that it is a vital remedy if our legal system is to continue its use of injunctions. The substantive requirements applied by the courts set out a system of self-imposed restraints which greatly limit the use of the power and serve as a check against misuse of criminal contempt. Therefore, in ordinary times, the substantive controls seem adequate. The great danger lies in the use of the power to enforce some great social policy, the justice of which most men cannot fail to agree upon. Such a policy is desegregation. With an issue of such compelling national importance, there is a possibility that the judges, in their anxiety to bring about racial equality, will relax some of the controls.[73] This might result in injustice to some persons who are against the desegregation policy and perhaps some who are merely victims of circumstances, caught between two powerful forces. Many of the southern school authorities fall within the last category.[74] They are faced with strong local pressures on one hand and the power of the federal courts on the other. Even those who honestly wish to comply with the desegregation orders will have difficulty. As to those who resist desegregation, while most cannot agree with them, it is still highly desirable that they be afforded their full legal rights. Therefore, the courts should exercise even greater caution in the use of the contempt power, and because the procedural protections are fewer, make certain that the substantive requirements are met.

MALPRACTICE AND THE STATUTE OF LIMITATIONS

Statutes of Limitation are said to serve the dual purpose of protecting defendants against the evidentiary difficulties inherent in litigating stale claims[1] and providing for security of transactions with the passage of time.[2] In negligence cases, the stale claims policy consideration is particularly cogent in view of the perishable nature of evidence usually involved.[3] Thus, the shorter statutory period for actions to recover

73. This was not the case in *In re* Kasper, No. 1555 (E.D. Tenn. 1956). The defendant was enjoined from interfering with the execution of a previously issued desegregation order. The restraining order was served on Kasper while he was making a speech. He ignored the order and continued the speech in which he urged resistance to the desegragation order. The court found this conduct amounted to inciting others to violence and held the defendant guilty of criminal contempt.

74. See Hoxie School Dist. v. Brewer, 135 F. Supp. 296 (E.D. Ark. 1955), where the school board sought to enjoin persons who were interfering with the board's attempt to comply with a desegregation order.

1. See WOOD, LIMITATION OF ACTIONS § 5 (1st ed. 1882).

2. See Patterson, *Can Law Be Scientific?*, 25 ILL. L. REV. 121 at 144 (1930); Marshall v. Watkins, 106 Ind. App. 235, 18 N.E.2d 954.

3. See Note, 28 CONN. B. J. 346, 348.

damages for personal injuries, including malpractice, not only facilitates determination of the validity of the claim, but allegedly aids in a more accurate evaluation of the extent of injuries.[4] While the basic policy considerations are no longer a matter of controversy, administration of such policy by the courts is a protean and dynamic area of the law.

At a very early period the courts did not share the enthusiasm of the legislature for the statute of limitations: it was considered an unconscionsable defense, strictly construed against the party seeking to bring himself within the statute's provisions.[5] After the courts came to consider such statutes beneficial, it was generally recognized that inflexible application would result in the sacrifice of legitimate claims along with the spurious, and numerous exceptions were always implied.[6] Limitations applicable to malpractice suits presented a singular exception to the general lenient attitude, however, and it is only since the early '30's that devices used for removing the statutory bar in other cases have been employed extensively in malpractice actions.[9]

A recent decision of the Indiana Supreme Court illustrates the problems encountered in this area.[10] The plaintiff Guy alleged that during a three year course of treatment for a fractured leg, the defendant physician negligently failed to remove a piece of drill broken during an operation on the defendant and negligently failed to inform the plaintiff of the presence of the metal which was not discovered until eleven years after the physician-patient relationship was terminated. The trial court sustained the defendant's demurrer on the grounds that the plaintiff's claim was barred by the two year statute of limitations for malpractice. Although the Supreme Court held that the statute, absolute on its face, was

4. See Howard v. Middlesborough Hospital, 242 Ky. 602, 611, 47 S.W.2d 77, 81 (1932); Nightlinger v. Johnson, 18 Pa. D. & C. 47, 48 (1932) *But see Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1177, 1203 (1950); Dawson, *Fraudulent Concealment and Statutes of Limitation,* 31 MICH. L. REV. 875, 903 & n. 80 (1933). The difficulty of proving prospective damages in malpractice cases is said to be one of the greatest hardships resulting from inflexible application of limitation statutes.

