v. Watts, 129 Kan. 489, 283 P. 654 (1930).

90. *See, e.g.*, Moody v. State Highway Dep't, 56 Idaho 21, 48 P.2d 1109 (1935); Central Car Works v. Industrial Comm'n, 290 Ill. 436, 125 N.E. 369 (1919); Levesque v. Bronze Craft Corp., 104 N.H. 195, 182 A.2d 603 (1962).

91. *See, e.g.*, Carroll v. International Paper Co., 175 La. 315, 143 So. 275 (1932); Dintaman v. Board of Comm'rs, 17 Md. App. 345, 303 A.2d 442 (1973); McKee v. Industrial Comm'n, 115 Utah 550, 206 P.2d 715 (1949).

92. Free v. Associated Indem. Corp., 78 Ga. App. 839, 52 S.E.2d 325 (1949). *Free* involved a claim for compensation for occupational disease and the interpretation of the date of disablement under a special provision equating disablement from occupational disease with injury by accident, GA. CODE ANN. § 114-801 (1973).

93. Fontenot v. Great Am. Indem. Co., 127 So. 2d 822 (La. Ct. App. 1961); Hodge v. T.L. James & Co., 57 So. 2d 913 (La. Ct. App. 1952). The claims in *Hodge* and *Fontenot* were brought within two years after the accident—the time allotted by the strictly construed overall cutoff provision, LA REV. STAT. ANN. § 23:1209 (1964). The issue in each case was whether the claim had been brought within one year of the injury, as required by the intermediate limitations provision, *id.*

94. Williams v. Dobberstein, 182 Neb. 862, 157 N.W.2d 776 (1968); Keenan v. Consumers Pub. Power Dist., 152 Neb. 54, 40 N.W.2d 261 (1949); Dryden v. Omaha Steel Works, 148 Neb. 1, 26 N.W.2d 293 (1947).

95. Panchak v. Simmons Co., 15 N.J. 13, 103 A.2d 884 (1954); Bucuk v. Edward A. Zusi Brass Foundry, 49 N.J. Super. 187, 139 A.2d 436 (Super. Ct. 1958); Minardi v. Pacific Airmotive Corp., 43 N.J. Super. 460, 129 A.2d 51 (Union County Ct. 1957). *Panchak* interpreted the general New Jersey notice requirement that specified the date of injury as the date triggering the notice limitations period, N.J. STAT. ANN. § 34:15-17 (1959). *Bucuk* applied an explicit statutory discovery rule that by its terms was limited to occupational diseases, N.J. STAT. ANN. §§ 34:15-33 to -34 (1959). *Minardi* interpreted a special hernia notice provision that required notice within forty-eight hours of the "occurrence of the hernia," N.J. STAT. ANN. § 34:15-12(23) (Supp. 1974).

96. Sierzega v. U.S. Steel Corp., 204 Pa. Super. 531, 205 A.2d 696 (1964); Ma-

nessee[98]].[99]

He argues that this interpretation is supportable on two grounds. First, it is

> the only way to give effect to the overall legislative intent. The legislature could hardly intend to give substantive benefits and then snatch them away by the imposition of a literally impossible procedural condition.[100]

Secondly, the limitations provision should be interpreted in conformity with the coverage formula.[101] The "operative factor" in the coverage formula is *injury* of accidental character. It is a mistake to construe the coverage formula to require a specific accident. The legislative choice of the date of the accident as the starting point for the limitations period necessarily leads to confusion and "bad results" because it is not consistent with the "operative factor for acquiring substantive rights," an injury.

Except for Nebraska and Tennessee, courts in accidental injury cases have never construed the "accident" limitations language to start the limitations period from the date the employee knows he has a compen-

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souski v. Hammond Coal Co., 172 Pa. Super. 409, 94 A.2d 55 (1953); Valent v. Berwind-White Coal Mining Co., 172 Pa. Super. 305, 94 A.2d 197 (1953); Roschak v. Vulcan Iron Works, 157 Pa. Super. 227, 42 A.2d 280 (1945). All four cases were decided under PA. STAT. ANN. tit. 77, § 1415 (Supp. 1974), a special occupational-disease-claim-limitations provision that starts the limitations period when "compensable disability begins."

97. Drake v. Raybestos-Mantattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962); Altman v. Williams Furniture Co., 250 S.C. 98, 156 S.E.2d 433 (1967); Dawkins v. Capitol Constr. Co., 252 S.C. 536, 167 S.E.2d 439 (1969). *Drake* involved determining the date of disablement in an occupational disease case under a statutory provision, S.C. CODE ANN. § 72-253 (1962), equating disablement by occupational disease with injury by accident. In *Altman*, the court held that the employer was estopped from asserting the limitations bar in an accidental injury case because the company doctor had told the employee there was nothing wrong with him when the doctor should have known that there was something wrong with him. *Dawkins* interpreted the explicit statutory excuses for late notice of injury, *id.* §§ 72-301 to -302.

98. Tennessee Prod. & Chem. Corp. v. Reeves, 220 Tenn. 148, 415 S.W.2d 118 (1967); Imperial Shirt Corp. v. Jenkins, 217 Tenn. 602, 399 S.W.2d 757 (1966); American Bridge Div. v. McClung, 206 Tenn. 317, 333 S.W.2d 557 (1960); Mathes v. Blue Ridge Glass Corp., 206 Tenn. 19, 330 S.W.2d 342 (1959) (holding incorrectly described, 3 LARSON § 78.41, at 55 n.23); Charnes v. Burk, 205 Tenn. 371, 326 S.W.2d 657 (1959); Burcham v. Carbide & Carbon Chem. Corp., 188 Tenn. 592, 221 S.W.2d 888 (1949).

99. 3 LARSON § 78.42(d), at 75-76.

100. *Id.* at 75.

101. *Id.* at 75-76.

sable disability.[102] The cases Professor Larson cites to the contrary from other jurisdictions all involve either (1) the construction of a statutory provision not phrased in terms of "accident,"[103] (2) the determination of the date of disablement from occupational disease under statutory provisions equating such disablement with injury by accident,[104] (3) the application of a statutory exception to an "accident" limitations provision,[105] or (4) the application of the principle of equitable estoppel.[106] The Nebraska and Tennessee discovery-rule interpretations of "accident" limitations provisions were influenced by the peculiar circumstance that each state's statute had two limitations provisions, one dating the limitations period from the "injury" and the other from the "accident." Both courts seem to have seized on the ambiguity created by the two separate limitations provisions to avoid the harsh "accident" result, for neither resolution of the technical statutory construction problem posed by the presence of two limitations provisions is a model of legal reasoning. The Nebraska court at first relied on the statutory distinction between "accident" and "injury" to support a liberal interpretation of the six-month "injury" provision.[107] In a subsequent case it relied on the "injury" cases to support giving the same interpretation to the one-year "accident" provision.[108] The Tennessee court ignored a possible harmonizing construction of the separate limitations provisions[109] and asserted that the "injury" provision was controlling because

102. Professor Larson's statement was not limited to judicial construction of "accident" limitations provisions in *accidental injury* cases. Given the generality of his statement, *see* text accompanying note 99 *supra*, some of the occupational disease cases he cites from states other than Nebraska and Tennessee arguably support his statement.

103. *See* cases cited notes 93, 95-96 *supra*.

104. Free v. Associated Indem. Corp., 78 Ga. App. 839, 52 S.E.2d 325 (1949); Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962).

105. Dawkins v. Capitol Constr. Co., 252 S.C. 536, 167 S.E.2d 439 (1969).

106. Altman v. Williams Furniture Co., 250 S.C. 98, 156 S.E.2d 433 (1967). *See also* notes 116-25 *infra* and accompanying text (discussion of equitable estoppel).

107. Johansen v. Union Stock Yards Co., 99 Neb. 328, 156 N.W. 511 (1916), *construing* ch. 198, § 33, [1913] Neb. Laws 593 (now NEB. REV. STAT. § 48-133 (1968)).

108. City of Hastings v. Saunders, 114 Neb. 475, 208 N.W. 122 (1926), *construing* ch. 198, § 38, [1913] Neb. Laws 595 (now NEB. REV. STAT. § 48-137 (1968)).

109. The two limitations provisions in the Tennessee Act, ch. 123, §§ 24, 31, [1919] Tenn. Acts 377, 389 (now TENN. CODE ANN. §§ 50-1003, -1017 (1966)), specified the same time period (one year), with one simple provision dating the period from the "accident" and a subsequent, more complicated provision dating the period from the "injury" and setting forth exceptions to the statutory bar. It appears that the "accident" provision was intended to be the basic limitation and was simply repeated in the subsequent "injury" provision for the sake of consistency in detailing the exceptions to the basic limitations bar. The obvious conclusion is that both one-year limitations provisions

it was the more detailed and "later" of the two limitations provisions.[110]

Courts have never found the "accident" language by itself ambiguous when applied to latent compensable accidental injuries. If the "accident" language is not ambiguous, Professor Larson's first statutory construction argument makes sense only if it is reformulated as follows: the legislature, through inadvertence or ignorance, made a mistake in starting the limitations period from the date of the "accident," for it could not have intended to impose an impossible procedural restriction on the right to compensation. That argument would be more convincing if the "accident" provision operated in all cases to preclude recovery before the right to compensation accrued. As it is, the "accident" provision precludes recovery before the right to compensation accrues only in the small number of cases in which the injury becomes compensable after the limitations period has passed. It is unreasonable to say that the legislature could not possibly have intended this result. The fact that many "accident" provisions are the results of changes from more liberal provisions demonstrates that legislatures have at times specifically intended this result. The certainty and evidentiary considerations behind limitations provisions, moreover, are persuasive reasons for precluding these claims, even though the results in particular cases seem harsh and inconsistent with the compensation purpose of a workmen's compensation system.

If the "accident" language is not ambiguous, Professor Larson's second statutory construction argument makes sense only if it is reformulated as follows: legislatures, and courts interpreting workmen's compensation acts, have made a simple mistake in requiring that a personal injury be traceable to a particular accident before compensation can be awarded. The mistake is repeated in the decision to start the limitations period from the date of the accident. Professor Larson's implicit

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were thought and intended to be identical. The "accident" language therefore should control, since the only way the date of the "injury" and the date of the "accident" can be identical is if they both refer to the date of the accident. The Tennessee court at first accepted this harmonizing construction. Graham v. J.W. Wells Brick Co., 150 Tenn. 660, 266 S.W. 770 (1924) (alternative holding).

110. Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 530-31, 206 S.W.2d 909, 910 (1947). The court referred to the "injury" section's position in the statute, not its date, in its "later section" argument, since both provisions were included in the original Tennessee Workmen's Compensation Act, ch. 123, §§ 24, 31, [1919] Tenn. Acts 377, 389. The subtlety of this point was later lost by the court. *See* Imperial Shirt Corp. v. Jenkins, 217 Tenn. 602, 606, 608, 399 S.W.2d 757, 759-60 (1966) (characterizing the "injury" provision as later in *time*).

accusation that courts and legislatures made an inadvertent mistake is contradicted by the history of the early exclusion of occupational diseases from coverage under the workmen's compensation acts. A key and often intentional method of excluding coverage of occupational diseases was to formulate the coverage provision to cover "personal injury by accident" and to start the limitations period from the accident. Exclusion of occupational disease from the workmen's compensation statute is not prima facie unreasonable, at least by 1912 standards, when there was political opposition to compensation for occupational diseases because of fears that such compensation would place an intolerable burden on local industry,[111] and when a respected law professor, Francis Bohlen, argued that compensation for occupational diseases was inconsistent with the fundamental purposes of workmen's compensation statutes.[112] Professor Larson's argument is convincing only if one views workmen's compensation statutes as perfectly consistent embodiments of the compensation principle rather than as the historical results of legislative compromise of competing interests.

The best argument for a liberal interpretation of the "accident" language can be made only in states without a history of a change from a more liberal provision to the "accident" language. In those states, it could be argued that the legislature did not intend to preclude claims for latent compensable injuries by the "accident" language. At most, the legislature intended to preclude coverage for occupational diseases. In the absence of any more specific legislative intent, the date of "accident" can be interpreted by reference to the general compensation purposes of the workmen's compensation act. This argument, however, is flawed. There is little room for legislative intent arguments in construing the date of the "accident," since the term "accident" can bear the meaning assigned to it by Professor Larson only with great difficulty, if at all. The legislative intent arguments would have to be unassailable to support this strained and artificial interpretation, and simple absence of a specific legislative intent to achieve the harsh "accident" result may not be enough to overcome the natural import of the word. Reference to the general compensation purpose of the act is not persuasive, because the existence of a limitations provision in the act indicates some

111. *Cf.* CHICAGO CONFERENCE PROCEEDINGS, *supra* note 44, at 288.

112. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 344-48 (1912).

compromise of that purpose in favor of other interests. The question of the extent of that compromise cannot be answered by simple reference to the compromised interest.

Courts in the "accident" states have recognized, with good reason, that the harsh "accident" interpretation is inescapable as a matter of statutory construction, but that has not stopped some courts in "accident" states and some commentators from searching for ways to avoid harsh results in individual cases.

In cases in which an accident aggravates an injury received in an earlier accident, courts in Georgia and California have held that the limitations period for a claim for the resulting compensable condition runs from the second accident.[113] They have also held that when the injury results from continuous strain or cumulative minor traumas that cease only when the employee quits work, the date of the "accident" is the day the employee quits work.[114] In California the legislature overturned this line of cases in 1968,[115] but the approach is still valid in Georgia, and it remains a possibility in other "accident" jurisdictions whose courts have not faced the issue but have authorized compensation in such cases.

If cumulative trauma or aggravation cannot be found, courts may be able to avoid harsh results from application of the "accident" provisions

113. Beveridge v. Industrial Acc. Comm'n, 175 Cal. App. 2d 592, 346 P.2d 545 (1959); Aetna Cas. & Sur. Co. v. Cagle, 106 Ga. App. 440, 126 S.E.2d 907 (1962).

114. Freuhauf Corp. v. Workmen's Comp. App. Bd., 68 Cal. 2d 569, 440 P.2d 236, 68 Cal. Rptr. 164 (1968); Fireman's Fund Indem. Co. v. Industrial Acc. Comm'n, 39 Cal. 2d 831, 250 P.2d 148 (1952) (en banc); Mallory v. American Cas. Co., 114 Ga. App. 641, 152 S.E.2d 592 (1966); Noles v. Aragon Mills, 114 Ga. App. 130, 150 S.E.2d 305 (1966).

115. Ch. 4, § 2, [1968] Cal. Stat. 31 (codified at CAL. LABOR CODE § 3208.2 (Deering Supp. 1973)), provides in part:

> When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

Ch. 4, § 10, [1968] Cal. Stat. 33-34 (codified at CAL. LABOR CODE § 5303 (Deering Supp. 1973)), provides in part:

> [N]o injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, need for medical treatment or death.

For a discussion of the conflict between these statutes and previous case law, see Note, *Judicial Philanthropy Curbed*, 9 SANTA CLARA LAW. 156 (1968).

only by using legal doctrines that do not depend on direct interpretation of the statutory "accident" language. Equitable estoppel is the most eligible of these independent doctrines. Traditionally, the equitable estoppel doctrine has precluded one litigant from using to his advantage prior actions of another litigant that he has induced when to do so would be inequitable or unconscionable.[116] Some state courts have held that equitable estoppel does not apply in workmen's compensation limitations cases,[117] reasoning very technically that the limitations provision is jurisdictional rather than procedural. Other state courts, however, have applied equitable estoppel in workmen's compensation limitations cases.[118] Using the traditional equitable estoppel doctrine,[119] these courts barred the employer from asserting the limitations defense when the employer had assured the employee that he need not file a claim by promising him that compensation would be paid without a formal claim[120] or that the employer would file claim for him,[121] and when the employer's conduct led the employee to believe that a claim would not be necessary to protect his rights,[122] as when both employer and employee recognized the employee's impaired working capacity and the employer continued to pay the employee the same wages for lighter work.[123] A few courts have extended equitable estoppel in workmen's compensation limitations cases beyond its traditional scope. Some, relying on the relationship of trust between employer and employee, have barred the employer

116. *See generally* Dawson, *Estoppel and Statutes of Limitations*, 34 MICH. L. REV. 1 (1935).

117. *See, eg.*, Holland v. Industrial Comm'n, 78 Ariz. 16, 274 P.2d 836 (1954); Rehtarchik v. Hoyt-Messinger Corp., 118 Conn. 315, 172 A. 353 (1934); Petraska v. National Acme Co., 95 Vt. 76, 113 A. 536 (1921).

118. *See generally* cases cited 3 LARSON § 78.45.

119. *See generally* Dawson, *supra* note 116; Annot., 24 A.L.R.2d 1413 (1952); Annot., 130 A.L.R. 8 (1941). As Professor Dawson points out, application of equitable estoppel in limitations cases differs from the traditional requirements for equitable estoppel, chiefly in the recognition of a promise as a basis for estoppel in addition to the traditional basis of a factual misrepresentation. *See, e.g.*, 2 J. POMEROY, EQUITY JURISPRUDENCE §§ 801-21 (3d ed. 1905).

120. *See, e.g.*, Mulhall v. Nashua Mfg. Co., 80 N.H. 194, 115 A. 449 (1921); Skipper v. Marlowe Mfg. Co., 242 S.C. 486, 131 S.E.2d 524 (1963).

121. *See, e.g.*, Parks & Hull Appliance Corp. v. Reimsnyder, 177 Md. 280, 9 A.2d 648 (1939); McCoy v. Mike Horse Mining & Milling Co., 126 Mont. 435, 252 P.2d 1036 (1953).

122. *See, e.g.*, Benner v. Industrial Acc. Comm'n, 26 Cal. 2d 346, 159 P.2d 24 (1945).

123. *See, e.g.*, St. Joe Ice Co. v. Frazier, 103 So. 2d 228 (Fla. Ct. App. 1958).

from asserting the limitations defense if he in good faith told the employee that his injury was not legally compensable.[124] Two courts have barred the employer from asserting the limitations defense when the employee failed to make timely claim because he relied on the employer's doctor's innocent misdiagnosis, which concealed the compensable nature of his injury.[125] In extending the doctrine of equitable estoppel, the courts seem to be imposing affirmative duties on the employer because of either the employment relationship itself or the employer's statutory duty to provide medical care for work-related injuries, for the employer's reliance on the limitations defense in these cases would not otherwise appear "inequitable" or "unconscionable."

Commentators have suggested,[126] although no court so far has been persuaded,[127] that it is an unconstitutional denial of due process to apply the "accident" limitations provision to bar compensation before the employee ever had a right to compensation.[128] The commentators rely on a 1917 United States Supreme Court case, *New York Central Rail-*

124. Dupaquier v. City of New Orleans, 260 La. 728, 257 So. 2d 385 (1972); Levo v. General-Shea-Morrison, 128 Mont. 570, 280 P.2d 1086 (1955); Watkins v. Central Motor Lines, Inc., 279 N.C. 132, 181 S.E.2d 588 (1971); Young v. Sonoco Prods. Co., 210 S.C. 146, 41 S.E.2d 860 (1947); *cf.* City & County of San Francisco v. Workmen's Comp. App. Bd., 2 Cal. 3d 1001, 472 P.2d 459, 88 Cal. Rptr. 371 (1970). *But see* Ryan v. Lumbermen's Mut. Cas. Co., — Tenn. —, 485 S.W.2d 548 (1972) (misrepresentations of law ordinarily cannot be basis for equitable estoppel).

125. McCoy v. Mike Horse Mining & Milling Co., 126 Mont. 435, 252 P.2d 1036 (1953); Esperson v. Gowanda State Homeopathic Hosp., 20 App. Div. 2d 828, 247 N.Y.S.2d 835 (1964); *cf.* Angermier v. Hubley Mfg. Co., 206 Pa. Super. 422, 213 A.2d 171 (1965). *But see* American Can Co. v. Industrial Acc. Comm'n, 204 Cal. App. 2d 276, 22 Cal. Rptr. 164 (1962) (no showing of reliance on company physician); Case v. Hermitage Cotton Mills, 236 S.C. 285, 113 S.E.2d 794 (1960); Netherland v. Mead Corp., 170 Tenn. 520, 98 S.W.2d 76 (1936) (no estoppel without fraudulent or negligent misdiagnosis); McKee v. Industrial Comm'n, 115 Utah 550, 206 P.2d 715 (1949).

126. 3 LARSON § 78.42(e), at 76-79; W. SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 2358, at 11 (3d ed. 1959).

127. The issue has been raised in two reported cases. In Ancor v. Belden Concrete Prods., Inc., 260 La. 372, 256 So. 2d 122 (1971), the Louisiana court upheld the constitutionality of the harsh accident result, rejecting an argument based on a Louisiana constitutional provision that provides:

> All courts shall be open, and every person for injury done him in his rights, lands, goods, person or reputation shall have adequate remedy by due process of law . . . .

LA. CONST. art. 1, § 6. In Dintaman v. Board of Comm'rs, 17 Md. App. 345, 303 A.2d 442 (1973), the court held that the employee's federal constitutional objections to the harsh accident result had been raised too late in the proceedings to be considered.

128. Both state and federal constitutional objections might be raised. Detailed analysis of all the relevant state constitutional provisions is beyond the scope of this Article.

road v. White,[129] in which the Court upheld the constitutionality of New York's Workmen's Compensation Act when applied to require the employer to pay benefits without proof of the employer's fault. Dicta in that case suggested that a statutory change in common law liability rules might violate due process if a substantive right is taken from one class of persons without providing a "reasonably just substitute."[130] That dicta carries little weight now, however. The Court decided the *White* case in the heyday of substantive due process, using as its due process standard whether the statute was arbitrary and unreasonable from the standpoint of natural justice. That standard is no longer applied. Rather, the Court now asks whether the statute is rationally related to a constitutionally permissible objective, based on facts that the legislature could have assumed were true.[131]

The "accident" limitations provision, applied to bar a right to compensation before the right accrues, passes the current due process test. A reasonable legislature could determine that the "accident" provision was necessary to assure the employer of freedom from liability after the passage of a definite period of time and to protect the employer from false and fraudulent claims impossible to refute after the passage of the limitations period. That these are legitimate state goals is assured by the long history and unquestioned constitutionality[132] of statutes of limitations for common law negligence actions. The same argument supports the rationality—and hence the constitutionality under the "old" equal protection analysis[133]—of the legislative distinction between employees whose injuries become compensable within the limitations period and employees whose injuries do not.

