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Black v. Littlejohn: A New Discovery Formula for Non-apparent Injuries Under the Professional Malpractice Statute of Limitations

Under the discovery rule a cause of action accrues and the statute of limitations begins to run when the plaintiff discovers, or reasonably should discover, facts giving rise to the claim.[1] Difficulties arise, however, in the application of this rule. Some courts have held that the plaintiff need only discover the injury to trigger the statute of limitations.[2] Other courts have stated that the limitation period will not begin until the plaintiff discovers the connection between the injury and the defendant's conduct.[3] Finally, some courts have held that even when injury and causation are known, the statute will not begin to run until the plaintiff becomes aware that the defendant's conduct was wrongful or negligent.[4]

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1. United States v. Kubrick, 444 U.S. 111, 126 (1979) (Stevens, J., dissenting) (Cause of action accrues "when a diligent plaintiff has knowledge of facts sufficient to put him on notice of an invasion of his legal rights."); Dawson v. Eli Lilly & Co., 543 F. Supp. 1330, 1333 (D.D.C. 1982) ("[T]he cause of action accrues for limitations purposes . . . when plaintiff [discovers], or by the exercise of due diligence should have discovered, the facts giving rise to her claim."); Christ v. Lipsitz, 99 Cal. App. 3d 894, 898, 160 Cal. Rptr. 498, 501 (1979) ("The statute begins to run when the plaintiff has notice of circumstances sufficient to put a reasonable person on inquiry . . . ."); Flippin v. Jarrell, 301 N.C. 108, 118, 270 S.E.2d 482, 489 (1980) ("Periods of limitation, by definition, are those periods which begin running upon accrual of the claim."), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981). For a general discussion of the discovery rule, see 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE § 13.07 (1984) [hereinafter cited as LOUISELL & WILLIAMS].

2. *See* Williams v. General Motors Corp., 393 F. Supp 387 (M.D.N.C. 1975) (statute of limitations began to run against plaintiff's decedent on date of automobile accident rather than when car was manufactured or sold), *aff'd without opinion*, 538 F.2d 327 (4th Cir. 1976); Christ v. Lipsitz, 99 Cal. App. 3d 894, 160 Cal. Rptr. 498 (1979) (limitation period began to run when wife of a supposedly sterile man became pregnant and not on date of negligently performed vasectomy); Gray v. Reeves, 76 Cal. App. 3d 567, 142 Cal. Rptr. 716 (1977) (plaintiff's recovery barred by discovery more than one year before commencement of suit that damage to hip was due to drug treatment); Kelton v. District of Columbia, 413 A.2d 919 (D.C. 1980) (statute began to run against plaintiff when told that a tubal ligation had been performed on her during a Caesarean section delivery and not when ligation was performed). For additional cases that require only that injury be shown to start the running of the limitation period, see LOUISELL & WILLIAMS, *supra* note 1, § 13.07, at 13-22 n.52.

3. *See* United States v. Kubrick, 444 U.S. 111 (1979) (statute of limitations contained in Federal Tort Claims Act began running when veteran suffered loss of hearing and was informed that a previously administered antibiotic had caused the loss); Grigsby v. Sterling Drug, Inc., 428 F. Supp. 242 (D.D.C. 1975) (statute started running once plaintiff was told that defendant's drug possibly caused plaintiff's deafness), *aff'd without opinion*, 543 F.2d 417 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 967 (1977); Johnson v. Podger, 43 N.C. App. 20, 257 S.E.2d 684 (statute of limitations started running when plaintiff was informed that infection was result of earlier hysterectomy), *cert. denied*, 298 N.C. 806, 261 S.E.2d 920 (1979). For additional cases that discuss the necessary elements of injury and causation, see LOUISELL & WILLIAMS, *supra* note 1, § 13.07, at 13-23 n.53.

4. *See* Dawson v. Eli Lilly & Co., 543 F. Supp. 1330 (D.D.C. 1982) (plaintiff's claim did not accrue for limitations purposes until discovery that defendant had marketed diethylstilbestrol without adequate testing); Jacoby v. Kaiser Found. Hosp., 622 P.2d 613 (Hawaii Ct. App. 1981) (statute of limitations commenced running when plaintiff discovered negligence of defendants in grafting arteries); Witherell v. Weimer, 85 Ill. 2d 146, 421 N.E.2d 869 (1981) (statute started to run against plaintiff when she discovered that defendants were negligent in prescribing Ortho-Novum for her). For additional cases requiring that the plaintiff discover the negligence of the defendant in addition to injury and causation, see LOUISELL & WILLIAMS, *supra* note 1, § 13.07, at 13-24 n.54.

In *Black v. Littlejohn*[5] the North Carolina Supreme Court addressed the issue whether the statute of limitations had run against a plaintiff who knew that her reproductive organs had been removed as the result of defendant's surgery, but who did not discover until more than two years later that the surgery was unnecessary.[6] Speaking for a unanimous court,[7] Justice Frye wrote that a legally recognizable injury did not exist until the plaintiff discovered defendant's wrongful conduct.[8] Therefore, plaintiff's surgery qualified as a non-apparent injury within the meaning of the applicable medical malpractice statute of limitations.[9] Because plaintiff's injury "was not readily apparent until her subsequent discovery of defendant's wrongful conduct,"[10] the North Carolina Supreme Court held that the court of appeals erred in dismissing her cause of action, which she had filed within one year after the discovery and within the bounds of the four-year period of repose.[11]

This Note discusses the conflicting policies that underlie statutes of limitations[12] and analyzes the supreme court's opinion in *Black v. Littlejohn* in light of these policies.[13] It concludes that the court was correct in interpreting discovery of injury to include discovery of defendant's negligent or wrongful conduct.[14]

In March 1976, Sharon Black began experiencing menstrual problems.[15] She consulted Dr. Thomas Littlejohn, Sr., a specialist in obstetrics and gynecology who diagnosed her condition as endometriosis.[16] On June 29, 1978, Dr.

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5. 312 N.C. 626, 325 S.E.2d 469 (1985).

6. *Id.* at 642, 325 S.E.2d at 480.

7. Justice Vaughn did not participate in the decision. He had previously considered the case in the court of appeals and had concurred in the holding the supreme court reversed. Black v. Littlejohn, 67 N.C. App. 211, 214, 312 S.E.2d 909, 911 (1984), *rev'd*, 312 N.C. 626, 325 S.E.2d 469 (1985).

8. *Black*, 312 N.C. at 646, 325 S.E.2d at 482.

9. N.C. GEN. STAT. § 1-15(c) (1983). The pertinent language of the statute states:

> (c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person . . . which originates under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin, and the injury . . . is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

Id.

10. *Black*, 312 N.C. at 646, 325 S.E.2d at 482.

11. *Id.* at 647, 325 S.E.2d at 483.

12. *See infra* notes 55-59 and accompanying text.

13. *See infra* notes 69-141 and accompanying text.

14. *See infra* notes 142-45 and accompanying text.