5. See cases cited in WOOD, LIMITATION OF ACTIONS 6, n. 1. One of the early American codes of professional ethics contained the following resolution: "I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery." Resolution XII, *Hoffman's Fifty Resolutions in Regard to Professional Deportment,* in 31 REPORTS OF AMERICAN BAR ASS'N 71 (1907). The modern view, however, is that such defenses are deliberately offered by the law, and it is the client's privilege to avail himself of them. See DRINKER, LEGAL ETHICS 149 (1953).

6. Dawson, *supra* note 4, n. 3 at 876.

9. One writer has speculated that the hostility of lawyers towards actions for malpractice may be traced to the "solidarity of two professional castes which are equally exposed to the criticism and dislike of laymen." Dawson, *supra* note 4, at 902.

10. Guy v. Schuldt, 138 N.E.2d 891 (Ind. Sup. Ct. 1956).

not governed by an 1881 statute providing an exception for fraudulent concealment, the court nevertheless reversed the trial court on the grounds that fraudulent concealment, independent of any statutory exception, would toll the statute of limitations. The holding in *Guy v. Schuldt* is, of course, very narrow. Specifically, it was held that since fraudulent concealment is an exception to the malpractice statute of limitations, the complaint is not demurrable because the plaintiff must be allowed an opportunity to plead the exception by way of reply. The court did not need to determine the nature of the fraudulent concealment required to toll the statute, nor did it necessarily restrict itself as to other possible techniques for preventing the running of the limitation.

The general problems suggested by *Guy v. Schuldt* have been frequently litigated in other jurisdictions, and several methods for suspending the operation of the limitation have been evolved. One line of decisions has been primarily concerned with the facts giving rise to the cause of action, with a view towards determining when the statute begins to run and what statute is applicable. Cases involving the so-called "contract," "continuing negligence," and "discovery" doctrines are involved here. Another line of cases emphasizes facts other than those giving rise to the original cause of action which may postpone the running of the statute, even though the cause of action, itself, may already be said to have accrued. The majority of these cases involve "fraudulent concealment" by the defendant. As will be seen, these categories are neither always distinct nor mutually exclusive, but they do provide a convenient dichotomy for the purposes of case analysis.

It has frequently been held in states following the first line of decisions that the physician-patient relationship is contractual in nature, and a few jurisdictions allow the plaintiff to sue for breach of contract where the cause of action would otherwise be barred by the shorter limitation on actions to recover damages for personal injury.[11] A more significant ramification of the contractual nature of the relationship is the confusion which it creates as to when a cause of action accrues.[12] The usual tort rule is that an action for negligence requires allegation and proof of actual injury, and the statute of limitations does not begin to run until the injury has been sustained.[13] Contrasted to this is the

11. Sellers v. Noah, 209 Ala. 103, 95 So. 167 (Sup. Ct. 1923); Stokes v. Wright, 20 Ga. App. 325, 93 S.E. 27 (1911). Where the action is in contract the general rule is no recovery for disability, pain or suffering. See, *e.g.*, Franklel v. Walper, 181 App. Div. 547 (1918).

12. See generally *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1201.

13. Wabash County v. Pearson, 120 Ind. 426, 22 N.E. 134 (1889) (period measured from collapse of bridge rather than from negligent construction); White v. Schnoebelen,

rule in contract actions that the statute begins to run from the breach of duty when an action for nominal damages could be sustained.[14] Although in the majority of jurisdictions malpractice has been characterized as an action sounding in tort and not contract, the statute has been held to run from the time of the negligent act, regardless of when actual damage was sustained.[15] This failure to distinguish between technical breach of contract and recovery of compensable damages for negligence may result in the anomaly of a plaintiff's action for negligence against a physician being barred before it could be feasibly maintained.[16] It is important here to distinguish situations where the plaintiff seeks to postpone the running of the statute on the grounds of ignorance of the full extent of damages. Although sound tort law should require the statutory period to run from the date actual injury results from the defendant's negligent conduct, it is clearly improper to postpone commencement of the period until maturation of all the harm.[17] It has been suggested that placing the burden on the plaintiff to prove that damages for actual injury were first recoverable within the statutory period immediately preceding suit would protect defendants from abuse of such a rule.[18]

The contractual nature of the physician-patient relationship forms the basis of the "continuing negligence" theory which in certain situations may be employed to toll the statute.[19] In *Gillette v. Tucker,* the first malpractice case to recognize the theory, the defendant physician who failed to remove a sponge from the plaintiff during an operation

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91 N.H. 273, 18 A.2d 185 (1941) (period commences when lightning causes damage rather than from negligent installation of lightning rod.) *Contra,* Wilcox v. Plummer, 4 Pet. 172 (U.S. 1830) (period held to run from time of attorney's negligent act rather than from date of damage).

