

DAMAGE DEFERRED: DETERMINING WHEN A CAUSE OF ACTION BEGINS TO ACCRUE FOR A CANCER MISDIAGNOSIS CLAIM

*Ann Louise Zarick**

I. INTRODUCTION

ONE in four Americans will die of cancer¹ and 1,479,350 Americans are estimated to be diagnosed with cancer in 2009.² By the end of 2009,³ nearly 562,340 men and woman will die of cancer.⁴ Cancer is the “leading cause of death for women aged [forty] to [seventy-nine] and men aged [sixty] to [seventy-nine].”⁵

Medical researchers are discovering new ways to treat existing cases of cancer every day,⁶ and they have dramatically improved the survival rates among cancer patients. Ironically, improved treatment also creates a greater possibility of misdiagnosis, since the success of many cancer treatments often depends on early detection. Despite being the subject of medical attention since 1600 BC,⁷ there is still much to learn about cancer because there are so many different types

* J.D. Candidate, University of Toledo, 2010. I would like to dedicate this note to my father, Joseph M. Zarick, for showing me the meaning of true strength and determination and always inspiring me to make him proud. I would also like to thank my mother, Nancy Zarick, for her unwavering support and encouragement. Finally, I would like to thank Professor Geoffrey Rapp for his guidance and advice in writing this article.

1. Aetna IntelliHealth: Diseases & Conditions: Cancer—How Common is Cancer?, <http://www.intelihealth.com/IH/ih/IH/WSIHW000/8096/24516/362246.html?d=dmContent> (last visited Jan. 22, 2010).

2. Surveillance Epidemiology and End Results: Cancer Statistics—SEER Stat Fact Sheets, <http://seer.cancer.gov/statfacts/html/all.html> (last visited Jan. 22, 2010).

3. This article was written in 2009.

4. Surveillance Epidemiology and End Results, *supra* note 2.

5. Aetna IntelliHealth, *supra* note 1.

6. See, e.g., Jason Lea, *Doctors, Researchers on Quest for a Cure*, NEWS-HERALD (Nw. Ohio), Nov. 29, 2008, <http://www.news-herald.com/articles/2008/11/29/news/nh103112.txt> (stating that “doctors and researchers are looking for ways to improve old treatments and create new ones”); *Potential New Drug Target for Chronic Leukemia*, SCIENCE DAILY.COM, Dec. 4, 2008, <http://www.sciencedaily.com/releases/2008/11/081124174901.htm> (“Researchers at the University of California, San Diego (UCSD) and the Moores UCSD Cancer Center have discovered what could be a novel drug target for an often difficult-to-treat form of leukemia.”).

7. The American Cancer Society: Cancer Reference Information: The History of Cancer—What Is Cancer?, http://www.cancer.org/docroot/CRI/content/CRI_2_6x_the_history_of_cancer_72.asp (last visited Jan. 22, 2010) (older descriptions of cancer).

and variations.⁸ One thing doctors and specialists know for certain is that the earlier the cancer is discovered, the more favorable the prognosis.⁹ Thus, the span of time a patient waits for a proper diagnosis after a misdiagnosis or after a doctor's failure to diagnose, can mean the difference between life and death.¹⁰

Unfortunately, cancer patient misdiagnosis is not as rare as one would hope; 12% of cancer patients are misdiagnosed.¹¹ Overall, "[m]edical errors are the eighth leading cause of death in the United States"¹² and malpractice related to cancer diagnosis and treatment is likely a component of this problem. Error and misdiagnosis, unsurprisingly, lead to litigation. Cancer misdiagnosis cases raise complex issues, including the issue of when does a cause of action begin to accrue for a cancer misdiagnosis claim. The Minnesota Supreme Court recently confronted this issue in *MacRae v. Group Health Plan, Inc.*¹³