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129. 243 U.S. 188 (1917).

130. *Id.* at 201.

131. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

132. Of course, an argument can be made that the discovery-rule interpretation of the general statute of limitations is constitutionally required. This argument was firmly rejected by the United States Court of Appeals for the First Circuit in Clark v. Gulesian, 429 F.2d 405 (1st Cir. 1970), in which the court applied Maine's statute of limitations to preclude recovery by the plaintiff in a medical-malpractice-foreign-object case. The court reasoned that the statute of limitations effectuates a policy decision balancing rights of both plaintiffs and defendants, saying:

> [The] state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be. Such a conclusion does not deprive the plaintiff of any constitutional right to fair and equal treatment.

Id. at 406. *Cf.* Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E.2d 450 (1970).

133. *See* Railway Express Agency v. New York, 336 U.S. 106 (1949).

Similar constitutional attacks have been made on the recently enacted statutes that start the limitations periods for tort actions against architects or builders from the time the building is completed or occupied rather than the time injury results from the defective construction or design. Under some circumstances, these statutes bar recovery before the right to recover damages ever exists. Most state courts that have faced the question have upheld the constitutionality of these statutes[134] against state and federal constitutional attacks. A decision of the Arkansas Supreme Court upholding one of these statutes[135] was appealed as a matter of right to the United States Supreme Court, which dismissed the appeal for lack of a substantial federal question.[136] Only the Illinois and Kentucky courts have held statutes like this unconstitutional, and they have done so on grounds that are not widely applicable—Illinois on state equal protection grounds (because of the exclusion of everyone who might be held liable for defects in a building except architects and contractors from the scope of the statutory protection)[137] and Kentucky[138] because of a peculiar state constitutional provision that precludes the legislature from changing common law liability rules.[139]

An employee attacking the constitutionality of an "accident" limitations provision could try to avoid the result in the architects-limitations cases by arguing that the right to workmen's compensation payments is a fundamental right or a fundamental interest. Therefore, any classification determining who receives workmen's compensation payments must be subjected to close scrutiny under the "new" equal protection test,[140] and the legislative judgment behind the "accident" pro-

134. Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972); Joseph v. Burns, 260 Ore. 493, 491 P.2d 203 (1971).

135. Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971).

136. 401 U.S. 901 (1971).

137. Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

138. Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973).

139. The Kentucky court had previously held that these constitutional provisions did not apply to the voluntary workmen's compensation scheme in the state. Green v. Caldwell, 170 Ky. 571, 186 S.W. 648 (1916). This suggests that the Kentucky "accident" provision within the voluntary workmen's compensation act is immune from attack under these constitutional provisions.

140. For an explanation of the differences between the "new" and the "old" equal protection, see San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); Gunther, *The Supreme*

vision must be scrutinized closely under the refurbished substantive due process analysis epitomized by *Roe v. Wade*[141] and *Doe v. Bolton.*[142] The employee could argue that the right to workmen's compensation payments is "fundamental" by analogizing those payments to the wages in the procedural due process case of *Sniadach v. Family Finance Corp.*[143] on the one hand, and to welfare payments in the equal protection case of *Shapiro v. Thompson*[144] on the other.

The prospects for acceptance of this "new" equal protection argument are not good. The Court has been reluctant to expand its category of fundamental rights to include interests other than the right to vote and the right to travel interstate,[145] and the employee cannot buttress his equal protection argument by pointing to a "suspect" classification in addition to the infringement of an allegedly fundamental right. If the Court would apply the new equal protection analysis, however, it is unlikely that the "accident" provision could withstand the close scrutiny of that test. Since other states with less onerous limitations provisions appear to have functioning, healthy workmen's compensation systems, there are obviously viable alternatives that burden the fundamental interest less.[146]

Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).

141. 410 U.S. 113 (1973).

142. 410 U.S. 179 (1973).

143. 395 U.S. 337 (1969) (prejudgment wage garnishment). For the subsequent application of the *Sniadach* principle to prejudgment repossessions under conditional sales contracts, see Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). *See generally* Note, *Provisional Remedies and Due Process in Default—Mitchell v. W. T. Grant Co.*, 1974 WASH. U.L.Q. 653.

144. 394 U.S. 618 (1969) (statutes limiting state welfare benefits to residents who have lived in state for one year violate equal protection clause of fourteenth amendment). Cases decided after *Shapiro* indicate that a statutory classification will not be subject to the strict scrutiny of the "new" equal protection test simply because it tends to withhold from one class benefits that might be termed "necessities of life." Dandridge v. Williams, 397 U.S. 471 (1970). Strict scrutiny under the *Shapiro* principle seems to be restricted to durational residence classifications that penalize the exercise of the right to move from one state to another by withholding important benefits from new residents. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (durational residence restriction on nonemergency medical care for indigents). In Sosna v. Iowa, 95 S. Ct. 553 (1975), however, the Court seemed to retreat from the strict scrutiny test to a simple balancing test in reviewing a state's durational residence restriction on the availability of a significant state benefit—dissolution of marriage.

145. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education not a fundamental interest); Lindsey v. Normet, 405 U.S. 56 (1972) (housing not a fundamental interest). *See also* note 144 *supra.*

146. The determination of whether the state's interest behind the "accident" provision

IV. "INJURY" JURISDICTIONS

Of the twenty-one states and the District of Columbia[147] that do not have "accident" workmen's compensation claim limitations provisions, twenty states and the District of Columbia date their limitations periods from the date of the "injury."[148] The remaining state, New Mexico, dates its limitations period from the failure or refusal of the employer or insurer to pay compensation.[149] The New Mexico court has con-

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was "compelling" would presumably take into account the considerations discussed in the conclusion of this Article, text accompanying notes 348-60 *infra*.

147. The District of Columbia has adopted as its general workmen's compensation statute the federal Longshoremen's & Harbor Workers' Compensation Act. D.C. CODE ANN. § 36-501 (1973). The Longshoremen's Act limitations provision is 33 U.S.C. § 913(a) (Supp. III, 1973).

148. ALASKA STAT. § 23.30.105 (1972) (claim must be filed within two years after "employee has knowledge of the nature of disability and its relation to his employment and after disablement" and within four years after date of injury); ARIZ. REV. STAT. ANN. § 23-1061A (Supp. 1974) (claim must be filed "within one year after the injury occurred or the right thereto accrued"); ARK. STAT. ANN. § 81-1318(a)(1) (Supp. 1973) (claim must be filed within two years "from the date of the injury"); COLO. REV. STAT. ANN. § 81-13-5(2) (1963) (notice claiming compensation must be filed within one year "after the injury"); D.C. CODE ANN. § 36-501 (1973) (adopting U.S. Longshoremen's and Harbor Workers' Act provisions, 33 U.S.C. § 913(a) (Supp. III, 1973)) (claim must be filed within "one year after the injury"); FLA. STAT. ANN. § 440.19(1)(a) (1966) (claim must be filed "within two years after the time of injury"); IOWA CODE ANN. § 85.26 (Supp. 1974) (proceedings must be commenced "within two years from the date of the injury"); MASS. ANN. LAWS ch. 152, § 41 (Supp. 1974) (claim must be made within one year after injury); MICH. STAT. ANN. § 17.237(381) (Supp. 1974) (claim must be made "within 6 months after the occurrence" of injury); MISS. CODE ANN. § 71-3-35 (1972) (application for benefits must be filed "within two years from the date of the injury or death"); MO. REV. STAT. § 287.430 (Supp. 1974) (claim must be filed "within one year after the injury or death"); N.D. CENT. CODE § 65-05-01 (Supp. 1973) (claim must be filed "within sixty days after injury or death"); OHIO REV. CODE ANN. § 4123.84 (Page 1973) (written notice must be made to industrial commission or bureau of workmen's compensation "within two years after the injury or death"); OKLA. STAT. ANN. tit. 85, § 43 (1961) (claim filed "within one (1) year after the injury or death"); Act No. 263, § 13, [1974] Pa. Sess. Laws Serv. 745 (petition must be filed or agreement made "within three years after the injury"); R.I. GEN. LAWS ANN. § 28-35-57 (1968) (agreement or petition must be filed "within two years after the occurrence or manifestation of the injury or incapacity"); S.D. COMPILED LAWS ANN. § 62-7-35 (Supp. 1974) (claim must be filed "within two years after the injury"); TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967) (claim must be made "within six (6) months after the occurrence of the injury"); VT. STAT. ANN. tit. 21, § 656 (1967) (claim must be made "within six months after the date of the injury"); Rules and Regulations of the West Virginia Workmen's Fund § 10, at 20 (1973) (claim must be made "within two years after the injury"), *adopted pursuant to* W. VA. CODE § 23-1-13 (1973); WYO. STAT. ANN. § 27-105 (1967) (application or claim for award must be filed "within one year after the day on which the injury occurred").

149. N.M. STAT. ANN. § 59-10-13.6 (Supp. 1973) (limitations period of one year).

strued the provision to start the limitations period from the time the injury becomes compensable.[150] New Mexico will therefore be included in the following discussion of states with a "compensable injury" interpretation of the "injury" language. Ten of the twenty-two jurisdictions have statutory exceptions or excuses for late claims: for "reasonable cause," undiscovered or latent injuries, or other reasons. Three of those ten have an overall cutoff to the exception, dated from the time of the injury;[151] six of the ten have no overall cutoff to the exception[152] (at least not in the workmen's compensation statute); and one state, Alaska, has a puzzling limitations section that seems to have an express cutoff provision and an express open-ended provision[153] governing the applicability of a liberal exception to the limitations bar.

Courts in the twenty-one "injury" jurisdictions have interpreted the "date of the injury" language in four different ways: (1) the date of

150. Anderson v. Contract Trucking Co., 48 N.M. 158, 146 P.2d 873 (1944).

151. COLO. REV. STAT. ANN. § 81-13-5(2) (1963) (one-year limitation does not apply if "reasonable excuse" for late claim established, employer rights have not been prejudiced by delay, and notice claiming compensation filed within two years after the injury); MICH. STAT. ANN. § 17.237(381) (Supp. 1974) (if "actual injury, disability, or incapacity does not develop or make itself apparent within 6 months after the happening of injury," limitation period is three months after it does develop or make itself apparent, with overall cutoff of three years "from the date the personal injury was sustained"); N.D. CENT. CODE § 65-05-01 (Supp. 1973) ("[f]or any reasonable cause shown," workmen's compensation bureau may allow claims to be filed "at any time within one year after the injury or death").

152. The District of Columbia adopted the U.S. Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 913(a) (Supp. III, 1973) ("[t]he time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment"); MASS. ANN. LAWS ch. 152, § 49 (1965) (late claim excused "if it is found that it was occasioned by mistake or other reasonable cause, or if it is found that the insurer was not prejudiced by the delay"); R.I. GEN. LAWS ANN. § 28-35-57 (1968) ("[t]he time for filing claims shall not begin to run in cases of latent or undiscovered physical or mental impairment due to injury including disease until (1) the person claiming benefits knew, or by exercise of reasonable diligence should have known, of the existence of such impairment and its causal relationship to his employment or (2) after disablement, whichever is later"); TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967) ("[f]or good cause the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to . . . filing of the claim before the Board"); VT. STAT. ANN. tit. 21, § 660 (1967) ("[w]ant of or delay . . . in making such claim, shall not be a bar to proceedings . . . if it is shown that the employer, his agent or representative, had knowledge of the accident or that the employer has not been prejudiced by such delay"), *read as subject to a six-year general statute of limitations for contracts in* Fitch v. Parks & Woolson Mach. Co., 109 Vt. 92, 191 A. 920 (1937); WYO. STAT. ANN. § 27-105 (1967) ("[f]or injuries not readily apparent," application must be filed "within one (1) year after discovery of the injury by the workman").

153. ALASKA STAT. § 23.30.105(a) (1972).

the initial injury accompanying the accident (the "accident interpretation"); (2) the date the accident culminates in serious physical consequences (the "latent-physical-injury interpretation"); (3) the date the injury becomes compensable under the workmen's compensation statute (the "compensable-injury interpretation"); or (4) the date the employee learns or should have learned all the facts establishing the compensability of his injury (the "discovery-rule interpretation").[154] Each of these interpretations is discussed below.

A. *Accident Interpretation*

At the time the courts of Massachusetts, Texas, and North Dakota first interpreted the date of injury in the limitations provisions, the acts of those states included one or more excuses for late claims. In all these states, the courts construed the term "injury" to mean the initial injury received at the time of the accident.[155] The statutory excuses for late claims may have lessened the pressure on these courts to interpret the date of "injury" more liberally. Also, the existence of a more specific statutory excuse may have suggested to the courts that the choice of the word "injury" was not intended to rescue late claimants.[156] In five states without statutory excuses for late claims, however, courts also

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154. For a discussion of the relationship between the compensable-injury interpretation and the discovery-rule interpretation, see text accompanying notes 230-47 *infra*.

155. *Massachusetts*: Carroll's Case, 225 Mass. 203, 114 N.E. 285 (1915); *cf.* Crowley's Case, 287 Mass. 367, 191 N.E. 668 (1934) (*but cf.* Brown's Case, 228 Mass. 31, 116 N.E. 897 (1917)); *North Dakota*: Bjorseth v. North Dakota Workmen's Comp. Bureau, 62 N.D. 623, 244 N.W. 515 (1932); *Texas*: Jones v. Texas Employers Ins. Ass'n, 128 Tex. 437, 99 S.W.2d 903 (1937).

156. *See* Bjorseth v. North Dakota Workmen's Comp. Bureau, 62 N.D. 623, 244 N.W. 515 (1932), *construing* ch. 162, [1919] N.D. Laws 270 (now N.D. CENT. CODE § 65-05-01 (Supp. 1973)). The statute provided that claim had to be filed within sixty days after the injury, but allowed the Workmen's Compensation Bureau to waive the limitation "for any reasonable cause shown" and allow claims to be filed at any time within one year after the injury. The court reasoned:

> We should be strongly inclined . . . [to interpret the date of injury as the date of subsequent serious manifestation of injury] if it were possible to spell out such a legislative intention. The statute itself presupposes that the serious consequences of any injury may not become so manifest within sixty days thereafter as to cause the claimant to file a claim. This would undoubtedly be a "reasonable cause" for presenting the same at a later time. In the very provision authorizing the making of delayed claims, where a reasonable cause exists for the delay, the authority of the bureau to receive them is limited to one year from the injury or death.

62 N.D. at 629, 244 N.W. at 517. Compare the rejection of a similar argument, based on the explicit excuse in the Colorado statute for "reasonable excuse," in City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967).

construed the date of injury to mean the date of the initial injury accompanying the accident,[157] and the United States Supreme Court in two cases seemingly adopted this interpretation of the similar "injury" limitations provision in the United States Longshoremen's and Harbor Workers' Compensation Act.[158] The reasoning supporting these cases can be summarized as follows.[159] In ordinary language[160] and in tradi-

157. *Iowa*: Otis v. Parrott, 233 Iowa 1039, 8 N.W.2d 708 (1943) (*but see* Mousel v. Bituminous Material & Supply Co., — Iowa —, 169 N.W.2d 763 (1969) (dictum)); *Michigan*: Cook v. Holland Furnace Co., 200 Mich. 192, 166 N.W. 1013 (1918) (leading case); *Ohio*: Larimore v. Perfect, 45 Ohio App. 136, 186 N.E. 739 (1932); *Oklahoma*: Tulsa Hotel Co. v. Sparks, 200 Okla. 636, 198 P.2d 652 (1948), *overruling* Brown & Root v. Dunkelberger, 196 Okla. 116, 162 P.2d 1018 (1945); *Oregon*: Lough v. State Indus. Acc. Comm'n, 104 Ore. 313, 207 P. 354 (1922) (statute changed to "accident" language in 1935, ch. 139, [1935] Ore. Laws 215).

158. Pillsbury v. United Eng'r Co., 342 U.S. 197 (1952); Kobilkin v. Pillsbury, 103 F.2d 667 (9th Cir. 1939), *aff'd mem. by an equally divided Court*, 309 U.S. 619 (1940).

Opponents of the harsh "accident" interpretation have argued that neither case really adopts the "accident" interpretation. *Kobilkin* arguably held only that the limitations period runs from the time the injury becomes compensable under any standard of compensability. *United Engineering* is arguably unrelated to latent-compensable-injury problems, since the Court specifically emphasized that the facts did not raise the latent-injury problem. *See* Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970); 3 LARSON § 78.51.

These interpretations of the two cases are plausible because an "accident" interpretation of the "injury" language is not essential for the result in either case. Relief could have been denied in *Kobilkin* even under a compensable-injury interpretation, given a nonseparability interpretation of the scope of the limitations bar, since the claimant suffered an immediate, compensable, temporary disability at the time of the accident, *see* text accompanying notes 182-215 *infra*. Similarly, in *United Engineering* the claimants could have been barred even under a compensable-injury interpretation, since each claimant suffered a compensable loss of earning power at the time of the accident (the trial court in *United Engineering* barred the claimants precisely on this ground, United Eng'r Co. v. Pillsbury, 92 F. Supp. 898 (N.D. Cal. 1950)). In both cases, however, the court stated that it rejected the interpretation of the "injury" language that would equate "injury" with "disability." Pillsbury v. United Eng'r Co., 342 U.S. 197, 198-200 (1952); Kobilkin v. Pillsbury, 103 F.2d 667, 670 (9th Cir. 1939), *aff'd mem. by an equally divided Court*, 309 U.S. 619 (1940). When either of two interpretations of a statutory provision would bar recovery in a particular case, it is difficult to dismiss the court's express rejection of one of those interpretations as mere dicta.

The "accident" interpretation of *Kobilkin* and *United Engineering* may not have been entirely mooted by the 1972 amendment to the Longshoremen's and Harbor Workers' Act adding a discovery rule to the claim limitations provision, since the provision talks only of the discovery of the causal relationship between the injury and the employment, not the discovery of the existence or seriousness of a compensable injury. 33 U.S.C. § 913(a) (Supp. III, 1973).

159. Two of the six courts gave other reasons than those summarized here. In Otis v. Parrott, 233 Iowa 1039, 8 N.W.2d 708 (1943), the court relied on peculiarities in the wording of Iowa's limitations provision. In Lough v. State Indus. Acc. Comm'n, 104 Ore. 313, 207 P. 354 (1922), the Oregon court evidently felt obliged to make true

tional negligence personal injury cases, it is settled that an accident produces an injury, albeit minor or trivial, at the time of the accident, even though the serious results of the accidental injury do not appear until some later time.[161] There is no reason to assume the legislature used the term "injury" in any but the ordinary and legally accepted meaning.[162] Any other interpretation of the date of "injury" in accidental injury cases would be inconsistent with the personal certainty purpose of a limitations provision, for it would necessarily substitute an indefinite and uncertain time for the definite and easily ascertainable time of the accident.[163]

B. *Latent-Physical-Injury Interpretation*

The Nebraska court, in 1916, was the first to reject the "time of accident" interpretation of the "injury" limitations provision. In *Johansen v. Union Stockyards Co.*,[164] the court relied on the separate definitions of the terms "injury" and "accident" in the statute to support its conclusion that the date of the "injury" (defined as violence to the physical structure of the body) was not necessarily the same as the date of the "accident" that caused the injury. The court reasoned:

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by decision what it had assumed to be true in a prior case rejecting workmen's compensation coverage for occupational diseases. In the preceding case, Iwanicki v. State Indus. Acc. Comm'n, 104 Ore. 650, 205 P. 990 (1922), the court had used the *Steel* argument, note 41 *supra* and accompanying text, against coverage of occupational diseases: "The requirements of our Code that the claim shall be filed within a certain time after the date of the accident . . . enforce this conclusion, that the injury must be referable to a certain point of time." 104 Ore. at 665, 205 P. at 995. The only flaw in this argument was that the coverage provision in the Oregon statute had deleted the "by accident" qualification and the claim limitation provision ran from the date of the injury, not the date of the accident. The court in *Lough* plugged this gaping hole in the *Iwanicki* reasoning by stating that since the language of the act precluded compensation for occupational diseases (citing *Iwanicki*), the words "date upon which the injury occurred" plainly refer to a specific point in time, and thus refer to the date of the accident and the immediately consequent injury. This seems to be a variation of the old shell game.

160. *See* Kobilkin v. Pillsbury, 103 F.2d 667, 670 (9th Cir. 1939), *aff'd mem. by an equally divided Court*, 309 U.S. 619 (1940).

161. *See* Cooke v. Holland Furnace Co., 200 Mich. 192, 202, 166 N.W. 1013, 1016 (1918).

162. *See id.* at 203, 166 N.W. at 1017; Larimore v. Perfect, 45 Ohio App. 136, 141, 186 N.E. 739, 741 (1932); Tulsa Hotel Co. v. Sparks, 200 Okla. 636, 640, 198 P.2d 652, 656 (1948).

163. *See* Dane v. Michigan United Traction Co., 200 Mich. 612, 614, 166 N.W. 1017, 1017 (1918); *cf.* Bjorseth v. North Dakota Workmen's Comp. Bureau, 62 N.D. 623, 629, 244 N.W. 515, 517 (1932).

164. 99 Neb. 328, 156 N.W. 511 (1916).

