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Determining the proper accrual date for a medical malpractice action under the Federal Tort Claims Act can be a difficult and exasperating experience.[1] The federal version of the medical malpractice discovery doctrine states that the cause of action accrues when the victim knows both that there has been an injury and its cause. This deceptively laconic formula has engendered a series of subsidiary doctrines such as concealment, blameless ignorance, continuous treatment, duty of inquiry, constructive knowledge, delayed manifestation, and suspicion of harm.

This article will discuss the general accrual standards of the Federal Tort Claims Act and the special rules relating to medical negligence cases, including the requirements and theories for tolling of the statute of limitations. Irrespective of appellation, each approach is basically an attempt to determine when the injured person knew enough to file a claim for damages with the federal government. Judges and claimants who realize this may ascertain more accurately whether the cause of action is indeed barred under federal law.

I. The General Statute of Limitations Standard

The Federal Tort Claims Act[2] (FTCA) makes the United States liable in tort "in the same manner and to the same extent as a private individual under the circumstances."[3] The state where the

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1 The chronic headaches of one tort claimant began in 1962: "They continue to this day—the pain amplified by the dismissal of her suit under the Federal Tort Claims Act as barred by the statute of limitations." Harrison v. United States, 708 F.2d 1023, 1024 (5th Cir. 1983) (suppression of critical medical records by the government tolled the statute of limitations).

2 The Federal Tort Claims Act is an interrelated set of laws governing tort claims and suits against the federal government. The primary statutes are: 28 U.S.C. § 134(b) (1982) (exclusive federal district court jurisdiction over tort lawsuits); 28 U.S.C. § 1402 (1982) (venue); 28 U.S.C. § 2401(b) (1982) (statute of limitations); 28 U.S.C. § 2402 (1982) (jury trial unavailable); 28 U.S.C. § 2411 (1982) (judgment interest); 28 U.S.C. § 2412 (1982) (court costs and fees); 28 U.S.C. §§ 2671-2680 (1982) (tort claim substantive rules, procedures, and exceptions). For an overview of the FTCA, see generally L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES (1985); 35 AM. JUR. 2D *Federal Tort Claims Act* 291 (1967 & Supp. 1985).

3 27 U.S.C. § 2674 (1982). Most of the exceptions to coverage are found in 28 U.S.C. § 2680 (1982).

negligent act or omission occurred supplies the substantive tort law.[4] The statute of limitations, however, is federal.[5] Under the FTCA, a tort claim against the United States is forever barred "unless it is presented to the appropriate Federal agency within two years after such claim accrues."[6] Federal law also governs the determination of when a claim accrues for a personal injury action brought under the FTCA.[7]

Unfortunately, Congress has never addressed the question of when a claim "accrues" against the United States.[8] In resolving the accrual problem, federal courts have begun with the basic justifications for a time limit on bringing suit: preservation of evidence, accessibility of witnesses, and prevention of fraudulent claims.[9]

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4 28 U.S.C. § 1346(b) (1982). *See, e.g.*, Richards v. United States, 269 U.S. 1, 9 (1962) (conflict of laws problem arising from crash of interstate airline flight).

5 *See, e.g.*, Poindexter v. United States, 647 F.2d 34, 36-37 (9th Cir. 1981) (federal two year statute of limitations preempts Arizona law governing injured worker's suit against third party). *See generally* Annot., 29 A.L.R. FED. 482 (1976 & Supp. 1985) (statute of limitations under the FTCA, 28 U.S.C. § 2401(b)).

6 28 U.S.C. § 2401(b) (1982). The statute continues, "or unless such action is begun within six months of the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." There are thus two limitations periods for any FTCA claim. This article focuses on the first statute of limitations when the medical malpractice claim initially accrues, and the tolling of the first statute of limitations. However, it is important to keep in mind that a valid claim may still be lost by failing to file a timely suit in federal court after agency denial of the administrative claim. *See, e.g.*, McDuffee v. United States, 769 F.2d 492, 493-94 (8th Cir. 1985) (FTCA medical malpractice complaint untimely when filed six months and one day after agency denial); Kollios v. United States, 512 F.2d 1316 (1st Cir. 1976) (vehicular accident FTCA damages suit barred when complaint filed six months and one day after mailing date of final denial notice); Murray v. United States Postal Serv., 569 F. Supp. 794 (N.D.N.Y. 1983) (untimely filing of slip-and-fall FTCA suit). *But see* Rodriguez v. United States, 382 F. Supp. 1 (D.P.R. 1974) (FTCA complaint filing period runs from the day after mailing of administrative denial up to and including the same calendar date six months later).

7 United States v. LePatourel, 593 F.2d 827 (8th Cir. 1976) ("When a particular claim 'accrues' within the meaning of the FTCA is a qustion of Federal law. . . ."). *See also* Wollman v. United States, 637 F.2d 544, 551 (8th Cir. 1980) (Adams, Circuit J., dissenting) (in FTCA automobile accident claim, lack of knowledge that tortfeasor was government employee did not toll the statute of limitations).

8 Guidance is lacking both in the legislation and relevant legislative reports. *See, e.g.*, S. REP. No. 1400, 79th Cong., 2d Sess. (1946); H.R. REP. No. 276, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. CODE CONG. SERV. 1226; S. REP. No. 1327, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2515; H.R. REP. No. 1532, 89th Cong., 2d Sess. (1966).

9 In Lee v. United States, 485 F. Supp. 883 (E.D.N.Y. 1980), the court noted:

> Statutes of limitation are enacted on the theory that a defendant ought not to be called upon to defend even against a just claim where "evidence has been lost, memories have faded, and witnesses have disappeared," *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944), or where a lapse of time is such as to encourage or facilitate fraudulent claims. The chief purposes in setting the limitation period are, in fairness to defendants, to try to assure them they will not be required to meet a claim at so late a date that their defense is likely to be compromised, and, in fairness to plaintiffs, to afford them a reasonable opportunity to make their claims. The same concerns

Normally, a federal tort cause of action accrues when there has been an invasion of a legally protected interest of the plaintiff.[10] In FTCA actions charging negligence, accrual generally occurs when the harm or injury is inflicted.[11] Since the FTCA is a waiver of sovereign immunity, courts tend to strictly construe the limitation period set by Congress.[12] One consequence of this demanding judicial attitude is that the statute of limitations is extremely hard to toll once it begins to run, and it is difficult to prevent the initial early accrual of the claim.[13]

In fact, compliance with the two year statute of limitations is necessary to give the federal district court subject matter jurisdiction over the case.[14] Since the defense of lack of subject matter jurisdiction cannot be waived, the district court has the continuing duty to dismiss any FTCA action whenever it appears that jurisdiction is lacking.[15] Once the government shows that suit is untimely on the face of the pleadings, "the burden of establishing an exception to the statute of limitations is on the plaintiff."[16] This burden

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are relevant to a determination of when the limitation period should begin to run. Rationally to decide upon both the limitation period and the time when the claim "accrues" thus involves the weighing of a variety of factors, including the nature of the claim, the consequent probable degree of permanence of the evidence, and the time when the injured person is likely to learn of the claim to be in a position to assert it.

Id. at 885-86.

10 RESTATEMENT (SECOND) OF TORTS § 889 comment c (1979).

11 *See, e.g.*, Steele v. United States, 599 F.2d 823, 826-27 (7th Cir. 1979) (statute of limitations barred suit against FAA for negligent infliction of electrical shock); Targett v. United States, 551 F. Supp. 1231, 1236-37 (N.D. Cal. 1982) (timely suit for postdischarge failure to warn of military service radiation exposure dangers).

12 *See, e.g.*, Scott v. Casey, 562 F. Supp. 475, 480 (N.D. Ga. 1983) (FTCA suit over wrongful participation in prison medical experiment). *But see* Raymer v. United States, 609 F. Supp. 1332 (E.D. Mo. 1985) (FTCA suit alleging negligence in V.A. trauma treatment held timely). In *Raymer*, the court stated that "when Congress has permitted suit, the courts have viewed the conditions imposed with an eye to providing the type of effective relief that Congress intended." *Id.* at 1339.

13 *See, e.g.*, Burns v. United States, 764 F.2d 722, 724 (9th Cir. 1985) (equity will not toll the FTCA statute of limitations); Leonhard v. United States, 633 F.2d 599, 624 (2d Cir. 1980) (the FTCA two year statute is not tolled by minority of claimant), *cert. denied*, 451 U.S. 908 (1981); Casias v. United States, 532 F.2d 1339, 1342 (10th Cir. 1976) ("Insanity, such as constitutes a legal disability in most states, does not toll the statute of limitations under the Federal Tort Claims Act.").