15. Record at 9, *Black* (plaintiff's affidavit).

16. *Id.* Endometriosis is a common disorder in which the membrane lining of the inner surface

Littlejohn told Ms. Black that "the only way to get rid of this endometrosis [sic] and to get permanent relief was by hysterectomy."[17] Dr. Littlejohn never recommended any drug treatments, yet he told Ms. Black that "he had done everything he could to avoid a hysterectomy and that nothing else would work."[18]

On October 1, 1978, Dr. Littlejohn performed a total abdominal hysterectomy on the plaintiff, as well as a bilateral salpingo oophorectomy, and an appendectomy accompanied by lysis of adhesions.[19] On August 17, 1981, Ms. Black, a medical secretary, transferred to a new job unit. After the transfer, Ms. Black began to see medical charts of patients suffering from endometriosis who were being effectively treated with the drug Danocrine.[20] She was informed by two doctors that her surgery "might have been unnecessary."[21] This information led Ms. Black to suspect that Danocrine treatments should have been tried in her case before resorting to surgery.[22] Ms. Black continued to suffer from endometriosis until July 1982 when another physician began to treat her with Danocrine.[23] She called the Food and Drug Administration and learned that the drug had been available to physicians as of September 1976.[24] At this time Ms. Black stated that it became "completely apparent to me that my hysterectomy was unnecessary."[25]

On August 16, 1982, Sharon Black initiated a medical malpractice action against Dr. Littlejohn.[26] Defendant filed a motion to dismiss pursuant to Rule

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of the uterus spreads to abnormal locations such as the "uterine wall, ovaries, or extragenital sites." THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1669 (R. Berkow 14th ed. 1982).

17. Record at 9, *Black* (plaintiff's affidavit).

18. *Id.*; *see also Black*, 312 N.C. at 627, 325 S.E.2d at 471 (quoting defendant's statement to plaintiff).

19. *Black*, 312 N.C. at 626, 325 S.E.2d at 471. An abdominal hysterectomy involves removal of the uterus through an incision in the abdominal wall. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 700 (14th ed. 1981). A bilateral salpingo oophorectomy is the removal of both ovaries and fallopian tubes. *Id.* at 1270. An appendectomy is removal of the appendix, *id.* at 111, and lysis of adhesions entails the removal of fibrous scar tissue to prevent the tissue from adhering to other surfaces, *id.* at 35, 845.

20. Record at 10, *Black* (plaintiff's affidavit). Danocrine is a type of steroid that prevents the spread of endometriosis and also reduces the patient's discomfort by causing atrophy of the endometrial tissue. L. GOVONI & J. HAYES, DRUGS AND NURSING IMPLICATIONS 295 (4th ed. 1982).

21. Record at 10, *Black* (plaintiff's affidavit); *see also Black*, 312 N.C. at 627, 325 S.E.2d at 471 (quoting plaintiff in her affidavit).

22. Record at 10, *Black* (plaintiff's affidavit); *see also Black*, 312 N.C. at 627, 325 S.E.2d at 471 (quoting plaintiff in her affidavit).

23. *Black*, 312 N.C. at 627, 325 S.E.2d at 471.

24. *Id.*

25. Record at 10, *Black* (plaintiff's affidavit); *see also Black*, 312 N.C. at 627, 325 S.E.2d at 471 (quoting plaintiff in her affidavit).

26. *Black*, 312 N.C. at 627, 325 S.E.2d at 471. Plaintiff did not file her complaint until September 3, 1982. Record at 2, *Black*. On August 16, 1982, plaintiff obtained an order extending the time to file a complaint until September 5, 1982. Plaintiff-Appellant's New Brief at 2, *Black*. Had the order not been granted, plaintiff may have been barred even under the supreme court's interpretation of injury requiring discovery of defendant's wrongful conduct. As the court of appeals noted, "perhaps as early as 17 August 1981, plaintiff contends that she began to suspect that her medical condition could have been treated without surgery, and that defendant had negligently failed to advise her of alternative, less drastic treatments." Black v. Littlejohn, 67 N.C. App. 211, 211-12, 312 S.E.2d 909, 910 (1984), *rev'd*, 312 N.C. 626, 325 S.E.2d 469 (1985). Plaintiff commenced the action one day short of the running of the statute.

12(b)(6) of the North Carolina Rules of Civil Procedure,[27] on the grounds that the professional malpractice statute of limitations barred the action.[28] The trial court granted the motion and a divided court of appeals affirmed.[29] The court of appeals held that plaintiff's injury was "the unnecessary surgery and the removal of her ovaries and other reproductive organs."[30] Therefore, plaintiff did not suffer a latent injury, in which "there is bodily injury to the person . . . which originates under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin."[31] Because the court classified plaintiff's injury as an apparent injury which constituted "the last act of the defendant giving rise to the cause of action,"[32] the three-year statute of limitations[33] began to run on the date of surgery.[34] Therefore, the discovery exceptions contained in section 1-15(c) of the North Carolina General Statutes, which would have tolled the statute until plaintiff discovered her injury, did not apply and plaintiff was barred by the three-year statute of limitations.[35]

The court of appeals acknowledged that plaintiff did not discover the defendant's negligence in failing to advise her of alternative treatments until August 17, 1981.[36] Nevertheless, the court reasoned that the purpose behind the four year exception found in section 1-15(c) was "to provide for latent injuries where the physical damage to a prospective plaintiff is not readily apparent, and not for those cases in which the injury is obvious but the alleged negligence of the doctor is not."[37] The court concluded that "[w]e do not believe our legislature intended to equate the discovery of injury with discovery of negligence."[38]

The North Carolina Supreme Court reversed, recognizing that under the statute of limitations in section 1-15(c), "[t]he pivotal language for purposes of

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27. N.C. GEN. STAT. § 1A-1 (1983). Rule 12(b)(6) provides that a defendant may move to dismiss a pleading for "[f]ailure to state a claim upon which relief can be granted." N.C.R. CIV. P. 12(b)(6).

28. N.C. GEN. STAT. § 1-15(c) (1983); *see supra* note 9.

29. *Black*, 67 N.C. App. at 214, 312 S.E.2d at 911. Judge Johnson dissented. *Id.* at 214, 312 S.E.2d at 912. For a discussion of the dissent, see *infra* note 38.

30. *Id.* at 213, 312 S.E.2d at 911.

31. N.C. GEN. STAT. § 1-15(c) (1983); *see supra* note 9 for the text of the statute.

32. N.C. GEN. STAT. § 1-15(c) (1983); *see supra* note 9 for the text of the statute.

33. N.C. GEN. STAT. § 1-52(5) (1983).

34. *Black*, 67 N.C. App. at 213, 312 S.E.2d at 911.

35. *Id.* Section 1-52(5) provides a three-year statute of limitations "for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated." N.C. GEN. STAT. § 1-52(5) (1983).

36. *Black*, 67 N.C. App. at 213, 312 S.E.2d at 911.

37. *Id.*

38. *Id.* Judge Johnson filed a lengthy dissent. *Id.* at 214, 312 S.E.2d at 912. He rejected the majority's interpretation of injury as "the submission to unnecessary surgery," *id.* at 218, 312 S.E.2d at 914, and argued for the adoption of the legal injury test, *id.* at 222, 312 S.E.2d at 916. Under this test

> a patient must file the action within one year from the time the patient discovers, or through the use of reasonable diligence should have discovered, both the fact of damage or injury suffered and facts leading to the realization that the cause was or may have been her physician's negligence. In other words, discovery—actual or presumptive—of all the essential elements of a malpractice cause of action.

Id.

this appeal is the term 'injury.' "[39] The supreme court rejected the court of appeals' narrow interpretation of injury as a "latent injury where physical damage is not readily apparent."[40] Instead, the court defined injury as "bodily injury resulting from wrongful conduct in the *legal sense*."[41] Thus, Black's injury was "the wrong entitling plaintiff to commence a cause of action. Until plaintiff discovers the wrongful conduct of defendant, she is unaware that she has been injured in the legal sense."[42]

Under the supreme court's interpretation, plaintiff suffered a non-apparent bodily injury because, even though she was aware of the surgery, she was unaware of defendant's wrongful conduct. Thus, the court applied the longer discovery statute of limitations, applicable to non-apparent injuries, instead of the shorter statute of limitations for apparent injuries. Because plaintiff's discovery of defendant's negligence occurred "two or more years after the occurence of the last act of the defendant giving rise to the cause of action,"[43] the statute granted her "one year from the date discovery is made"[44] to file a claim, provided "that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action."[45] The supreme court concluded that "[s]ince plaintiff timely filed her complaint within one year after discovering defendant's wrongful conduct or negligence, well within the four-year outer limit, her cause of action should not be dismissed."[46]

Under the supreme court's definition of legal injury in *Black*, three elements must be present to trigger the statute of limitations in section 1-15(c).