> [Between the time of the accident and the time the employee first saw a doctor,] the injury resulting from the accident gradually became developed, and it cannot be said that the injury resulted from the accident, within the meaning of the statute, before the time it was discovered it might become permanent, which was some time after the 25th of December.[165]

Although the exact interpretation the court gave to the phrase "occurrence of the injury" in the limitations provision is not clear, the court's reliance on the distinction between "accident" and "injury" suggests that it interpreted the date of the occurrence of the injury as the date of physical impairment. This latent-physical-injury interpretation was later abandoned sub silentio by the Nebraska court,[166] and no other state court has ever adopted this interpretation expressly, although the Tennessee[167] and New Mexico[168] courts have at times applied their states' limitations provisions as if they had adopted it.

The unpopularity of the latent-physical-injury interpretation may derive from its defects, which were pointed out in 1918 by the Michigan court in *Cooke v. Holland Furnace Co.*[169] The Michigan court argued that "injury" as an element in the traditional negligence cause of action has a well-defined meaning, and the initial, apparently trivial physical effect of an accident is an "injury" under that meaning. Since there is no evidence that the legislature intended a different meaning for the term "injury," there is no statutory or historical warrant for interpreting "injury" as the Nebraska court did in *Johansen.* In addition, there is no basis in the normal usage of the term "injury" for choosing any time after the apparently trivial initial injury as the date of the "injury."

C. *Compensable-Injury Interpretation*

1. *In General*

Perhaps influenced by the criticisms of the Nebraska analysis, other

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165. *Id.* at 330, 156 N.W. at 512.

166. *See* Selders v. Cornhuskers Oil Co., 111 Neb. 300, 196 N.W. 316 (1923); Astuto v. V. Ray Gould Co., 123 Neb. 138, 242 N.W. 375 (1932); Park v. School Dist. No. 27, 127 Neb. 767, 257 N.W. 219 (1934). *See also* note 235 *infra.*

167. *Compare* Griffitts v. Humphrey, 199 Tenn. 528, 536-38, 288 S.W.2d 1, 4-5 (1955) (response to petition to rehear), *with* Bradford v. Dixie Mercerizing Co., 199 Tenn. 170, 285 S.W.2d 136 (1955).

168. *See* Gonzales v. Coe, 59 N.M. 1, 277 P.2d 548 (1955) (focus on latency of the injury rather than latency of compensability).

169. 200 Mich. 192, 166 N.W. 1013 (1918).

courts that rejected the "accident" interpretation—Indiana in 1919,[170] Connecticut in 1921,[171] Louisiana in 1922,[172] Maine in 1924,[173] and Washington in 1926[174]—concluded that the date of the injury was the date the employee's condition became compensable under the workmen's compensation statute.[175] The reasoning supporting this interpretation probably was expressed best by the Connecticut Supreme Court of Errors in *Esposito v. Marlin-Rockwell Corp.*,[176] in which the court held that the date of the "injury" in the limitations provision meant the date of the compensable injury. The court argued:

> A compensable injury is an injury for which compensation is payable, and the date of such an injury is not the time of the accident or occurrence causing injury, but the time under § 5348 [the basic compensation provision] when the right to compensation accrues.[177]
>
> Therefore, when § 5360 [the basic limitations provision] provides that a written notice of a claim for compensation must be made within one year from the date of the injury, the claim spoken of must be a compensable claim under § 5348, as there is no other kind of a claim for compensation referred to in the Compensation Act.[178]

The court further argued that construing the limitations period to start from the date of the accident, thus precluding some claims before they accrued, would be "an unreasonable construction and entirely out of harmony with the beneficent purpose of the Act."[179]

Connecticut's interpretation solves the analytical problems of the Nebraska latent-physical-injury interpretation. First, by emphasizing the meaning of "injury" as one of the elements of a prima facie case under the workmen's compensation act, the Connecticut court

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170. Hornbrook-Price v. Stewart, 66 Ind. App. 400, 118 N.E. 315 (1918) (alternative holding) (interpretation of "injury" language in notice provision). In *In re* McCaskey, 65 Ind. App. 349, 117 N.E. 268 (1917), an earlier Indiana case, the court liberally interpreted a thirty-day-after-injury limitation on provision of medical services, using an argument that can be interpreted either as a *Johansen* rule, relying on the simple distinction between accident and injury, or as a "compensable injury" interpretation.

171. Esposito v. Marlin-Rockwell Corp., 96 Conn. 414, 114 A. 92 (1921).

172. Guderian v. Sterling Sugar & Ry., 151 La. 59, 91 So. 546 (1922).

173. Hustus' Case, 123 Me. 428, 123 A. 514 (1924).

174. Stolp v. Department of Labor & Indus., 138 Wash. 685, 245 P. 20 (1926).

175. In each of these states, the legislature subsequently changed to a harsher limitations provision. *See* note 62 *supra*.

176. 96 Conn. 414, 114 A. 92 (1921).

177. *Id.* at 418-19, 114 A. at 94.

178. *Id.* at 419, 114 A. at 94.

179. *Id.*

demonstrated that there is reason to assume that the legislature, in adopting the workmen's compensation limitations provision, was using the term "injury" in a different sense than its traditional meaning as part of a prima facie negligence case, because the prima facie case for recovery in workmen's compensation is different. Secondly, the court's emphasis on the "word of art" interpretation of the word "injury" in the context of the workmen's compensation act solves the plain-meaning criticism of Nebraska's latent-physical-injury interpretation. The absence of any ordinary language meaning of "injury" to support the Connecticut result does not negate the Connecticut interpretation, for "injury," *in the context of the workmen's compensation act*, can bear the meaning assigned to it.

The Connecticut court's focus on the difference between the prima facie case in negligence and the prima facie case in workmen's compensation raises a fundamental problem with limitations provisions in workmen's compensation statutes. With certain exceptions not related to the nature of the injury,[180] any injury, however trivial, caused by the negligence of the defendant is prima facie compensable under negligence liability theory; but not every injury caused by an accident at work is compensable under the workmen's compensation acts. Because of that difference, no single workmen's compensation limitations provision can strike exactly the same balance between employers' and employees' interests that the traditional statute of limitations strikes between the interests of prospective defendants and prospective plaintiffs, viewing the interests of prospective plaintiffs solely in terms of the right to recover and not in terms of the amount of the recovery.[181] If the limitations period starts when the injury becomes compensable, the employee is treated in the same way under the workmen's compensation limitations provision as under the traditional negligence statute of limitations ("when the cause of action accrues"), but the employer's posi-

180. *E.g.*, scope of duty limitations, contributory negligence, sovereign immunity, and guest statutes.

181. As a practical matter, claimants with apparently trivial initial injuries and claimants with serious latent injuries that become apparent after the statutory period may be in substantially the same position whether claiming in negligence or in workmen's compensation. If the claimant sues in negligence for the initial trivial injury, his recovery would be minimal. As a practical matter, he probably would not sue at all. In large cities, the delay between filing suit and trial in negligence actions may mean that by the time of trial the latent injury will have become manifest, but, absent this circumstance, the plight of claimants with latent serious injuries may be substantially the same under both a negligence theory and workmen's compensation.

tion in terms of certainty is drastically changed since the date of the accidental injury is no longer necessarily the date when the limitations period starts. If the limitations period starts when the accident occurred, the employer is in the same position as under the negligence statute of limitations, but the employee may be precluded from recovery by limitations before he ever had the right to compensation, something that could never have happened under the negligence statute of limitations.

The announced interpretation in all "injury" jurisdictions that reject the "accident" interpretation is now either the compensable-injury interpretation or the discovery-rule interpretation. These two interpretations share a common characteristic: both require the court to look to the statutory rules for determining the compensability of an injury in deciding when the limitations period starts to run. This close relationship between the rules for determining compensability and the limitations provision raises several problems common to both interpretations, problems which will be discussed below.

2. *Problems in Application of the Compensable-Injury Interpretation*

a. *Scope of the Limitations Bar*

A single accidental injury may give rise to several different claims for compensation under a workmen's compensation act. The employee may be entitled to compensation for (1) total temporary disability for the periods he was away from work, (2) medical expenses incurred, and (3) a resulting permanent condition of partial disability, total disability, or "specific" or "scheduled" injury resulting from the accident.[182] The rights to these kinds of compensation may not all arise at the same time and, with one exception,[183] the different rights

182. *See generally* 2 LARSON §§ 57.10, 58.10, 61.10. Recovery for any kind of disability usually requires a showing of lost wages or impaired wage-earning capacity. *See id.* § 57.10. In addition to disability payments, specified sums often are payable without regard to the impact on earnings for certain "specific" or "scheduled" injuries (*e.g.*, loss of a specified member, a percentage-loss of use of a specified member). *See id.* § 58.10. In addition, compensation in the form of payment of medical expenses or direct provision of medical services usually is required by the act. *See id.* § 61.10.

183. In many states, if the employee's injury is compensable as a "specific" or "scheduled" injury, he may recover only medical expenses and the compensation authorized for the specified injury. He cannot receive compensation for permanent partial or permanent total disability resulting from the scheduled injury in addition to or in substitution for the scheduled compensation. *See generally id.* § 58.20.

are not mutually exclusive. The multiple rights issue causes no difficulty in the interpretation of the scope of "accident" limitations provisions, for under these provisions all claims for compensation arising from the accident, regardless of when they accrue, are barred if not brought within the specified time after the accident. Under the compensable-injury and discovery-rule[184] interpretations, however, the following problem arises: If the limitations period starts only when the injury becomes compensable or when compensability is reasonably discoverable, does the limitations bar apply separately to different claims arising at different times (the "separability rule"), or does the limitations bar apply to preclude all claims arising at subsequent times if any claim would be precluded (the "nonseparability rule")?

Most states that now have compensable-injury or discovery-rule interpretations have not clearly decided this question.[185] Missouri courts have faced the scope of the limitations issue, however, and the Missouri development is instructive. The first Missouri case, *Wheeler v. Missouri Pacific Railroad*,[186] involved successive accrual of an initial claim for temporary total disability and a subsequent claim for a "scheduled" permanent injury (loss of sight of one eye). The Missouri Supreme Court gave the "injury" language a compensable-injury interpretation,[187] but went on to hold that the limitations period began running from the time the injury first became compensable under any standard for compensation. The court rejected the argument that the limitations period ran from the time long after the accident that the employee lost the sight of his eye, pointing out that shortly after the accident he became entitled to payments for medical aid and for temporary total disability. The court argued that its decision was consistent with the goal of the limitations provision to protect

184. *See* notes 223-47 *infra* and accompanying text (discussion of discovery-rule variation). The basic issue under both interpretations is the same. In the compensable-injury interpretation, the problem is whether the occurrence of one compensable condition starts the limitations period running for all claims for compensation for conditions deriving from the same accident; in the discovery-rule variation, the problem is whether the discovery or reasonable discoverability of one compensable condition starts the limitations period running for all claims for compensation for conditions arising from the same accident. The problem will be analyzed solely in terms of the compensable-injury interpretation because the special considerations underlying the discovery rule do not affect the analysis.

185. *See* text accompanying notes 199-215 *infra*.

186. 328 Mo. 888, 42 S.W.2d 579 (1931).

187. The court's opinion also could be construed as adopting a discovery-rule interpretation, *see* note 249 *infra*.

the employer against stale claims, "stale, not only as to the matter as to whether the accident has culminated in a particular disability, but stale as to other matters, including one as to whether the accident was a compensable one."[188] The court also argued that its interpretation was supported by the legislative purpose behind the provision authorizing the Workmen's Compensation Commission to reopen and change an award because of a change in the employee's condition:[189]

> [The reopening provision] plainly shows that it was [the legislature's] intention to provide that the claim should be filed within six months after the receipt of a compensable injury by the employee, and, should it transpire thereafter that the injury received has developed into a more serious injury compensable in a different manner, the commission should change the award, if any, previously made.[190]

The *Wheeler* court's reasoning is not persuasive. The basic limitations provision in the Missouri Workmen's Compensation Act at the time of the *Wheeler* case read:

> No proceedings for compensation under this act shall be maintained unless a claim therefor be filed with the commission within six months after the injury or death . . . .[191]

Once the Missouri court adopted the compensable-injury interpretation of the "injury" language, the term "injury" as construed referred to a compensable condition, not to the underlying deleterious physical process initiated by the original accident. Therefore, each separate compensable condition resulting from the underlying physical process would seem to be a separate "injury," with a separate limitations period running from the date that compensable condition first appeared. The contrary *Wheeler* interpretation is arguably unsupportable as a matter of statutory construction, for it assigns two different meanings to the single word "injury" as used in the limitations provision. In adopting the compensable-injury interpretation, the court says that "injury" refers to a particular compensable condition, but in interpreting the scope of the limitations bar, the court implies that "injury" refers to the underlying physical process initiated by the accident.

The separability interpretation of the limitations language, on the

188. 328 Mo. at 894, 42 S.W.2d at 581.

189. Act of Apr. 30, 1925, § 42, [1925] Mo. Laws 396 (now MO. REV. STAT. § 287.470 (1969)).

190. 328 Mo. at 895, 42 S.W.2d at 582.

191. Act of Apr. 30, 1925, § 39, [1925] Mo. Laws 396 (now MO. REV. STAT. § 287.430 (1969) (period now one year)).

other hand, is consistent with the policy considerations supporting the original compensable-injury interpretation: the beneficent purpose of workmen's compensation acts in general and the inequity of precluding one from recovery before he ever had the right to compensation.[192] The differences between the ordinary case under the compensable-injury interpretation and the *Wheeler* case are insignificant. The employee's failure to claim compensation for a minor previous compensable condition would not seem to increase the likelihood that his present claim is false or fraudulent. The employer's ability to investigate and gather evidence is hampered equally in both cases. The time between accident at work and compensation hearing may be just as long in an ordinary compensable-injury case as in a case involving the separability problem. The only significant difference between the cases is that in *Wheeler* the employee failed to file claim for his prior, minor disability. Barring compensation for the employee's subsequent serious

192. The argument here, which differs slightly from that in the main compensable-injury interpretation, is that it does not make sense to preclude the employee from recovery of compensation for subsequent serious disability simply because he failed to claim compensation for prior minor disability.

The response to the arguments against the *Wheeler* result might go as follows. First, there is nothing inconsistent in the *Wheeler* court's interpretation, since the compensable-injury interpretation never equated the "injury" with a particular disability or specific compensable condition, but referred instead to the underlying physical process (the injury) initiated by the accident, at the time that process resulted in a compensable condition, or became compensable. The compensable-injury interpretation was never meant to give an unusual meaning to the term "injury," but was intended only to give content to the notion of the "time of the injury."

Secondly, the arguments in favor of a compensable-injury interpretation do not apply with the same force to support the employee's position in the *Wheeler* case. One argument supporting the compensable-injury interpretation is that the legislature could not have intended to authorize compensation and then bar the right to compensation before the right ever existed. The argument does not apply in the *Wheeler* situation because, as pointed out by the court, if the employee files claim within six months after the injury becomes compensable, he can thereafter without limitation reopen the original case to claim additional compensation for a change in condition. Act of Apr. 30, 1925, § 42, [1925] Mo. Laws 396 (now MO. REV. STAT. § 287.470 (1969)). *Wheeler*, therefore, does not preclude innocent, diligent employees before they could have made claim for compensation. The interpretation only precludes employees who slept on their rights. The employee might respond that the situations are substantially the same, since it makes little sense to preclude him from claiming compensation for an accident's serious results that did not occur immediately simply because he did not claim compensation for the apparently minor immediate compensable results of the accident. The employee's argument here may be persuasive, but it is demonstrably different from the simple argument in favor of a compensable-injury interpretation. It is the difference between precluding someone before he had a right to recover and precluding someone for failing to make timely claim for a prior, less serious compensable condition.

disability solely on this ground seems a harsh penalty for a trifling offense. It seems unreasonable to preclude an employee from compensation for serious disability just to encourage other employees to file claim for every technically compensable disability they incur.[193] To support the *Wheeler* result on such a ground turns the paternalism of the workmen's compensation scheme into oppression—oppression not required by the language of the Act, which can bear the separability meaning.

The *Wheeler* court's reference to the reopening provision in the Missouri statute is perhaps its most persuasive argument. Missouri's reopening provision, however, does not contain any limitation on the time within which a case can be reopened for change in conditions,[194] so it would appear the legislature did not intend to limit the time in which the reopening relief would be available. Therefore, it is difficult to argue that the existence of the reopening provision indicates an intent to preclude application of the complementary compensable-injury rule in the *Wheeler* situation, since the ultimate purpose of the reopening provision and the purpose of a liberal application of the compensable-injury interpretation seem identical: to solve the problem of unforeseen future contingencies in the employee's favor. One could argue that applying the compensable-injury interpretation to aid the employee in the *Wheeler* case would make the reopening provision superfluous. It would be reasonable, however, for the legislature to provide alternative solutions to the same problem, depending on whether a prior claim had been made. The employee in an original claim has to show that a prior work-incident caused his current compensable condition. The previously compensated employee has already proved that his original condition was caused by the work-incident, and the only relevant question is whether his current condition developed out of his original condition. The difference well might lead a legislature to provide alternative remedies, eliminating the need in a reopening proceeding to prove again that the original injury was compensable.[195]

193. The social interest in encouraging workers to claim compensation for every technically compensable condition is arguably minimal in light of the strain such claims would impose on the employer-employee relationship and the burden such claims would impose on the workmen's compensation system itself.

194. Mo. Rev. Stat. § 287.470 (1969). Most other states have time limitations on reopening. *See generally* 3 Larson § 81.20.

195. One recurrent problem in interpreting reopening provisions relates directly to the latent-injury limitations question. The question is whether the original claim can be reopened to show a subsequently developed disability that results not from the originally compensated injury, but from a concomitant, previously unmentioned injury re-

The Missouri Supreme Court carried the *Wheeler* rule to its logical extreme in a subsequent case in which the employer's insurer voluntarily paid compensation for the initial temporary total disability.[196] Applying the *Wheeler* nonseparability rule, the court held that the limitations period ran from the date of the initial temporary total disability, not from the date the injury culminated in serious permanent disability. The court thought it was irrelevant that the employee had been compensated fully for the initial compensable results of the injury.[197]

Given its continued adherence to the *Wheeler* nonseparability rule, the Missouri court's decision in this case is difficult to criticize on statutory construction grounds. If the nonseparability rule is accepted, no exploitable ambiguity remains on which to distinguish the case in which the injury was initially compensable and compensation was paid from

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ceived in the same accident. *See, e.g.*, Erhart v. Industrial Acc. Comm'n, 172 Cal. 621, 158 P. 193 (1916), *overruled by implication*, ch. 1034, § 5, [1947] Cal. Laws 2307; Automatic Sprinkler Corp. of America v. Rucker, 87 Ga. App. 375, 73 S.E.2d 609 (1952). The responses of the Ohio and Rhode Island courts to this problem have been interesting. The Ohio court fluctuated until the question was definitely resolved by the legislature. State *ex rel.* Bernhardt v. Industrial Comm'n, 127 Ohio St. 582, 190 N.E. 224 (1934); Kaiser v. Industrial Comm'n, 136 Ohio St. 440, 26 N.E.2d 449 (1940); Miller v. Spicer Mfg. Co., 159 Ohio St. 571, 113 N.E.2d 4 (1953); Kittle v. Keller, 9 Ohio St. 2d 177, 224 N.E.2d 751 (1967), *overruled by implication*, § 4123.84, [1967] Ohio Laws 1432 (denying reopening). The Rhode Island court's harsh interpretation of the state's reopening provision to preclude reopening if the original injury was misdiagnosed, Barin v. Lymansville Co., 88 R.I. 169, 143 A.2d 705 (1958), may have led in a roundabout way to the court's strained interpretation of the limitations provision in Provencher v. Glas-Kraft, Inc., 107 R.I. 97, 264 A.2d 916 (1970).

196. Hundley v. Matthews Hinsman Co., 379 S.W.2d 489 (Mo. 1964).

197. The court rejected the contrary arguments in Professor Larson's treatise, 3 LARSON § 78.44, as unsupported by any authority and as primarily directed to the legislature and not to the courts. Professor Larson was commenting on the case of Kobilkin v. Pillsbury, 103 F.2d 667 (9th Cir. 1939), *affirmed mem. by an equally divided Court*, 309 U.S. 619 (1940). Professor Larson first interpreted the opinion as holding that the claim for compensation was barred under a compensable-injury interpretation with a nonseparability rule. *See* note 158 *supra*. Next, he argued that the claimant in *Kobilkin* should not be treated differently from the claimant in any other latent-injury case. The fact that compensation was paid for the initial minor temporary disability should not lead to a different result. The basic question is "whether claimant had any reasonable occasion to file a claim sooner than he did." 3 LARSON § 78.44. If the employer pays full compensation voluntarily, the employee has no reason to make claim for compensation. The contrary result in *Kobilkin*, which encourages an employee to attribute the worst imaginable consequences to an injury and file claim immediately for all of them, is inconsistent with the rule in the majority of states, properly understood, and, given the liberal reopening provisions, makes the availability of compensation for the subsequently developing condition depend on the irrelevant technicality of whether the initial compensation was paid voluntarily or pursuant to an award.

the case in which the injury was initially compensable and compensation was not paid. Prior full payment of compensation cannot affect the date the injury becomes compensable, just as a compromise settlement or full payment of claimed damages cannot prevent the cause of action from "accruing" under the similar traditional statute of limitations for negligence claims. Carried one step further, however, the analogy between this case and settlement cases under the traditional negligence limitations provision breaks down. Under the "cause of action accrues" language, it makes sense to start the limitations period without regard to settlement of the plaintiff's claim because in practice, as well as in theory, he has only one cause of action. If, instead of settling with the defendant, plaintiff had brought suit to recover damages and received full payment for all damages incurred or predicted, that would have been the end of the matter. Plaintiff could not reopen the case to seek additional damages for further, originally unforeseen injuries. Therefore, in the ordinary negligence case, it makes little difference whether the claimant is paid voluntarily or recovers damages in a lawsuit. The workmen's compensation situation may be different, because of the reopening provisions. As Professor Larson points out,[198] the claimant in a workmen's compensation case may be able to reopen an award to obtain additional compensation for an unforeseen change in condition. Under these circumstances, there is a significant difference under *Wheeler* and its progeny between employees whose employers voluntarily paid compensation and those who received the same amount under an award by the compensation commission. In the latter case the employee can reopen and obtain additional compensation for change in condition, even after the limitations period has run. In the former case, however, the employee's subsequent claim will be barred if the limitations period has run on the initial, compensated claim. Different treatment of employees in the two situations seems patently inconsistent with both the compensation purpose of the workmen's compensation statute and the rationale behind the reopening provision. Furthermore, the difference is not supportable by reference to the purposes of the limitations provision, since the evidentiary and certainty purposes seem equally applicable whether previous compensation was paid voluntarily or by award. Once the nonseparability rule has been adopted, however, the result in the case of prior voluntary compensation seems inevitable as a matter of statutory construction.