14 *See, e.g.*, Ashley v. United States, 413 F.2d 490, 492 (9th Cir. 1969) (medical malpractice suit for damage to nerve incurred in drawing blood sample barred by noncompliance with the FTCA statute of limitations).

15 "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h)(3). *See also* Garrett v. United States, 640 F.2d 24, 26 (7th Cir. 1981) (statute on wrongful death suit began to run at date of death and not date of release of autopsy report by the Bureau of Prisons).

16 Drazan v. United States, 762 F.2d 56, 60 (7th Cir. 1985) (suit arising from alleged failure to conduct follow-up examination by the V.A.).

is especially heavy for victims of medical malpractice, who may be unaware for many years that they have been injured tortiously and who caused the harm.[17]

II. The *Kubrick* Standard

United States v. Kubrick[18] is the only United States Supreme Court decision explaining when a medical malpractice claim accrues under the FTCA.[19] In April 1968, Veterans' Administration doctors employed the antibiotic neomycin on William Kubrick in conjunction with surgery on his right femur. About six weeks after discharge from the hospital, Kubrick noticed a ringing sensation in his ears and a hearing loss. By January 1969, medical specialists had informed him it was highly possible the neomycin treatment had caused bilateral nerve deafness.[20]

Since Kubrick was already receiving a government disability pension for a back injury, he filed for a benefits increase due to the deafness. The Veterans' Administration denied his application in September 1969, asserting that Kubrick's care had been proper and that the neomycin had not generated the deafness. On June 2, 1971, a medical doctor specifically told Kubrick that "the neomycin had caused his injury and should not have been administered."[21] The V.A. turned down his disability appeal in August 1972. Kubrick filed suit in federal district court the next month,[22] and won this lower court case on the merits.[23]

In the district court, the United States unsuccessfully asserted

17 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 899 comment e (1979) (growing acceptance of discovery rule in medical malpractice actions).

18 444 U.S. 111 (1979). Discussions of the *Kubrick* opinion may be found in Case Comment, *Accrual of a Medical Malpractice Claim Under the Federal Tort Claims Act—Accrual of Medical Malpractice Action:* United States v. Kubrick, 4 W. NEW ENG. L. REV. 155 (1981); Case Comment, *Federal Tort Claims Act—Lack of Reason to Know of Possible Medical Malpractice Claim Does Not Toll the Statute of Limitations:* United States v. Kubrick, 14 SUFFOLK U.L. REV. 1428 (1980).

19 *See In re* Swine Flu Prod. Liab. Litig., 764 F.2d 637, 639 (9th Cir. 1985) (government-sponsored swine flu vaccine allegedly killed female recipient).

20 444 U.S. at 113-14.

21 *Id.* at 114. The trial judge agreed that the treating physician had "violated the standard of care imposed upon him by law because he administered excessive quantities of neomycin to the plaintiff over an extended period of time through an imperfectly functioning hemovac tube system, and also because he failed to utilize polycillin (ampicillin) or penicillin, the true drugs of choice in the situation, given the ototoxic hazards of neomycin." Kubrick v. United States, 435 F. Supp. 166, 189 (E.D. Pa. 1977).

22 435 F. Supp. at 170. Kubrick did not file a proper FTCA administrative claim until January 1973. A complaint filed before the administrative claim is properly submitted and considered does not give subject matter jurisdiction to the district court. *See, e.g.*, Reynolds v. United States, 748 F.2d 291, 292 (5th Cir. 1984) (prematurely filed FTCA complaint mandates dismissal of action). The administrative issue in *Kubrick* was not raised on appeal. 444 U.S. at 115 n.4.

23 435 F. Supp. at 189.

that the two year statute of limitations barred Kubrick's claim since he had noticed by January 1969 that neomycin caused his hearing loss.[24] The trial judge acknowledged the general rule that a claim accrues under the FTCA when "the claimant has discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice."[25] The court concluded that a reasonably diligent plaintiff could toll the statute upon "establishing that there was no reasonable suspicion that there was negligence in his treatment."[26] Despite reasonable diligence, the court held that Kubrick had not "known" of the malpractice until his visit to a medical specialist in June of 1971, less than two years before presenting his tort claim.[27] The Third Circuit Court of Appeals agreed that "if the plaintiff can prove that in the exercise of due diligence he did not know, nor should he have known, facts which would have alerted a reasonable person to the possibility that the treatment was improper, then the limitation period is tolled."[28]

The Supreme Court disagreed with the lower courts and reversed the decision.[29] Writing for the majority, Justice White stressed the importance of the federal statute of limitations in encouraging the prompt presentation of claims against the government. He could find no support for the concept that the statute tolled until the victim discovers he has been legally wronged.[30] Justice White held that the statute of limitations begins to run when the victim knows both that he has been injured and who caused the harm.[31] His reasoning on the issue may best be shown by setting out two frequently quoted passages from the opinion:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum stan-

24 444 U.S. at 115.
25 435 F. Supp. at 180.
26 *Id.* at 185.
27 *Id.* at 185-86.
28 Kubrick v. United States, 581 F.2d 1092, 1097 (3d Cir. 1978).
29 444 U.S. at 125.
30 *Id.* at 118-25.
31 *Id.* at 122.

> dards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.
>
> . . . .
>
> We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government. . . . Of course, he may be incompetently advised or the medical community may be divided on the crucial issue of negligence, as the experts proved to be on the trial of this case. But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make.[32]

Justice White found that Kubrick knew of his injury and its cause by January 1969, and that reasonable inquiry on his part would have disclosed the impropriety of his medical treatment at that point.[33] The complexity of the case would not excuse Kubrick's dilatoriness, and the claim was therefore barred by the statute of limitations.[34]

Justice Stevens dissented, arguing that the statute does not begin to run "until after fair notice of the invasion of the plaintiff's legal rights."[35] He would have preferred to have placed the accrual date at the point a diligent plaintiff knows the injury was due to misconduct.[36] Since the district court had already decided that the plaintiff had exercised "all kinds of reasonable diligence," Justice Stevens objected to the de novo majority determination that Kubrick was not in fact diligent in pursuing his claim.[37]

III. Defining Terms

Kubrick established the general rule that a medical malpractice action under the FTCA accrues when the victim knows both the cause of his injury and the person who caused it. The terms and concepts of this formula have accumulated a judicial gloss which is

32 *Id.* at 122-24 (footnote omitted).

33 *Id.* at 122-23.

34 *Id.* at 124-25.

35 *Id.* at 125-26 (Stevens J., dissenting). Justice Stevens was joined in dissent by Justices Brennan and Marshall. *Id.* at 125.

36 *Id.* at 126-28.

37 *Id.* at 128-29 (White, J., dissenting). Justice White did acknowledge the dissent's criticism that the majority was deciding a question of fact. However, Kubrick's admitted diligence in finding the cause of his injury did not excuse his omission to seek timely legal advice. *Id.* at 123 n.10.

useful in applying the tort accrual standard in practice. The most basic element is "knowledge." The crucial facts which must be known are the cause of injury, the identity of the tortfeasor, and the existence of the injury.

A. *Knowledge*

A federal tort claimant has knowledge sufficient to start the two year limitations period when he is "in possession of the critical facts that he has been hurt and who has inflicted the injury."[38] Merely defining knowledge as "possession" of certain facts is not very helpful. The critical question is what an individual person does or should "know" under given circumstances. As several courts have suggested, the concept of knowledge encompasses a spectrum of comprehension ranging from mere belief through suspicion to certainty. At some point, enough is comprehended to say that the victim should be held accountable for filing a claim.

The Fifth Circuit recently considered a case in which the sufficiency of the claimant's knowledge was a central concern. In *Harrison v. United States*,[39] Air Force physicians negligently punctured Sybil Harrison's thalamus while conducting a ventriculogram in 1966. In the following years, Harrison suffered excruciating chronic headaches. Repeated examinations and treatments failed to disclose the true cause of her problem. Harrison suspected that her doctors had done something wrong in 1966, but no medical expert would agree with her. She hired an attorney who was finally able to obtain the records of the ventriculography after several years of persistent requests and diligent searches. When they arrived in 1976, the records easily revealed the 1966 malpractice, and Harrison promptly filed her FTCA claim.[40]

The district court ruled that Harrison's suspicions were sufficient to start the statute of limitations running long before she presented her claim. The appellate court reversed and remanded, concluding that mere belief or suspicion was insufficient to accrue a federal tort claim.[41]

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38 444 U.S. at 122. *See also* Jackson v. United States, 526 F. Supp. 1149, 1152-53 (E.D. Ark. 1981) ("critical facts" of medical negligence concealed by Veterans' Administration personnel), *aff'd without opinion*, 696 F.2d 999 (8th Cir. 1982).