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39. *Black*, 312 N.C. at 638, 325 S.E.2d at 477.

40. *Id.*

41. *Id.* at 646, 325 S.E.2d at 483 (emphasis added).

42. *Id.* at 639, 325 S.E.2d at 478. The supreme court thus adopted the legal injury test Judge Johnson urged in his dissent. *See supra* note 38. Judge Johnson believed that the legal injury test was particularly appropriate in lack of informed consent cases. *Black*, 67 N.C. App. at 217, 312 S.E.2d at 913. Plaintiff did not contend "that defendant performed the operation negligently." *Id.* at 215-16, 312 S.E.2d at 912. In this case, "[t]he legally protected interest invaded by defendant was plaintiff's right to be adequately informed about the treatments available for her condition prior to giving consent to the recommended surgery." *Id.* at 219, 312 S.E.2d at 914. In an informed consent case, the injury

> does not actually manifest itself in a physically objective and ascertainable manner . . . . Such an "injury" manifests itself in the *knowledge or awareness* that it was not necessary to consent to surgery because another less drastic treatment was available. Until the plaintiff learned of the alternative treatment, her injury was not apparent to her.

Id. at 218, 312 S.E.2d at 914. Under this view, plaintiff's loss of her reproductive organs was only a consequential injury attributable to defendant's malpractice in failing to advise her adequately about available alternative treatments. *Id.*

43. N.C. GEN. STAT. § 1-15(c) (1983). The defendant's last act "giving rise to the cause of action" was the October 1, 1978, surgery. Plaintiff's discovery occurred, at the earliest, on August 17, 1981, approximately two years and ten months later, when she changed jobs. *Black*, 312 N.C. at 628, 325 S.E.2d at 472.

44. N.C. GEN. STAT. § 1-15(c) (1983). Plaintiff's discovery occurred on August 17, 1981. She began her action on August 16, 1982, one day before the end of the discovery period. *Black*, 312 N.C. at 628, 325 S.E.2d at 472. *See supra* note 26.

45. N.C. GEN. STAT. § 1-15(c) (1983). Because the last act of defendant was the October 1, 1978, surgery, the absolute four year limit provided by the statute was October 1, 1982. Plaintiff came within this period by commencing her action on August 16, 1982. *Black*, 312 N.C. at 629, 325 S.E.2d at 472. For a discussion of these absolute time limits or periods of repose, see *infra* note 63.

46. *Black*, 312 N.C. at 647, 325 S.E.2d at 483.

First, the plaintiff must become aware of the injury.[47] Second, the plaintiff must realize the cause of the injury.[48] Last, the plaintiff must discover that the defendant's conduct was possibly wrongful or negligent.[49]

The court identified five reasons to support its adoption of the legal injury test. First, it claimed that this interpretation best conformed to the purpose and spirit of section 1-15(c) in light of the history and circumstances that surrounded its enactment.[50] Second, the court noted that the legislative history justified interpreting the statute to include a legal injury test.[51] Third, the court found support in various rules of statutory construction that guide the interpretation of ambiguous language.[52] Fourth, the court examined how other jurisdictions have interpreted "injury" in the discovery provisions of their statutes and noted that injury is generally defined as a breach of a duty.[53] Last, the court recognized that the considerations of fairness and equity that underlie the discovery provisions conflict with an interpretation of "injury" that allows the statute of limitations to run against a plaintiff who does not have enough information to bring suit.[54]

Several policy considerations underlie the enactment of statutes of limitations. Statutes of limitations protect a defendant from stale or fraudulent claims "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[55] In addition, statutes of limitations protect the courts from having to adjudicate stale claims that otherwise would undermine their efficiency and effectiveness.[56] Finally, statutes of limitations provide an incentive to potential plaintiffs not to sleep on their rights but to investigate and file timely claims.[57]

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47. *Id.* at 645, 325 S.E.2d at 482 ("The plaintiff in the instant case . . . was well aware of her injury (if injury in a purely physical sense were the intended meaning).").

48. *Id.* ("Plaintiff knew that the removal of her reproductive organs was caused by the defendant's performance of surgery . . . .").

49. *Id.* ("[T]he one-year-from-discovery provision in G.S. 1-15(c) can and should be interpreted to include an awareness by plaintiff that wrongful or negligent conduct was involved.").

50. *Id.* at 634, 325 S.E.2d at 477; *see infra* notes 69-82 and accompanying text.

51. *Black*, 312 N.C. at 635-36, 325 S.E.2d at 476; *see infra* notes 83-90 and accompanying text.

52. *Black*, 312 N.C. at 638-39, 325 S.E.2d at 478; *see infra* notes 91-109 and accompanying text.

53. *Black*, 312 N.C. at 639-43, 325 S.E.2d at 478-80; *see infra* notes 110-24 and accompanying text.

54. *Black*, 312 N.C. at 643-45, 325 S.E.2d at 480-82; *see infra* notes 125-41 and accompanying text.

55. Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349 (1944). Morgan v. Grace Hosp. Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965), demonstrates the inherent problems of stale claims. On January 16, 1953, a physician employed by defendant performed a hysterectomy on plaintiff and failed to remove a sponge. On April 13, 1963, another physician discovered the sponge by means of an X-ray. *Id.* at 784, 144 S.E.2d at 157. The dissent noted that by the time plaintiff began her action, "the doctor who performed the operation and who presumably knows more about plaintiff's injury than any other person has long since removed from this State and his testimony as a material witness is unavailable to the defendant." *Id.* at 795, 144 S.E.2d at 163 (Haymond, J., dissenting).

56. *See* Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 & nn.89-90 (1950) (noting that this concern for efficiency often appears in the conflicts of laws area).

57. *See* United States v. Kubrick, 444 U.S. 111, 123 (1979):

In direct opposition to these policy considerations is an injured party's right to seek relief in the courts for an injury.[58] Therefore, all statutes of limitations must "strike a delicate balance between the rights of the diligent plaintiff who should not be barred from pursuing a meritorious claim and the defendant who deserves protection from stale claims after a viable defense may be weakened because of dead witnesses or forgotten facts."[59]

The court's interpretation of the professional malpractice statute of limitations was "[t]he heart of the controversy" in *Black*.[60] North Carolina General Statutes section 1-15(c) applies to three types of injuries. First, the section refers to apparent injuries, which plaintiff must discover or reasonably should discover within three years "of the last act of the defendant giving rise to the cause of action."[61] For apparent injuries, "the last act of the defendant" marks the date on which the statute begins to run,[62] and the plaintiff must commence suit within three years.[63] A second type of injury covered by section 1-15(c) is the

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A plaintiff . . . 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 . . . .

58. *Black*, 312 N.C. at 634, 325 S.E.2d at 475; *see also* Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150, 163 (1983) (discussing the strong public policy in favor of giving an injured person access to the courts).

59. *Black*, 312 N.C. at 635, 325 S.E.2d at 476; *see also* Lopez v. Swyer, 62 N.J. 267, 274, 300 A.2d 563, 567 (1973) ("[I]n each case . . . equitable claims of opposing parties must be identified, evaluated, and weighed. Where, as is often the case, they cannot be wholly reconciled, a just accommodation must be reached . . . . The interplay of the conflicting interests of the competing parties must be considered.").