Roderick MacRae's misdiagnosis changed his life.¹⁴ Mr. MacRae went to the doctor for a routine checkup and alerted the doctor to a suspicious skin lesion on his left leg.¹⁵ After conducting a shave biopsy, Mr. MacRae's doctor concluded that the lesion was benign.¹⁶ Three years later, additional suspicions concerning the skin lesion caused the doctor to re-evaluate the biopsy.¹⁷ Mr. MacRae was informed of the misdiagnosis and told he had malignant melanoma.¹⁸ By this time, the melanoma had metastasized to his lymph nodes, and less than a year after being properly diagnosed, Mr. MacRae died of "extensive metastatic malignant melanoma."¹⁹ Following her husband's death, Mrs. MacRae's sued her husband's doctors for wrongful death caused by the misdiagnosis.²⁰

8. See generally Cancer Research UK: About Cancer: Cancer Questions and Answers—How Many Different Types of Cancer Are There?, <http://www.cancerhelp.org.uk/help/default.asp?page=2545> ("There are more than 200 different types of cancer. You can develop cancer in any body organ. There are over 60 different organs in the body where a cancer can develop.") (last visited Jan. 22, 2010).

9. The American Cancer Society: Cancer Reference Information: The History of Cancer—What Is Cancer?, *supra* note 7 ("The sooner a cancer is found and treatment begins, the better are the chances of living for many years.").

10. See e.g., Kathy Kendall, Comment, *Latent Medical Errors and Maine's Statute of Limitations for Medical Malpractice: A Discussion of the Issues*, 53 ME. L. REV. 589, 590 (2001) ("Each year in the United States, between 44,000 and 98,000 hospitalized patients dies as a result of medical errors.").

11. See *Cancer Misdiagnosed in 12% of Cases: Study*, REDORBIT.COM, Oct. 10, 2005, http://www.redorbit.com/news/health/266589/cancer_misdiagnosed_in_12_of_cases_study/index.html.

12. Kendall, *supra* note 10, at 595.

13. 753 N.W.2d 711, 714-15 (Minn. 2008).

14. See generally *id.*

15. Brief and Appendix of Petitioner Margaret MacRae, Trustee for the Next of Kin of Roderick MacRae at 2-3, *MacRae v. Group Health Plan, Inc.*, 735 N.W.2d 711 (Minn. 2008).

16. *Id.* at 3.

17. *Id.* at 4.

18. *Id.*

19. *Id.*

20. *Id.* at 5.

The district court dismissed the claim on the basis that the action was barred by the four-year statute of limitations.²¹ The appellate court affirmed.²² The Minnesota Supreme Court granted leave to appeal and, on appeal, framed the issue as the point at which a cause of action begins to accrue for a cancer misdiagnosis claim, especially the court stated: “the question presented in this case focuses on when the misdiagnosis caused Roderick (and therefore Margaret) to suffer compensable damages.”²³

The Minnesota Supreme Court declined to rule that the cause of action began to accrue at the time of misdiagnosis and, instead, adopted a case-by-case approach.²⁴ Further, the Court rejected the two other approaches taken by other states:²⁵ the “discovery rule”²⁶ and the “occurrence rule.”²⁷ The Court provided minimal guidance, stating that Minnesota follows the “‘damage’ rule of accrual”²⁸ and held that “a court must determine when a cause of action accrues in cases of misdiagnosis of cancer by looking at the unique circumstances of the particular case to determine when some compensable damage occurred as a result of the alleged negligent misdiagnosis.”²⁹ The issue in each misdiagnosis case following *MacRae* is: at what point in time was the patient “damaged” by the doctor’s negligent diagnosis?

By avoiding the creation of a bright-line rule and adopting a case-by-case approach for determining when a cause of action begins to accrue for a cancer misdiagnosis claim, the Minnesota Supreme Court created further confusion. *MacRae* undercuts the goals of tort law—deterrence for wrongdoers and compensation for those who are wronged.³⁰

This comment explores how states determine when a cause of action begins to accrue for a cancer misdiagnosis claim. Part II addresses the history and current state of the statute of limitations in the context of medical malpractice. Part III synthesizes the Minnesota Supreme Court’s reasoning in *MacRae*. Part IV highlights the confusion left in place by *MacRae* and the advantages and disadvantages the various approaches provide for patients, doctors, insurance

21. *MacRae*, 753 N.W.2d at 713-14.

22. *Id.*

23. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 717 (Minn. 2008).