14. See *e.g.,* Pennsylvania Company v. Good, 56 Ind. App. 562, 103 N.E. 672 (1913).

15. "Any act of misconduct or negligence on his (physician's) part in the service undertaken was a breach of his contract, which gave rise to a right of action in contract or tort, and the statutory period began to run at that time, and not when the actual damage results. . . . The damage sustained by the wrong done is not the cause of action. . . . Cappucci v. Barone, 226 Mass. 578, 165 N.E. 653, 654 (1919). See also Wernstein v. Blanchard, 109 N.J.L. 332, 162 Atl. 601 (Ct. Err. & App. 1932). The other rule has been recognized, however: "Where . . . the cause of action is based on consequential as distinguished from direct damages, and involves an act or omission which might have proved harmless, the cause of action must be taken as accruing only upon the actual occurrence of damage so that the statute runs only from that time." Hahn v. Claybrook, 130 Md. 179, 100 Atl. 83, 85 (1917); *cf.* Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947) (limitation on husband's action for loss of wife's services resulting from injuries to her caused by defendant's malpratcice runs from date of injury).

16. In Weinstein v. Blanchard, *supra* note 15, the court admitted that no actual damage was sustained until 19 years after the defendant physician failed to remove a rubber drainage sponge, but still denied recovery.

17. When some actual damage occurs the plaintiff can of course recover for prospective damages. See McCormick, Damages § 26 (1935).

18. See *Developments in the Law, supra* note 12 at 1202.

19. 67 Ohio Op. 106, 65 N.E. 865 (Sup. Ct. 1902).

had continued to treat the plaintiff until eight months prior to the suit. Although the operation had occurred beyond the statutory period, the court held that the action was not barred. The court reasoned that since the physician's contractual duty was to successfully complete the operation, failure to remove the sponge constituted continuous negligent conduct during the entire course of treatment.[20] In subsequent cases the language of *Gillette v. Tucker* was used to sustain the sweeping proposition that the statute of limitations never begins to run until termination of treatment.[21] The better rule as announced in more recent decisions would seem to be that the limitation should run from the date of the last *negligent* treatment.[22] In cases where the surgeon leaves a foreign substance inside the patient, the two rules would reach the same result, but where irreparable harm results from a single act, such as a negligently administered blood transfusion or X-ray treatment, the continuing attendance of the physician has no causal relation to the harm,[23] and the statute should run from the date of the last negligent act regardless of whether this coincides with termination of treatment.[24]

Although the general rule is that knowledge of the injury by the plaintiff is not a factor in determining when the statutory period commences,[25] there is some authority for a contrary rule. In the field of

20. The theory of continuing tort has also been applied to a failure to properly diagnose. Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941). The doctrine of *Gillette v. Tucker* was repudiated by the Ohio court in McArthur v. Bowers, 72 Ohio Op. 656, 76 N.E. 1128 (Sup. Ct. 1905), but was later reaffirmed in Bowers v. Santee, 99 Ohio Op. 361, 124 N.E. 238 (Sup. Ct. 1919).

21. See *e.g.*, Schmitt v. Esser, 178 Minn. 82, 226 N.W. 196 (1929) (negligent setting of broken leg), where the court quoted with approval the following policy argument from Bowers v. Santee, 99 Ohio Op. 361, 363, 124 N.E. 238, 240 (Sup. Ct. 1919): "Moreover, it is clearly just to the surgeon that he be not harassed by any premature litigation instituted in order to save the right of the patient in the event that there be substantial malpractice. The surgeon should have all reasonable time and opportunity to correct the evils which made the operation or treatment necessary, and even reasonable time and opportunity to corrct the ordinary and usual mistakes incident to even skilled surgery." In these cases "termination of treatment" does not necessarily mean formal discharge. The physician need only have ceased to treat as to the particular injury or malady in question. Schmitt v. Esser, 183 Minn. 354, 236 N.W. 622 (1931).

22. Nervick v. Fine, 195 Misc. 465, 87 N.Y.S.2d 534 (Sup. Ct. 1949) (limitation runs from date of last negligent act which is a question of fact for the jury).