198. 3 LARSON § 78.44; *see* note 197 *supra*.

The impossibility of reconciling that result with the purpose of the workmen's compensation statute and the right to reopen if a prior award has been made argues against the *Wheeler* decision itself, not against the subsequent gloss of the later voluntary compensation case.

Most of the other states that have settled the question of the scope of the limitations bar are states in which the legislature subsequently changed from an "injury" to an "accident" limitations provision: Hawaii,[199] Maryland,[200] and Utah[201] adopted the nonseparability rule; Indiana adopted a separability rule;[202] and Washington rejected the nonseparability result without adopting a separability rule.[203] The status of the nonseparability rule in states with current compensable-injury or discovery-rule interpretations is far from clear. The Nebraska,[204] New Mexico,[205] Rhode Island,[206] and United States[207] Supreme Courts have all seemingly adopted a nonseparability rule in at least one case. The courts do not seem to apply the rule consistently, however. Prior and subsequent cases in Nebraska[208] and Rhode Island[209] were decided in

199. Silva v. Wheeler & Williams, Ltd., 32 Hawaii 920 (1933).

200. Griffin v. Rustless Iron & Steel Co., 187 Md. 524, 51 A.2d 280 (1947).

201. Katsanos v. Industrial Comm'n, 71 Utah 479, 267 P. 781 (1928) (decided before liberal compensable-injury interpretation of statute of limitations in Salt Lake City v. Industrial Comm'n, 93 Utah 510, 74 P.2d 657 (1937)).

202. International Detrola Corp. v. Hoffman, 224 Ind. 613, 70 N.E.2d 844 (1947); *cf.* Briggs Indiana Corp. v. Davis, 107 Ind. App. 177, 23 N.E.2d 285 (1939).

203. Fee v. Department of Labor & Indus., 151 Wash. 337, 275 P. 741 (1929). The case was decided after the legislature had changed to an "accident" provision, but on facts that occurred before the change. The facts in *Fee* were almost identical to the facts in *Wheeler*. The court rejected the employer's argument that the limitations period should run from the time the injury to the employee's eye first became compensable for total temporary disability instead of the time the employee was told he would lose the sight of his eye:

> [W]e do not think that it [the compensable-injury rule announced in a prior case] militates against a workman who may have suffered some compensable damage, but who, in the hope of preventing any permanent injury and loss, makes no claim for the minor loss, but continues to endeavor to prevent permanent, partial disability, for which hopes are held out to him by those specially skilled in that line to whom he applies for treatment.

Id. at 342, 275 P. at 742.

204. Park v. School Dist. No. 27, 127 Neb. 767, 257 N.W. 219 (1934).

205. Noland v. Young Drilling Co., 79 N.M. 444, 444 P.2d 771 (Ct. App. 1968).

206. Cruso v. Yellow Cab Co., 82 R.I. 158, 106 A.2d 734 (1954).

207. Kobilkin v. Pillsbury, 103 F.2d 667 (9th Cir. 1939), *aff'd mem. by an equally divided Court*, 309 U.S. 619 (1940) (alternative interpretation of holding).

208. The prior case is Montgomery v. Milldale Farm & Live Stock Imp. Co., 124 Neb. 347, 246 N.W. 734 (1933), *overruled sub silentio*, Park v. School Dist. No. 27, 127 Neb. 767, 257 N.W. 219 (1934). The subsequent cases are Plambeck v. Natkin & Co., 171 Neb. 774, 107 N.W.2d 734 (1961) (prior voluntary compensation), and

favor of employees on facts which seem to negate the nonseparability rule. A subsequent District of Columbia case[210] applying the statute construed in the United States Supreme Court case also reached a result seemingly negating the nonseparability rule. In New Mexico, the nonseparability rule has not been applied in cases of prior voluntary compensation because of the specific wording of the limitations provision, which starts the limitations period from the date the employer failed to pay compensation due the employee.[211] In two other states—Arizona and Tennessee—the result or language in some cases suggests a position on the separability question, but neither state court has announced a definite position on the question. All that can be said is that Arizona may have adopted a nonseparability rule[212] and Tennessee may have adopted a separability rule.[213] The question is still open in those two states, as well as in the liberal "injury" states of Alaska, Arkansas, Colorado, Mississippi, and Wyoming.

Without discussing the separability issue, the courts in many liberal "injury" states have decided cases involving prior voluntary compensa-

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Webb v. Consumers Coop. Ass'n, 171 Neb. 758, 107 N.W.2d 737 (1961) (same). Prior to *Park*, the Nebraska court had analyzed limitations cases by applying a formula: If the condition was latent and progressive and undiscovered, the limitations period would not run until the nature of the injury was discovered. The court stretched the latency formula to include misdiagnosis cases in which employees were told by their doctor that their condition was not caused by the accident at work when in fact it was. *See* Astuto v. V. Ray Gould Co., 123 Neb. 138, 242 N.W. 375 (1932). In *Montgomery*, the court extended its past misdiagnosis cases to allow recovery by a late claimant even though she had been totally disabled for a long period immediately after the accident and the relationship between the disability and the work-accident was clear, simply because the precise nature of her condition was not properly diagnosed until much later. In *Park*, the court rejected the *Montgomery* analysis, and moved toward a test of latency by a misdiagnosis that conceals the compensable character of the injury.

209. The prior case is Larkin v. George A. Fuller Co., 76 R.I. 395, 71 A.2d 690 (1950) (subsequent "scheduled" injury). The subsequent cases are Tirocchi v. United States Rubber Co., 101 R.I. 429, 224 A.2d 387 (1966) ("scheduled" injury), and Lozowski v. Nicholson File Co., 92 R.I. 270, 168 A.2d 143 (1961) ("scheduled" injury). These cases may be explainable in terms of Rhode Island's peculiar scheduled injury provision which makes "scheduled" payments nonexclusive additions to compensation for disability, R.I. GEN. LAWS ANN. § 28-33-19 (1968).

210. Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970).

211. Rayburn v. Boys Super Mkt., Inc., 74 N.M. 712, 397 P.2d 953 (1964).

212. *See* Hughes v. Industrial Comm'n, 81 Ariz. 264, 304 P.2d 1066 (1956); Shepard v. Industrial Comm'n, 6 Ariz. App. 207, 431 P.2d 102 (1970).

213. *See* Griffitts v. Humphrey, 199 Tenn. 528, 288 S.W.2d 1 (1955); Murray Ohio Mfg. Co. v. Vines, — Tenn. —, 498 S.W.2d 897 (1973); Imperial Shirt Corp. v. Jenkins, 217 Tenn. 602, 399 S.W.2d 757 (1966). *But see* A.C. Lawrence Leather Co. v. Britt, 220 Tenn. 444, 414 S.W.2d 830 (1967).

tion by rejecting the nonseparability result. In almost every "injury" state with a compensable-injury or discovery-rule interpretation, the provision of medical services alone does not seem to start the limitations period running.[214] In five jurisdictions there are cases in which prior compensation for some kind of disability was paid voluntarily and the court found that the limitations period ran from a later date than the initial compensated disability.[215]

b. *Elective Corrective Surgery*

Action within the discretion of the employee may determine the date on which his injury becomes compensable, and thus may trigger commencement of the limitations period under the compensable-injury interpretation. The most common cases are those in which the employee has no right to compensation unless and until he submits to corrective surgery. In such cases, courts have had difficulties in applying the compensable-injury or discovery-rule interpretations. Some courts

214. *Alaska*: Morrison-Knudsen Co. v. Vereen, 414 P.2d 536 (Alas. 1966); *Arizona*: Hartford Accident & Indem. Co. v. Industrial Comm'n, 43 Ariz. 50, 29 P.2d 142 (1934); *Arkansas*: T.J. Moss Tie & Timber Co. v. Martin, 220 Ark. 265, 247 S.W.2d 198 (1952); *Colorado*: City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); Aetna Cas. & Sur. Co. v. Industrial Comm'r, 474 P.2d 242 (Colo. Ct. App. 1970); *District of Columbia*: Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970); *Louisiana*: Mottet v. Libbey-Owens-Ford Glass Co., 220 La. 653, 57 So. 2d 218 (1952) (applying Louisiana's intermediate "injury" limitation); *Missouri*: Kostron v. American Packing Co., 227 Mo. App. 34, 455 S.W.2d 871 (1932) (*but see* Hundley v. Matthews Hinsman Co., 379 S.W.2d 489 (Mo. 1964); Conn v. Chestnut St. Realty Co., 235 Mo. App. 309, 133 S.W.2d 1056 (1940)); *Nebraska*: Plambeck v. Natkin & Co., 171 Neb. 774, 107 N.W.2d 734 (1961); Webb v. Consumers Coop. Ass'n, 171 Neb. 758, 107 N.W.2d 737 (1961); *Rhode Island*: Rosa v. George A. Fuller Co., 74 R.I. 215, 60 A.2d 150 (1948); *Tennessee*: Griffitts v. Humphrey, 199 Tenn. 528, 288 S.W.2d 1 (1955); Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909 (1947).

215. Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970); T.J. Moss Tie & Timber Co. v. Martin, 220 Ark. 265, 247 S.W.2d 198 (1952); Webb v. Consumers Coop. Ass'n, 171 Neb. 758, 107 N.W.2d 737 (1961) (*semble*); Tirocchi v. United States Rubber Co., 101 R.I. 429, 224 A.2d 387 (1966); Larkin v. George A. Fuller Co., 76 R.I. 395, 71 A.2d 690 (1950); Murray Ohio Mfg. Co. v. Vines, — Tenn. —, 498 S.W.2d 897 (1973).

In these states, a late claimant who failed to make claim for a prior compensable condition might use one of these cases to assert that the court has rejected the nonseparability rule completely, arguing as a matter of statutory construction that the nonseparability rule is applicable equally to cases of compensated and uncompensated prior disability. The cases are not completely supportive, however, because at least arguably, the claimant in the case of prior voluntary compensation was diligent in filing and the claimant in the uncompensated case was not. The court might distinguish the cases on this ground even though the statute never mentions diligence and cannot be construed reasonably to support the distinction.

have held that the condition becomes compensable and the limitations period begins when the employee first discovers that corrective surgery is needed.[216] Other courts have held that the condition becomes compensable and the limitations period begins when the employee has the operation, incurring compensable medical expenses and postoperative temporary disability.[217]

Which application of the compensable-injury rule is better? The language of the statute could bear either meaning, given a prior compensable-injury interpretation. Starting the limitations period at the time the need for corrective surgery arises can be supported by reading "compensable injury" as an injury for which compensation is payable now if the employee chooses to take all steps within his control necessary to perfect a possible claim for compensation. Starting the limitations period at the time of the corrective surgery can be supported by reading "compensable injury" as an injury for which compensation is payable now if the employee chooses to take all the procedural steps within the workmen's compensation system necessary to perfect a claim for compensation. When laid alongside the traditional "cause of action accrues" limitations provision, the second reading of the compensable-injury rule is arguably preferable. Traditionally, the cause of action accrues when all nonprocedural events necessary to establish plaintiff's right to recover have occurred. In this context, submission to an operation is an event necessary to establish plaintiff's right to recover surgical expenses and total temporary disability for postoperative convalescence. It is obviously not a procedural step in the process of recovering compensation through the established legal procedures.

On the other hand, the traditional accrual limitations provision may be used to support the first reading of the compensable-injury rule. In the traditional relationship between limitations provisions and the prima facie case for a negligence personal-injury action, the right to recover damages depends on an event—negligent act or omission of the defendant causing the plaintiff injury—over which the plaintiff has no control. If workmen's compensation rules make the right to compensation depend on events within the control of the claimant, those events should be treated for limitations purposes as procedural prerequisites

216. *See, e.g.*, Liberty Mut. Ins. Co. v. Parker, 19 F. Supp. 686 (D. Md. 1937); Conn v. Chestnut St. Realty Co., 235 Mo. App. 309, 133 S.W.2d 1056 (1939).

217. *See, e.g.*, Rayburn v. Boys Super Mkt., Inc., 74 N.M. 712, 397 P.2d 953 (1964); Chicoria v. Kenyon Piece Dyeworks, Inc., 74 R.I. 260, 60 A.2d 492 (1948).

to recovery of compensation rather than as substantive elements of the "cause of action."

The above analysis goes to the heart of the matter. Courts are reluctant to adopt an interpretation of the limitations provision that connects the commencement of the limitations period to an action within the control of the claimant. To do so seems contrary to a basic aim of any statute of limitations—to force a claimant to perfect his claim within a specified time and thus to prevent fraudulent claims and claims brought by claimants "lying in wait" until contradictory evidence has disappeared. Since the timing of the surgery is within the claimant's control, in most cases both the compensation purposes of workmen's compensation and the protective purpose of the limitations provision can be furthered without sacrificing either. All that is needed is a statutory incentive for the claimant to have the operation and make claim within the limitations period after the need for the operation arises or becomes apparent. Adoption of this rationale for starting the limitations period at the time the need for corrective surgery becomes apparent, however, seems to carry the paternalism of workmen's compensation acts to an unreasonable extreme. The workmen's compensation system in effect dictates to the employee that he must have an operation within a certain time or forego compensation, despite the fact that the employee's physician has not specified a time for the operation.

Is there a way to promote the objectives of the limitations provision without dictating to the employee when he must submit to an operation? The obvious answer lies in enforcement of the notice requirements.[218] If the employer has notice of the injury and notice of the need for eventual corrective surgery within a reasonable time after the employee learned of the injury and the need, the employer can investigate the circumstances of the accident and prepare and keep documentary evidence relating to the possible future claim for surgical care. Thus, at least in elective-corrective-surgery cases,[219] the date triggering

218. *See generally* 3 LARSON § 78.20.

219. Some states have special provisions limiting the compensability of hernias, the most common work-related condition correctible by elective surgery. *See, e.g.*, MICH. STAT. ANN. § 17.237(405)(c) (1968). These special hernia provisions often contain a special notice requirement more stringent than the notice requirement generally applicable to other accidental injuries. *See, e.g.*, N.J. STAT. ANN. § 34.15-12(23) (Supp. 1974). Even without special notice requirements for hernias, courts in hernia cases have emphasized the importance of notice. *Compare* McGee v. San Manuel Copper Corp., 89 Ariz. 244, 360 P.2d 1024 (1961), *with* Arizona Grocery Co. v. Meier, 61 Ariz. 317, 149 P.2d 274 (1944).

the notice limitations period should not be the same as the date triggering the claim limitations period.[220] The notice period should begin to run as soon as the need for eventual corrective surgery arises or becomes apparent; the claim period should begin to run from the date of the corrective surgery. Starting the claim limitations period at the time of the operation would then pose no more threat to the limitations purposes than the ordinary compensable-injury case.

c. *Preclusion of Claim Before Wage Loss*

In most states, compensation for permanent partial disability is payable upon a showing of impaired earning capacity, whether or not there was an actual wage loss.[221] Compensation for permanent "scheduled" injuries also is payable without a showing of actual wage loss.[222] In limitations cases involving claimed compensation for impaired earning capacity or for a permanent scheduled injury, therefore, application of the compensable-injury rule (starting the limitations period at the time the injury becomes compensable) may bar the employee's claim before he has ever suffered any wage loss from the injury.[223] This result is open to question.

220. *See* notes 322-26 *infra* and accompanying text (discussion of interpretation of Minnesota notice requirement).

221. *See generally* 2 LARSON § 57.21.

222. *See generally id.* § 58.11.

223. *See, e.g.*, Helle v. Eyermann Contracting Co., 44 S.W.2d 234 (Mo. Ct. App. 1932) (scheduled injury); Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N.W.2d 237 (1965); Bradford v. Dixie Mercerizing Co., 199 Tenn. 170, 285 S.W.2d 136 (1955) (all permanent partial disability in Tennessee is "scheduled" injury). In Louisiana, compensation for permanent partial disability requires a showing of actual wage loss. The Louisiana court's compensable-injury interpretation of the state's intermediate "injury" limitations provision, therefore, has not been used to preclude a claim for permanent partial disability before the employee lost any wages. Wallace v. Remington Rand, Inc., 229 La. 651, 661-62, 86 So. 2d 522, 525-26 (1956). The Louisiana court then faced a problem like the elective-corrective-surgery problem, since the court's interpretation starts the limitations period from the time the employee loses time from work, an event partially within the employee's control. The court analyzed the problem as follows:

> [T]he law did not require plaintiff to work during those 70 tedious weeks following the accident enduring the pain that he must have continuously experienced and perhaps a man of less fortitude would have immediately stopped working and demanded compensation for total permanent disability. But for us to presently conclude that the injury developed on the day of the accident would be dealing in conjecture and the commencement of prescription cannot be decided on that basis. What may be a disabling injury to one man may not be to another and the plain purpose of the [amendment of 1934] is to provide a reasonable period of limitation in cases like this, where the injured workman continues on at his job and earns his wage, even though he does not per-

The primary purpose of compensation for disability is to replace lost wages.[224] The only way that purpose can be reconciled with compensation for impaired earning capacity or for permanent "scheduled" injuries is to view those forms of compensation as based on statutory assumptions about the probable effects of a particular condition on the employee's future earnings. These forms of compensation can thus be seen as attempts to solve the problem of future contingencies in a system in which an award must be made at some definite time, similar to the assessment of damages in a traditional tort action, in which the probable future effects of the injury are taken into account in determining the amount of damages.

The need for a measure of damages that hedges against future contingencies may be less pressing in workmen's compensation acts than in traditional tort actions. In many state workmen's compensation systems the problem of unforeseen future contingencies is also dealt with by liberal interpretation of the limitations provision and by the reopening provision. The compensable-injury interpretation[225] postpones the running of the limitations period until the injury becomes compensable, and the reopening provision allows the employee to reopen prior claims for a change in condition. If the state with a compensable-injury interpretation of its limitations provision also authorizes compensation for impaired earning capacity or for scheduled injuries, however, the conclusion seems unavoidable that the limitations period starts to run from the date the employee's earning capacity is impaired or the date the scheduled injury occurs. Thus, the employee who files claim within the allotted time after he first loses wages may be precluded from recovery by the combination of two provisions—the compensable-injury interpretation of the limitations provision, and provisions authorizing compensation for impaired earning capacity or scheduled injury. It is ironic that each of the provisions was intended to resolve the problem of future contingencies in the employee's favor.

> form all of the duties formerly assigned to him. It is to be remembered that the statute does not countenance an unreasonable delay for filing compensation claims in any case as it provides a peremption of two years from the date of the accident within which all suits must be instituted.

Id. at 661-62, 86 So. 2d at 525-26 (footnote omitted).

224. *See generally* Larson, *Basic Concepts & Objectives of Workmen's Compensation*, in 1 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS 31-35 (1973).

225. The analysis in text applies to jurisdictions following the discovery-rule interpretation as well.

D. *Discovery-Rule Interpretation*[226]

1. *History and Development*

A few jurisdictions have adopted some form of discovery rule by statute.[227] The courts of twelve jurisdictions have adopted a discovery rule by interpretation of the basic limitations language.[228] Three of these

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226. Professor Larson's influential discussion of the discovery rule differs in certain respects from the analysis in this Article. Professor Larson states the rule as follows:

> The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease.

3 LARSON § 78.41, at 47. Professor Larson, in a footnote to the passage quoted above, supports this general statement by citing cases from the federal courts and thirty states. Professor Larson's statement and citations must be clearly understood in order to avoid possible misinterpretation. He is discussing the interpretation of three different kinds of limitations provisions: notice limitations provisions, claim limitations for occupational disease claims, and claim limitations provisions for accidental injury claims. If a state has what appears to be a discovery-rule interpretation of any one of these three kinds of limitations, it is included in the footnote. Professor Larson therefore cites cases from several states that have a harsh "accident" claim limitations provision for accidental injury claims but also have a liberally-interpreted notice-limitations provision or occupational-disease-claim-limitations provision (California, Georgia, Hawaii, Kentucky, Maryland (citing a case superseded by 1957 change to "accident" language, ch. 814, § 37(a), [1957] Md. Laws 1504), Minnesota, New Jersey, New York, Pennsylvania (subsequently changed to "injury" form in 1972, Act No. 223, § 4, [1972] Pa. Sess. Laws Serv. 696-97), South Carolina, Virginia, Washington, and Wisconsin). For similar reasons, Professor Larson includes cases from jurisdictions with "injury" claim limitations provisions in which the prevailing interpretation starts the limitations period from the time of the initial injury accompanying the accident (Iowa, Massachusetts, North Dakota, Oklahoma (citing an irrelevant reopening case, State Highway Dep't v. Crossland, 391 P.2d 801 (Okla. 1964))), or in which the claim limitations provision has received no definitive interpretation (Florida). Professor Larson further cites claim limitations cases from Louisiana, in which the compensable-injury interpretation seems to prevail, and in which the highest court has never clearly adopted the discovery-rule interpretation. *See* Mottet v. Libbey-Owens-Ford Glass Co., 220 La. 653, 57 So. 2d 218 (1952); Johnson v. W.C. Fatjo, Inc., 154 So. 2d 781 (La. Ct. App. 1963), *appeal denied*, 245 La. 61, 156 So. 2d 603 (1963) (misdiagnosis case analyzed under compensable-injury interpretation).