24. *Id.* at 721.

25. *Id.*

26. *See id.* at 719. *See also infra* Part II.C.I (discussing the discovery rule).

27. *See MacRae*, 753 N.W.2d at 719. *See also infra* Part II.C.2 (discussing the occurrence rule).

28. *MacRae*, 753 N.W.2d at 719. *See also* *Antone v. Mirviss*, 720 N.W.2d 331, 335-36 (Minn. 2006) (citing *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999)) (“Minnesota has taken the middle ground by adopting the ‘damage’ rule of accrual, under which the cause of action accrues and the statute of limitations begins to run when “‘some’ damage has occurred as a result of the alleged malpractice.””).

29. *MacRae*, 753 N.W.2d at 721-22.

30. *See Fu v. Fu*, 733 A.2d 1133, 1141 (N.J. 1999) (“*The interests underlying the field of tort law* require courts to consider the degree to which deterrence and compensation, the fundamental goals of tort law, would be furthered by the application of a state’s local law.”).

companies, and the legal community. Finally, Part V discusses other theories Minnesota could adopt.

II. HISTORY OF THE STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE CLAIMS

This section begins by discussing the law behind a medical malpractice claim and the history of the medical malpractice crisis. Next, this section outlines the various approaches to when a cause of action begins to accrue for a malpractice claim, including the discovery rule, the occurrence rule, and the damage rule. Finally, this section explains other doctrines that can affect the statute of limitations, the continuing-treatment exception, the single-discrete-act rule, minority tolling provisions, and the loss-of-chance doctrine.

A. General Treatment of Medical Malpractice Claims

Generally,³¹ there are four elements necessary to bring a medical negligence claim: “(1) the health care facility or practitioner owed the patient a duty to exercise due care, (2) the health care facility or practitioner ‘breached’ that duty, (3) the breach of duty resulted in injury to the patient, and (4) the patient sustained legally recognized damages as a result.”³² Simply put, duty, breach, injury, and damages are the basic elements of any negligence claim.³³

Though often publicized, medical malpractice claims are rarely successful. In 2001, only 27% of the medical malpractice cases tried in the seventy-five largest counties in the United States resulted in plaintiff victories.³⁴ Tort reform, combined with low success rates, has contributed to a recent decline in the number of claims filed.³⁵ But, this was not always the case.³⁶ In the early 1970s, the healthcare industry declared a medical malpractice “crisis.”³⁷

31. This is a general view of the elements for a medical malpractice claim; the majority of states have their own statutes governing medical malpractice claims. See generally David W. Feeder II, Comment, *When Your Doctor Says, “You Have Nothing to Worry About,” Don’t Be so Sure: The Effect of Fabio v. Bellomo on Medical Malpractice Actions in Minnesota*, 78 MINN. L. REV. 943, 950-51 n.40 (1994) (detailing various states’ statute of limitations for medical malpractice claims).

32. HELAINE W. HEYDEMANN, MICHAEL G. MACDONALD & ELLEN J. NEELY, 3-12 TREATISE ON HEALTH CARE LAW § 12.04 (2008) [hereinafter HEYDEMANN ET AL.].

33. Charles J. Nagy, C.J.S. *Torts* § 2 (2008).

34. Wrong Diagnosis: Statistics About Medical Malpractice, http://www.wrongdiagnosis.com/medical-malpractice/statistics_about_medical_malpractice_cases.htm (from the Bureau of Justice Statistics) (last visited Jan. 22, 2010).

35. Sarah J. Evans, *Newsletter: Number of Malpractice Claims Filed Reduced, but Cases More Severe*, AM. FAM. PHYSICIAN, Nov. 15, 2005, <http://www.aafp.org/afp/20051115/newsletter.html> (stating that according to a report conducted by Aon Corp in 2005, the frequency of medical malpractice claims declined by one percent from 2004 to 2005, however, the claims grew by 7.5% in severity).

36. See Kendall, *supra* note 10, at 600 (“In 1950, physicians had only a one in seven chance of being sued throughout their entire career.”).

37. *Id.* at 599.