39 708 F.2d 1023 (5th Cir. 1983).

40 *Id.* at 1023-27.

41 *Id.* at 1027-28. In reaching this result, the court stated:

> In assessing the awareness required to trigger the statute of limitations, it is essential to distinguish between "knowledge" and "belief." For one to have knowledge of fact "x," three requisities must exist: (1) "x" must be true, (2) the person must believe "x" to be true, and (3) the belief must be reasonably based. A. Flew, *A Dictionary of Philosophy* (1979); A. Quiton, "Knowledge and Belief," *Encyclopedia of Philosophy* (1967). "Belief," which is a component of knowledge, requires

B. *Suspicion, Possibility, or Mere Belief*

Noting that "[s]uspicion and knowledge are poles apart on a continuum of understanding,"[42] the Fifth Circuit in *Harrison* decided "it would be unreasonable to hold Harrison to a higher degree of medical competence and understanding than the many medical experts she consulted."[43] Her privately conceived notion, belief, or suspicion that government doctors had wrongfully injured her did not turn into "knowledge" until she actually gained access to the incriminating medical records.[44]

While not a medical malpractice case, one of the most enlightened discussions of "knowledge" relating to the FTCA statute of limitations may be found in *Allen v. United States*,[45] a 1984 decision of the United States District Court for the District of Utah. In that case, Judge Jenkins was faced with suits by a group of plaintiffs who claimed that the Nevada above-ground nuclear tests by the Atomic Energy Commission had caused their cancer and leukemia. Their afflictions did not become apparent immediately after the atomic tests. Judge Jenkins decided that "the *Kubrick* standard readily lends itself to a case such as this, in which the injury does not manifest itself until years—sometimes decades—later and in which the critical facts concerning injury or causation are difficult if not impossible to early ascertain."[46] Accrual of the statute of limitations would hinge on knowledge by the lay plaintiffs that ionizing radiation could induce cancer. Some of the plaintiffs knew in a general way of a possible connection between radiation and sickness, but "hard information" was quite "minimal," and often contradicted by reassurances from the federal government that there was no danger.[47]

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only requisites (1) and (2)—"x" must be true and the person must believe it to be true. As a consequence, conclusions based on dreams, intuitions, suspicion, conjecture, ESP, speculation, or faulty reasoning, even if true, are merely "belief." Absent a reaonsable basis, these conclusions do not rise to the level of "knowledge."

Id. at 1027.

42 *Id.*, quoting Tracerlab, Inc. v. Industrial Nucleonics, 313 F.2d 97, 102 (1st Cir. 1963) (in misappropriation of trade secrets action summary judgment was inappropriate when there was a genuine issue of fact whether plaintiff had sufficient knowledge to accrue the statute of limitations).

43 708 F.2d at 1028.

44 *Id.* The court was also concerned about fraudulent concealment of the malpractice by Harrison's physicians, although that issue was not resolved in view of the appellate decision in the plaintiff's favor on other grounds. *Id.* at 1026, 1028 n.1. *See also* notes 107-15 *infra* and accompanying text (concealment and misdirection by the government).

45 588 F. Supp. 247 (D. Utah 1984). *See also* Allen v. United States, 527 F. Supp. 476 (D. Utah 1981) (same case on preliminary motions). The *Allen* decision is examined fully in Note, Allen v. United States: *Discretion Defined Downwind*, 1985 UTAH L. REV. 435.

46 588 F. Supp. at 341.

47 *Id.* at 342-43.

Judge Jenkins concluded that mere suspicion was not the "knowledge" necessary under *Kubrick* to start the limitations clock. The reasoning of Judge Jenkins as he worked out guidelines for distinguishing the "crucial difference" between suspicion and knowledge merits quotation at length:

> "Knowledge" speaks to the direct interaction between the mind and that which exists—facts, information, truth, understanding.
>
> *Suspicion*, on the other hand, speaks to the formation of subjective impression or belief. . . . Knowledge and suspicion are distinguished from each other by the degree of interplay between the mind and the facts. . . . "Knowledge" of "fact" carries an unmistakable sense of certainty, of objective proof or at least that the fact "known" is more likely than not. That which is known can readily be shared with others often by pointing them to the fact claimed known. This is the basis of our entire law of evidence, and of "fact-finding" by courts. The court is told and is shown.
>
> "Suspicion" is inextricably tied to the notion of uncertainty, to a scarcity of "facts" by which one could "know" rather than merely imagine or suspect. One suspects that which he cannot prove, a more intuitive than demonstrative exercise. . . . A plaintiff with the requisite quantum of knowledge (or reason to have such knowledge) has received—seized, grasped, understood—facts. Knowledge requires at least a modest factual basis, one to which the perceptive minds of others may be pointed.[48]

Judge Jenkins ruled that the plaintiffs knew too little about their injuries and their causation to start the statute of limitations running prematurely.[49] He awarded damages to eight of the fallout victims.[50]

C. *Constructive Knowledge*

Federal courts prefer to find that the victim has "actual" knowledge of the critical facts before concluding that the statute of limitations has accrued. Although the facts may clearly indicate malpractice to a medical specialist, many claimants are laypersons dependent on their malpracticing physicians for candor about and access to the critical facts.[51] Moreover, even sophisticated claimants will normally vigorously deny any actual knowledge, leaving the courts to flounder in a sea of "should haves" and "maybes."

48 *Id.* at 344-45 (emphasis in original).

49 *Id.* at 347.

50 *Id.* at 447-48.

51 *See, e.g.*, Overstreet v. United States, 517 F. Supp. 1098, 1099-1103 (M.D. Ala. 1981), in which the patient had only a lay familiarity with medical procedures and did not actually know that the cause of his jaundice and fever was surgical error. His doctors were singularly unmotivated to suggest an iatrogenic cause. *See also* Overstreet v. United States, 528 F. Supp. 838 (M.D. Ala. 1981) (same case on the merits).

For instance, in *Jastremski v. United States*,[52] a child suffered brain damage as a result of a traumatic, negligently managed birth. The father was a licensed clinical pediatrician who was in the operating room and assisted in the difficult breach delivery. He knew of the grand mal seizures occurring shortly after birth and of the boy's abnormal gait which appeared at age two. The neurological diagnosis of cerebral palsey caused by a brain injury immediately before delivery was not made until two more years had passed. Despite all of these circumstances, the trial court refused to impute knowledge to the father when he testified that he did not actually know that the injury existed or had been negligently caused. The Court of Appeals for the Seventh Circuit upheld this determination.[53]

At some point, however, the wrong done to the victim involves matters of such general knowledge that he will be held accountable under the statute for a failure to promptly pursue his claim. In *Scott v. Casey*,[54] for example, the plaintiffs ingested LSD and similar compounds as part of a Central Intelligence Agency volunteer prison study in the late 1950's. Several of the participants sued for medical malpractice approximately seventeen years after they stopped taking the drugs, claiming a lack of informed consent and negligently inflicted mental trauma. The district court observed that by the end of the 1960s, "the general properties of LSD, including its propensity to cause hallucinations, flashbacks, and personality disorders, had become a matter of public knowledge."[55] This public awareness, coupled with early symptoms and inconsistencies in the claimants' stories, led the court to conclude that the suits were indeed time-barred.[56]

This public awareness approach was followed in *Svoboda v. United States*,[57] a swine flu vaccine case from the Northern District of Illinois. Although vaccinated in 1976, and aware of consequent vision and neurological problems by 1981, the plaintiff did not file suit until 1984. District Court Judge Kocoras granted the government's motion to dismiss the case for lack of subject matter jurisdiction due to delinquent filing. He noted the numerous local swine flu vaccine cases, the regular reports in the Chicago newspapers, and the national scientific recognition of the injuries caused by the vaccination program. This information was sufficient to alert a rea-

52 737 F.2d 666 (7th Cir. 1984).

53 *Id.* at 670. *But see* Fernandez v. United States, 673 F.2d 269, 272 (9th Cir. 1982) (claim barred when parents did not file a claim for twelve years for alleged malpractice at birth of son despite having available "all there was to know about the cause of the injury" soon after its occurrence).