227. 33 U.S.C. § 913(a) (Supp. III, 1973); ALASKA STAT. § 23.30.105 (1972); ME. REV. STAT. ANN. tit. 39, § 95 (Supp. 1974); MICH. STAT. ANN. § 17.237 (381) (Supp. 1974); R.I. GEN. LAWS ANN. § 28-35-57 (1968); WYO. STAT. ANN. § 27-105 (1967); *cf.* MONT. REV. CODES ANN. § 92-601 (Supp. 1973) (commission may waive time requirement up to an additional two years if delay is because of lack of knowledge of disability); NEV. REV. STAT. § 616.500(6)(c) (1973) (commission may excuse failure to file claim within specified time period if due to employee's mistake or ignorance of fact or law).

228. *Arizona*: English v. Industrial Comm'n, 73 Ariz. 86, 237 P.2d 815 (1951); *California*: Marsh v. Industrial Acc. Comm'n, 217 Cal. 338, 18 P.2d 933 (1933) (occupational disease); Continental Cas. Co. v. Industrial Acc. Comm'n, 11 Cal. App. 2d 619,

jurisdictions now have a harsh, legislatively imposed "accident" limitations provision.[229] The histories of the discovery-rule interpretation in eight[230] of these twelve jurisdictions share certain characteristics. The Arizona development is typical.

The Arizona court first interpreted the state's limitations provision in 1934, in the case of *Hartford Accident & Indemnity Co. v. Industrial Commission*.[231] In that case, the employee's lower lip was punctured at work. The wound did not immediately result in a compensable disability or a compensable scheduled injury. Later on, carcinoma developed at the site of the wound and surgical removal of the cancerous tissue resulted in permanent disfigurement, a compensable scheduled injury. The court held that the limitations period ran from the date of the operation, since that was the time the injury became compensable. The court stated the rule as follows:

> [I]f it [the injury] is slight or trivial at the time [of the accident] and noncompensable and later on develops unexpected results for which the employee could not have been expected to make a claim and receive compensation, then the statute runs, not from the date of the accident, but from the date the results of the injury became manifest and compensable.[232]

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54 P.2d 753 (1936) (accidental injury), *overruled by implication*, ch. 1034, § 5, [1974] Cal. Stat. 2307; *Colorado*: City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); *District of Columbia*: Great Am. Indem. Co. v. Britton, 179 F.2d 60 (D.C. Cir. 1949); *cf.* Pillsbury v. United Eng'r Co., 342 U.S. 197 (1952); Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970); *Indiana*: International Detrola Corp. v. Hoffman, 224 Ind. 613, 70 N.E.2d 884 (1947); *Mississippi*: Tabor Motor Co. v. Garrard, — Miss. —, 233 So. 2d 811 (1970); *Missouri*: Marie v. Standard Steel Works, 319 S.W.2d 871 (Mo. 1959) (occupational disease); Crites v. Missouri Dry Dock & Repair Co., 348 S.W.2d 621 (Mo. Ct. App. 1961); *Nebraska*: Williams v. Dobberstein, 182 Neb. 862, 157 N.W.2d 776 (1968); *New Mexico*: Anderson v. Contract Trucking Co., 48 N.M. 158, 146 P.2d 873 (1944) (applying unique statute starting limitations period at employer's refusal to pay compensation, ch. 113, § 13, [1929] N.M. Laws 220 (now N.M. STAT. ANN. § 59-10-13.4 (1953))); *Tennessee*: Burcham v. Carbide & Carbon Chem. Corp., 188 Tenn. 592, 221 S.W.2d 888 (1949); Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909 (1947); *Washington*: Fee v. Department of Labor & Indus., 151 Wash. 337, 275 P. 741 (1929), *"accident" language adopted by legislature*, ch. 310, § 2, [1927] Wash. Laws 818, 847 (now WASH. REV. CODE ANN. §§ 51.18.100, .28.050 (1962). *See also* notes 324-27 *infra* and accompanying text (discussion of Minnesota's interpretation of its notice provision).

229. California, Indiana, and Washington. *See* notes 62 & 67 *supra*.

230. Arizona, California, Colorado, the District of Columbia, Mississippi, Nebraska, New Mexico, and Wyoming. *See* notes 231-43 *infra* and accompanying text.

231. 43 Ariz. 50, 29 P.2d 142 (1934).

232. *Id.* at 55-56, 29 P.2d at 144.

In 1951, the Arizona court faced a different problem in the case of *English v. Industrial Commission.*[233] In that case, the employee suffered an immediately compensable disability from inhaling toxic fumes at work. The employer's doctors, however, told him that his condition was not caused by his work, and the employee attributed his condition to tuberculosis. Five years later he learned that his condition was caused by inhaling toxic fumes at work, and shortly thereafter he filed an application for compensation. The court held that the limitations period began when the employee learned that his condition was caused by the prior incident at work. In support of this holding, the court emphasized the statement in the *Hartford* case that the limitations period does not start until the results of the injury become manifest and compensable. The court went on to argue that in light of the beneficent purposes of the workmen's compensation act, the limitations provision should not be interpreted to bar an employee when in the exercise of reasonable care, relying on the expert opinion of employer's physicians, he was unable to discover the causal relationship between his condition and the work-accident within the allotted time after the injury otherwise became compensable. The court seemed to adopt the general rule proposed by the employee that the right to compensation accrues when the employee knows or by the exercise of reasonable diligence should know that he has sustained a compensable injury.[234]

The developments of the discovery rule in Nebraska and the District of Columbia share the basic characteristics of the Arizona development. In each jurisdiction, the court started with an arguably justifiable interpretation of the basic limitations provision (either the latent-physical-injury[235] or the compensable-injury interpretation[236]). In each, the court jumped from the first interpretation to a discovery rule[237] by a process of common law development, relying solely on the language and reasoning of the prior case without returning to the underlying statutory language. In each, the court moved to a formulation of a reasonable-man discovery rule in a case in which the employee originally did not know that he had a compensable injury because a doctor misdiag-

233. 73 Ariz. 86, 237 P.2d 815 (1951).

234. *Id.* at 90, 237 P.2d at 818.

235. Johansen v. Union Stock Yards Co., 99 Neb. 328, 156 N.W. 511 (1916).

236. Potomac Elec. Power Co. v. Cardillo, 107 F.2d 962 (D.C. Cir. 1939).

237. Great Am. Indem. Co. v. Britton, 179 F.2d 60 (D.C Cir. 1949); Astuto v. V. Ray Gould Co., 123 Neb. 138, 242 N.W. 375 (1932); Selders v. Cornhuskers Oil Co., 111 Neb. 300, 196 N.W. 316 (1923).

nosed the cause[238] of his condition. Indeed, in the Nebraska and the District of Columbia cases, the doctors who misdiagnosed were not company doctors, and were probably selected and paid by the employees.

In California,[239] Colorado,[240] Mississippi,[241] New Mexico,[242] and Wyoming,[243] a liberal interpretation of the basic limitations language first occurred in a misdiagnosis case. All five states adopted a discovery-rule interpretation which starts the limitations period at the date the employee learned that his condition was caused by his work. In each case, the court first announced that it was interpreting the limitations provision to start the limitations period from the date the injury became compensable. The core characteristics of the Arizona, District of Columbia, and Nebraska developments are thus present in California, Colorado, Mississippi, New Mexico, and Wyoming, except that in the latter group a discovery rule came about in a single case rather than as a result of a progressive case development.

The recurrent relationships between the compensable-injury interpretation and the discovery rule on the one hand, and between the discovery-rule interpretation and causation-misdiagnosis cases on the other suggest that the discovery rule in most cases developed out of the compensable-injury interpretation because of the courts' unwillingness to preclude an employee who failed to make claim within the allotted time because a physician misdiagnosed the cause of his condition.

Of the states that appear to have adopted the discovery rule, only Indiana, Missouri, Tennessee, and Washington deviate from this general pattern. The Indiana and Washington developments in part parallel the Arizona development, starting with a compensable-injury case[244] and then adopting a discovery rule in a subsequent case involving misdiagnosis,[245] but the misdiagnoses in the Indiana and Washing-

238. Great Am. Indem. Co. v. Britton, 179 F.2d 60 (D.C. Cir. 1949); Astuto v. V. Ray Gould Co., 123 Neb. 138, 242 N.W. 375 (1932).

239. Marsh v. Industrial Acc. Comm'n, 217 Cal. 338, 18 P.2d 933 (1933) (occupational disease).

240. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967).

241. Tabor Motor Co. v. Garrard, — Miss. —, 233 So. 2d 811 (1970), *overruling* Thyer Mfg. Co. v. Keys, 235 Miss. 229, 108 So. 2d 876 (1959).

242. Anderson v. Contract Trucking Co., 48 N.M. 158, 146 P.2d 873 (1944).

243. Baldwin v. Scullion, 50 Wyo. 508, 62 P.2d 531 (1936).

244. S.G. Taylor Chain Co. v. Marianowski, 95 Ind. App. 120, 182 N.E. 584 (1932); Stolp v. Department of Labor & Indus., 138 Wash. 685, 245 P. 20 (1926).

245. International Detrola Corp. v. Hoffman, 244 Ind. 613, 70 N.E.2d 844 (1947); Fee v. Department of Labor & Indus., 151 Wash. 337, 275 P. 741 (1929).

ton cases concealed only the ultimate seriousness of the injury, not the work-causation. The early development of the discovery rule in Tennessee was influenced by the peculiar problem of interpreting two separate limitations provisions,[246] and the development in Missouri was influenced by the importance assigned the nonseparability rule in that state.[247]

246. In the first liberal Tennessee case, the court focused on resolution of the peculiar Tennessee double limitations provision problem. Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909 (1947), *construing* ch. 123, § 4, [1919] Tenn. Acts 377 (now TENN. CODE ANN. § 50-1003 (1966)), *and* ch. 123, § 31, [1919] Tenn. Acts 389 (now TENN. CODE ANN. § 50-1017 (1966)). *See* notes 110-11 *supra* and accompanying text. The court's opinion in *Ogle* announces no clear interpretation of the limitations provision. Parts of the opinion support a discovery-rule reading of the case:

> No reasonable construction of law could require that complainant give notice of a disability which he did not know existed or which did not, in fact, exist, or that he should file suit for a disability before he had suffered it.

185 Tenn. at 532, 206 S.W.2d at 911. Other parts of the opinion support a compensable-injury reading of the case: the court says that the limitations period starts from the "injury," not the "accident," and argues that "[t]his construction finds strong support in common sense. It is the 'injury' and not the 'accident' which determines the rights of the employee under the Act . . . ." *Id.* at 531, 206 S.W.2d at 910. Whether the court meant to adopt the compensable-injury interpretation or the discovery-rule interpretation, it is clear that the result in the case is consistent only with the discovery rule and inconsistent with Missouri's *Wheeler* nonseparability rule, since the court held that the limitations period started when the employee first discovered the permanent total loss of sight in one eye, even though, from the facts given, he must have known of prior serious compensable impairment of his vision in that eye short of total blindness. In a subsequent company-doctor case of causation-misdiagnosis, the Tennessee court reached a discovery-rule result and announced a discovery-rule interpretation of the limitations provisions. Burcham v. Carbide & Carbon Chem. Corp., 188 Tenn. 592, 221 S.W.2d 888 (1949). This interpretation was confirmed in Griffitts v. Humphrey, 199 Tenn. 528, 288 S.W.2d 1 (1955). The Tennessee court's application of its discovery rule differs from other courts', for the Tennessee court, perhaps influenced by the fact that all compensation for partial disability is based on scheduled percentage of physical impairment rather than on impairment of wage-earning capacity, starts the limitations period from the time the employee discovers the nature of his physical injury, while other states start the limitations period from the time the employee discovers his compensable condition. *Compare* Griffitts v. Humphrey, 199 Tenn. 528, 288 S.W.2d 1 (1955), *with* Bradford v. Dixie Mercerizing Co., 199 Tenn. 170, 285 S.W.2d 136 (1955). Given the peculiar basis for determining permanent partial disability in Tennessee, however, the Tennessee development may be consistent with the rule in other states.

247. An early Missouri Court of Appeals case specifically rejected the discovery-rule interpretation. Schrabauer v. Schneider Engraving Prod., 229 Mo. App. 866, 25 S.W.2d 529 (1930). Subsequently, in *Wheeler*, the Missouri Supreme Court announced what could be interpreted as a discovery-rule interpretation, but combined that with the nonseparability rule to preclude the claimant. Wheeler v. Missouri Pac. R.R., 328 Mo. 888, 42 S.W.2d 579 (1931). *See* text accompanying notes 186-95 *supra*. Because of the emphasis on nonseparability in Missouri, even though the courts continued to announce a discovery-rule interpretation of the basic limitations provision, it was not until a series

2. *Statutory Construction*

However the courts arrived at the discovery-rule interpretation, and however socially desirable the result may seem to be as an interpretation of the "injury" limitations language, the discovery rule must still be evaluated by the generally accepted standards of statutory construction. The discovery-rule interpretation of the "injury" language may not pass the first test of statutory construction: Can the "time of the injury" reasonably bear the discovery-rule meaning of the time when the claimant discovered or should have discovered the compensable nature of his injury? Courts in Missouri,[248] Connecticut,[249] and Rhode Island,[250] at one time or another expressly rejected the discovery-rule interpretation, arguing that the "injury" language will simply not bear that meaning. These courts have a good point: the context of the workmen's compensation act may support reading the term "injury" to mean "an injury compensable under the act," but the context does not support stretching the word "injury" to mean "discovery" (actual or constructive) of an injury compensable under the act. It is hard to see how the word "injury" can mean "discovery of injury."

The Supreme Court of Mississippi[251] and one commentator[252] have

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of occupational disease cases that the Missouri courts applied the announced rule in cases where there might be a significant difference between the result from a compensable-injury interpretation and the result from a discovery-rule interpretation. *See* Cleveland v. Laclede Christy Clay Prod. Co., 129 S.W.2d 12 (Mo. Ct. App. 1939), *overruled on other grounds*, Wentz v. Price Candy Co., 352 Mo. 1, 8, 175 S.W.2d 852, 856 (1943); Ford v. American Brake Shoe Co., 252 S.W.2d 649 (Mo. Ct. App. 1952); Marie v. Standard Steel Works, 319 S.W.2d 871 (Mo. 1959). These cases were decided under a cryptic 1931 amendment, H.B. 498, § 1, [1931] Mo. Laws 383-84, that simply made occupational diseases compensable without providing any guidance on the application of the general "injury" limitations provision to occupational disease claims. A specific discovery rule for occupational disease claims was later adopted, S.B. No. 167, [1959] Mo. Laws 11-13 (now MO. REV. STAT. §§ 287.063, .067 (1969)). Except for these early occupational disease cases, all the Missouri cases seem consistent with either a compensable-injury interpretation or a discovery-rule interpretation. *Cf.* Crites v. Missouri Dry Dock & Repair Co., 348 S.W.2d 621 (Mo. Ct. App. 1961).

248. Schrabauer v. Schneider Engraving Prod., 224 Mo. App. 304, 25 S.W.2d 529 (1930). *But see* note 247 *supra* (discussion of subsequent developments in Missouri).

249. Rossi v. Jackson Co., 120 Conn. 456, 181 A. 539 (1935); Connolly v. Pennsylvania Seaboard Steel Corp., 100 Conn. 423, 123 A. 906 (1924).

250. Cruso v. Yellow Cab Co., 82 R.I. 158, 106 A.2d 734 (1954). Rhode Island legislatively adopted the discovery rule in 1960. Ch. 94, § 1, [1960] R.I. Acts 378-79 (codified at R.I. GEN. LAWS ANN. 28-35-57 (1969)).

251. Tabor Motor Co. v. Garrard, — Miss. —, 233 So. 2d 811 (1970); *cf.* Keenan v. Consumers Pub. Power Dist., 152 Neb. 54, 40 N.W.2d 261 (1949).

252. Tate, *Workmen's Compensation Claimants' Latent or Unknown Injuries—Pre-*

suggested an interpretation of the "injury" language that preserves the discovery-rule result but avoids the plain-meaning arguments against the simple discovery-rule interpretation. The term "injury" is interpreted to mean "compensable injury," but the injury becomes compensable only when the evidence sufficient to establish a right to compensation becomes available. In the causation-misdiagnosis case, for ex-

scription, 12 LA. L. REV. 73, 79 (1951). After the article was published, the Louisiana Supreme Court interpreted the intermediate "injury" limitations provision, No. 29, § 1, [1934] La. Acts 188 (now LA. REV. STAT. ANN. 23:1209 (1964)), to mean "compensable injury." Mottet v. Libbey-Owens-Ford Glass Co., 220 La. 653, 57 So. 2d 218 (1952). Because compensation for partial disability in Louisiana is not payable without a showing of actual wage loss, the Louisiana courts subsequently applied the simple compensable-injury interpretation to start the intermediate limitations provision from the time the employee suffered actual wage loss. *See, e.g.*, Wallace v. Remington Rand, Inc., 229 La. 651, 86 So. 2d 522 (1956). The discovery-rule interpretation was never specifically adopted by the Louisiana Supreme Court. The author of the article subsequently became a Judge on the New Orleans Court of Appeal. While there and before he became a Judge on the Louisiana Supreme Court, he wrote the opinion in an interesting limitations case, Guillory v. Maryland Cas. Co., 227 So. 2d 620 (La. Ct. App. 1969). The employee, the manager of the employer's plant, twisted his knee at work. He did not report the injury to employer's insurer because he thought it was minor and he did not want to raise the employer's insurance rates. Less than a month after the accident the employee changed employment to teach for a year. His knee continued to trouble him, so he consulted a doctor three months after the accident. The doctor diagnosed the condition as a torn cartilage. Claim was filed less than one year after this diagnosis, but more than a year after the accident. Judge Tate held that the date of the injury was the same as the date of the accident in this case, since the employee knew of pain and difficulty with the knee at that time. Judge Tate distinguished the *Wallace* case on the grounds that the rule does not apply when the employee continues to work, but does so at a different job and for a different employer. He refused to hold that the injury became compensable only when properly diagnosed, distinguishing the apparently contrary conclusion in his 1951 article by noting that in *Guillory* there was no prior misdiagnosis. Judge Tate's reasoning makes little sense. First, if the employee could not have recovered compensation for partial disability while working at his new job because he could not prove actual wage loss, the reasoning of the *Wallace* case would seem to apply regardless of the fact that he switched jobs. Secondly, the reasoning in the 1951 article would appear to support the employee's position in *Guillory*. While the employee thought his condition was trivial and temporary and had no expert advice to the contrary, he had no evidence to establish the right to compensation. Therefore, the injury was not then compensable. Judge Tate's distinction between a case of prior misdiagnosis and *Guillory* seems to penalize an employee because he did not see a doctor when the court deems he should have. *See* text accompanying notes 282-89 *infra*. The only obvious reason to avoid application of the reasoning in the 1951 article was that the Louisiana courts since 1951 had had opportunity to adopt a discovery rule but had never done so, relying instead on the compensable-injury interpretation. *See, e.g.*, Johnson v. W.C. Fatjo, Inc., 154 So. 2d 781 (La. Ct. App.), *appeal denied*, 245 La. 61, 156 So. 2d 603 (1963). Judge Tate's opinion in this case suggests that he may have been trying so hard to appear unbiased by his prior article that he seized on unsupportable distinctions to reach a result that would prove his freedom from bias.

ample, the injury becomes compensable only when the employee obtains competent medical advice indicating that the condition was work-related, since, if causation is an issue, an employee ordinarily cannot establish a right to compensation without expert testimony relating the injury to the job. Although the Mississippi interpretation is less strained than the ordinary discovery-rule interpretation, it is still difficult to justify the interpretation on the basis of the statutory language. It seems a strained construction to read "the date of injury" as meaning "the time at which the employee is in a position to establish by competent evidence that the injury was work-related." If the statutory purpose is forwarded by an artificial reading—by either the ordinary discovery rule or the Mississippi interpretation—however, it is at least arguable that the result converts the unreasonable reading of the specific language to a reasonable exercise of judicial discretion. The issue then becomes whether the purposes of compensation statutes in fact require judicial development of a broad discovery-rule interpretation.

Courts have justified adopting a discovery rule by reference to a general legislative purpose to compensate injured workers[253] and to a presumption that the legislature could not have intended to preclude a late claimant who reasonably relied on a doctor's misdiagnosis in foregoing claim.[254] Although on the surface these arguments appear persuasive, the employer can argue that on closer analysis they do not justify the violence done to the language of the statute by the discovery-rule interpretation. First, the general purpose of the applicable workmen's compensation act to compensate injured workers should not be used to interpret the limitations provision, because the very existence of a limitations provision in the act indicates that the legislature has deliberately compromised the general compensation purpose in the interests of the purposes served by a limitations provision. Secondly, it is difficult to support the presumption that the legislature could not have intended to preclude a late claimant who acted reasonably in foregoing suit in reliance on a physician's misdiagnosis. The legislature may very well have intended to preclude such claimants. The traditional statute of limitations, after all, has often been held to preclude a late claimant even though he acted reasonably, and this result is consistent with the

253. *See* English v. Industrial Comm'n, 73 Ariz. 86, 237 P.2d 815 (1951); Selders v. Cornhuskers Oil Co., 111 Neb. 300, 196 N.W. 316 (1923).

254. *See* Great Am. Indem. Co. v. Britton, 179 F.2d 60 (D.C. Cir. 1949); English v. Industrial Comm'n, 73 Ariz. 86, 237 P.2d 815 (1951).

evidentiary and personal certainty purposes of the statute of limitations. Without a showing that the contrary policy choice favored by the court was expressly or impliedly adopted by the legislature, the legislative purpose argument fails.