B. The “Crisis” and Its Effect on Medical Malpractice Claims

The influx of medical malpractice claims in the early 1960s motivated doctors and insurance companies to reach out to their state legislatures for relief.³⁸ Legislators soon labeled this influx of complaints a “crisis,” which spurred the phenomenon of tort reform.³⁹

In the late 1950s, the American Medical Association (“AMA”) estimated that only one out of seven doctors had *ever* defended a medical malpractice suit⁴⁰—a surprisingly low rate. Damages for these rare claims and medical malpractice insurance premiums were low in the post-World War II years.⁴¹ Medical malpractice lawsuits did not appear to be an issue until the 1960s, when doctors and insurance companies began to alert policymakers of an increase in lawsuits and rising insurance premiums.⁴² In 1969, the 91st Congress considered the issue in a hearing, but found the alleged “crisis” did not exist.⁴³ During the next decade, courts were flooded with medical malpractice claims and by the mid-1970s,⁴⁴ the legislature declared it a crisis.⁴⁵

Prior to 1970, many physicians chose not to carry medical malpractice insurance.⁴⁶ As lawsuits became more common, some insurance companies in California and New York stopped issuing policies.⁴⁷ During the “crisis,” the average damages awarded to plaintiffs increased, as did insurance claim disbursements.⁴⁸ Insurance premiums skyrocketed by 1975 and, once again, doctors and insurance companies lobbied for tort reform.⁴⁹ This time, legislatures noted the influx of claims and many states took action.⁵⁰ Statutes tried to control the number of claims.⁵¹ “By the end of the 1970s, every state had enacted some form of legislation aimed at alleviating the medical malpractice crisis.”⁵² The purpose of all of this tort reform was to shift the burden to the plaintiff, in turn making it more difficult for lawsuits to succeed.⁵³ Legislative

38. Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499, 501-02 & n.8 (1989).

39. *Id.* at 502-03.

40. *Id.* at 501.

41. *See id.*

42. *Id.* at 502 & n.8.

43. *Id.* at 502.

44. *Id.* (“Crisis was not declared until 1974-1975.”).

45. *Id.*

46. Kendall, *supra* note 10, at 599.

47. Bovbjerg, *supra* note 38, at 503.

48. *Id.* at 502.

49. *See id.* at 503.

50. *See generally* A LEGISLATOR’S GUIDE TO THE MEDICAL MALPRACTICE ISSUE: A COLLECTION OF INFORMATION AND MATERIALS RELATING TO STATE LEGISLATIVE ACTION ON A CURRENT PUBLIC ISSUE (David G. Warren & Richard Merritt eds., 1976).

51. *Id.*

52. Kendall, *supra* note 10, at 603.

53. *Id.*

actions included insurance regulation reforms,⁵⁴ litigation reforms,⁵⁵ and legislation to improve “medical quality.”⁵⁶ One common reform included shortening the statute of limitations for medical malpractice actions.⁵⁷

C. *The Starting Point of Medical Malpractice Claims: When a Cause of Action Begins to Accrue—The States’ Approach*

States that carved out specific statutes of limitations for medical malpractice issues typically adopted one of three approaches to determine when a cause of action begins to accrue.⁵⁸ As a result of the medical malpractice tort reform, three rules developed.⁵⁹ Those rules—which were developed both statutorily and through common law—are the “discovery rule,” the “occurrence or injury rule,” and the “damage rule.”⁶⁰ The discovery rule does not trigger the statute of limitations until the patient discovers, or should have reasonably discovered, his or her injury.⁶¹ In an occurrence jurisdiction, the occurrence of the injury or negligent act begins the running of statute of limitations.⁶² By contrast, a damage rule jurisdiction provides that a cause of action accrues when there are legally compensable damages.⁶³ Each rule has advantages and disadvantages for patients and doctors.