23. McCoy v. Stevens, 182 Wash. 54, 44 P.2d 797 (1935) (X-ray burns); Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940). "The term malpractice itself may be applied to a single act of a physician or surgeon or, again, to a course of treatment. The statute of limitations begins to run when the breach of duty occurs . . . [if] the injury is complete at the time of the act, the statutory period commences to run at that time. When, however, the injurious consequences arise from a course of treatment, the statute does not begin to run until the treatment is terminated." Giambozi v. Peters *supra* at 56, 16 A.2d 835.

24. Gangloff v. Appelbach 319 Ill. App. 596, 49 N.E.2d 795 (1943) (negligent setting of fractured arm); Tortorello v. Reinfeld, 6 N.J. 58, 77 A.2d 240 (1950) (statute runs from date of last unsuccessful operation by plastic surgeon).

25. Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917) (X-ray burns); Conklin v.

occupational diseases it has been held that the limitation should run from the date when the plaintiff might reasonably have discovered his injury, where a certain type of injury, termed by Justice Rutledge "inherently unknowable," is involved.[26] In Missouri this rule has been statutorily adopted for all negligence actions,[27] and Louisiana follows the civil law maxium, *Contra non volentem agere non volet praescriptio* (Prescription does not run against him who is unable to sue).[28] The California courts have drawn on the theory of continuing negligence and an analogy between malpractice and workman's compensation cases to develop the rule that the statute runs from the date when the plaintiff discovered or should have discovered his injury. At first the rule was thought to apply only to foreign substance cases, but now it is held to apply to all types of malpractice actions.[29]

Of all the theories used to toll the statute of limitations in order that the plaintiff may have a practical remedy, the discovery rule is the most unique. The only area outside of occupational disease where it has found any general judicial acceptance is in actions for interference with the

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Draper, 229 App. Div. 227 (1930) (affirmed without opinion 254 N.Y. 620, 173 N.E. 892) (1930) (forceps left in abdominal cavity after operation).

26. In Urie v. Thompson, 337 U.S. 163 (1948), the plaintiff had contracted silicosis because of inhalation of silica dust over a 30 year period. J. Rutledge, in disposing of the contention that the action was barred because the plaintiff must have contracted the disease many years prior to suit, said: "If Urie were held barred . . . it would be clear that the federal legislation afforded only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect Urie was charged with knowledge of the slow & tragic disintegration of his lungs. We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor can [they] be reconciled with the traditional purposes of statutes of limitations. . . ." Urie v. Thompson, *supra* at 169.

27. ". . . the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained." Mo. ANN. STAT. § 516.100 (1952).

28. See McKnight v. Calhoun, 36 La. Ann. 408, 1 So. 612 (1884); Perrin v. Rodriguez, 153 So. 555 (1934).

29. Prior to 1936 the California courts had consistently declined to use any technique to toll the statute of limitations in malpractice actions. See *e.g.*, Gum v. Allen, 119 Cal. App. 293, 6 P.2d 311 (1931); Johnson v. Nolan, 105 Cal. App. 293, 288 Pac. 78 (1930). The origin of the discovery doctrine may be traced to Huysman v. Kirsch, 6 Cal. App. 2d 302, 57 P.2d 908 (App. Dep't 1936) (failure to remove drainage tube) where the court applied the discovery rule of workmen's compensation cases, although that case was apparently decided on the mutually independent ground of continuing negligence. For a while the discovery rule was apparently thought to be applicable only in cases involving continuing negligence, Petrucci v. Heidenreich, 43 Cal. App.2d 561, 111 P.2d 421 (1941) (improperly performed cervical cauterization), or failure to remove a foreign substance. Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (1942) (failure of dentist to remove roots of decayed teeth). Since 1947 the discovery doctrine has been applied to all types of malpractice cases without qualification. Greninger v. Fischer, 81 Cal. App. 2d 544, 184 P.2d 694 (1947) (improper diagnosis); Costra v. Regents of University of California, 116 Cal. App. 2d 445, 254 P.2d 85 (1953) (negligent treatment).