The employee might argue that the same legislative intent arguments that support the compensable-injury interpretation also support the similar Mississippi evidentiary-compensable-injury interpretation or the simple discovery-rule interpretation. The employer might answer that the argument is unpersuasive for two reasons. First, the compensable-injury interpretation is not strained on its face, as are the discovery-rule and Mississippi readings, so no presumption against it arises from the bare language of the statute. Since the question of statutory construction resolved by the compensable-injury interpretation was close, the same legislative intent arguments that supported the compensable-injury interpretation would not prevail when used to support an interpretation that is presumptively incorrect. Secondly, the most important legislative intent argument favoring a compensable-injury interpretation—that the legislature could not have intended to preclude a claim before the claimant ever had the right to receive compensation—does not always support the discovery rule or the Mississippi interpretation. When the work-causation of the injury could not have been correctly diagnosed by a competent physician before it was in fact diagnosed, the argument supports application of the discovery rule or the Mississippi interpretation. When the work-causation of the injury could have been diagnosed by a competent physician, however, and the doctor treating the employee simply missed it, the above argument does not support the discovery-rule or Mississippi interpretation, for the employee could have enforced his right to compensation had he consulted different physicians and discovered the work-relation. In that case, the issue is not whether the legislature intended to preclude a claim before the right to compensation arose. Rather, the issue is whether the legislature intended to allocate the risk of avoidable mistaken diagnosis to the employee or to the employer. Although one could argue that the basic compensation purpose of the workmen's compensation statute supports the conclusion that the legislature intended to place the risk of mistaken diagnosis on the employer, the argument is not as persuasive as the argument that the legislature could not have intended to preclude claims before the right to compensation arose.

The discovery-rule result may be achieved in a limited class of mis-

diagnosis cases, however, without resort to statutory construction. In cases in which the employer's salaried physician fraudulently[255] or negligently[256] misdiagnoses the employee's condition, thus concealing from the employee the causal relationship between his condition and his work, the courts may combine the traditional doctrines of principal-agent and equitable estoppel[257] to aid the late claimant. The doctrine of equitable estoppel may only approximate the results under a discovery rule, however, for the discovery rule may aid late claimants in cases in which the doctrine of equitable estoppel cannot apply. Courts applying the discovery rule have aided late claimants who relied on nonnegligent misdiagnoses[258] and who relied on misdiagnoses by a doctor selected and paid by the claimant.[259] Agency and estoppel principles support allocation of the risk of misdiagnosis to the employer when the employer's salaried physician misdiagnoses the injury, and agency principles arguably can be extended to support imposing on the employer the risk of misdiagnosis by a nonsalaried physician selected and paid by the employer or its insurer.[260] When the physician is selected by the employee and paid by the employer, however, estoppel principles cannot support allocation of the risk of misdiagnosis to the employer, and when the physician is selected and paid by the employee, neither agency nor estoppel principles support allocation of the risk of misdiagnosis to the employer. In addition, a good faith misdiagnosis by the employer-selected physician may not be negligence at all, much less the culpable negligence traditionally required for application of the doctrine of equitable estoppel.[261] An argument could be made, however, that because of the relationship of faith and trust between the employee and the company doctor and the conflict of interest be-

255. McCoy v. Mike Horse Mining Co., 126 Mont. 435, 252 P.2d 1036 (1953); Esperson v. Gowanda State Homeopathic Hosp., 20 App. Div. 2d 828, 247 N.Y.S.2d 835 (1964); Altman v. Williams Furniture Co., 250 S.C. 98, 156 S.E.2d 433 (1967).

256. *Cf.* Watson v. Proctor & Gamble Defense Corp., 188 Tenn. 494, 221 S.W.2d 528 (1949).

257. Esperson v. Gowanda State Homeopathic Hosp., 20 App. Div. 2d 828, 247 N.Y.S.2d 835 (1964).

258. *See, e.g.*, English v. Industrial Comm'n, 73 Ariz. 86, 237 P.2d 815 (1951).

259. *See, e.g.*, Great Am. Indem. Co. v. Britton, 179 F.2d 60 (D.C. Cir. 1949).

260. Because future referrals by the employer may depend on the physician's treatment of the case, it makes sense to ignore the technical independent contractor status of the physician and treat him for these purposes as an agent of the employer. *See* 1 F. MECHEM, AGENCY §§ 200-08 (1914).

261. *See* Netherland v. Mead Corp., 170 Tenn. 520, 98 S.W.2d 76 (1936).

tween the doctor's patient and the doctor's employer,[262] any misdiagnosis should be treated as equivalent to culpable negligence for purposes of the traditional equitable estoppel analysis.[263]

3. *Application of the Discovery Rule*

The fundamental question in the application of a discovery rule is what must be discovered or discoverable in order to start the limitations period. Given the close relationship between the discovery rule and the compensable-injury interpretation,[264] the answer seems obvious: the limitations period begins when all the facts necessary to establish the employee's right to compensation are discovered or are reasonably discoverable.

Almost all courts that have decided the issue agree that the employee's justifiable ignorance that his otherwise compensable condition was caused by a work-accident postpones the start of the limitations period under the discovery rule.[265] The only significant problems have arisen in determining (1) whether the employee must have known from the sequence of events that his condition was caused by the work-accident,[266] and (2) whether the employee's belief that his condition was caused by a work-accident should start the limitations period even though the doctors he consulted all told him that his condition was not work-related.[267]

More troublesome than work-causation ignorance cases are cases in which the employee knows that his condition was caused by a work-accident but is ignorant of the exact nature and full seriousness of the condition. The following two examples are typical. Assume that in each case the limitations period was twelve months from date of

262. *See generally* Murray, *Ethics in Occupational Health Practice,* in OCCUPATIONAL HEALTH PRACTICE 421 (R. Schilling ed. 1973); Roberts, *The Question of Ethical Standards in Occupational Medical Practice,* 14 J. OCCUPATIONAL MED. 633 (1972).

263. *Cf.* Angermeir v. Hubley Mfg. Co., 206 Pa. Super. 422, 213 A.2d 171 (1965) (imposing duty on employer to inform employee of its attitude toward workmen's compensation liability within limitations period if employer's physician treats employee).

264. *See* text accompanying notes 230-47 *supra.*

265. Morrison-Knudsen Co. v. Vereen, 414 P.2d 536 (Alas. 1966); English v. Industrial Comm'n, 73 Ariz. 86, 237 P.2d 815 (1951); City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967).

266. *See* Surratt v. Otoe Food Prod. Co., 146 Neb. 854, 21 N.W.2d 862 (1946).

267. *See* Keenan v. Consumers Pub. Power Dist., 152 Neb. 54, 40 N.W.2d 261 (1949); Rastella v. State Dep't of Pub. Works, 102 R.I. 123, 229 A.2d 43 (1967).

"injury" and that the employee files claim within twelve months after he discovers the nature and seriousness of his condition.

Case One: The employee hurts his back at work. A doctor diagnoses it as a back sprain and tells him that he will get better soon with no serious, harmful results. After several months or years of intermittent back trouble, the employee is told by another doctor that he has a herniated disc traceable to the original injury. The employee then has corrective surgery that is not entirely successful, leaving him permanently partially disabled.[268]

Case Two: The employee injures his arm. The doctor who examines him discovers a broken bone, which he sets. After the cast is removed, his arm is stiff, but the doctor tells him the stiffness will go away eventually. The stiffness remains, and months or years later another doctor tells the employee that his arm will be permanently stiff, causing permanent percentage-loss of use of his arm.[269]

In a jurisdiction with a discovery rule and a nonseparability rule, the employee need know only that he is suffering from some work-related compensable condition to start the limitations period. The exact medical diagnosis or ultimate seriousness of the employee's condition is not ordinarily[270] a fact needed to establish the right to compensation.[271] Unlike ignorance of work-causation, the employee's ignorance of the true nature or seriousness of his condition does not automatically post-

268. This fact pattern is perhaps the most common one in compensable-injury or discovery-rule cases. *See, e.g.*, Dees v. Mississippi River Fuel Corp., 192 S.W.2d 635 (Mo. Ct. App. 1946); Webb v. Consumers Coop. Ass'n, 171 Neb. 758, 107 N.W.2d 737 (1961); Gomez v. Hausman Corp., 83 N.M. 400, 492 P.2d 1263 (Ct. App. 1971); Cruso v. Yellow Cab Co., 82 R.I. 158, 106 A.2d 734 (1954); Imperial Shirt Corp. v. Jenkins, 217 Tenn. 602, 399 S.W.2d 757 (1966). *See also* Tate, *supra* note 252, at 78 n.24.

269. *See* T.J. Moss Tie & Timber Co. v. Martin, 220 Ark. 265, 247 S.W.2d 198 (1952); Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N.W.2d 237 (1965); Collins v. Casualty Reciprocal Exch., 123 Neb. 227, 242 N.W. 457 (1932); Tirocchi v. United States Rubber Co., 101 R.I. 429, 224 A.2d 387 (1966).

270. When compensation for occupational diseases is limited to diseases specifically listed in the statute, the exact medical diagnosis may be essential. *See* Wilson v. Van Buren County, 196 Tenn. 487, 268 S.W.2d 363 (1954).

271. *See* Cleveland v. Laclede Christy Clay Prod. Co., 129 S.W.2d 12, 16 (Mo. Ct. App. 1939):

> [W]hat claimant knew prior to [date of correct diagnosis] was not added to by Dr. Weinel on that date by giving him the specific name of "silicosis" as the disease from which he suffered. The greatest poet has said, "What is in a name? That which we call a rose, by any other name would smell as sweet."

The claimant was precluded from compensation because he knew, more than six months before filing claim, that he had suffered disability caused by his work.

pone the commencement of the limitations period under the discovery rule. Therefore, the result in the above cases cannot be determined without knowing more facts, facts that would indicate whether the employee's ignorance of the exact nature or ultimate seriousness of his injury prevented him from knowing that his condition was compensable.

Addition of other facts to Case One shows how different circumstances may affect the application of the discovery rule. Assume in Case One that immediately after the accident the employee could not perform some of his former tasks at work and it was obvious that his wage-earning capacity was decreased. Assume further that the statute authorized partial disability payments for impaired earning capacity. Under the circumstances, the employee would be precluded because he failed to claim compensation for partial disability within twelve months after he discovered or should have discovered the facts necessary to establish his right to compensation.[272] Similarly, if the employee's back injury resulted in any period of compensable total temporary disability, failure to file claim within twelve months after the discovery of the facts establishing a right to receive compensation for temporary total disability would bar his subsequent claims.[273] These examples suggest that the employee in Case One can avoid the limitations bar in a nonseparability state only if (1) the original medical care was provided by the employer,[274] (2) the employee subsequently suffered no compensable temporary total disability, and (3) facts establishing the right to compensation for partial disability were not discovered or reasonably discoverable before the condition was correctly diagnosed and the need for an operation became apparent.[275] As a practical matter, the facts establishing partial or total disability—impaired earning capacity or actual wage loss—are usually obvious and discoverable immediately. Therefore, the results under a discovery-rule interpretation ordinarily will be the same as the results under a compensable-injury interpretation. The plea for additional relief for late claimants under

272. *See* Inspiration Consol. Copper Co. v. Smith, 78 Ariz. 355, 280 P.2d 273 (1955); Imperial Shirt Corp. v. Jenkins, 217 Tenn. 602, 399 S.W.2d 757 (1966); *cf.* Williams v. S.N. Long Warehouse Co., 426 S.W.2d 725 (Mo. Ct. App. 1968) (discovery of need for medical treatment starts statutory period).

273. *See* Hundley v. Matthews Hinsman Co., 379 S.W.2d 489 (Mo. 1964); *cf.* Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970); Webb v. Consumers Coop. Ass'n, 171 Neb. 758, 107 N.W.2d 737 (1961).

274. *See* text accompanying note 214 *supra.*

275. *See* Imperial Shirt Corp. v. Jenkins, 217 Tenn. 602, 399 S.W.2d 757 (1966).

the discovery rule in such cases is fundamentally an argument for a separability interpretation of the scope of the limitations bar, since the discovery rule together with the nonseparability rule would preclude recovery.

Most of the time, the discovery-rule and the compensable-injury interpretations will lead to identical results in Case Two (the stiffened arm case) as well. Assume that the case arises in a jurisdiction that (1) has a nonseparability rule, (2) authorizes compensation without a showing of impaired earning capacity for scheduled injuries, (3) includes permanent partial loss of the use of an arm as a scheduled injury, but (4) does not authorize compensation for temporary partial loss of the use of an arm.[276] Assume further that under the rules determining partial disability the employee would not have qualified at any time after the accident for compensation for partial disability. Under these circumstances the injury first becomes compensable when it becomes permanent. But when is that? Permanency is an unusual "fact" because it involves a prediction, a judgment about the future. It could be argued that a condition that never gets any better is "permanent" from its inception. On the other hand, it could be argued that a condition is permanent only when the facts would support a knowledgeable prediction that the condition will not change. The latter interpretation has been adopted by courts that have faced the problem.[277] In Case Two, this interpretation would lead a court using a compensa-

276. *See* Helle v. Eyermann Contracting Co., 44 S.W.2d 234 (Mo. Ct. App. 1931).

277. *See, e.g.*, Tirocchi v. United States Rubber Co., 101 R.I. 429, 224 A.2d 387 (1966). The Rhode Island court rejected the argument that the limitations period precluded compensation for scheduled percentage loss of use of hands because the physical condition of the employee's hands had remained stable since the date of unsuccessful corrective surgery which had taken place more than the allotted time before the claim was filed. The court said that the issue was

> at what time following surgery did the percentage of uselessness of the hands, if any, become manifest. In justice to both an employer as well as an employee, reason and experience recommend judicial recognition of a period of use of impaired bodily members before an opinion as distinguished from a guess can be given. We think then that in circumstances such as are here present the statute begins to run at the time sound medical opinion has it that, independent of prosthetic devices, post-surgery functional development can objectively be said to have reached its potential. Involved therein are such conditions as the extent of the healing of scar tissues, improvement of circulation, reasonable minimum tenderness, not to mention such damage to the sensory nerves as time may prove to be irreparable.

Id. at 434, 224 A.2d at 391. The court noted that had the employee filed her claim shortly after the surgery, the employer could have justifiably contended there was no competent evidence to establish the permanency of any percentage of uselessness.

ble-injury interpretation to the same result as a court using a discovery rule if the employee was under the continual observation and care of a competent physician. Under such circumstances, compensable-injury courts[278] and discovery-rule courts[279] alike have held that the limitations period begins to run from the date the employee was informed by a physician that the condition was permanent.

A compensable-injury court may reach a different result than a discovery-rule court in Case Two when the employee, after being told at first that the injury will be temporary, subsequently fails to return or consult another physician about the condition until some time after it would have been apparent to a physician that the injury was permanent. If claim is filed more than twelve months after a doctor could have determined that the injury was permanent, but less than twelve months after the employee in fact learned that the injury was permanent, the compensable-injury interpretation would presumably preclude the employee from suit and the discovery rule *might* not preclude him, depending on whether the court determines that the employee's failure to consult a doctor sooner was reasonable. This case arose in Nebraska, and the court there applied the discovery rule to bar the employee's claim.[280] In denying recovery, the Nebraska Supreme Court reasoned:

> There can be no question that the plaintiff knew that he had a physical disability, and that it was due to his employment. It might be said that the mere fact that the plaintiff did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable. . . . Although each case must be determined on its own facts and circumstances, the evidence here establishes that it should have become reasonably apparent that the plaintiff had a compensable disability more than 1 year before filing his petition.
>
> We hold that where an injury is latent and progressive, the tolled statute of limitations begins to run against an employee from the time it becomes reasonably apparent, or should have become reasonably apparent, that he has a compensable disability of any class from an accident (whether he is working or not) if the employee is aware that the disability is due to his employment.[281]

278. Anderson v. Marion Plumbing Co., 236 So. 2d 299 (La. Ct. App. 1970).

279. Collins v. Casualty Reciprocal Exch., 123 Neb. 227, 242 N.W. 457 (1932); Duran v. New Jersey Zinc Co., 83 N.M. 38, 487 P.2d 1343 (1971).

280. Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N.W.2d 237 (1965). Other discovery-rule courts might well hold to the contrary.

281. *Id.* at 746, 135 N.W.2d at 240.

From the court's statement of the case, it seems that the employee was claiming compensation for a permanent "scheduled" injury. Since he had continued at the same work, presumably at the same pay, at all times after the accident, he probably could not have claimed compensation for partial disability under the Nebraska statute.[282] The employee's physical disability was not compensable, then, until it became permanent. The court's argument that the employee must have known that he had a physical disability is convincing; the conclusion that he must have known his physical disability was permanent does not follow. The court seems to be charging plaintiff with constructive knowledge of the permanency of his disability because a physician could have determined permanency six months after the accident. This constructive-knowledge test could be seen as just an application of the ordinary circumstantial evidence test for determining the existence of a subjective state. That is, the court could simply be trying to determine whether the employee knew that his condition was permanent by asking whether a reasonable man in the employee's circumstances would have known that his condition was permanent. If so, the application of the test in the Nebraska case seems suspect, since a worker told that his injury was a temporary sprain might not suspect his continued physical disability was permanent until long after the original accident. The Nebraska court seems to use the constructive-knowledge test not just as an aid in determining the claimant's subjective knowledge, but as a substantive standard by which to judge the reasonableness of the employee's conduct in failing to consult a physician to determine the nature and probable duration of his condition.

Two questions arise. First, what standards can a court use to judge the reasonableness of the employee's decision not to consult a physician? A stoic worker, inured to working with various aches and pains, limps and "hitches," may not consult a doctor for a condition that would send a judge running to one. Secondly, and more importantly, why should the employee's failure to act reasonably in attempting to discover the nature and probable duration of his condition prevent him from asserting the discovery-rule exception to the limitations bar if in fact he did not know the compensable nature of his injury? The reasonableness of the employee's action is not relevant under any other statutory provision that affects his right to compensation.

282. *See* Anderson v. Cowger, 158 Neb. 772, 65 N.W.2d 51 (1954).

The Nebraska standard is not required by the logic or the history of the discovery rule. True, the discovery rule has often been phrased in terms of the actions of a reasonable man:[283] "[T]he limitations period starts when a man exercising reasonable diligence would have discovered the facts supporting compensability." Except for Nebraska and possibly Iowa,[284] however, the reasonable-man test has not been applied as a standard of conduct. The reluctance of courts in other states to turn the announced reasonable-man standard into a standard of conduct can be understood in light of the origins of the reasonable-man language in the discovery-rule formulation. How did the reasonable man creep into the discovery rule? First, in the judicial development of the discovery rule the court in the initial "compensable-injury" interpretation in a latent-physical-injury case may have attempted to describe the time when the injury became compensable—the time when the process initiated by the accident culminated in serious, compensable injury—in terms that emphasized the discoverability of the compensable condition,[285] for want of a better way to describe the time when the injury becomes compensable. The focus was not really on the discoverability, but rather on the compensability of the underlying latent physical injury. When the court in a subsequent causation-misdiagnosis case shifted the emphasis from the employee's observable physical condition to the employee's knowledge of his physical condition and its relationship to his work, the court seized on the "reasonably discoverable" language in the prior compensable-injury case and elaborated it into an announced test of whether the compensable character and work-relation of the injury were "discoverable by one acting with reasonable diligence."[286] The main purpose of the reasonable-man formulation seemed to be to demonstrate the continuity between the discovery rule and the prior compensable-injury interpretation. Secondly, in explaining the rationale for holding in favor of the employee in the causation-misdiagnosis cases, the courts often dwelt on

283. *See, e.g.*, 3 LARSON § 78.41, at 47.

284. Mousel v. Bituminous Material & Supply Co., — Iowa —, 169 N.W.2d 763 (1969) (dictum).

285. *See* Hartford Acc. & Indem. Co. v. Industrial Comm'n, 43 Ariz. 50, 56, 29 P.2d 142, 144 (1934) ("date the results of the injury become manifest"); Wheeler v. Missouri Pac. R.R., 328 Mo. 888, 894, 42 S.W.2d 579, 582 (1931) ("reasonably discoverable and apparent"); Johansen v. Union Stock Yards Co., 99 Neb. 328, 156 N.W. 511 (1916).

286. *See* English v. Industrial Comm'n, 73 Ariz. 86, 237 P.2d 815 (1951); Myers v. Rival Mfg. Co., 442 S.W.2d 138 (Mo. Ct. App. 1969); Clarey v. R.S. Proudfit Co., 124 Neb. 582, 247 N.W. 417 (1933).

the plight of the employee who acted with reasonable prudence and was misled by an incorrect diagnosis.[287] To emphasize this argument, the court often stated the rule in terms of discoverability by one acting with reasonable diligence.[288]

Given the origins of the reasonable-man language, the refusal of most discovery-rule courts to turn the reasonable-man test into a standard of conduct is not surprising. Simply because a court deems the claimant's reasonable diligence in not filing claim sooner an additional reason for avoiding the limitations bar in one case does not require the court to apply the limitations bar in another case when the claimant failed to act with reasonable diligence to discover the nature and extent of his injury. Nothing in the statutory language supports a distinction between a claimant who discovered his compensable injuries as soon as a reasonable man in his circumstance would have and a claimant who discovered his compensable injuries long after a reasonable man in his circumstances would have. The important arguments for a discovery-rule result apply to support the claimant in both cases.[289] The critical question is "When did the employee in fact discover the facts establishing his right to compensation?" Certainly, in answering that question, a reasonable-man test as a circumstantial evidence test of the claimant's subjective knowledge may be desirable, but that is not the same as using the test as a conclusive substantive standard of conduct.