54 562 F. Supp. 475 (N.D. Ga. 1983).

55 *Id.* at 479.

56 *Id.* at 480-83.

57 No. 84-C-2926 (N.D. Ill. April 22, 1985) (available on WESTLAW, DCTU database).

sonable person that the vaccine may have caused subsequent health problems, and therefore "sufficient to start the running of the statute of limitations."[58]

Of course, the existence of public awareness that could supply critical facts to a potential federal tort claimant is not dispositive on the accrual issue. In a recent appellate case,[59] a district court granted summary judgment to the government on the ground that the claimant should have realized within the limitations period that a swine flu vaccination led to his wife's injuries and ultimate death.[60] The Ninth Circuit held that there was a genuine issue of material fact concerning the extent of the community knowledge during the period when the claim would have been timely if filed.[61] In reversing the lower court, the Court of Appeals refused to hold a plaintiff "accountable as a matter of law for press accounts."[62] Conceding that community awareness might or might not be sufficient to charge the plaintiff with knowledge of the causal connection between the death and the vaccine, the court determined that the proper standard "looks not to the likelihood that a plaintiff would in fact have discovered the cause of his injury if he had only inquired, but instead focuses on whether the plaintiff could reasonably have been expected to make the inquiry in the first place."[63]

D. *Duty of Inquiry*

The *Kubrick* opinion stressed the need for an inquiry once the plaintiff possesses the critical facts of injury and agency.[64] The victim must promptly seek medical and legal advice about the proper standard of care and whether his care conformed to that standard. Failure to sue because of improper or incompetent advice will not toll the statue, although the victim should then have a cause of action against his advisors.[65] The duty[66] or burden[67] of investigation

58 *Id.* at 5, WESTLAW.

59 *In re* Swine Flu Prod. Liab. Litig., 764 F.2d 637 (9th Cir. 1985).

60 The alternate ground for summary judgment was that the claim accrued at death, not when the cause of the injury was reasonably discovered. *Id.* at 638. The Ninth Circuit resolved this issue by adopting the medical malpractice *Kubrick* discovery rule for wrongful death actions. *Id.* at 640. *See also* notes 138-47 *infra* and accompanying text.

61 764 F.2d at 641.

62 *Id.*

63 *Id.* at 642 n.2.

64 United States v. Kubick, 444 U.S. 111, 122 (1979).

65 *Id.* at 123-24. The unfortunate consequences of an error caused by mistaken medical or legal advice will fall on the victim, not on the federal government.

66 Gilbert v. United States, 720 F.2d 372, 375 (4th Cir. 1983) (1980 action against V.A. for wrongful adjudication of incompetency untimely filed when veteran knew of the wrongful act by the V.A. in 1958).

67 Dessi v. United States, 489 F. Supp. 722, 725 (E.D. Va. 1980) (claim of impotence allegedly caused by negligent transurethral resection of the prostate at U.S.P.H.S. hospital barred by untimely filing).

belongs to the plaintiff, who must exercise reasonable diligence in the inquiry.[68]

Whether a plaintiff has investigated the situation with reasonable diligence depends upon inferences drawn from the unique facts of each case.[69] Despite the specificity of this approach, the appropriate standard for evaluating reasonable diligence is clearly objective, and not subjective. If the actual claimant fails to investigate at all, or inquires less diligently than the mythical reasonable person would in like circumstances, the claim will accrue at the point when a reasonable inquiry would have uncovered indications of malpractice.[70]

E. *Facts of Injury*

In many cases, however, the victim may not know that there has been any injury at all. Although directly traceable to medical negligence, the resulting damage may not become apparent for decades.[71] Since the *Kubrick* standard presupposes awareness of the medical harm, justifiable ignorance of injury tolls the statute until the necessary knowledge is acquired.[72] Mere negligent treatment, before the actual injury manifests itself, will not start the running of the statute of limitations. Otherwise, "depending on the gap between treatment and the occurrence of the injury, a plaintiff could lose his cause of action before it even arose."[73]

Occasionally, a patient will be told that a certain medical procedure or treatment will have inevitable, unpleasant consequences. This situation arose in *Rispoli v. United States*,[74] where Veterans' Administration physicians attempted to close the plaintiff's traumatic open leg wounds with painful and complex skin grafts and flap advancement techniques. Despite the subsequent loss of his heel and parts of his foot, the doctors repeatedly assured Rispoli that his

68 *See, e.g.*, Smith v. United States, No. 84-C-5996 (N.D. Ill. July 16, 1985) (available on WESTLAW, DCTU database) (failure of plaintiff to promptly prosecute claim for alleged surgical malpractice did bar the action).

69 *See, e.g.*, Snyder v. United States, 717 F.2d 1193 (8th Cir. 1983) (conflicting inferences over issues of due diligence and constructive knowledge precluded summary judgment).

70 *See, e.g.*, Arvayo v. United States, 766 F.2d 1416, 1422 (10th Cir. 1985) (failure to inquire into causes of son's retardation after receiving drastically different diagnoses within brief period would bar claim by parents for malpractice).

71 This is especially true in the toxic tort and radiation exposure cases. *See generally* Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683, 1684-90 (1983).

72 444 U.S. at 122.

73 Foskey v. United States, 490 F. Supp. 1047, 1068 (D. R.I. 1979) (negligent nondiagnosis and treatment of seizure disorder led to grand mal seizure resulting in severe brain damage to child).

74 576 F. Supp. 1398 (E.D.N.Y. 1983).

problems had been anticipated and that his wounds would heal. After many months and several useless operations, Rispoli consulted an outside plastic surgeon and soon afterward filed an FTCA claim. The district court rejected the government's statute defense, concluding that the signs of malpractice had been masked by the predicted "side-effects" of the treatment.[75]

The patient possesses the foundational fact of injury when he is aware or on notice that his condition is beyond the reasonable range of the anticipated complications.[76] The victim may know little about the ultimate nature of the damage at that point. The federal courts, however, have consistently held that lack of knowledge of the injury's permanence,[77] extent,[78] and ramifications[79] will not toll the statute of limitations.

F. *Cause of Injury*

Although cognizant of an injury, the victim may still not know its cause. In broad terms, "the concept of causation embraces everything that has ever occurred commencing with the ultimate cause of causes up until the present instant."[80] The causation inquiry in FTCA cases is far less nebulous.[81] Cause in the context of federal medical malpractice focuses specifically upon the govern-

75 *Id.* at 1403. *See also* Burgess v. United States, 744 F.2d 771, 774-75 (11th Cir. 1984) (parents unaware that breaking of son's clavicle at birth would result in palsey condition); Jackson v. United States, 526 F. Supp. 1149, 1153 (E.D. Ark. 1981) (knowledge that stroke after surgery was an expected complication not necessarily indicative of malpractice), *aff'd without opinion*, 696 F.2d 999 (8th Cir. 1982).

76 This may be the rationale behind Green v. United States, 765 F.2d 105 (7th Cir. 1985). In *Green*, the appellate court ruled that the statute had run on the claim of a veteran who was afflicted with osteoradionecrosis caused by V.A. radiation therapy for the treatment of oral cancer. Osteoradionecrosis in mild form was an expected side effect of the radiation therapy. Nevertheless, the court concluded that the victim knew of the injury and its cause far more than two years before his claim was filed. "Further, the severity of Green's injuries—the oral hemorrhaging, the development of an oral fistula, the numerous surgical procedures and the length of his hospitalization—would have caused a reasonably diligent claimant to seek advice in the medical and legal community." *Id.* at 108.

77 Robbins v. United States, 624 F.2d 971, 973 (10th Cir. 1980) (claim presented too late when stria from wrongful prescription of drug were readily apparent for five years before the claimant acted).

78 Snyder v. United States, 537 F. Supp. 633, 635 (W.D. Mo. 1982) (suit over negligent percutaneous cordotomy), *rev'd and remanded on other grounds*, 717 F.2d 1193 (8th Cir. 1983).

79 Gustavson v. United States, 655 F.2d 1034, 1036 (10th Cir. 1981) (knowledge of injury to kidneys started statute running despite uncertainty over ultimate scope of the damage).

80 Lee v. United States, 485 F. Supp. 883, 887 (E.D.N.Y. 1980) (reasonable unawareness of traumatic birth injury meant that delayed claim by parents was still timely).