60. *Black*, 312 N.C. at 628, 325 S.E.2d at 472.

61. N.C. GEN. STAT. § 1-15(c) (1983); *see supra* note 9. For apparent injury examples, see Sullivan v. McGraw, 118 Mich. 39, 76 N.W. 149 (1898) (plaintiff entered hospital for surgery on right leg but defendant operated on left); Mohr v. Williams, 95 Minn. 516, 104 N.W. 12 (1905) (plaintiff underwent surgery for the right ear but defendant operated on left).

62. Stanley v. Brown, 43 N.C. App. 503, 259 S.E.2d 408 (1979), *cert. denied*, 299 N.C. 332, 265 S.E.2d 397 (1980). The defendant in *Stanley* performed an operation on plaintiff's vagina on February 27, 1974. Plaintiff stated in her affidavit that within several days of her return home, she examined herself in the mirror and noticed a bulging condition known as "pooched intestines." *Id.* The court held that under § 1-15(c) "the action accrues at the time of defendant's last act giving rise to the cause of action. In this case the action accrued on 27 February 1974, the date defendant performed the operation on the plaintiff." *Id.* at 506, 259 S.E.2d at 410.

63. *See Black*, 312 N.C. at 629, 325 S.E.2d at 472 (under holding that plaintiff suffered an apparent injury, she was brought "within the three-year limitation period contained in the first provision of G.S. 1-15(c)."); Stanley v. Brown, 43 N.C. App. 503, 259 S.E.2d 408 (1979) (plaintiff suffering from apparent injury barred from recovery for failure to file within the three-year statutory period), *cert. denied*, 299 N.C. 332, 265 S.E.2d 397 (1980).

Historically, statutes of repose have been considered equivalent to statutes of limitation. *See* Colton v. Dewey, 212 Neb. 126, 129, 321 N.W.2d 913, 916 (1982) ("It has long been the rule of this state that a statute of limitations is a statute of repose designed to prevent recovery on stale claims."); Shearin v. Lloyd, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957) ("Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all."). Modern cases, however, have distinguished between the two statutes. "Unlike an ordinary statute of limitations which begins running upon *accrual of the claim* . . . the period contained in the statute of repose begins when a *specific event occurs*, regardless of whether a cause of action has accrued or whether any injury has resulted." *Black*, 312 N.C. at 633, 325 S.E.2d at 474-75 (emphasis added); *see also* Bolick v. American Barmag Corp., 306 N.C. 364, 366, 293 S.E.2d 415, 418 (1982) ("Such statutes [of repose] are intended to be 'a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.' ")

non-apparent injury.[64] Section 1-15(c) provides an additional one year from time of discovery provision for non-apparent injuries[65] subject to a four year period of repose.[66] The third type of injury covered by section 1-15(c) involves "a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body."[67] Foreign object injuries, like non-apparent injuries,

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(quoting Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad*, 16 U. RICH. L. REV. 323, 334 n.38 (1982)).

64. N.C. GEN. STAT. § 1-15(c) (1983) ("bodily injury to the person . . . which originates under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin"). For the full text of the statute see *supra* note 9. For examples of non-apparent injuries see Lopez v. Swyer, 62 N.J. 267, 271, 300 A.2d 563, 565 (1973) (Negligence of radiologist undiscovered until plaintiff overheard another physician state, "And there you see, gentlemen, what happens when the radiologist puts a patient on the table and goes out and has a cup of coffee."); Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974) (negligent bilateral tubal ligation undiscovered until plaintiff became pregnant).

65. N.C. GEN. STAT. § 1-15(c) (1983); *see Black*, 312 N.C. at 634, 325 S.E.2d at 475 (§ 15(c) contains "an additional one-year-from-discovery period for injuries 'not readily apparent' ") (quoting N.C. GEN. STAT. § 1-15(c)).

66. N.C. GEN. STAT. § 1-15(c) (1983) ("[I]n no event shall an action be commenced more than four years from the last act of defendant giving rise to the cause of action . . . .").

A question left unanswered by § 1-15(c) is whether a foreign object injury must also be a non-apparent injury. Clearly, the statute and the courts consider them to be separate and distinct categories. *See* N.C. GEN. STAT. § 1-15(c) (1983); *Black*, 312 N.C. at 637, 325 S.E.2d at 477 ("the General Assembly . . . [included] separate discovery provisions for both non-apparent injury and foreign objects"); Flippin v. Jarrell, 301 N.C. 108, 112, 270 S.E.2d 482, 485 (1980) ("[F]or latent claims discovered two or more years after the defendant's last negligent act, except those involving a . . . 'foreign object' left in the body, the statute established a four-year period of limitation . . . ."). There is an assumption that foreign object injuries are always non-apparent. *See, e.g.*, Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957) (physician left lap-pack in patient after surgery on appendix). This assumption may not always be valid. A patient who has a pacemaker unnecessarily implanted into the chest clearly has a "foreign object, which has no therapeutic or diagnostic purpose or effect . . . left in the body." N.C. GEN. STAT. § 1-15(c) (1983). Under the legal injury test adopted by *Black*, the patient has ten years to discover that the doctor was negligent in placing the unessential object into the chest cavity. On the other hand, when a patient has all of her reproductive organs unnecessarily removed, the statute provides only four years in which to discover the defendant's negligence. The difference does not seem to justify the statutory distinction.

The constitutionality of North Carolina General Statutes § 1-15(c) has been upheld. In Roberts v. Durham County Hosp. Corp., 56 N.C. App. 533, 289 S.E.2d 875 (1982), *aff'd*, 307 N.C. 465, 298 S.E.2d 384 (1983), the court held that the statute was not unconstitutionally vague as applied to the particular defendants in the case, a doctor and a hospital. *Id.* at 537, 289 S.E.2d at 878. Despite the fact plaintiffs had no standing, the court found that under the rational basis test, § 1-15(c) did not violate the equal protection clause of the federal constitution ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1), nor the exclusive emoluments clause of the state constitution ("No person . . . is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. CONST. Art. I, § 32). *Id.* at 541, 289 S.E.2d at 880. In Walker v. Santos, 70 N.C. App. 623, 320 S.E.2d 407 (1984), the court of appeals summarily rejected a challenge to § 1-15(c) under the open courts provision of the state constitution, which provides that, "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay." N.C. CONST. art. I, § 18. For a general discussion of the constitutionality of statutes of repose, see McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981); Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150 (1983). For a discussion of how North Carolina courts have viewed the constitutionality of statutes of repose, see Note, *Repose for Manufacturers' Six Year Statutory Bar to Products Liability Actions Upheld*—Tetterton v. Long Manufacturing Co., 64 N.C.L. REV. 1157 (1986); Note, Wilder v. Amatex Corp.: *A First Step Toward Ameliorating The Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases*, 64 N.C.L. REV. 416 (1986).

67. N.C. GEN. STAT. § 1-15(c) (1983). For the text of the statute, see *supra* note 9. For examples of foreign object injuries, see Wilder v. St. Joseph Hosp., 225 Miss. 42, 82 So. 2d 651 (1955)

have an additional one year from time of discovery provision. Unlike non-apparent injuries, however, foreign object injuries are subject to a ten year period of repose.[68]

The *Black* court stressed the purpose underlying the medical malpractice statute of limitations as a first justification for applying the legal injury test to the non-apparent injury discovery provision.[69] To determine that purpose, the court looked to the history of the statute and to the circumstances surrounding its enactment.