4. *The Reasonable Man in Texas*

In adopting the discovery rule, some courts reasoned that the employee should not be precluded for failure to file claim if a reasonable man with the employee's knowledge would not have filed claim before he did.[290] Perhaps because of the relationship between the discovery rule and the underlying compensable-injury interpretation,[291] courts have not incorporated this rationale into the announced rule for decis-

287 *See, e.g.*, Great Am. Indem. Co. v. Britton, 179 F.2d 60 (D.C. Cir. 1949); Imperial Shirt Corp. v. Jenkins, 217 Tenn. 602, 399 S.W.2d 757 (1966), *citing* 2 LARSON §§ 78.41-.42.

288. Some courts quote Professor Larson's statement of the rule, 2 LARSON § 78.41, in announcing a reasonable-man standard. City of Boulder v. Payne, 162 Colo. 345, 352, 426 P.2d 194, 197 (1967); Tabor Motor Co. v. Garrard, — Miss. —, —, 233 So. 2d 811, 814 (1970).

289. *See* text accompanying notes 253-55 *supra.*

290. *See* Great Am. Indem. Co. v. Britton, 179 F.2d 60 (D.C. Cir. 1949); Tabor Motor Co. v. Garrard, — Miss. —, 233 So. 2d 811 (1970).

291. *See* text accompanying notes 231-43 *supra.*

ion. The courts have not said that the limitations period starts to run when a reasonable man would have filed claim; rather, they have said that the limitations period starts to run when the employee, acting with reasonable diligence, discovered or should have discovered all the facts necessary to establish his right to compensation. In Texas, however, the broad rationale underlying the discovery rule in other states has been adopted as a rule of decision.

From its inception, the Texas claim limitations provision authorized the Industrial Accident Board to waive compliance with the notice and claim provision in "meritorious cases for good cause."[292] The Texas courts have interpreted the "good cause" provision as establishing a reasonable-man standard:[293] the employee has good cause for delay if an ordinary prudent man in the same situation would not have brought suit sooner. The ordinary-prudent-man test in Texas does not determine the time when the limitations period begins. It just determines whether the otherwise late claimant has "good cause" for delay. The Texas courts have held that good cause must exist until the late claimant files his claim.[294] Good cause for delay after an ordinary prudent man would decide to file claim continues to exist only for the reasonable time needed to consult a lawyer and file a claim.[295]

To be a judicially manageable test, the Texas ordinary-prudent-man standard must yield an objective, discoverable meaning when applied to a late claimant's failure to file claim sooner. But there seems to

292. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1967).

293. The Texas Court of Civil Appeal for the Beaumont district first announced the interpretation. Consolidated Underwriters v. Seale, 237 S.W. 642 (Tex. Civ. App. 1922). The Courts of Civil Appeal developed and applied the interpretation in a number of cases. *See, e.g.*, Texas Employers' Ins. Ass'n v. Clark, 23 S.W.2d 405 (Tex. Civ. App. 1930); New Amsterdam Cas. Co. v. Chamness, 63 S.W.2d 1058 (Tex. Civ. App. 1933); Maryland Cas. Co. v. Merchant, 81 S.W.2d 794 (Tex. Civ. App. 1935). The Texas Supreme Court announced its acceptance of the interpretation in Hawkins v. Safety Cas. Co., 146 Tex. 381, 207 S.W.2d 370 (1948). The Texas Supreme Court had previously decided several cases under the "good cause" provision without adopting the ordinary-prudent-man standard or stating any criteria at all for determining good cause. *See* Petroleum Cas. Co. v. Dean, 132 Tex. 320, 122 S.W.2d 1053 (1939); Johnson v. Employers Liab. Assur. Corp., 131 Tex. 357, 112 S.W.2d 449 (1938); Williams v. Safety Cas. Co., 129 Tex. 184, 102 S.W.2d 178 (1937); Jones v. Texas Employers' Ins. Ass'n, 128 Tex. 437, 99 S.W.2d 903 (1937); Williamson v. Texas Indem. Ins. Co., 127 Tex. 71, 90 S.W.2d 1088 (1936).

294. Jones v. Texas Employers' Ins. Ass'n, 128 Tex. 437, 99 S.W.2d 903 (1937).

295. *See, e.g.*, Texas Employers' Ins. Ass'n v. Brantley, 402 S.W.2d 140 (Tex. 1966); Texas Cas. Ins. Co. v. Beasley, 391 S.W.2d 33 (Tex. 1965), *cert. denied*, 382 U.S. 994 (1966); Texas Employers' Ins. Ass'n v. Hancox, 162 Tex. 565, 349 S.W.2d 102 (1961).

be no readily discoverable custom or community moral standard the court can use to determine when one ordinarily would or should sue. How then can the court determine when the ordinary prudent man would decide to sue?

The Texas courts seem to have solved the problem of giving objective content to the ordinary-prudent-man standard by simply assuming that the ordinary prudent man would decide to file claim for workmen's compensation when he discovers all the facts necessary to establish his right to receive compensation.[296] The courts reached this assumption in a roundabout way. In cases in which the employee was justifiably ignorant of one of the facts necessary to establish his right to compensation, the courts explained that there was good cause for the delay because an ordinary prudent man would not file claim until he discovered all the facts necessary to establish his right to compensation.[297] It was then an easy, although not a necessary, step to the conclusion that the ordinary prudent man would decide to file claim as soon as he learned all the facts necessary to establish his right to compensation.[298] The assumption that the ordinary prudent man would not decide to file claim until he discovered all the facts necessary to establish his right to compensation is seriously flawed, since it fails to take into account individual differences in claim-consciousness. One worker, knowing only that he has a disability, may be eager to sue someone for something and therefore will investigate to find evidence that would support a claim for compensation.[299] Who is to say that this worker is not an ordinary prudent man? Even if the court's first assumption were valid, the conclusion that an ordinary prudent man would file claim as soon as he learns the facts establishing his right to compensation would still be suspect. The court's first assumption can be stated narrowly: the ordinary prudent man would not file claim at least until he learned all the facts nec-

296. *See, e.g.*, Texas Employers' Ins. Ass'n v. Portley, 153 Tex. 62, 263 S.W.2d 247 (1953); Allstate Ins. Co. v. Maines, 468 S.W.2d 496 (Tex. Civ. App. 1971).

297. Hawkins v. Safety Cas. Co., 146 Tex. 381, 207 S.W.2d 370 (1948); Hartford Acc. & Indem. Co. v. Jackson, 201 S.W.2d 265 (Tex. Civ. App. 1947); Dean v. Safety Cas. Co., 190 S.W.2d 750 (Tex. Civ. App. 1945).

298. *See, e.g.*, Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969); Texas Employers' Ins. Ass'n v. Portley, 153 Tex. 62, 263 S.W.2d 247 (1953); Copinjon v. Aetna Cas. & Sur. Co., 242 S.W.2d 219 (Tex. Civ. App. 1951).

299. *Compare* Texas Employers' Ins. Ass'n v. Leathers, 395 S.W.2d 601 (Tex. 1965), *and* Employers' Liab. Assur. Corp. v. Crawford, 149 S.W.2d 1005 (Tex. Civ. App. 1941), *with* Liberty Mut. Ins. Co. v. Wilson, 495 S.W.2d 579 (Tex. Civ. App. 1973), Allstate Ins. Co. v. Maines, 468 S.W.2d 496 (Tex. Civ. App. 1971), *and* Zurich Gen. Acc. & Liab. Ins. Co. v. Lee, 135 S.W.2d 505 (Tex. Civ. App. 1940).

essary to establish his right to compensation. The court's conclusion, then, does not follow. An employee may have reasons other than simple inattention for not filing suit as soon as he learned the facts; he may not realize he has a right to compensation based on the facts he knows or he may not want to antagonize his employer and jeopardize his continued employment by filing claim for compensation. These considerations raise two questions. First, does the ordinary prudent man know the law? Secondly, would the ordinary prudent man forego his claim for fear of jeopardizing his continued employment by filing claim? Although they have not discussed the reasons for their conclusion, the Texas courts have answered "yes" to the first question,[300] making the standard that of the ordinary prudent man who knows the workmen's compensation law.[301] They have answered "no" to the second question, holding that fear of jeopardizing one's continued employment is not "good cause" for delay in filing claim.[302]

The Texas courts thus resolved the problem of giving content to the reasonable-man standard by adopting the compensation system itself as their standard. The results are arguably consistent with the basic purpose of the workmen's compensation system. Since the objective

300. *See* Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969); Driver v. Texas Employers' Ins. Ass'n, 266 S.W.2d 401 (Tex. Civ. App. 1953) (ignorance of six-month limitations provision not good cause); LaCour v. Continental Cas. Co., 163 S.W.2d 676 (Tex. Civ. App. 1942) (same); Sandage v. Traders & Gen. Ins. Co., 140 S.W.2d 871 (Tex. Civ. App. 1940); Zurich Gen. Acc. & Fidelity Ins. Co. v. Walker, 35 S.W.2d 115 (Tex. Comm'n App. 1931) (applying special statutory provision, ch. 177, § 3c, [1923] Tex. Laws 388-89 (now TEX. REV. CIV. STAT. ANN. art. 8306, § 3c (1967)), creating presumption that employee knows that employer is covered by workmen's compensation act). *But see* Traders & Gen. Ins. Co. v. Davis, 147 S.W.2d 908 (Tex. Civ. App.), *application for writ of error denied on other grounds*, 136 Tex. 187, 149 S.W.2d 88 (1941) (per curiam).

301. Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969). Texas courts have deviated from this standard only in cases in which courts in other jurisdictions probably would have applied the doctrine of equitable estoppel, *see* notes 116-25 *supra* and accompanying text. These include cases in which the employer or his insurer innocently or intentionally misled the claimant as to his legal rights, Western Cas. Co. v. Lapco, 108 S.W.2d 740 (Tex. Civ. App. 1937); New Amsterdam Cas. Co. v. Chamness, 63 S.W.2d 1058 (Tex. Civ. App. 1933), or cases in which the employer or his insurer stated that any compensation would be paid, United States Fidelity & Guar. Co. v. Herzik, 359 S.W.2d 914 (Tex. Civ. App. 1962); Texas Employers' Ins. Ass'n v. Crain, 259 S.W.2d 905 (Tex. Civ. App. 1953). The Texas courts held that the claimant's reliance on these misleading statements constituted good cause for failure to file a claim, despite an admission by the claimant that he would have filed claim sooner had he known the law.

302. Texas Employers' Ins. Ass'n v. Leake, 196 S.W.2d 842 (Tex. Civ. App. 1946); Texas Indem. Ins. Co. v. Cook, 87 S.W.2d 830 (Tex. Civ. App. 1935).

of shifting the cost of industrial accidents from the injured worker to the employer[303] can be achieved fully only if each injured worker claims the compensation that is due him, an out-of-time injured worker should have a duty to claim compensation once he knows the facts establishing his right to compensation.

At best, the argument involves oppressive and unrealistic paternalism, as demonstrated in the following situations. Partial disability is defined in the Texas statute in terms of impairment of wage-earning capacity.[304] The courts have interpreted this to mean that an employee may receive compensation for partial incapacity even though he receives the same wages as before the injury.[305] In addition, the Texas statute authorizes compensation for specific scheduled injuries without a showing of impairment of wage-earning capacity or loss of wages.[306] In these two situations, the employee may know all the facts establishing his right to compensation long before he ever loses any wages because of his injury. Texas courts have held in such cases that the payment of full wages (for work done and not in lieu of compensation) will not justify a delay in filing claim—it is not "good cause."[307] With full salary being paid, however, a reasonably prudent employee is not likely to realize that he has a compensable claim or even be concerned about finding out whether he might have a claim.[308] Furthermore, since compensation payments for disability are intentionally pegged below full wage replacement levels,[309] a reasonably prudent employee

303. Ultimately, the cost is shifted to those who benefit from the employer's enterprise.

304. TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (1967).

305. Travelers Ins. Co. v. Pacheco Co., 497 S.W.2d 464 (Tex. Civ. App. 1973); Liberty Mut. Ins. Co. v. Gomez, 462 S.W.2d 338 (Tex. Civ. App. 1970); Maryland Cas. Co. v. Goetz, 337 S.W.2d 749 (Tex. Civ. App. 1960); Commercial Cas. Ins. Co. v. Strawn, 44 S.W.2d 805 (Tex. Civ. App. 1932).

306. TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (Supp. 1974).

307. Despite earlier cases suggesting the contrary by the Courts of Civil Appeals, *see, e.g.*, Zurich Gen. Acc. & Liab. Ins. Co. v. Chancey, 166 S.W.2d 966 (Tex. Civ. App. 1943); American Mut. Liab. Ins. Co. v Wedgeworth, 140 S.W.2d 213 (Tex. Civ. App. 1940); Maryland Cas. Co. v. Jackson, 139 S.W.2d 631 (Tex. Civ. App. 1940), the rule stated in the text is now firmly established. *See* Texas Employers' Ins. Ass'n v. Portley, 263 S.W.2d 247 (Tex. 1953); Texas Employers' Ins. Ass'n v. Matejek, 381 S.W.2d 942 (Tex. Civ. App. 1964); Lambert v. Houston Fire & Cas. Ins. Co., 260 S.W.2d 691 (Tex. Civ. App. 1953); Copinjon v. Aetna Cas. & Sur. Co., 242 S.W.2d 219 (Tex. Civ. App. 1951). *But cf.* Consolidated Underwriters v. Pittman, 388 S.W.2d 315 (Tex. Civ. App. 1964).

308. *See* Sandage v. Traders & Gen. Ins. Co., 140 S.W.2d 871 (Tex. Civ. App. 1940).

309. The purpose of setting compensation payments below full wage replacement lev-

who continues to work for the employer may decide to forego claim, for fear of jeopardizing his continued employment, even though he knows that he has a valid compensable claim. The Texas courts, however, hold that fear of jeopardizing one's employment is not good cause for delay in filing claim.[310]

The reasonable-man test, either in its broad formulation in Texas or in its narrower formulation in the discovery-rule states, seems flawed. The courts have turned a simple rationale for excusing claimant's late claim in one kind of case into a standard of conduct that may preclude the employee if he fails to live up to the standard—if he is somehow at fault. In light of the basic compensation purposes of the workmen's compensation system, it makes little sense to use notions of fault, particularly paternalistic notions of fault derived from those very same purposes, to preclude the late claimant. Furthermore, use of the employee's fault as a limitation on an exception to the limitations bar cannot be supported by reference to the personal certainty and evidentiary purposes of the limitations provision. That is, these purposes provide no basis for choosing a "reasonable-man" discovery rule over a "straight" discovery rule[311] or for choosing the Texas reasonable-man standard of "good cause" over a more liberal interpretation that would find good cause whenever the late claimant had a good reason for not filing claim sooner. Each of the possible tests seems to eliminate the personal certainty achievable under the "accident" limitations provision. The only significant difference between the tests appears to be in the different number of cases with possible evidentiary problems each lets past the limitations bar. The court should have a better reason for choosing the reasonable-man discovery rule over a more liberal rule than that the more liberal rule would let more cases with possible evidentiary problems go before the trier of fact. If the possibility of evidentiary problems were controlling, there would be no reason for any exception to the original strict limitations rule. Perhaps most importantly, the court's application of a reasonable-man standard seems to depend more on the abstract purposes and technical compensation rules of the workmen's compensation act than on the realities of the employment relationship and the reasonable expectations of the parties.

els is to discourage malingering by employees. *See generally* NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 56 (1972) [hereinafter cited as NATIONAL COMM'N REPORT].

310. *See* cases cited note 302 *supra.*

311. *I.e.*, a rule that would start the limitations period from the time the employee discovered the compensable injury.

Courts may thus deny claims based on the application of a purported standard of reasonableness to the employee's conduct even though the judges of that court, if put in the position of the employee, would have done just what he did.[312]

V. ALTERNATIVES TO COMPENSABLE-INJURY AND DISCOVERY RULES

A. *Minnesota Notice and Claim Provisions*

Many statutes require the employer to report all accidental injuries of which it has knowledge[313] to the state workmen's compensation commission. Maryland,[314] Michigan,[315] Minnesota,[316] and Missouri[317] have provisions that postpone the beginning of the limitations period until the employer makes the required report. The various statutory provisions differ in wording and interpretation, and there is no "typical" wording or interpretation. Minnesota's provision will be analyzed for the light it may shed on the possible reach of this kind of provision.

In Minnesota, a compensation claim must be filed within two years of the date of the employer's written report of the injury to the commissioner of the Department of Labor and Industry.[318] Claim must be filed in any event within six years of the accident,[319] and written notice of the injury must be given to the employer within ninety days of the occurrence of the injury.[320] After receiving the employer's report of the injury, the commissioner is required to send a letter to the employee, explaining the employer's duty to pay compensation and to furnish medical treatment, and inviting the employee to ask the advice of the local division of the commission.[321] This employee-notification re-

312. *See, e.g.*, Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N.W.2d 237 (1965); Allstate Ins. Co. v. King, 444 S.W.2d 602 (Tex. 1969); Texas Employers' Ins. Ass'n v. Leake, 196 S.W.2d 842 (Tex. Civ. App. 1946).

313. *See generally* 3 LARSON § 79.41; *id.*, app. F, at 583.

314. MD. ANN. CODE art. 101, § 38(c) (Supp. 1973).

315. MICH. STAT. ANN. § 17.23(381)(1) (Supp. 1974).

316. MINN. STAT. ANN. § 176.151 (Supp. 1974).

317. MO. REV. STAT. § 287.430 (1969).

318. MINN. STAT. ANN. § 176.151(1) (Supp. 1974).

319. *Id.*

320. *Id.* § 176.141 (1966).

321. *Id.* § 176.235 (Supp. 1974). Compare the 1974 amendment to the Kentucky statute requiring the *employer* to inform the employee of the applicable limitations period not later than 30 days prior to the expiration date. Ch. 93, § 1, [1974] Ky. Acts 180.

quirement figured prominently in an early case in which the employer filed a "nondisabling-accident report" of an injury that had no immediate disabling effect.[322] When the condition became disabling five years later, the employee filed claim for compensation. The court held that the statute did not authorize the filing of nondisabling-accident reports and that filing such a report did not trigger the limitations period. The court reasoned:

> The main purpose of such notice [to the commission] is doubtless to enable the commission to advise the employee of his rights as required by [the statute]. When the report is such as to lead the commission to believe that no just claim for compensation can arise, it serves no proper purpose.[323]

The combination of the claim limitations period running from the date of the employer's report of a compensable injury with the requirement that the commission inform the employee of his rights upon receipt of the report tended to equate the limitations bar with a knowing waiver by the employee of his right to compensation.

Because the six-year overall cutoff and the notice requirement prevented total identification of the limitations bar with knowing waiver, interpretation of the Minnesota notice requirement became vitally important. In the leading Minnesota case interpreting the provision requiring written notice to the employer within ninety days after "occurrence of the injury," the court held that the injury occurred "when disability occurs, or when it becomes reasonably apparent that disability or loss of member is likely to occur."[324] This interpretation of the date of the "occurrence of the injury" differed significantly from the compensable-injury or discovery-rule interpretations of the "date of injury" in claim limitations provisions in other states. The Minnesota court said the limitations period began when the injury resulted in disability or when it became reasonably apparent that disability was *likely* to occur. The ordinary compensable-injury interpretation starts the limitations period from the date the injury becomes compensable; the discovery rule normally starts the limitations period at the time the employee discovers or should discover the compensable injury, not the likelihood of compensable injury. The difference between the Minnesota rule and the ordinary compensable-injury or discovery-rule interpretations was

322. Pease v. Minnesota Steel Co., 196 Minn. 555, 265 N.W. 427 (1936).
323. *Id.* at 555, 265 N.W. at 428.
324. Clausen v. Minnesota Steel Co., 186 Minn. 80, 87, 242 N.W. 397, 400 (1932).

not crucial to the outcome of the first case, but it became important in two subsequent cases. In both cases the court held that the employees were precluded by failure to give written notice within ninety days after the time a reasonable man would have known that future disability was likely, even though notice had been given within ninety days after actual compensable disability.[325] After these two cases, however, the court applied the "likelihood" rule less harshly,[326] and finally rejected the "likelihood" rule completely,[327] without stating it was doing so.

As a matter of statutory construction of the "injury" language, the ordinary compensable-injury interpretation is more supportable than the "likelihood" interpretation. How can the date of the injury mean the date when it is reasonably apparent that future compensable injury is likely? Viewed simply as a matter of policy, however, the "likelihood" rule has much to commend it. If the employee knows the likelihood of future compensable injury from the work-related accident, he should be required to give notice to enable the employer to investigate the accident. The rule requires only that notice be given; it does not require the employee to file claim for compensation before the injury becomes compensable, and, in fact, the Minnesota two-year claim limitations period does not start until the injury becomes compensable and the employer reports the compensable injury to the commission. This combination of rules seems to give the employer time to investigate effectively, and to impose on the employee a duty consistent with good faith and fair dealing. On the other hand, the employee may be precluded from compensation because of his failure to give timely notice when the employer's ability to investigate and defend has not been impaired by the lack of timely notice. In those circumstances, there seems no good reason to bar the employee's claim.

B. *Massachusetts "No Prejudice" Exception*

The British Workmen's Compensation Act of 1906 amended the notice provision of the 1897 Act to excuse late notice of the injury to the employer if the employer was not prejudiced by the delay.[328] Several state statutes have a similar provision,[329] perhaps derived from the

325. Bruggeman v. Ford Motor Co., 225 Minn. 427, 30 N.W.2d 711 (1948); Rinne v. W.C. Griffis Co., 234 Minn. 146, 47 N.W.2d 872 (1951).