right of subjacent support. This result is reached because the gravamen of the action is considered injury to the surface of the land and the injury is therefore not said to have occurred until it becomes apparent.[30] In many instances application of the discovery rule in malpractice cases represents a similar judcial recognition that an action for negligence does not exist, even theoretically, until an injury is sustained.[31] In other situations the fraudulent concealment exception will produce the same result.[32] It must be recognized, however, that there are situations where the plaintiff's blameless ignorance of his cause of action can be traced to neither delayed harm nor fraudulent concealment.[33] In this penumbra the equities involved must be closely examined. The very uniqueness of the discovery rule in view of its apparent fairness and simplicity of application is in itself a caveat. The general rule that knowledge of the harm is immaterial in determining when the limitation begins to run is based on the assumption that in most cases a diligent plaintiff will be aware of the injury within the statutory period.[34] In many malpractice cases such an assumption is probably fallacious. Patients will frequently experience difficulty in distingnishing between injuries arising out of malpractice and those disabilities which are a normal incident of the injury or malady giving rise to treatment.[35] Certainly the term "inherently unknowable" is a fair description of cases where a foreign substance is negligently left in a patient's body, and it is submitted that extending the discovery doctrine to cover such cases is clearly warranted. The injustice of denying to this class of plaintiffs any practical relief seems great enough to justify subordination of the policy considerations behind an absolute limitation.[36]

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30. West Pratt Coal Co. v. Dorman, 161 Ala. 389, 49 So. 849 (1909); Rector, Wardens, & Vestrymen of the Church of the Holy Communion v. Paterson Ext. R.R., 66 N.J.L. 218, 49 Atl. 1031 (1901). *Contra,* Noonan v. Pardee, 200 Pa. 474, 50 Atl. 255 (1901). See note 13 *supra.*

31. See Huysman v. Kirsch, 6 Cal. App.2d 302, 57 P.2d 908 (1936).

32. See *infra,* note 40.

33. This is especially true if knowledge of the malpractice by the physician is deemed essential to invocation of the fraudulent concealment exception. See *infra,* note 54. Malpractice cases involving internal injuries arising out of negligent X-ray treatments furnish another good example. See, *e.g.,* Becker v. Floersch, 153 Kan. 374, 110 P.2d 752 (1941); Wilder v. Haworth, 187 Ore. 688, 213 P.2d 797 (1949).

34. See *Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1177, 1203 (1950).

35. See Schmitt v. Esser, 178 Minn. 82, 226 N.W. 196 (1929).

36. Placing the burden on the plaintiff to prove that the first time he could have reasonably discovered the injury was within the statutory period immediately preceding the suit, would minimize the danger of fraud. The California courts have placed a higher duty of diligence on the plaintiff to discover his injury after the physician-patient relationship has terminated. While the relationship continues the patient has a right to rely on the duty of the physician to make full disclosure, and need not make any independent effort to ascertain the existence of his cause of action. Stafford

In the second line of malpractice cases, emphasizing acts subsequent to the original cause of the action, the major source of confusion has arisen from the indiscriminate use of the word "fraud." The first distinction which must be made is between "undiscovered fraud" and "fraudulent concealment."[37] The former term is properly applicable only when the act giving rise to the original cause of action constitutes fraud as opposed to an act of negligence.[38] A deliberate misrepresentation as to the existence of a disease for the purpose of inducing the patient to submit to expensive treatments would therefore give rise to an action for fraud rather than negligence, and exemplary damages would be recoverable.[39] To come under the fraudulent concealment exception, the act of negligence giving rise to the cause of action must be accompanied by some further act of concealment preventing the plaintiff's discovery of a cause of action.[40] In either case, the running of the limitation is postponed until the patient discovered, or exercising reasonable diligence might have discovered the injury; but where fraudulent concealment is involved, the negligence or personal injury statute of limitations is applicable,[41] and where undiscovered fraud is involved, the longer fraud statute should be applied.[42] In certain jurisdictions where the exception for fraudulent concealment is not recognized, this distinction is ignored, and the subsequent concealment is held to give rise to a separate action for fraud.[43] In Alabama, on the other hand, a statute which postpones running of the limitation in causes of action grounded in fraud has been interpreted to apply to fraudulent concealment of a legal cause of action;[44] and a Georgia statute, which provides that fraud will toll all limitations, has been applied exactly as fraudulent concealment statutes in other jurisdictions.[45]

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v. Shultz, 42 Cal.2d 767, 270 P.2d 1 (1954) (negligent treatment of injured leg necessitating subsequent amputation). In this respect the discovery rule is similar to the fraudulent concealment doctrine. See *infra*, note 52.