The court noted that prior to legislative adoption of the discovery rule, North Carolina courts followed the general rule that a cause of action arises on the date of defendant's negligent act.[70] Lack of actual or substantial damage and lack of knowledge of injury by the plaintiff were irrelevant.[71] Because of the

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(action against defendants for leaving gauze, sponges, and other substances in plaintiff after hysterectomy); Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957) (lap-pack left in abdomen of plaintiff after appendectomy performed by defendant).

68. N.C. GEN. STAT. § 1-15(c) (1983) ("a person seeking damages . . . may commence an action therefor within one year after discovery thereof . . . but in no event may an action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action"). For the text of the statute, see *supra* note 9.

69. *Black*, 312 N.C. at 630-37, 325 S.E.2d at 473-77; *see also* Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) ("[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish . . . ."), *aff'd*, 326 U.S. 404 (1945).

70. *Black*, 312 at 630-31 & n.1, 325 S.E.2d at 473 & n.1. This interpretation of when a cause of action accrues has been called the time-of-wrongful-act rule, or the occurrence rule. *See* LOUISELL & WILLIAMS, *supra* note 1, § 13.06 (discussing the rule, stating the reasons given for its use, noting the injustice that often results from its application, and examining the various doctrines that ameliorate its application); Ellis, *Malpractice Accrual: Adherence to the Common Law in Professional Negligence Actions*, 19 IDAHO L. REV. 63 (1983) (discussing the origin of the occurrence rule, its development, and the current trend away from it).

The courts also have interpreted "accrual" in other ways. The termination of treatment rule holds that the cause of action accrues at the termination of a course of treatment. When plaintiff receives only one treatment, the rule operates like the occurrence rule. However, when plaintiff undergoes a prolonged treatment and the time of the negligent act is uncertain, the cause of action arises only when the physician ceases that specific treatment. *See* LOUISELL & WILLIAMS, *supra* note 1, § 13.08, at 13-32 & n.81. The North Carolina Court of Appeals expressly adopted this rule in Ballenger v. Crowell, 38 N.C. App. 50, 59, 247 S.E.2d 287, 294 (1978). The court did note the general rule, however, that if the plaintiff discovers the injury during the treatment, the statute will run from the earlier date of discovery. *Id.* at 60, 247 S.E.2d at 294.

Under the termination of relation rule, the cause of action accrues at the end of the doctor-patient relationship. Usually this occurs when the patient recovers, when the patient is referred to another physician for treatment, or when the physician is dismissed. This interpretation may extend liability far beyond the date on which the doctor performed the negligent act. *See* LOUISELL & WILLIAMS, *supra* note 1, § 13.09, at 13-37. This rule was rejected in *Ballenger*, 38 N.C. App. at 56, 247 S.E.2d at 292.

71. *See* Shearin v. Lloyd, 246 N.C. 363, 367, 98 S.E.2d 508, 511 (1957) (statute begins to run despite absence of damage or knowledge of injury); Lewis v. Shaver, 236 N.C. 510, 512, 73 S.E.2d 320, 322 (1952) (statute begins to run despite plaintiff's lack of knowledge of injury). In *Shearin* the physician left a "lap-pack" in plaintiff's abdomen during an appendectomy. The court held that "plaintiff's cause of action accrued . . . immediately upon the closing of the incision." *Shearin*, 246 N.C. at 370, 98 S.E.2d at 513. Plaintiff in *Lewis* entered the hospital to have a cyst removed from one of her ovaries. Without informing plaintiff, defendant completely removed an ovary and tied off her fallopian tubes. After consulting various doctors about her inability to have children, plaintiff discovered what defendant had done. *Lewis*, 236 N.C. at 511, 73 S.E.2d at 321. The court held that "lack of knowledge on the part of plaintiff does not suspend the statute" and therefore she was barred from recovery. *Id.* at 512-13, 73 S.E.2d at 322.

harsh results that often arose from application of the rule,[72] and because of the courts' refusal to mitigate or modify the rule,[73] the general assembly enacted North Carolina General Statutes section 1-15(b) in 1971,[74] allowing application of a discovery rule to non-apparent injuries caused by a physician's medical malpractice.[75] Under the new law, "a plaintiff had three years from the date of discovery to bring suit, with an outside time limit of ten years."[76] In 1975, however, the general assembly amended section 1-15(b) to exclude from its coverage "malpractice arising out of the performance of or failure to perform professional services."[77] At the same time, the general assembly enacted North Carolina General Statutes section 1-15(c), a statute applicable only to professional malpractice actions.[78] The new statute reduced the discovery rule to a requirement that the plaintiff commence suit within one year after the discovery of his or her injury, with a four year period of repose for non-apparent injuries and a ten year period of repose for foreign object injuries.[79]

Whereas the purpose of section 1-15(b) "was to enlarge, [and] not to restrict the time within which an action for damages could be brought,"[80] the intent of section 1-15(c) was "to decrease the number and severity of medical malpractice claims in an effort to decrease the cost of medical malpractice insurance."[81] The *Black* court noted that this historical counterbalancing demonstrated a legislative effort to reach a compromise between "the needs of the malpractice victims and those of health care providers and insurers."[82]

The court next examined the circumstances that surrounded enactment of section 1-15(c). The court noted that the medical profession was caught in a

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72. *See supra* note 71.

73. *See, e.g.*, Shearin v. Lloyd, 246 N.C. 363, 370-71, 98 S.E.2d 508, 514 (1957).

> It is not for us to justify the limitation period prescribed for actions such as this. . . . Suffice to say, this is a matter within the province of the General Assembly.
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> . . . .
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> In some instances, [the statute] may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: "Hard cases must not make bad law." [citations omitted].

Id.

74. Act of July 21, 1971, ch. 1157, §§ 1-2, 1971 N.C. Sess. Laws 1706, 1706, *repealed by* Act of May 28, 1979, ch. 654, § 3(a), 1979 N.C. Sess. Laws 687, 689.

75. *See* Raftery v. William C. Vick Constr. Co., 291 N.C. 180, 188, 230 S.E.2d 405, 409 (1976); Johnson v. Podger, 43 N.C. App. 20, 22-23, 257 S.E.2d 684, 687, *cert. denied*, 298 N.C. 806, 261 S.E.2d 920 (1979).

76. Roberts v. Durham County Hosp. Corp., 56 N.C. App. 533, 535, 289 S.E.2d 875, 877 (1982), *aff'd*, 307 N.C. 465, 298 S.E.2d 384 (1983). The "outside time limit" is the period of repose. *See supra* note 63.

77. Medical Malpractice Act, ch. 977, § 1, 1975 N.C. Sess. Laws 3, 3, *repealed by* Act of May 28, 1979, ch. 654, § 3(a), 1979 N.C. Sess. Laws 687, 689.

78. Medical Malpractice Act, ch. 977, § 2, 1975 N.C. Sess. Laws 3, 3-4 (codified at N.C. GEN. STAT. § 1-15(c) (1983)). For the text of the statute, see *supra* note 9. In 1979 the general assembly repealed § 1-15(b). Act of May 28, 1979, ch. 654, § 3(a), 1979 N.C. Sess. Laws 687. 689. This repeal had no effect on § 1-15(c). *See Black*, 312 N.C. at 632 n.2, 325 S.E.2d at 474 n.2.

79. *See supra* notes 60-68 and accompanying text.

80. Raftery v. William C. Vick Constr. Co., 291 N.C. 180, 189, 230 S.E.2d 405, 410 (1976).

81. *Black*, 312 N.C. at 633, 325 S.E.2d at 475.