1. *The Discovery Rule*

In a jurisdiction that has adopted the discovery rule, a cause of action does not begin to accrue “until the patient discovers, or reasonably should discover,

54. *Id.*

55. *Id.*

56. Bovbjerg, *supra* note 38, at 513.

57. See, e.g., OHIO REV. CODE ANN. § 2305.113 (West 2004). Time limitations for bringing medical, dental, optometric, or chiropractic claims provides:

(A) Except as otherwise provided in this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the cause of action accrued (D)(1) If a person making a medical claim, dental claim, optometric claim, or chiropractic claim, in the exercise of reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within three years after the occurrence of the act or omission, but, in the exercise of reasonable care and diligence, discovers the injury resulting from that act or omission before the expiration of the four-year period specified in division (C)(1) of this section, the person may commence an action upon the claim not later than one year after the person discovers the injury resulting from that act or omission.

Id.

58. James J. O’Malley, *Cause of Action for Medical Malpractice Based on Misdiagnosis of or Failure to Diagnose Cancer*, 13 CAUSE OF ACTIONS § 21 (1987).

59. See generally *id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See, e.g., *Antone v. Mirviss*, 720 N.W.2d 331, 335-36 (Minn. 2006).

[his or her] injury.”⁶⁴ With its origin in property law, this rule seeks to avoid harsh results for plaintiffs.⁶⁵ It allows a reasonable period of time, typically determined by statute, for a plaintiff to discover his or her injury, thus discovering his or her claim.⁶⁶

A majority of states use the “discovery rule.”⁶⁷ Most states⁶⁸ limit the statutory period to one year after discovery, in addition to having an overall statute of limitations.⁶⁹ The policy behind the discovery rule is that it would be unfair for a plaintiff to be “charged with knowledge [of an inherently unknowable injury],”⁷⁰ which would bar the plaintiff’s claim.⁷¹ For example, in *Urie v. Thompson*, the plaintiff brought a claim under the Federal Employer’s Liability Act (“FELA”) alleging that he was forced to stop working because he contracted silicosis.⁷² The Missouri Supreme Court found that the action was not time-barred; however, the United States Supreme Court, applying the discovery rule, held that it would be unfair to “charge” Urie with knowledge of his latent injury.⁷³

The discovery rule originates from an 1895 property law case in which a trespasser removed minerals from the plaintiff’s land.⁷⁴ In *Lewey v. H.C. Frick Coke Co.*, the court held that the statute of limitations did not begin to run until the plaintiff became aware of the trespass.⁷⁵ Courts have further applied this rule to cases including elements of fraud, mistake, and breach of fiduciary duty.⁷⁶

At first, courts were reluctant to extend the discovery rule to medical malpractice situations unless there was a fraudulent concealment issue.⁷⁷ For example, in *Hall v. De Saussure*, a widow filed a wrongful-death claim on behalf of her husband after a doctor performed unauthorized spinal surgery on her

64. O’Malley, *supra* note 58, § 21.

65. *See* *Lewey v. H.C. Frick Coke Co.*, 31 A. 261, 262 (Pa. 1895) (“[I]t would be inequitable to permit a defendant to profit by his own fraud.”).

66. O’Malley, *supra* note 58, § 21.

67. *Id.*

68. *See, e.g.*, OHIO REV. CODE ANN. § 2305.113(A) (West 2008) (one year discovery period); ALA. CODE § 6-5-482 (2009) (six months discovery period).

69. *See, e.g.*, LA. REV. STAT. ANN. § 9:5628(A) (2008).

No action for damages for injury or death against any physician ... shall be brought unless filed within one year from the date of the alleged act ... or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery ... claims shall be filed at the latest within a period of three years from the date of the alleged act.

Id.

70. *Urie v. Thompson*, 337 U.S. 163, 169 (1949).

71. *See, e.g., id.*

72. *Id.* at 165-66.

73. *Id.* at 167, 169.

74. *See* *Lewey*, 31 A. at 261.

75. *Lewey v. H.C. Frick Coke Co.*, 31 A. 261, 263. *See also* Cynthia Alice Feigin, Comment, *Statutes of Limitations: The Special Problem of DES Suits*, 7 AM. J.L. & MED. 91, 97 (1981).

76. *Developments in the Law—Statute of Limitations*, 63 HARV. L. REV. 1177, 1221-22 (1950).