37. For a general discussion see Dawson, *Undiscovered Fraud and Statutes of Limitation*, 31 MICH. L. REV. 591, and, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875.

38. See Graham v. Upegraph, 144 Kan. 45, 49, 58 P.2d 475, 479 (1936); Swankowski v. Diethelm, 98 Ohio App. 21, 129 N.E.2d 182 (1953).

39. Mc. Burney v. Daughety, 195 S.W.2d 113 (Tex. Civ. App. 1929).

40. Thompson v. Barnard, 142 S.W.2d 238 (Tex. Civ. App. 1940). Here the court emphasizes that the fraudulent concealment exception is really a recognition of the theory of equitable estoppel or estoppel in pais to prevent fraudulent or inequitable resort to a plea of limitations. See also Adams v. Ison, 249 S.W.2d 791 (Ky. Ct. of App. 1952) (failure to remove rubber drainage tube).

41. Schmucking v. Mayo, 183 Minn. 37, 235 N.W. 633 (1931) (implied exception).

42. Mc. Burney v. Daughtey, 19 S.W.2d 113 (Tex. Civ. App. 1929).

43. Krestich v. Stefanez, 243 Wis. 1, 9 N.W.2d 130 (1943) (failure to remove surgical needles).

44. Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940) (failure to remove sponge).

45. Saffold v. Scarborough, 91 Ga. App. 628, 86 S.E. 649 (1955) (excessive radium

The distinction between legal and equitable actions which strongly influenced the early development of the undiscovered fraud exception has been generally ignored by courts applying the fraudulent concealment exception. The early cases treated concealment by the defendant as an inherent bar to a plea of the statute of limitations which was grounded in morality and justice, and only in New Jersey has the exception taken the form of a separate bill in equity enjoining a plea of the statute at law.[46] Today the exception is recognized either by statute or judicial decision in over half the states.[47] Unfortunately, judicial acceptance of the fraudulent concealment exception in malpractice cases has only recently been achieved.[48] In early cases a strict adherence to a requirement of affirmative misrepresentations as to the existence of an injury precluded relief in situations where the physician utilized his most effective weapon of concealment: that of mere silence.[49] Only affirmative conduct, it was thought, involved that degree of moral turpitude deemed essential to invocation of the doctrine.[50] Later cases have abandoned the requirement of affirmative conduct, and it is now generally held that the fiduciary relationship between physician and patient imposes a duty of disclosure, breach of which constitutes fraudulent concealment.[51] The fiduciary relationship is also relied on to excuse the plaintiff from making any independent effort to ascertain the extent or existence of an injury as long as he remains in the defendant's care.[52] The question of exactly what must be concealed before the exception applies is in need of clarification. This is especially true where the concealment goes only to the seriousness rather than the existence of an injury, and in borderline cases the problem is further confused by the question of whether or not the plaintiff should have been put on inquiry notice as to the existence of his injury.[53]

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treatment); Tabar v. Clifton, 63 Ga. App. 788, 12 S.E.2d 137 (1940) (physician going beyond authority in operation).

46. See Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875, n. 4. *But cf.* Guy v. Schuldt, 138 N.E.2d 891, 894 (Ind. Sup. Ct. 1956).

47. Cases collected by Dawson, *supra* note 46, at 877 n. 5, 6.

48. The first unequivocal application of fraudulent concealment to a malpractice action appears to be Schmucking v. Mayo, 183 Minn. 37, 235 N.W. 633 (1931).

49. Cappucci v. Barone, 266 Mass. 578, 165 N.E. 653 (1919); De Hann v. Winter, 258 Mich. 293, 241 N.W. 923 (1932) (statute was tolled on alternative ground of continuing negligence).

50. Picket v. Aglinsky, 110 F.2d 628 (4th Cir. 1940) (applying W. Va. law) (failure to remove surgical sponge).

51. See *e.g.*, Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940) (failure to remove surgical sponge); Tabar v. Clifton, 63 Ga. App. 768, 12 S.E.2d 137 (1940).

52. Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948) (failure to remove piece of drill broken during extraction of impacted wisdom tooth); Adams v. Ison, 249 S.W.2d 791 (Ky Ct. of App. 1952) (failure to remove drainage tube).

53. See Bowman v. McPheeters, 77 Cal. App.2d 795, 176 P.2d 745 (1947); Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917); Adams v. Ison, 249 S.W.2d 791 (Ky Ct.