326. Balow v. Kellogg Coop. Creamery Ass'n, 248 Minn. 20, 78 N.W.2d 430 (1956).

327. Davidson v. Bermo, Inc., 272 Minn. 97, 137 N.W.2d 567 (1965).

328. Workmen's Compensation Act, 6 Edw. 7, c. 58, § 2(a) (1906).

329. *See, e.g.*, ARK. STAT. ANN. § 81-1317(c)(2) (1960); CAL. LABOR CODE § 5403

British example. The Massachusetts[330] and Vermont[331] statutes go beyond the British Act. Besides excusing late notice, they also excuse late claim if the employer or insurer has not been prejudiced by the delay. The New Hampshire Supreme Court at one time interpreted that state's statute to provide a "no prejudice" excuse for delayed claims.[332] The decision was later overruled by legislative amendment,[333] but Justice Snow's opinion for the New Hampshire court in the original case remains as the best explanation of the relationship between the "no prejudice" exception and the purpose of the workmen's compensation act. Justice Snow said:

(Deering 1964); MO. REV. STAT. § 287.420 (1969); OKLA. STAT. ANN. tit. 85, § 24 (1973). Some statutes require a showing of a reasonable excuse for delay plus a showing of lack of prejudice from the delay. *See, e.g.*, COLO. REV. STAT. ANN. § 81-13-5(2) (1963); GA. CODE ANN. § 114-303 (1973). *See also* Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 912(d) (1970). Note the similar problem of judicial interpretation of notice provisions in insurance contracts. Gibson v. Colonial Ins. Co., 92 Cal. App. 2d 33, 206 P.2d 387 (1949); 51 MICH. L. REV. 275 (1952).

330. MASS. ANN. LAWS ch. 152, § 49 (1965).

331. VT. STAT. ANN. tit. 21, § 662 (1967).

332. In Mulhall v. Nashua Mfg. Co., 80 N.H. 194, 115 A. 449 (1921), the employee gave notice and filed claim more than the allotted six months after the injury. The trial court entered judgment for the employee, after finding that the employer was not prejudiced by the delay in giving notice and that the employer's conduct estopped it from asserting the claim limitations defense. The New Hampshire Supreme Court affirmed on these two grounds, adding in dictum that the statutory excuse for delay applied to delay in making claim as well as delay in giving notice of injury. The statutory provision the court interpreted, ch. 163, § 5, [1911] N.H. Laws 183-84, read as follows:

> No proceedings for compensation under this act shall be maintained unless notice of the accident as hereinafter provided has been given to the employer as soon as practicable after the happening thereof . . . and unless claim for compensation has been made within six months from the occurrence of the accident . . . but no want or defect or inaccuracy of a notice shall be a bar to the maintenance of proceedings unless the employer proves that he is prejudiced by such want, defect, or inaccuracy. Notice of the accident shall apprise the employer of the claim for compensation under this article, and shall state the name and address of the workman injured, and the date and place of the accident . . . .

The court argued that this provision could be construed to excuse delay in making claim because the last sentence of the provision equated notice with claim; if notice necessarily includes a claim, the sentence excusing delay in giving notice necessarily excuses delay in making claim.

333. Ch. 77, § 1, [1951] N.H. Laws 249. After the *Mulhall* court interpreted the statutory exception allowing late notice to an employer not prejudiced by delay to apply to claims, too, by reading "notice" to include "claim," the legislature recognized the de facto uselessness of any separate mention of claim in the statute, and eliminated the claim limitation provision completely in the 1947 Act, ch. 266, § 14, [1947] N.H. Laws 408-09. The 1951 Act added a specific claim limitation starting from the date of the accident, not subject to the "no prejudice" exception. The 1951 Act remains in force, with minor changes. N.H. REV. STAT. ANN. § 281:17 (1966).

> One of the more important aims of this legislation is to secure to the injured workman, or to his dependents, compensation by direct payments "under certain fixed rules without a law-suit and without friction." . . . This is to be accomplished by a "procedure at once simple and inexpensive." . . . Certainty of relief to all injured employees not guilty of willful misconduct is assured in the place of uncertain relief to a limited number. . . . With these objects in mind, it cannot be presumed that the legislature intended to set up a rigid limitation which would defeat the purpose of the act in respect to injured workmen and their dependents who, from their unfamiliarity with business affairs and legal requirements, fail to make a claim within a limited time where the employer is in no way prejudiced by such failure. Such a result would be in the teeth of the legislative design to liquidate through the employer the statutory compensation for such a claim and distribute it as a part of the cost of production. To the extent that claims for compensation, authorized by the statute, fail to be presented, the underlying purpose of the statute fails. The object of the limitations, with respect to notice of the accident and the making of a claim for compensation, was not to create technical defences to otherwise valid claims. The intention of the legislature was to cut off fraudulent claims and to protect the employer if he has been prejudiced by the employee's negligence in seasonably presenting his claim.[334]

Justice Snow's analysis is persuasive in theory, but two questions remain about the practical application of the "no prejudice" exception. First, does the "no prejudice" exception present any practical or administrative difficulties that might argue against its widespread adoption? Secondly, does the "no prejudice" exception sacrifice other purposes of the limitations provision overlooked by Justice Snow? The extensive case law applying the Massachusetts "no prejudice" exception may help answer these questions.

Two caveats should be entered before examining the Massachusetts cases with this purpose in mind. First, the examination is limited to appellate court opinions reviewing decisions initially made by an administrative agency. The appellate court opinions may not reflect accurately the full range of problems in administering a "no prejudice" exception. Secondly, since the court in reviewing administrative decisions gives deference to administrative determinations of facts and recognizes that the existence of prejudice to the insurer from delay in

334. 80 N.H. at 200-01, 115 A. at 453-54. Justice Snow's statement was technically dictum, because the court based its affirmance solely on grounds of estoppel.

filing claim is a question of fact,[335] caution in dealing with the "facts" of decided cases is in order.

The Massachusetts legislature added the "no prejudice" exception to the claim limitations provision in 1920.[336] In applying this exception, the Massachusetts Supreme Judicial Court soon decided that the claimant had the burden of proving that the insurer was not prejudiced by the delay in making claim,[337] thus raising the practical problem of the quantum of proof necessary to prove that negative. At first, the court said that the claimant could carry the burden even though he did not negate all possibilities of prejudice,[338] and that the burden was sustainable by "warrantable inferences from circumstances without evidence specifically directed to disproving particular forms of prejudice."[339] Later, the court identified the two most usual forms of prejudice from delay in making claim as (1) lack of prompt medical treatment the employer might have provided to minimize the seriousness of the injury, and (2) inability to gather all immediately available evidence to support the employer's position. The court said that the claimant had met the burden of proof if the evidence supported a finding that these two kinds of prejudice were not present.[340]

How can the claimant prove lack of prejudice from inability to gather evidence immediately after the accident? The Massachusetts court has held, in essence, that the claimant has met his burden of proof if all the evidence presented fails to suggest that evidence favorable to the employer was once available but is no longer available.[341] In practice, this test shifts the actual burden of proving prejudice to the employer.

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335. *See, e.g.*, De Felippo's Case, 245 Mass. 308, 139 N.E. 543 (1923).

336. Ch. 223, § 2, [1920] Mass. Acts 194. This amendment added another independent excuse for late claim to the two already provided by the 1912 Act, ch. 571, § 5, [1912] Mass. Acts 578-79. After the 1920 Act, the excuse provision read:

> The failure to make a claim within the period prescribed . . . shall not be a bar to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause, or if it is found that the insurer was not prejudiced by the delay.

337. Kanga's Case, 282 Mass. 155, 184 N.E. 380 (1933).

338. *Id.*

339. Anderson's Case, 288 Mass. 96, 101, 192 N.E. 520, 522 (1934), *quoted with approval in* Coakley's Case, 289 Mass. 312, 313, 194 N.E. 122, 123 (1935).

340. Kulig's Case, 331 Mass. 524, 120 N.E.2d 757 (1954); Tassone's Case, 330 Mass. 545, 116 N.E.2d 126 (1953).

341. *See* Goodale's Case, 353 Mass. 765, 232 N.E.2d 926 (1968); Thayer's Case, 345 Mass. 36, 185 N.E.2d 292 (1962); Berthiaume's Case, 328 Mass. 186, 102 N.E.2d 412 (1951).

That burden may be heavy, for if the insurer has been prejudiced by inability to gather evidence that is now unavailable, it seems likely that the insurer will have difficulty in ascertaining whether favorable evidence ever existed.[342] The Massachusetts court has responded to the employer's problem of proving prejudice by holding that where there is a conflict or inconsistency in testimony or evidence on a factual issue relevant to the merits of the claim, a finding of no prejudice cannot be supported.[343] Earlier investigation of the claim might have revealed additional evidence to resolve the conflict in the insurer's favor.[344]

In applying its announced criteria to determine whether the evidence supports a finding of no prejudice, the Massachusetts court has shown remarkable sensitivity to the nuances of the evidence presented. The court has found insufficient evidence to support a finding of no prejudice when the facts suggest collusion or the possible fabrication of evidence,[345] and when the claimant's story of the details of the accident is unverifiable.[346] The court has seized on weaknesses, inconsistencies, and conflicts in the evidence to reject findings of no prejudice when it seems to have doubted the administrative judgment that the injury was work-related.[347]

The transformation of the prejudice issue into the question of the extent of the court's reservations about the facts found by the administrative agency suggests a possible problem with the "no prejudice" exception. In cases where the facts supporting recovery are practically indisputable, the test works. But when the facts supporting the right to compensation are the subject of serious controversy, the "no prejudice" exception in effect asks the trier of fact to certify the validity of his own findings of fact, a task arguably beyond the competence of any fact-

342. *Cf.* Malloy v. Head, 90 N.H. 58, 48 A.2d 875 (1939) (discussing "no prejudice" exception to contractual notice provision in insurance contract).

343. Thibeault's Case, 341 Mass. 647, 171 N.E.2d 151 (1961); Herson's Case, 341 Mass. 402, 169 N.E.2d 865 (1960).

344. The court has not applied this test consistently, though. In other cases in which the conflicts and inconsistencies in evidence seemed great, the court upheld administrative findings of no prejudice. *See* Ogonowski's Case, 338 Mass. 468, 155 N.E.2d 787 (1959); Berthiaume's Case, 328 Mass. 186, 102 N.E.2d 412 (1951).

345. Lendall's Case, 342 Mass. 642, 174 N.E.2d 422 (1961).

346. Meagher's Case, 293 Mass. 304, 200 N.E. 1 (1935).

347. Curtin's Case, 354 Mass. 45, 235 N.E.2d 34 (1968); Thibeault's Case, 341 Mass. 647, 171 N.E.2d 151 (1961); Herson's Case, 341 Mass. 402, 169 N.E.2d 865 (1960); Russell's Case, 334 Mass. 680, 138 N.E.2d 286 (1956); Hatch's Case, 290 Mass. 259, 195 N.E. 385 (1935); Booth's Case, 289 Mass. 322, 194 N.E. 124 (1935); Kanga's Case, 282 Mass. 155, 184 N.E. 380 (1933).

finder, who just does his best on the evidence available, certifying only his good faith, not his infallibility. On the other hand, the transformation of the prejudice issue into the question of the court's reservations about the facts found by the commission might be desirable. Since lack of prejudice may not be provable directly, the best way to protect the insurer from fraudulent or unfounded claims is either to raise the employee's burden of proof as to the facts supporting his claim or to eliminate the presumption on appeal favoring the facts found by the commission. Either solution or a combination of both may provide the court with the means of protecting itself from becoming an unwitting tool of fraud or oppression without precluding obviously meritorious claims.

VI. CONCLUSION

Which claim limitations rule is preferable? No one answer, of course, would be universally acceptable. Any answer must depend on the relative importance one assigns to the general purposes of the workmen's compensation system and the traditional purposes of a limitations provision. The most that an objective analysis can do is to clarify the character of the competing interests and highlight some of the facts relevant to balancing and reconciling those interests.

One important purpose of any limitations provision is to bar fraudulent or unfounded claims that otherwise could not be refuted effectively because of defects in evidence occasioned by the passage of time. This purpose is arguably unimportant in a workmen's compensation system. Proof of the disability for which compensation is claimed will ordinarily not be affected by the passage of time, since it is the claimant's present condition that is at issue and the trier of fact can determine the present condition of the employee with as much certainty in a case of delayed claim as in a case of prompt claim. Defects in evidence from the passage of time will ordinarily affect only the determination of causation and work-relatedness of the injury. Arguably, then, even if the trier of fact errs in determining that the injury was work-related, one important purpose of the workmen's compensation system is still achieved: shifting the burden of a disability from the employee to the employer takes the burden off the injured party and spreads it over a large number of persons, thus reducing the total of human suffering.[348] The

348. This argument depends on the highly controversial theory of the marginal utility of money. *See generally* NATIONAL COMM'N COMPENDIUM, *supra* note 34, at 21-26.

evidentiary purpose behind the limitations provision is relatively unimportant in a workmen's compensation system, since the "evil" to be prevented—compensation for non-work-related disabilities—is not much of an evil within that system. Furthermore, the proposed remedy for that evil—wholesale preclusion of both valid and invalid late claims—denies compensation to many deserving claimants, thus frustrating the purposes of the workmen's compensation system.

Those supporting the importance of the evidentiary purpose might urge first, that the above contrary argument does not apply in a jurisdiction that authorizes compensation awards retroactive to the beginning of the claimed disability,[349] and secondly, that the contrary argument ignores the distinction between a workmen's compensation system based on the enterprise liability theory and a general social insurance system based on a "pure" compensation theory. This distinction is important.[350] The workmen's compensation system was not intended to provide compensation for injuries unrelated to work; to burden the workmen's compensation system with compensating non-work-related injuries would undermine the basic enterprise liability purpose of treating human injury occasioned by the enterprise as a cost of doing business.[351]

While this last argument may be sound on its face, it seems weak as a counterattack on the original argument that the evidentiary purpose is unimportant. The original argument did not propose that the workmen's compensation system provide compensation for non-work-related injuries as a matter of course. It simply suggested that occasionally granting a claim for compensation for a non-work-related injury that would otherwise have been prevented by a limitations provision was not a very significant evil in light of the basic workmen's compensation purposes, and certainly was not a significant enough evil to justify precluding all late claims, valid and invalid alike.

Those supporting the continued importance of the evidentiary purpose in a workmen's compensation system might respond that the contrary balancing argument misconceives the basic rationale of the evidentiary purpose, which is to protect the integrity of the adjudicative

349. *See generally* 1 LARSON § 3.40.

350. *See generally id.* § 3; NATIONAL COMM'N COMPENDIUM 41-59.

351. *See* Bernstein, *The Need for Reconsidering the Role of Workmen's Compensation*, 119 U. PA. L. REV. 992, 997-98 (1971).

process itself. Even though the result of any particular adjudicative error may not be evil per se, public respect for the integrity of the fact-finding process, and the integrity and objectivity of the institutionalized workmen's compensation system itself may be threatened by permitting the trier of fact to adjudicate factual issues long after the relevant events, when it may be unable to separate valid from invalid claims. It could be argued, on the other hand, that insofar as this purpose of limitations provisions derives from the same source as the exclusionary rules of evidence—the need to control the kinds of evidence submitted to a jury—the arguments for eliminating the exclusionary rules of evidence in workmen's compensation cases,[352] which are tried by an administrative agency rather than a jury, apply with equal force to support elimination of the limitations bar. Presumably, the administrative agency is a more sophisticated factfinder than the jury and does not need to be protected from the possibility of naive reliance on untrustworthy evidence. As a practical matter, however, it seems likely that "sophisticated" administrative agencies may make mistakes at times, just as juries do, because of misplaced reliance on untrustworthy evidence. The evidentiary purpose of limitations provisions thus retains some, although perhaps lessened, importance in a workmen's compensation system.

The certainty of freedom from ultimate liability provided the employer by liability insurance lessens the need for personal certainty of freedom from liability after the expiration of the limitations period.[353] The personal certainty consideration as a criterion for evaluating different limitations provisions, therefore, breaks down into two criteria: insurability of the risk and relative cost. In every state, employers can obtain workmen's compensation insurance, either through private insurance companies or the state insurance fund.[354] In practice, then, the risk of workmen's compensation liability is insurable under every current limitations provision.[355] The only remaining issue under the

352. Professor Larson asserts that more than half the state workmen's compensation statutes provide that common law and statutory rules of evidence shall not apply to compensation proceedings. 3 LARSON § 79.30.

353. *See* text accompanying notes 29-31 *supra.*

354. *See generally* NATIONAL COMM'N COMPENDIUM 243-65.

355. Except for temporary rate-making uncertainties caused by lack of sufficient claims experience following the changeover to the new system, it is at least possible that the risk of workmen's compensation liability would be insurable under a system without a limitations provision at all. Any conclusion on this matter would depend on a comprehensive study of actual practices and experience. *See* REPORT OF THE COMMITTEE ON

certainty analysis is the cost to the employers directly attributable to different limitations provisions. Although no precise figures can be given at this time, the available data suggest that the cost differential attributable to the differences in state limitations provisions is probably minimal.[356]

If the cost differential attributable to the difference in limitations provisions is in fact minimal, this might support an argument for choosing the most liberal limitations provision, or eliminating the limitations provision completely. The argument may be deceptive, however. Analytically, the question of cost differentials attributable to differences in limitations provisions is related only to the certainty purpose of the limitations provision. It is not relevant to the evidentiary purpose, which may support choice of a stricter limitations provision. Additionally, incremental cost arguments in compensation schemes may be treacherous, for repeated successful applications of the same argument can lead to a system in which costs become oppressive, causing continued inflation in the price of goods and services and draining away risk capital needed to keep the private enterprise system itself alive and healthy.[357]

How do the four alternative limitations rules compare when evaluated by the foregoing considerations?

The "accident" limitations provisions, of course, best promote the traditionally conceived evidentiary and personal certainty purposes. No serious threat to these purposes, however, even as traditionally conceived, would seem to flow from lengthening the often very short time periods in these "accident" provisions to the three years urged by the

THE LIMITATION OF ACTIONS, CMD. NO. 7740, at 7-8 (1949); LAW REFORM COMMITTEE, TWENTIETH REPORT, CMND. NO. 5630, at 9-10 (1974).

356. Professor John Burton's statistical analysis of the differences in workmen's compensation insurance costs in different states suggests that most of the cost differential is attributable to differences in the level of benefits. J. BURTON, THE SIGNIFICANCE AND CAUSES OF THE INTERSTATE VARIATIONS IN THE EMPLOYERS' COSTS OF WORKMEN'S COMPENSATION 217-25 (1965). Professor Burton was unable to demonstrate a significant correlation between other statutory and judicial variables and the differences in costs between states, although he did not use any limitations variables in his first study. *Id.* at 166-204, 231-35. Professor Burton generously agreed to run through his statistical analysis limitations variables for twenty-two states. That study failed to establish a statistically significant correlation between insurance costs and either the length of the limitations period or the harsh "accident" provision. The results of that study may be obtained from the author or the *Washington University Law Quarterly*.

357. *See* B. DEJOUVENEL, THE ETHICS OF REDISTRIBUTION (1952). *But see* NATIONAL COMM'N REPORT, *supra* note 309, at 128-29; Watkins & Burton, *Employer's Costs of Workmen's Compensation*, in 2 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS 217 (1973).

National Commission on Workmen's Compensation.[358] The preceding analysis, moreover, suggests that the evidentiary and personal certainty purposes no longer demand a rigid limitations rule. Other competing considerations may thus justify amelioration of some of the harsher results arising under the "accident" limitations provision. The injustice of precluding an employee by limitations before he ever had a right to compensation strongly supports choice of a compensable-injury limitations provision, at the very least.

Is it possible to go further and formulate a limitations provision that reconciles the basic workmen's compensation purposes with the surviving valid limitations purposes?

The discovery rule and the "no prejudice" rule seem the most likely candidates. They both seem to undermine the traditional personal certainty purpose of limitations provisions, for neither rule gives the employer a definitely ascertainable date from which he can confidently date the limitations period for possible claims arising out of an accident. The experience in Massachusetts and states with discovery rules, however, suggests that the risk of loss is insurable under each rule and that the incremental insurance cost associated with each rule is probably minimal.[359]

The discovery rule does not seem to be a reasoned reconciliation of the basic workmen's compensation purposes and the evidentiary limitations purpose. The line drawn between those who make claim within the statutory period after they reasonably should have discovered all the facts necessary to establish their right to compensation and those who do not make claim within that period (either because they failed to act reasonably to discover those facts or because they failed to file claim in time after they learned those facts) seems unrelated to either the basic workmen's compensation purposes, which would tend to support removal of the limitations bar in all cases, or the evidentiary limitations purpose, which would tend to support application of the limitations bar in all cases. It could be argued that the claim of an employee who can prove a good reason for not filing claim sooner is less likely to be fraudulent or unfounded than other delayed claims, but the argument seems unsound. In the typical discovery-rule case, doctors have disagreed over the proper diagnosis of the employee's condition. The

358. NATIONAL COMM'N REPORT 107-08. The Commission supports adoption of the discovery rule for starting the limitations period.

359. *See* note 356 *supra.*

danger of fraudulent or unfounded claims would seem to be particularly great in such cases.

A limitations provision is needed that protects against fraudulent and unfounded claims without precluding delayed meritorious claims. The likeliest candidate is the Massachusetts "no prejudice" exception, or a more candid variation that, after the passage of a specified time after the accident, would simply raise the claimant's burden of proof and eliminate the presumption on appeal favoring findings of the original trier of fact.[360] This solution would protect the courts on a case-by-case approach from becoming tools of fraud or injustice while presenting no insuperable barriers to valid delayed claims. The final question is whether tribunals are competent to protect themselves in this fashion. Although that question may not be answerable with any degree of certainty, and the answer may depend on one's own assessment of the limits of judicial and administrative competence, the Massachusetts experience suggests that courts are competent to identify the delayed claims that are most likely to be unfounded or fraudulent.

360. For similar suggestions see LAW REFORM COMMITTEE, TWENTIETH REPORT, CMND. NO. 5630, at 9-10 (1974).