81 "Once the plaintiff discovers that her injury is probably attributable to some act of those who treated her, there is no longer any reason to toll the statute of limitations." Price v. United States, 775 F.2d 1491, 1493 (11th Cir. 1985) (loss of fetus due to hysterectomy based upon inaccurate report of nonpregnancy).

mental acts and neglects the acts giving rise to the injury.[82]

The causal requirement of the *Kubrick* standard was the central concern in *Drazan v. United States*,[83] a recent decision of the Seventh Circuit Court of Appeals. In *Drazan*, a 1979 x-ray revealed the possibility of a small, treatable tumor in one of the lungs of a tuberculoid veteran. Contrary to standard medical practice, there was no follow-up examination. The next x-ray was not taken until early 1981, when the tumor was already large, cancerous, and fatal within a month. The decedent's widow requested his medical records in November of 1981, but delayed filing a proper administrative claim until September 1983. She thought at first that unavoidable and untreatable lung cancer had killed her husband. It was not until months after his demise that she suspected any connection between his death and the lack of an early, intensive follow-up examination. The plaintiff argued that she first suspected a possible government causation in December 1981, when she received her husband's medical records. The district court dismissed her action, holding that the claim accrued when she knew that her husband had died, and that the cause was plainly lung cancer. Since the death occurred in February of 1981, the two year statute had already run by the time the plaintiff filed her claim.[84]

Writing the appellate panel's cogent opinion, Judge Posner reversed the lower court. He noted the justifiable uncertainty about the true cause of the patient's death:

> When there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause.
>
> . . . .
>
> The district court's approach, if widely adopted, would have the following rather ghoulish consequence: any time someone suffered pain or illness or death in a Veterans' Administration hospital, he (or in the case of death his survivors) would request his hospital records to see whether diagnosis or treatment might have played a role in his distress—whether, that is, the harm might have been "iatrogenic" (doctor-caused). He could not wait till he had reason to think he had suffered any iatrogenic harm; the two years might have run. We do not think such behavior should be encouraged, or that anything in *Kubrick* requires us to encourage it. . . .

82 *See, e.g.*, Waits v. United States, 611 F.2d 550, 551 (5th Cir. 1980) (extreme delay in supplying medical records disclosing negligent treatment tolled the statute of limitations). *See also* Utley v. United States, 624 F. Supp. 641 (S.D. Ind. 1985) (delay of three years in filing claim over allegedly negligent prenatal care permitted when parents had no reason to suspect that government conduct was the cause of severe birth defects).

83 762 F.2d 56 (7th Cir. 1985).

84 *Id.* at 57-58.

> We have not said, however, that the statute of limitations begins to run when the government cause is known; that would be inaccurate. It begins to run either when the government cause is known or when a reasonably diligent person (in the tort claimant's position) reacting to any suspicious circumstances of which he might have been aware would have discovered the government cause—whichever comes first.[85]

G. *Who Caused the Injury*

Although knowledge of the fact of injury and its cause will ordinarily disclose who inflicted the damage, there are occasionally situations where the identity of the tortfeasor is unknown. Under *Kubrick*, the statute of limitations does not accrue until the plaintiff knows who has caused the injury.[86] The lower federal courts have been very stringent in requiring claimants to diligently investigate whether they were harmed by an agent or instrumentality of the federal government.[87] For example, in *Flickinger v. United States*,[88] the plaintiff suffered a puncture wound to her right foot. She was treated and sent home by a local hospital. Several days later, the victim's toes and foot showed purple discoloration and she was very cold. A nurse practitioner working at a nearby clinic gave assurances that there was no medical problem. When the plaintiff was seen by a physician four days later, her foot was so diseased that she lost two toes and sections of ganrenous tissue from the rest of her foot.[89]

The plaintiff filed a state court medical malpractice complaint against the nurse practitioner, more than two years after the incident, but within the applicable state tort limitations period. The United States attorney removed the action to federal court because the nurse practitioner had actually been a United States Public Health Service employee at the time of the injury. The government then moved to dismiss the action entirely since the two year federal tort statute of limitations had run without the filing of an administrative tort claim.

The district court laid great emphasis on the limited waiver of

85 *Id.* at 59 (emphasis in original). *See also* Brazzell v. United States, 788 F.2d 1352 (8th Cir. 1986), *aff'g* 633 F. Supp. 62 (N.D. Iowa 1985) (medically unconfirmed suspicion of government fault arising from immediate onset of myalgia after swine flu vaccination was not sufficient knowledge of injury to accrue statute of limitations); Nicolazzo v. United States, 786 F.2d 454 (1st Cir. 1986) (cause of injury undiscovered for eight years until competent nongovernment doctor correctly diagnosed cholesteatoma).

86 444 U.S. at 122.

87 *See, e.g.*, Scott v. Casey, 562 F. Supp. 475, 482-83 (N.D. Ga. 1983) (plaintiff possessed sufficient background information to uncover the fact that the federal government was conducting improper prison drug tests).

88 523 F. Supp. 1372 (W.D. Pa. 1981).

89 *Id.* at 1373.

sovereign immunity embodied in the FTCA, and on the need to narrowly construe the limitations period. The court placed the burden on the claimant to uncover the federal agency relationship in a timely manner, and then dismissed the suit as barred by the statue of limitations.[90]

IV. Blameless Ignorance

The *Kubrick* formula excuses a claimant's "blameless ignorance."[91] In order to benefit from this theory, the victim must exercise reasonable diligence to uncover the critical facts concerning his injury.[92] However, as long as the plaintiff is blamelessly ignorant of his injury or its cause or the true identity of the tortfeasor, the statute of limitations will not accrue.[93] Federal courts have applied the blameless ignorance concept in a wide variety of circumstances. Examples of its application include situations where the victim goes into a coma, where federal agents conceal the government wrongdoing, and cases in which there is a delayed manifestation of the injury. In all of these circumstances, it is the government itself which must bear the blame for at least some of the victim's ignorance.

A. *Coma Cases*

The general rule under the FTCA is that inability to file a claim due to mental incompetency will not toll the statute of limitations.[94] The federal judiciary has created an exception for patients rendered incompetent when the alleged government malpractice

90 *Id.* at 1375-77. *See also* Barrett v. Hoffman, 521 F. Supp. 307, 318-20 (S.D.N.Y. 1981), *rev'd on other grounds*, Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983), a wrongful death action arising from the injection of toxic experimental drugs by a federal agency. Both state and federal entities worked on the project, although the survivors of this particular victim only knew of the state activities. A federal claim was finally filed twenty years after the death. The federal district court dismissed the subsequent action, holding that the plaintiffs had failed to investigate the federal connection with sufficient alacrity. "Federal precedent supports the proposition that a plaintiff's ignorance of the identity of a tortfeasor will not excuse a delay of more than two years in pressing a tort claim against the government." *Id.* at 319.

91 *See, e.g.*, Dessi v. United States, 489 F. Supp. 722, 726 (E.D. Va. 1980) (plaintiff's claim barred by failure to make diligent inquiries about the cause of his impotency). *See also* Stoleson v. United States, 629 F.2d 1265, 1269 (7th Cir. 1980) (suit over heart problems resulting from unsuspected exposure to nitroglycerine at a federal ammunition plant).

92 *See, e.g.*, Camire v. United States, 489 F. Supp. 998, 1003 (N.D.N.Y. 1980) (claim over misdiagnosis of child's meningitis barred due to lenthy inaction by parents).

93 *See, e.g.*, DeGirolamo v. United States, 518 F. Supp. 778, 781 (E.D.N.Y. 1981) (claim barred since victim knew of acts amounting to malpractice in treatment of torn cartilage years before taking action).

94 *See, e.g.*, Casias v. United States, 532 F.2d 1339, 1342 (10th Cir. 1976) (plaintiff's insanity did not toll statute in claim for damage to sciatic nerve caused by pre-operative injections).

which incapacitated them is the basis of the tort claim itself. Several courts adopted this approach before *Kubrick* was decided.[95] The first post-*Kubrick* decision to apply this doctrine was *Dundon v. United States*,[96] a case from the Eastern District of New York.