82. *Id.* at 637, 325 S.E.2d at 477.

nationwide crisis "that revolved around the exorbitant cost of medical malpractice insurance and the dramatic increase in medical malpractice claims."[83] In North Carolina a study commission was appointed to examine the situation and make recommendations to the general assembly.[84] After holding public hearings and considering the available options, the commission made its report.[85] The *Black* court found one recommendation especially noteworthy. The commissioners urged that the period of repose for all professional malpractice injuries be reduced to four years.[86] The general assembly, however, rejected this proposal and retained the ten year period of repose for foreign object injuries.[87] The general assembly also rejected the commission's recommendation to include only one discovery provision in section 1-15(c).[88] The *Black* court reasoned that this action demonstrated "an intent on the part of the general assembly to preserve the plaintiff's cause of action in medical malpractice cases, particularly when the defendant's wrongdoing is not known to plaintiff at the time of defendant's last act,"[89] and to give claimants "the maximum opportunity in delayed discovery situations to pursue their cause of action subject to the outer time limits in the statute."[90] According to the court, these specific acts by the general assembly, in direct contradiction to the commission's recommendations, justified a liberal interpretation of "injury."

After examining the legislative history of the statute, the court turned to the language of the statute. Applying technical rules of statutory construction, the court found a third basis of support for its position that discovery of injury requires discovery of wrongful conduct.[91]

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83. *Id.* at 631, 325 S.E.2d at 474. For a discussion of various legislative responses to the medical malpractice insurance crisis during the seventies, see Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417. For a discussion of the North Carolina General Assembly's reaction, see Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C.L. REV. 711 (1984).

84. The house ordered the Commission "to make a thorough and comprehensive study on any and all aspects of professional liability insurance." Act of June 16, 1975, ch. 623, § 1, 1975 N.C. Sess. Laws 749, 749. The senate specifically requested an examination of the statute of limitations. Act of June 26, 1975, ch. 861, § 1(1), 1975 N.C. Sess. Laws 1227, 1227.

85. NORTH CAROLINA PROFESSIONAL LIABILITY INSURANCE STUDY COMMISSION, REPORT TO THE GENERAL ASSEMBLY OF 1976 [hereinafter cited as INSURANCE STUDY]. *See also Black*, 312 N.C. at 631-32, 325 S.E.2d at 474 (summarizing the findings and recommendations of the commission); Roberts v. Durham County Hosp. Corp., 56 N.C. App. 533, 540-41, 289 S.E.2d 875, 879 (1982) (discussion of insurance company threats to withdraw from state unless granted an 82% rate increase and allowed to change policy forms), *aff'd*, 307 N.C. 465, 298 S.E.2d 384 (1983).

86. INSURANCE STUDY, *supra* note 85, at 28. *See Black*, 312 N.C. at 631, 325 S.E.2d at 474 ("the most significant recommendation made was to lower the outside time limit to four years for actions based on professional malpractice").

87. *See supra* note 9.

88. *See supra* note 9.

89. *Black*, 312 N.C. at 635-36, 325 S.E.2d at 476.

90. *Id.* at 637, 325 S.E.2d at 477.

91. For discussions of various methods and rules of statutory construction, see G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (arguing that courts should be able to "repeal" outdated statutes and substitute a more modern rule); Dittoe, *Statutory Revision by Common Law Courts and the Nature of Legislative Decision Making—A Response to Professor Calabresi*, 28 ST. LOUIS U.L.J. 235 (1984) (criticizing Professor Calabresi's proposal as an intrusion on the lawmaking power of legislatures); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) (arguing that an economic analysis of law, stressing how

The court first recited the general rule that "words of a statute will be given their natural, approved, and recognized meaning"[92] and noted that a dictionary may be helpful in this regard.[93] The court then stated what it deemed the most suitable meaning of injury: " 'a violation of another's rights . . . an actionable wrong.' "[94] Thus, plaintiff in *Black* suffered no injury within the meaning of the statute until she discovered defendant's violation of her rights.[95]

The court's analysis, however, is flawed. The ordinary meaning of a word in a statute should be used only when the word has no legal or technical significance.[96] The two cases cited by the court, *In re Appeal of Martin*[97] and *State v. Martin*,[98] demonstrate this principle. *In re Appeal of Martin* involved the interpretation of the word "transshipment" as used in a property taxation statute. In defining the word, the court stated the general rule that "[o]rdinarily, words of a statute will be given their natural, approved, and recognized meaning. . . . However, when technical terms or terms of art are used in a statute they are presumed to have been used with their technical meaning in mind, absent a legislative intent to the contrary."[99] The court applied the ordinary meaning rule only after finding no technical or special meaning.[100] *State v. Martin* concerned an interpretation of a state wildlife resources commission rule making it unlawful "to snag fish."[101] Only after noting that "snag" had no legal significance did the court apply the ordinary meaning rule.[102] The *Black* court clearly acknowledged that "[w]ithin the legal field, the term injury does indeed possess legal significance and is considered to be a term of art."[103] Thus, the court should have looked to the legal or technical definition, not the ordinary definition, of the word "injury."

The court cured its flawed analysis, however, by applying a second rule of statutory construction: " 'when technical terms or terms of art are used in a statute they are presumed to have been used with their technical meaning in mind.' "[104] This technical meaning should have priority over other interpretations, including the "ordinary meaning" construction.[105] A court also may presume that when an expression has historical legal significance, the " 'legislators

interest groups seek to have wealth reallocated in their favor, is not incompatible with traditional methods of interpretation); Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982) (discussing the judicial reluctance to interpret legislative silence, the reasons for the reluctance, and suggesting that in some situations it may be necessary).

92. *Black*, 312 N.C. at 638, 325 S.E.2d at 478.
93. *Id.*
94. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1164 (1971)).
95. *Id.*
96. Lafayette Transp. Serv., Inc. v. County of Robeson, 283 N.C. 494, 196 S.E.2d 770 (1973).
97. 286 N.C. 66, 209 S.E.2d 766 (1974).
98. 7 N.C. App. 532, 173 S.E.2d 47 (1970).
99. *In re* Appeal of Martin, 286 N.C. at 77-78, 209 S.E.2d at 774 (citations omitted).
100. *Id.* at 78, 209 S.E.2d at 774.
101. *Martin*, 7 N.C. App. at 533, 173 S.E.2d at 48.
102. *Id.*
103. *Black*, 312 N.C. at 639, 325 S.E.2d at 478.
104. *Id.* (quoting *In re* Appeal of Martin, 286 N.C. at 77-78, 209 S.E.2d at 774).
105. *See supra* text accompanying notes 96-103.

intended the same significance to attach by use of that term . . . .' "[106] The *Black* court recognized that the legal community historically has defined an injury as "the invasion of any legally protected interest of another"[107] rather than "an act that damages, harms, or hurts."[108] Under this interpretation, the *Black* court noted that plaintiff's injury derived from defendant's wrongful invasion of her rights. Thus, until she discovered defendant's wrongful conduct her injury was non-apparent within the meaning of section 1-15(c).[109]

The *Black* court next examined how courts in other jurisdictions have construed the discovery provisions in their statutes of limitations. One line of authority requires that a plaintiff need only discover two facts to trigger the statute: a physical injury and a causal relationship between that physical injury and defendant's conduct. For example, in *United States v. Kubrick*[110] the United States Supreme Court held that the Federal Tort Claims Act discovery provision[111] requires only that a plaintiff become "aware of his injury and its probable cause"[112] to trigger the statute.

> 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.[113]

Courts that adhere to this rule emphasize the general purpose of statutes of

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106. *Black*, 312 N.C. at 639, 325 S.E.2d at 478 (quoting Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981)). *Sheffield* involved an interpretation of the term "tender offer" under the Williams Act. 15 U.S.C. § 78n(d)(1) (1982).