The unhappy distinction drawn between affirmative conduct and silence was only one aspect of a problem which continues to bother the courts. If scienter is an essential element of the fraudulent concealment exception, then allegation and proof that the defendant's silence was accompanied by knowledge that he had committed an act of malpractice would be necessary, and most courts have so held.[54] The proposition has not gone unchallenged, however. In Arizona the nebulous phrase, "constructive fraud," has been invoked to dismiss the necessity of scienter.[55] Perhaps the most forthright repudiation of scienter as an element of fraudulent concealment in malpractice cases is to be found in a Colorado decision where the court said that the doctrine should be applied in any situation where the defendant's negligent act is concealed from the plaintiff, regardless how innocently.[56] What these jurisdictions have actually done, of course, is to achieve the result of a discovery doctrine by a more devious route. When the traditional fraudulent concealment exception is stripped of the element of scienter, only the plaintiff's blameless ignorance remains as a justification for tolling the statute. The indirect approach to liberalization of statutes of limitation will probably be typical of future litigation in this area. Whereas the discovery doctrine represents a distinct innovation in statute of limitation law made possible by unique circumstances in three states,[57] the fraud and estoppel doctrines are familiar concepts in all jurisdictions. If the present trend away from strict application of limitations in malpractice suits continues, the very adaptability of such concepts will recommend them to the courts.[58]

An appraisal of the Indiana statute[59] with a view towards anticipat-

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of App. 1952); Hudson v. Shoulders, 45 S.W.2d 1072 (Tenn. Sup. Ct. 1932).

54. Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940); Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365 (1934); Brown v. Grinstead, 212 Mo. App. 533, 252 S.W. 973 (1923) (applying Ill. law); Murray v. Allen, 103 Vt. 373, 154 Atl. 678 (1931).

55. Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948). The court reasoned that the defendant physician, by the exercise of reasonable diligence, should have known that his instrument had broken off during the operation, and since good medical practice would require him to take X-rays to locate the broken drill and remove it, the failure to notify the plaintiff of his omission constituted a "constructive fraud" regardless of "moral guilt" or the intent to defraud. *Cf.* Adams v. Ison, 249 S.W.2d 791 (Ky. Ct. of App. 1952).

56. Rosane v. Singer, 112 Colo. 363, 149 P.2d 372 (1944).

57. See notes 27, 28, 29 *supra.*

58. The trend towards liberalization of the limitation is not apparent in all jurisdictions. An Oregon case has expressly rejected the discovery doctrine of California in favor of strict application. Wilder v. Haworth, 187 Ore. 688, 213 P.2d 797 (1949), and even the more common theory of continuing negligence has been rejected in a recent Washington decision. Lindquist v. Mullen, 45 Wash.2d 675, 277 P.2d 724 (1954).

59. "No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be

ing future developments in light of the *Schuldt* case reveals peculiar wording which should preclude the application of several of the previously discussed doctrines. In the majority of jurisdictions the limitation runs from the time the "cause of action accrues."[60] Thus, the courts, by interpreting the word "accrual," might postpone commencement of the period until maturation of an injury in cases where the defendant's act or omission and the harm will not naturally coincide.[61] The Indiana malpractice statute, by requiring that the period run from the date of the "act, omission, or neglect complained of," precludes this possibility, and it may be noted that this coerced result is inconsistent with results reached under other Indiana limitation statutes.[62]

The theory of continuing negligence remains a possibility. In cases where the plaintiff's injury is traceable to no single negligent act, but rather is attributable to the negligent treatment taken as a whole, there should be little doubt as to the applicability of the doctrine. In foreign substance cases a harder question is presented. By a strict construction of the words "act or omission" to mean only the original failure to remove, application of the theory might be precluded, but the additional phrase "or neglect complained of" could easily beconstrued to embrace a continuous neglect to remove, and the statute would run from termination of the duty to remove at the end of the treatment. In any event, the continuing negligence theory will not aid plaintiffs in situations similar to the *Schuldt* case where discovery of the injury occurs long after termination of the physician-patient relationship.