At the end of his distinguished service in Vietnam, James Dundon began to suffer severe depression and headaches. He attempted suicide in 1970. Military and Veterans' Administration physicians wasted five years treating his symptoms as purely psychiatric manifestations. Finally, in the summer of 1975, a proper neurological examination revealed an organic brain tumor or lesion. An operation in the fall of 1975 failed, and Dundon lapsed into an irreversible coma. He died in September 1977. His estate and survivors filed a claim in January 1979, alleging medical malpractice and wrongful death. After suit was brought in 1980, the government moved to dismiss on the ground that the statute had already run.[97]

District Judge Bramwell refused to accept the government's argument that Dundon's mental incompetence would not toll the statute. The judge noted that this case involved more than "mere mental incompetency" because Dundon's condition was allegedly due to the physician's actions which prevented him from understanding the cause of his injury.[98] Judge Bramwell also rejected the government's argument that a guardian could have brought suit for Dundon. Since Dundon was not a minor and had never been declared incompetent, only at the time of his death could a third party bring a suit to protect his interests.[99] Judge Bramwell found that the cause was timely and allowed the trial to continue for a determination on the merits.[100]

This approach was followed in *Pardy v. United States*.[101] Following injection of a diagnostic contrast medium on November 6, 1978, Pardy went into anaphylactic shock followed by a fifteen-day coma. He did not file a tort claim until November 10, 1980. After suit was instituted, the government moved to dismiss since more than two years had elapsed from the date of injury until filing of the

95 *See, e.g.*, Zeidler v. United States, 601 F.2d 527 (10th Cir. 1979), in which a former V.A. patient received two lobotomy operations in the late 1940s. The surgical procedures allegedly destroyed his mental functions. A conservator, appointed in 1975, filed both a tort admistrative claim and law suit within two years of the appointment. The district court held that the statute had already run, and dismissed the suit. On appeal, the Tenth Circuit Court of Appeals remanded, refusing to classify brain damage or destruction by the government in the same category as routine mental disease or insanity.

96 559 F. Supp. 469 (E.D.N.Y. 1983).

97 *Id.* at 469-71.

98 *Id.* at 474.

99 *Id.* at 475.

100 *Id.* at 475, 477.

101 575 F. Supp. 1078 (S.D. Ill. 1983).

claim. Chief Judge Foreman first concluded that the *Kubrick* discovery rule does apply "when a plaintiff is rendered incompetent by the government's allegedly tortious conduct."[102] Judge Foreman observed that in almost all cases involving a severe injury to an incompetent person, the cause of action would accrue at the time of the injury, since the legal guardian would become aware of the injury when it happened. Since Pardy was competent at the time he entered the hospital, he was in a different category. Having no legal guardian to act for him, the statute on Pardy's claim was tolled until he regained the use of his mental faculties. The government's motion was denied.[103]

The special rule for a tortiously inflicted coma was adopted by the Eighth Circuit in *Clifford v. United States*.[104] Allen Clifford took an overdose of an anti-depressant drug allegedly because of the malpractice of Veterans' Administration physicians. He became comatose in 1976 and remained in that condition throughout the proceedings. Allen's father was appointed guardian in 1979, and he filed a proper tort claim within two years. The district court granted summary judgment to the government, holding that the two year statute of limitations had expired before the claim was presented.

The Eighth Circuit Court of Appeals reversed and remanded.[105] Judge Arnold rejected the government's argument that Allen's family and friends should have expeditiously moved to protect his interests. Since Allen was an emancipated adult, Judge Arnold could find no legal duty for others to act for him before the appointment of a guardian. This was especially true when the government itself was allegedly to blame for the patient's coma.[106]

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102 *Id.* at 1080.

103 *Id.* at 1081.

104 738 F.2d 977 (8th Cir. 1984).

105 *Id.* at 978-80.

106 *Id.* at 979-80. The most persuasive government concern was the danger of being open to suit for a theoretically indefinite period.

> Probably the real exposure of the government to liability would be slight in such cases, though. The passage of time should make it progressively more difficult for a plaintiff to prove his case. But however that may be, we are persuaded that the rule contended for by the government would be still more objectionable. For under it the government would profit from its own (alleged) wrong. The statute would begin to run immediately at the time of the overdose. The coma that the government had (allegedly) negligently caused would prevent the plaintiff from knowing even that he had been injured, and there would be no one else with a legal duty to sue.

Id. at 980. The Ninth Circuit has recently accepted the *Clifford* rationale in this area. Washington v. United States, 769 F.2d 1436, 1438-39 (9th Cir. 1985) (suit for negligent injection of spinal anesthetic leading to fourteen year coma and death held timely when instituted by survivors promptly after death of victim).

B. *Perpetuating the Ignorance*

Government agents will often perpetuate the plaintiff's ignorance of the critical tort facts. This obfuscation may be intentional or merely inadvertent. The first hurdle in this regard is obtaining copies of the medical records in order to ascertain if the applicable standard of care has been met.[107] In many cases, the only reason there is a statute of limitations problem at all comes from a failure to rescue records from the "unaccessible hospital files" where the government has stored them.[108] Of course, the fog may not lift even when the medical records are obtained. "Anyone who has seen a volume of hospital and doctors' and nurses' notes would agree that they are seldom models of clarity."[109] However, at the least, the plaintiff who is armed with some of the basic raw data through access to the medical records stands a chance of ascertaining if there was an injury and who caused it.

Even when the patient is aware of untoward consequences from his treatment, he may justifiably be lulled into non-action by reasonable reassurances from government personnel. A classic example of improper assurances may be found in the 1985 decision of *Nemmers v. United States*,[110] where Navy doctors ignored plain signs that a fetus was post-mature. As a result of the late delivery, the child developed cerebral palsey. Although the parents raised concerns over the boy's poor muscular coordination, three pediatricians and a neurologist assured the parents that "the causes were unknown and that it was just one of those things and only God knows the cause."[111] No government doctor suggested any causal connection between the delayed birth and the child's condition. In fact, there seemed to be an active effort to hide the truth. The parents fortuitiously uncovered the connection eight years after the birth, and promptly initiated suit against the federal government.[112] Because of the misdirection provided by the government medical professionals, the district court held that the suit was timely.[113]

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107 *See, e.g.*, Jackson v. United States, 526 F. Supp. 1149, 1153 (E.D. Ark. 1981) (plaintiff unaware of the medical negligence until the V.A. hospital supplied the records).

108 *See, e.g.*, Waits v. United States, 611 F.2d 550, 553 (5th Cir. 1980) (great delay in provision of medical records in wrongful amputation precluded accrual of statute of limitations). *See also* Raymer v. United States, 609 F. Supp. 1332, 1339 (E.D. Mo. 1985) (plaintiff's claim for advanced paralysis did not accrue until the crucial medical records were produced by the V.A.).

109 Overstreet v. United States, 517 F. Supp. 1098, 1102 (M.D. Ala. 1981) (difficulties in obtaining accurate records prevented early accrual of claim).

110 612 F. Supp. 928 (C.D. Ill. 1985).

111 *Id.* at 930.

112 *Id.* at 930-31.

113 *Id.* at 933. *See also* Burgess v. United States, 744 F.2d 771, 775 (11th Cir. 1984) (parents acted reasonably in relying upon governmental misrepresentations and assurances that trauma at birth was unrelated to the manifestation of Erb's Palsey).

Concerned with the obvious lack of candor of many government physicians, several decisions have suggested that doctors are indeed responsible to their patients for a full, frank explanation of the scope and probable causes of their injuries. For example, in *Wilson v. United States*,[114] a young woman was rendered sterile from an abscess formed in her abdominal cavity secondary to a ruptured appendix. An administrative claim alleging federal medical malpractice was not filed until ten years after her treatment. Nevertheless, District Judge Hobbs allowed the case to proceed, since her treating doctors never told the patient in any meaningful way about the scope and significance of her injuries. It is settled law that intentional concealment of material facts by the government will toll the statute of limitations until the victim actually discovers the truth.[115]

C. *Delayed Manifestation*

The paradigm "blameless ignorance" defense arises where there is delayed manifestation of the injury. A victim unaware of an injury because it has not become apparent will not be held responsible for failure to file a claim.[116] In most situations, an injury will arise immediately following the tortious acts, although a hiatus in appearances of the harm does occur in many cases.[117] The delayed manifestation doctrine also has been raised with varying success in many circumstances on the borderline of true medical malpractice. Thus, delayed manifestation is often a factor in cases alleging wrongful radiation exposure,[118] improper vaccinations,[119] and tortious chemical or drug tests.[120]

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114 594 F. Supp. 843 (M.D. Ala. 1984).

115 *See, e.g.*, Barrett v. United States, 689 F.2d 324 (2d Cir. 1981) (government agents actively covered up unconsented army chemical experiment which killed plaintiff's decedent), *cert denied*, 462 U.S. 1131 (1983).