107. *Id.*; *see* RESTATEMENT (SECOND) OF TORTS § 7(1) & comment a (1965); *see also* Christ v. Lipsitz, 99 Cal. App. 3d 894, 897, 160 Cal. Rptr. 498, 500 (1979) ("The word 'injury' in the statute includes not only the physical condition but also the negligent cause of the condition.").

108. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1164 (1971).

109. *Black*, 312 N.C. at 639, 325 S.E.2d at 478. The *Black* court adopted the definition that "injury is legal injury is legal wrong is malpractice is cause of action is negligence." Jacoby v. Kaiser Found. Hosp., 622 P.2d 613, 617 (Hawaii Ct. App. 1981).

110. 444 U.S. 111 (1979).

111. The Federal Tort Claims Act provides that "A tort claim against the United States shall be forever barred unless it is presented . . . within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b) (1982).

112. *Kubrick*, 444 U.S. at 118.

113. *Id.* at 122. Kubrick has been severely criticized for two reasons. First, it imposes a duty on the injured party to "protect himself by seeking advice in the medical and legal community." *Kubrick*, 444 U.S. at 123. The court of appeals in *Black* also adopted this view, noting that "through the use of reasonable diligence [plaintiff] could have obtained a second medical opinion . . . ." *Black*, 67 N.C. App. at 213, 312 S.E.2d at 911. This affirmative duty was rejected by the North Carolina Supreme Court. The fiduciary relationship between the parties grants a patient the right to rely on the physician's knowledge and skill. *Black*, 312 N.C. at 646, 325 S.E.2d 482. The *Kubrick* position only "penalizes the patient who has full confidence in his or her doctor and serves to promote an atmosphere of mutual suspicion and distrust." *Black*, 67 N.C. App. at 217, 312 S.E.2d at 913 (Johnson, J., dissenting). This position also fails to recognize the conspiracy of silence that often prevents even a diligent plaintiff from obtaining the true facts. *See Kubrick*, 444 U.S. at 128 n.4 (Brennan, J., dissenting) (responding to the majority's assumption that plaintiff can obtain medical information from another doctor: "I am not at all sure about those odds."). Defendant in *Black* never asserted that plaintiff had a duty to investigate. Indeed, on appeal, defendant claimed that the language was

limitations—the prevention of stale claims.[114] When foreign objects are involved, the damaging evidence is preserved within the patient's body. With non-apparent injuries, however, the evidentiary problems become acute with the passage of time. Material witnesses disappear and memories grow dim. Furthermore, because the medical field experiences rapid advancements in technology and knowledge, the physician may be forced to defend against a standard that did not exist at the time of the injury.[115] The statute also involves economic and public health interests in protecting the medical profession from unreasonable claims. Increasing liability may force physicians to leave the state or stop practicing altogether.[116] The *Kubrick* court took note of these arguments and asserted that the statute of limitations itself serves "as a 'meritorious defense, in itself serving a public interest.' "[117]

These arguments, however, are inapplicable to *Black*. Unlike the Federal Tort Claims Act,[118] North Carolina General Statutes section 1-15(c) contains absolute time limits of four years for non-apparent injuries and ten years for foreign object injuries.[119] Thus, a physician will not be held liable indefinitely.[120] Furthermore, section 1-15(c) does not require actual discovery by the plaintiff. The statutory period will be triggered if the injury "should reasonably be discovered" by the injured party.[121] The plaintiff bears the burden of pleading the date of the discovery, the relevant factors involving the discovery, and

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mere dicta, "not central to the court's holding nor necessary to the decision reached." Defendant-Appellee's New Brief at 10.

A second criticism of the *Kubrick* test is that it undermines the policy of avoiding needless and spurious litigation because it forces an injured person to file a claim only to prevent the statute of limitations from running. *See* Thorpe v. DeMent, 69 N.C. App. 355, 365, 317 S.E.2d 692, 698 (Phillips, J., dissenting) ("Public interest requires that people be able to know what they are about and why before they take their grievances to court or even have a right to."), *aff'd*, 312 N.C. 488, 322 S.E.2d 777 (1984); Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979) (noting that the *Kubrick* view is inconsistent with the general rule opposing filing of unfounded claims). Thus, the *Kubrick* test of injury undermines the very purpose of § 1-15(c)—the prevention of unjustified and costly claims against the medical profession. *See supra* text accompanying note 81.

114. *See supra* notes 55-57 and accompanying text.

115. *See* Schiffman v. Hospital for Joint Diseases, 36 A.D.2d 31, 33, 319 N.Y.S.2d 674, 677 (1971) ("[D]efendants may be put in the position of resisting claims arising out of new technology or advances in medical knowledge which have taken place since the time of treatment.").

116. The North Carolina Professional Liability Insurance Study Commission noted that under a longer period of liability, the insurance companies would be required to establish larger reserves. This in turn would increase the amount of premiums physicians must pay. INSURANCE STUDY, *supra* note 85, at 4-5.

117. *Kubrick*, 444 U.S. at 117 (quoting Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938)).

118. *See supra* note 111.

119. *See supra* notes 66-68 and accompanying text.

120. A second major difference distinguishes *Black* from *Kubrick*. The Federal Tort Claims Act includes a waiver of governmental immunity that must be strictly construed. *Kubrick*, 444 U.S. at 117-18; *see also* Lincoln Constr. Co. v. Department of Admin., 3 N.C. App. 551, 165 S.E.2d 338 (1969) (statute permitting state agency to be sued must be strictly construed). In *Black* governmental immunity was not an issue.

121. *See supra* note 9. The *Black* court, however, specifically rejected imposing a duty on the plaintiff to seek a second medical opinion. *See supra* note 113; *see also* Christ v. Lipsitz, 99 Cal. App. 3d 894, 160 Cal. Rptr. 498 (1979) (plaintiff discovered negligent vasectomy upon pregnancy of wife rather than birth of child); Lutes v. Farley, 113 Ill. App. 3d 113, 446 N.E.2d 866 (1983) (plaintiff held to have discovered injury at stillbirth of child, not when later informed of defendant's possible negligence).

the circumstances that establish a reasonable delay in discovery.[122] Thus, the evidentiary problems that are often cited by the courts to justify their position that discovery of wrongdoing does not equate with discovery of injury were not present in *Black*. Indisputably, plaintiff had her reproductive organs removed by defendant. Therefore, the concern for lost or inaccurate evidence is not present. Because of these considerations, the North Carolina Supreme Court adopted the interpretation of injury used in the "better reasoned cases"[123] and held that discovery of defendant's wrongdoing is required before the statute of limitations begins to run.[124]

The final reason the North Carolina Supreme Court gave to support its holding in *Black* was a rule of fairness. The court noted that it is inherently unjust to interpret "injury" in a manner that requires the filing of a claim before the plaintiff possesses enough information upon which to base that claim.[125] One of the policies underlying the discovery rule is fairness to the plaintiff. Therefore, the discovery provision should be interpreted in a manner that furthers that policy. This goal can be achieved only through a broad interpretation of injury—defining the word injury in the legal sense.[126]

In examining the fairness rule, the court discussed *Dawson v. Eli Lilly & Co.*[127] In *Dawson* a federal district court analyzed and applied the fairness rule and identified three fact situations that commonly require application of the rule. The first arises when a plaintiff is unaware of the physical injury. The second arises when the plaintiff is aware of the harm but is unaware of its source. The final fact pattern arises when the plaintiff is aware of the injury and its cause but is unaware of any wrongful conduct.[128] The *Black* court noted that the third pattern fit the facts in *Black*.[129] After analyzing the reasoning in *Dawson*,[130] the supreme court concluded that, under the fairness rule, there was no reason to restrict the definition of injury to only the first two situations.[131]

Additional arguments have been made in support of the fairness rule. Injuries caused by medical malpractice often remain hidden for lengthy periods of

122. Christ v. Lipsitz, 99 Cal. App. 3d 894, 898, 160 Cal. Rptr. 498, 501 (1979). When the plaintiff should have reasonably discovered the injury is a question of fact for the jury to decide. *Id.*; *see also* Jacoby v. Kaiser Found. Hosp., 622 P.2d 613 (Hawaii Ct. App. 1981) (when discovery of negligent arterial graft occurred and whether plaintiff was reasonably diligent in the discovery is question for jury); Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978) (when plaintiff became aware of unnecessary narcotic treatment is question for jury); Anderson v. Shook, 333 N.W.2d 708 (N.D. 1983) (discovery date of doctor's negligent radiation treatment is issue of fact).