In such cases the theory of fraudulent concealment which was discussed by the Indiana Supreme Court in the *Schuldt* case would be the plaintiff's only alternative. Unfortunately, there is dicta in the *Schuldt* case which indicates that the fraudulent concealment exception may be given a rather unique interpretation in future Indiana cases. The court, after indicating that silence, because of the fiduciary relationship between physician and patient, may be sufficient to constitute concealment, goes on to say that in such cases the concealment ends and the statute begins to run at the termination of the physician-patient relationship.[63] Such an unusual interpretation of the fraudulent concealment exception

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brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two [2] years from the date of the act, omission or neglect complained of." IND. ANN. STAT. § 2-627 (1946).

60. *E.g.*, IOWA CODE ANN. § 614.1 (1955); MICH. COMP. LAWS § 609.13 (1948); NEB. REV. STAT. § 25-208 (1943).

61. See note 15 *supra*.

62. See note 13 *supra*.

63. Guy v. Schuldt, 138 N.E.2d 891, 895 (Ind. Sup. Ct. 1956).

indicates that the court may have confused it with the exception for undiscovered fraud. In Indiana, which has no undiscovered fraud exception, the statutory fraudulent concealment exception[64] has been applied to actions for fraud, but the decisions emphasize that fraud which is sufficient to give the complaining party a cause of action may not also be sufficient to serve as concealment.[65] In states where an independent undiscovered fraud exception is recognized by statute,[66] no additional concealment is necessary to make the statute run from discovery and if a fiduciary relationship is involved, the plaintiff may be excused from the duty to investigate or discover the fraud as long as the relationship exists.[67] Thus, as a question of fact it may often be determined that the plaintiff, at the termination of the fiduciary relationship, had information available which should have enabled him to discover the fraud, and the statute will begin to run. Where the original cause of action is based on negligence the mechanics of applying the fraudulent concealment exception will be different, since in an action for malpractice the fiduciary relationship serves a dual function. First, it creates a duty of disclosure which makes silence fraudulent concealment.[68] It also relieves the patient from any duty to independently ascertain the existence of an injury.[69] This right to rely may quite properly be said to end with the termination of the relationship,[70] but this should not mean, as a matter of law, that the plaintiff's injury is no longer effectively concealed from him. If a plaintiff who exercises all possible diligence is still unable to ascertain his injury because of information wrongfully withheld by the physician, under the theory of fraudulent concealment as applied in other jurisdictions, the statutory period would not commence. The question of when the plaintiff discovered, or exercising reasonable diligence should have discovered, his injury after concealment by the defendant, should be a question of fact determinable from the particular circumstances of each case.[71]

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64. IND. ANN. STAT. § 2-609 (1946):
"If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of the limitation after the discovery of the cause of action."

65. Jackson v. Jackson, 149 Ind. 238, 47 N.E. 963 (1897).

66. See *e.g.*, ARIZ. CODE ANN. § 12-543-(3) (1956):
"For relief on the ground of fraud or mistake, which cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

67. See *e.g.*, Heap v. Heap, 258 Mich. 250, 242 N.W. 252 (1932); McDonald v. McDougall, 86 Wash. 339, 150 Pac. 625 (1915).

68. See note 51 *supra*.

69. See note 52 *supra*.

70. *Compare* note 36 *supra*.

71. See Acton v. Morrison, 62 Ariz. 139, 155 P.2d 784 (1945); Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953); Breedlove v. Aiken, 85 Ga.

As to whether the Indiana court will go very far towards eliminating the element of scienter by the use of constructive fraud or estoppel is a matter of pure conjecture. The element of culpable wrongdoing has played an important part wherever the doctrine has been applied under the old statute[72] but perhaps the implied exception of the *Schuldt* case will prove more flexible than the statutory exception. In the final analysis, the answer will depend on whether or not the court feels that the injustice of denying blamelessly ignorant malpractice victims a remedy should over ride the policy of repose and protection against stale claims underlying statutes of limitation.

App. 719, 70 S.E.2d 85 (1952). Recognition of the fraudulent concealment exception by the Arkansas court is especially interesting in view of the statutory wording which might easily have precluded its application: "All actions of contract or tort for malpractice, error, mistake, or failure to treat or cure, against physicians, surgeons, dentists, hospitals, and sanatoria, shall be commenced within two (2) years after the cause of action accrues. *The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time.*" (Emphasis added.) ARK. STAT. ANN. § 37-205 (1947).

72. See *e.g.*, Terry v. Davenport, 185 Ind. 561, 112 N.E. 998 (1916); Lemster v. Warner, 137 Ind. 79, 36 N.E. 900 (1894); State v. Jackson, 52 Ind. App. 254, 100 N.E. 479 (1913).