116 This is the clear implication of United States v. Kubrick, 444 U.S. 111, 122 (1979).

117 *See, e.g.*, Arvayo *ex rel.* Arvayo v. United States, 580 F. Supp. 753 (D. Kan. 1984) (delay in appearance of mental retardation symptoms), *rev'd sub nom.*, Arvayo v. United States, 766 F.2d 1416 (10th Cir. 1985).

118 *See, e.g.*, Allen v. United States, 588 F. Supp. 247 (D. Utah 1984) (delayed manifestation of cancers from open-air atomic testing prevented accrual of action); Targett v. United States, 551 F. Supp. 1231 (N.D. Cal. 1982) (delayed manifestation of cancer arising from atomic testing precluded dismissal of suit as untimely). *But see* Timothy v. United States, 612 F. Supp. 160 (D. Utah 1985) (plaintiff fully aware of injury and its probable cause by radioactive fallout more than two years before administrative claim was filed).

119 *See, e.g.*, *In re* Swine Flu Prod. Liab. Litig., 764 F.2d 637 (9th Cir. 1985) (delayed manifestation factor in swine flu vaccine case); Davis v. United States, 642 F.2d 328 (9th Cir. 1981) (delayed manifestation of injury would not toll statute in oral polio vaccine case), *cert. denied*, 455 U.S. 919 (1982); Gallick v. United States, 542 F. Supp. 188 (M.D. Pa. 1982) (delayed manifestation not applicable in swine flu vaccine case).

120 *See, e.g.*, Bishop v. United States, 574 F. Supp. 66 (D.D.C. 1983) (in action for wrongful injection of test drug, delayed manifestation of injury would not toll statute); Sweet v. United States, 528 F. Supp. 1068 (D.S.D. 1981) (knowledge of government use of LSD

V. Special Tolling Doctrines

There are several "special" tolling doctrines which may prevent the FTCA statute of limitations from accruing. They involve wrongful death claims, continuous treatment, equitable principles, and the failure to diagnose and treat a preexisting injury. As with other facets of the *Kubrick* standard, these varied tolling theories actually depend in the final analysis upon the level of knowledge reasonably available to the victim. The validity of these doctrines as independent theories is therefore questionable, although they may serve some small useful function in focusing the limitations inquiry on knowledge.

A. *Continuous Treatment*

The "continuous treatment" doctrine for tolling the medical malpractice statute of limitations has been mentioned in several post-*Kubrick* cases, although it has not, strictly speaking,[121] been followed in any.[122] Under this doctrine, when a physician continues to treat a patient for the same condition which gave rise to the asserted malpractice, the statute of limitations does not begin to run until the patient-doctor relationship ends.[123]

Several justifications have been proffered for the continuous treatment theory: "first, it would obviously be both absurd and inappropriate to force a claimant to institute suit against either a hospital or physician while still undergoing corrective medical treatment, . . . and second, it prevents the concealment by physicians of malpractice acts until the time in which to sue has expired."[124] Two opposing ideas seem to be at work in this doctrine; that a patient should not disturb the confidential therapeutic relationship between the patient and the doctor, and yet that the physician may still be apt to conceal the truth about any malpractice from the gullible, trusting patient.[125]

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vitiated delayed manifestation assertion by plaintiff), *aff'd*, 687 F.2d 246 (8th Cir. 1982); Cox v. United States, 513 F. Supp. 564 (W.D. Ky. 1981) (plaintiff's early awareness of problems from government use of LSD prevented delayed manifestation argument).

121 The doctrine was employed as a subsidiary justification in Todd v. United States, 570 F. Supp. 670, 676-77 (D.S.C. 1983) (claim alleging surgical malpractice was timely because of reasonable, although erroneous, belief that a post-surgery fall caused a debilitating condition known as central cord syndrome).

122 *See, e.g.*, Dundon v. United States, 559 F. Supp. 469, 472 (E.D.N.Y. 1983). *See also* notes 96-100 *supra* and accompanying text.

123 *See, e.g.*, Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962) (first enunciation of the "continuous treatment" doctrine).

124 DeGirolamo v. United States, 518 F. Supp. 778, 780-81 (E.D.N.Y. 1981) (*see* note 93 *supra*).

125 See the excellent discussion of the "continuous treatment" doctrine in Kelly v. United States, 554 F. Supp. 1001, 1003-04 (E.D.N.Y. 1983) (claim for unpleasant gastrointestinal side effects of surgical procedures).

For the doctrine to apply, there must be a personal, confidential relationship with the physician charged with the malpractice, or a direct concert between the tortious doctor and succeeding medical practitioners.[126] There must also be an ongoing therapeutic relationship, not just an isolated operation or phase of treatment.[127] Intermittent visits and treatment by independent doctors and hospitals will preclude use of the doctrine.[128] A mere continuing right to demand further treatment at federal expense is insufficient to qualify under the continuous treatment theory.[129] Finally, if the patient actually knows of the acts constituting malpractice, he cannot avoid the statute of limitations by asserting that he was under continuous treatment.[130]

By enunciating this doctrine and then riddling it with exceptions and qualifications, the federal courts have demonstrated its unsuitability for the Federal Tort Claims Act. There is a clear countervailing "congressional intent to induce prospective plaintiffs to investigate possible claims promptly and to sue before evidence becomes stale and memories fade."[131] If care has been negligent, then any interruption could prove as salutary as harmful. Moreover, if a doctor is concealing vital facts over a course of continuing treatment, the victim's claim will not accrue until knowledge of the critical facts is actually obtained. The *Kubrick* formula seems to adequately cover the continuous treatment scenario without the excresence of a separate continuous treatment doctrine.[132]

B. *Failure to Diagnose and Treat a Preexisting Injury*

The Ninth Circuit has formulated a tolling doctrine that supposedly lies outside of the *Kubrick* standard.[133] The seminal case is

126 *See* Page v. United States, 729 F.2d 818, 823 n.36 (D.C. Cir. 1984) (dictum) (alleged damage caused by negligent drug therapy).

127 *See, e.g.*, Roll v. United States, 548 F. Supp. 97, 100-01 n.1 (E.D. Mo. 1982) (early awareness of untoward consequences of neurectomy precluded claim).

128 *See, e.g.*, Kelly v. United States, 554 F. Supp. 1001, 1004 (E.D.N.Y. 1983) (*see* note 125 *supra*). *See also* Otto v. United States, 634 F. Supp. 381 (D. Md. 1986) (medical malpractice claim barred when consultations with private physician and two specialists effectively terminated the intimate relationship supposedly protected by continuous treatment doctrine).

129 Mortensen v. United States, 509 F. Supp. 23, 30 (S.D.N.Y. 1980) (claim for negligent care by U.S. Public Health Service untimely).

130 *See, e.g.*, DeGirolamo v. United States, 518 F. Supp. 778, 781 (E.D.N.Y. 1981) (*see* note 93 *supra*).

131 Dundon v. United States, 559 F. Supp. 469, 473 (E.D.N.Y. 1983). *See* notes 96-100 *supra* and accompanying text.

132 *See, e.g.*, Kelly v. United States, 554 F. Supp. 1001, 1004 (E.D.N.Y. 1983) (*see* note 125 *supra*).

133 *See, e.g.*, Raddatz v. United States, 750 F.2d 791, 796 (9th Cir. 1984) (alleged negligence of Navy doctors in treating perforation caused by insertion of IUD).

Augustine v. United States,[134] where Air Force dental surgeons failed to diagnose a cancerous lump in the early treatable stage of development on the palate of their patient. The small lump shortly developed into incurable metastatic cancer. The victim filed a federal tort claim more than two years after the government negligence, but less than two years after the development of the mestastatic condition became apparent. The government argued that the claim arose when the lump was first examined and its significance overlooked.[135]

The Ninth Circuit saw the situation differently:

> Where a claim of medical malpractice is based on the failure to diagnose or treat a pre-existing condition, the injury is not the mere undetected existence of the medical problem at the time the physician failed to diagnose or treat the patient or the mere continuance of that same undiagnosed problem in substantially the same state. Rather, the injury is the *development* of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment. In this type of case, it is only when the patient becomes aware or through the exercise of reasonable diligence should have become aware of the development of a pre-existing problem into a more serious condition that his cause of action can be said to have accrued for purposes of section 2401(b).[136]

The court held that the claim was timely filed.[137]

It should be plain that this "doctrine" is simply an application of *Kubrick* to a specific brand of malpractice. The focus is indeed narrowed to a part of the *Kubrick* standard, namely, the fact of injury. However, the approach is identical: When the victim knows the fact of injury (the development of a preexisting injury) and has discovered the critical facts of causation and agency, the cause accrues. There is nothing in the Ninth Circuit's theory that does not fit comfortably within *Kubrick*.