123. *Black*, 312 N.C. at 640, 325 S.E.2d at 479.

124. *Id.* at 642, 325 S.E.2d at 480.

125. *Id.* at 643, 325 S.E.2d at 480.

126. *See id.* at 645, 325 S.E.2d at 482; *see also* Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (statute providing discovery rule only for foreign object injuries is unconstitutional violation of equal protection clause); Brown v. Mary Hitchcock Memorial Hosp., 117 N.H. 739, 378 A.2d 1138 (1977) (rule of fairness requires that plaintiff be given a reasonable opportunity to discover injury).

127. 543 F. Supp. 1330 (D.D.C. 1982).

128. *Id.* at 1338.

129. *Black*, 312 N.C. at 645, 325 S.E.2d at 482.

130. *Id.* at 643-45, 325 S.E.2d at 480-82.

131. *Id.* at 645, 325 S.E.2d at 482. For a discussion of the three situations and examples of each, see *supra* notes 2-4 and accompanying text.

time.[132] Even when the patient experiences discomfort, he or she often assumes the annoyance to be a part of the healing process—a side effect that must be tolerated.[133] Courts are naturally reluctant to hold a patient who possesses no medical knowledge responsible for discovering an injury based on the wrongful conduct of a physician.[134] It has been stated that "the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physician or surgeon."[135]

The fairness rule is supported not only by considerations of fairness to the individual plaintiff, but by broader policy reasons as well. Fairness to society requires that an interpretation of injury comport with basic principles of public policy. The major purpose of section 1-15(c) is to prevent unjustified and costly claims against the medical profession.[136] An interpretation of the statute that fails to require discovery of defendant's wrongful conduct would encourage the filing of lawsuits to prevent the statute of limitations from running.[137] Furthermore, if the statute of limitations is deemed to run before an injured party discovers the wrongful conduct of the physician, the temptation would exist for the physician to avoid disclosure instead of attempting to correct the problem and control the damage.[138] Broadening the rule to include discovery of negligence also reduces fraudulent concealment claims frequently filed by the injured party to avoid being barred by the statute of limitations.[139] This in turn decreases the number of issues the court must address and protects the reputation of the defendant "from reckless and indiscriminate charges of dishonorable conduct."[140]

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132. RESTATEMENT (SECOND) OF TORTS, § 899 comment e, at 444 (1979).

133. Foil v. Ballinger, 601 P.2d 144, 147 (Utah 1979).

134. *See Dawson*, 543 F. Supp. at 1337 ("[M]any courts have assumed that a person who has reacted adversely to medical treatment . . . cannot be expected to know that wrongful conduct, and thus a possible cause of action, is involved . . . ."); Foil v. Ballinger, 601 P.2d 144, 147 (Utah 1979) ("when injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not . . . destroy a right of action before a person even becomes aware of the existence of that right").

135. RESTATEMENT (SECOND) OF TORTS, § 899 comment e, at 444 (1979).

136. *See supra* text accompanying note 81.

137. *See supra* note 113.

138. *See* Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979).

139. Under the fraudulent concealment rule, the statute of limitations will be tolled if the physician engages in a deliberate attempt to conceal the patient's cause of action, thereby inducing a postponement in filing suit. *See* LOUISELL & WILLIAMS, *supra* note 1, § 13.11 (discussing the rule in general, the burden of proof borne by the plaintiff, and the types of conduct held to constitute fraudulent concealment).

140. Teeters v. Currey, 518 S.W.2d 512, 518 (Tenn. 1974). In a majority of jurisdictions, the statute of limitations is tolled if the physician has fraudulently concealed facts from the injured party. *See* LOUISELL & WILLIAMS, *supra* note 1, § 13.11, at 13-43. The North Carolina statute, however, does not contain such a provision. *See supra* note 9. It is unclear whether the North Carolina courts would extend the statute of limitations in a medical malpractice action for fraudulent concealment. *See* Shearin v. Lloyd, 246 N.C. 363, 369, 98 S.E.2d 508, 513 (1957) ("[W]e need not consider the circumstances under which a defendant's fraudulent concealment of material facts would toll the running of the statute of limitations."); Lewis v. Shaver, 236 N.C. 510, 513, 73 S.E.2d 320, 322 (1952) ("Whether the fraudulent concealment of the facts by the tort-feasor constitutes an implied exception to the statute, notwithstanding its express language, we need not now decide . . . ."). *But cf.* Troy's Stereo Center, Inc. v. Hodson, 39 N.C. App. 591, 251 S.E.2d 673 (1979) (doctrine of equitable estoppel may prevent defendant from asserting statute of limitations defense in legal malpractice suit).

Finally, statutes of limitations act as an incentive to potential plaintiffs to file prompt claims. This policy, however, is inapplicable to a plaintiff unaware of any basis for the claim.[141] One can hardly be accused of sleeping on rights that one does not know exist.

In 1984 the court of appeals stated that in North Carolina "[t]he judicial fiction that damage and loss occur and causes of action therefore accrue when negligence happens rather than when injury . . . is learned about leads to many anomalous and even pernicious results and it would be a great service to the law of this state if the Supreme Court abandoned it . . . ."[142] In 1985 the supreme court took that step by adopting an interpretation of injury in medical malpractice cases that includes discovery of misconduct.

Prior to 1985, the discovery provision for non-apparent injuries contained within section 1-15(c) was as useful to an injured patient as a butter-knife to a surgeon. In *Black* the North Carolina Supreme Court sharpened it into a scalpel. Like a scalpel, however, its use will be rare. In most cases, discovery of injury, causation, and misconduct occur simultaneously. Situations in which the patient is aware of the injury and its causation but fails to suspect malpractice are infrequent.[143] Like a scalpel, its application will also be definite and precise. Because the plaintiff bears the burden of showing due diligence in discovery[144] and because the four year period of repose serves as an absolute time barrier,[145] the scope of the rule is strictly limited. In view of these facts and in light of the inequitable result that arises from a refusal to apply the rule, the North Carolina Supreme Court made a wise and well-balanced decision to require that a plaintiff discover wrongful conduct before the statute of limitations begins to run.

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141. *See* Morgan v. Grace Hosp. Inc., 149 W. Va. 783, 791-92, 144 S.E.2d 156, 161 (1965).

142. Thorpe v. DeMent, 69 N.C. App. 355, 364, 317 S.E.2d 692, 698 (Phillips, J., dissenting), *aff'd*, 312 N.C. 488, 322 S.E.2d 777 (1984). The absurdity of the occurrence rule also has been noted by the Oregon Supreme Court:

> To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, "You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy," makes a mockery of the law.

Berry v. Branner, 245 Or. 307, 312, 421 P.2d 996, 998 (1966).

143. *See Dawson*, 543 F. Supp. at 1338; Anderson v. Shook, 333 N.W.2d 708, 710 (N.D. 1983).

144. *See supra* notes 121-22 and accompanying text.

145. *See supra* note 66.