C. *Wrongful Death*

It would seem logical that a cause of action for wrongful death arising from medical malpractice would accrue, at the earliest, upon the death of the patient. Nevertheless, government attorneys have doggedly argued that *Kubrick* requires a wrongful death cause to accrue at the same time the cause accrues for the underlying medical negligence. Thus, if medical malpractice fatally injures a patient who lingers for three years before death, any claim for wrongful

134 704 F.2d 1074 (9th Cir. 1983).

135 *Id.* at 1076-78.

136 *Id.* at 1078 (emphasis in original).

137 *Id.* at 1079. This approach was noted, although not applied on the facts, in Green v. United States, 765 F.2d 105, 108-09 (7th Cir. 1985) (*see* note 76 *supra*).

death would be barred if the victim knew the critical facts of his injury soon after its inception. This argument misconstrues both *Kubrick* and the tort of wrongful death.

The government contention of pre-death accrual was raised in the Seventh Circuit case of *Fisk v. United States*.[138] In *Fisk*, a government doctor negligently injected radiopaque dye into a patient's carotid arteries in 1950. The dye leaked into the soft tissues of the patient's neck and slowly killed him from complications of pharyngeal ulcers and esophageal stenosis induced by dye scarring. The patient died in 1979 as a direct result of the medical malpractice committed twenty-nine years earlier.[139] The government argued that a medical malpractice claim accrues when the victim knows the existence of his injury and its cause. Since the victim had discovered these matters by 1973, the claim was barred at his death in 1979. Otherwise, the government contended, the limitations period would be stretched to the end of an injured person's life, plus two years. This would violate the *Kubrick* discovery rule.[140]

The court rejected the government's argument, holding that two separate claims arose from the wrongful acts: a personal injury claim and a wrongful death claim. Under the *Kubrick* rule, the government would remain exposed to the personal injury claim for two years after it accrued. In addition, the government was also exposed to the wrongful death claim for two years after it accrued, at the time of the wrongful death.[141] Therefore, the wrongful death claim was not barred by the statute of limitations.

Fisk was followed in *Natale v. United States*,[142] a recent decision by the District Court for the Southern District of New York. In that case, Margaret Natale was allegedly the victim of medical negligence for fifteen years in the treatment of her cervical cancer. Her estate made a wrongful death claim within two years of her death in January 1980. The plaintiff admitted that the decedent learned of the alleged malpractice in August of 1978. The government asserted that the wrongful death claim was untimely, because it was

138 657 F.2d 167 (7th Cir. 1981).

139 *Id.* at 169.

140 *Id.* at 171.

141 *Id.* at 171-73. Some state statutes may alter this formula. Several federal courts have interpreted New York's wrongful death statute, for instance, to mean that "the decedent must have a valid personal injury claim at the time of death for heirs to maintain a wrongful death action." Washington v. United States, 769 F.2d 1436, 1438 (9th Cir. 1985) (wrongful death action following lengthy coma held timely). If the victim's personal injury claim has accrued more than two years before the death, then the wrongful death claim by the survivors may be barred by the victim's lack of diligence in prosecuting the underlying personal injury claim. *See* Dundon v. United States, 559 F. Supp. 469, 475-76 (E.D.N.Y. 1983) (victim's coma tolled personal injury claim, allowing subsequent wrongful death suit).

142 No. 82 Civ. 8184-CSH (S.D.N.Y. July 26, 1985) (available on WESTLAW, DCTU database).

not filed by August of 1980, two years after the accrual date of the personal injury claim.[143]

District Judge Haight was not responsive to this argument, reasoning that the government had failed to distinguish between common law malpractice and statutory wrongful death claims. The wrongful death claim, which incidentally arose from alleged malpractice, did not accrue until the patient's death. This was true even though the medical malpractice claim accrued in August 1978.[144] The court denied the government's motion to dismiss based upon the statue of limitations.[145]

The logical extension is to apply *Kubrick* fully in wrongful death cases, and find that the cause of action accrues only when the parties entitled to bring a claim discover, in the exercise of due diligence, the critical facts connected with the fatal injury. The Ninth Circuit Court of Appeals, citing "fundamental fairness concerns," has extended the medical malpractice discovery rule to wrongful death cases.[146] Focusing on the easy conclusion that a wrongful death claim cannot accrue before death, several lower courts have ruled that a wrongful death claim *must* accrue at death and can never accrue later than that point.[147] Of course, that is similar to holding that a personal injury action always accrues precisely when the damage becomes manifest, although other critical information about the injury and its cause is still reasonably unknown. The Ninth Circuit's approach seems far more in line with the knowledge criteria enunciated in *Kubrick*.

D. *Tolling on Equitable Principles*

It has become a commonplace among federal courts that the FTCA statute of limitations cannot be tolled by equitable principles.[148] The only reason given for this constricted attitude is that courts should strictly construe the limitation period set by Congress in this narrow statutory waiver of sovereign immunity.[149] In a

143 *Id.* at 1-4, WESTLAW.

144 *Id.* at 6-7, WESTLAW.

145 *Id.* at 9, WESTLAW.

146 *See In re* Swine Flu Prod. Liab. Litig., 764 F.2d 637, 640 (9th Cir. 1985); notes 65-69 *supra* and accompanying text. *See also* Barrett v. United States, 689 F.2d 324 (2d Cir. 1982) (similar result in case of wrongful injections of mescaline derivative into involuntary test subject), *cert. denied*, 462 U.S. 1131 (1983).

147 *See, e.g.*, Lotrionte v. United States, 560 F. Supp. 41, 42 (S.D.N.Y. 1983) (claim for wrongful death barred when presented more than two years after death); Gallick v. United States, 542 F. Supp. 188, 191 (M.D. Pa. 1982) (in swine flu vaccine case, claim was untimely when filed two years after death).

148 *See, e.g.*, DeGirolamo v. United States, 518 F. Supp. 778, 783 (E.D.N.Y. 1981); note 93 *supra*.

149 *See, e.g.*, Peterson v. United States, 694 F.2d 943, 944-45 (3d Cir. 1982) (claim over alleged failure to diagnose malignancy and subsequent metastasis).

broad sense, the *Kubrick* standard is already capable of accommodating many circumstances that unfairly and inequitably prevent a medical malpractice victim from learning the critical facts of injury and causation.[150] If the government unfairly impedes a victim from filing or pursuing a claim once he possesses the requisite knowledge of government responsibility, there would seem to be sufficient justification for equitably tolling the statute of limitations until the victim can reasonably undertake the proper course of action against the United States. However, no court has yet accepted this analysis.[151]

VI. Conclusion

The statue of limitations is critically important to medical malpractice federal tort claimants. The causal connection between an injury and the federal government may remain obscure or hidden for some time. The injury itself may remain unknown for decades following the actual medical negligence. The consequent lack of information will often delay presentation of a valid tort claim beyond the apparently proper limitations period. As a result, federal courts often have to grapple with the slippery and difficult determination of when the cause of action actually did accrue.

By staying the statute of limitations until the victim knows both the fact of injury and the causal link to the government, the *Kubrick* decision has granted some coherence, fairness, and consistency to both tort victims and the federal judiciary. The major difficulties which seem to afflict the courts in this area result from a failure to define the terms and components of the *Kubrick* standard, combined with a hesitance to specifically focus on what level of claimant knowledge must be reached to trigger the running of the statue of limitations. There is no need for special ancillary doctrines to ameliorate this situation. What is needed is a concentration on what the victim knows or should know about his situation, and when that knowledge became reasonably available. A realization of this simple fact would spare considerable anxiety and uncertainty for all concerned.

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150 *See, e.g.*, Washington v. United States, 769 F.2d 1436, 1439 (9th Cir. 1985) (court tolls statute fourteen years for woman in a coma).

151 *See, e.g.*, Burns v. United States, 764 F.2d 722 (9th Cir. 1985), in which an apparently incompetent veteran relied in vain upon a Veterans' Administration caseworker to file a proper claim for compensation against the United States for negligent medical treatment. When he tried to file a proper tort claim after the two year period had run, the court of appeals refused to grant any equitable relief. Circuit Judge Reinhardt, in his scathing dissent, could find no support for the majority position in either logic or equity. *Id.* at 725-29.