77. *See, e.g., Hall v. De Saussure*, 297 S.W.2d 81, 85 (Tenn. Ct. App. 1956).

husband.⁷⁸ The widow argued that her claim was not barred by the one-year statute of limitations because the statute was tolled by the defendant's fraudulent concealment of the "nature of the operation."⁷⁹ The Tennessee Court of Appeals disagreed, highlighting that the "discovery rule" is not applied broadly and holding "that mere ignorance and failure of the plaintiff to discover the existence of a cause of action will not prevent the running of the statute of limitations."⁸⁰ The Court reiterated that the discovery rule is only to be applied in situations involving fraudulent concealment.⁸¹ Tennessee upheld this limitation of the "discovery rule" until 1974.⁸² Over time, courts eventually applied the discovery rule in the medical malpractice context.⁸³

Within medical malpractice law, courts first applied the discovery rule to medical malpractice claims where a doctor left a foreign object, such as a sponge, in a patient's body cavity during surgery.⁸⁴ As time went on, some courts extended the discovery rule to other situations.⁸⁵ For example, in *Lipsey v. Michael Reese Hospital*, the Illinois Supreme Court applied the discovery rule where a plaintiff was told her cancerous condition was non-cancerous⁸⁶—the statute of limitations did not begin to run until the plaintiff discovered that her presumed non-cancerous condition was actually cancerous.⁸⁷ Illinois is just one of many states to adopt the discovery rule in medical malpractice actions. Other states have also adopted the discovery rule through either common law or statute and variations on the general rule have been created.⁸⁸

78. *Id.* at 83.

79. *Id.*

80. *Id.* at 85.

81. *Id.*

82. *See* *Teeters v. Currey*, 518 S.W.2d 512, 516 (Tenn. 1974).

83. *Id.* *See also* *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967).

84. *See, e.g., Gaddis*, 417 S.W.2d at 580 ("Causes of action based upon the alleged negligence of a physician in leaving a foreign object in his patient's body are proper subjects for the 'discovery rule.'"). *See also* *Billings v. Sisters of Mercy of Idaho*, 389 P.2d 224, 232 (Idaho 1964); *Teeters*, 518 S.W.2d at 515 (foreign objects left in body cavities are arguably a form of fraudulent concealment).

85. *See, e.g., Lipsey v. Michael Reese Hosp.*, 262 N.E.2d 450, 451 (Ill. 1970).

86. *Id.*

87. *Id.* at 455.

88. *See, e.g.,* Alabama: ALA. CODE § 6-5-482 (2008); *Ex parte Sonnier*, 707 So. 2d 635 (Ala. 1997); Alaska: *Pedersen v. Zielski*, 822 P.2d 903 (Alaska 1991); Arkansas: ARK. CODE ANN. § 16-114-203 (2008) (applying the discovery rule only to foreign substances within the body); Colorado: *Davis v. Bonebrake*, 313 P.2d 982 (Colo. 1957); Delaware: DEL. CODE ANN. tit. 18, § 6856 (2008); Kentucky: *Tomlinson v. Siehl*, 459 S.W.2d 166 (Ky. 1970); Louisiana: *Kozan v. Comstock*, 270 F.2d 839 (La. 1959); Massachusetts: *Harlfinger v. Martin*, 754 N.E.2d 63 (Mass. 2001); Missouri: *Thatcher v. De Tar*, 173 S.W.2d 760 (Mo. 1943); New Jersey: *Grunwald v. Bronkesh*, 621 A.2d 459 (1993); North Carolina: *Nowell v. Hamilton*, 107 S.E.2d 112 (N.C. 1957); Ohio: *Oliver v. Kaiser Cmty. Health Found.*, 449 N.E.2d 438 (Ohio 1983); Oregon: *Frohs v. Greene*, 452 P.2d 564 (Or. 1969); Pennsylvania: *Ayers v. Morgan*, 154 A.2d 788 (Pa. 1959); Vermont: *Cavanaugh v. Abbott Labs.*, 496 A.2d 154 (Vt. 1985); Washington: *Gunnier v. Yakima Heart Ctr., Inc.*, 953 P.2d 1162 (Wash. 1998).

As the discovery rule has been incorporated into state statutes, it has also been extended.⁸⁹ The main extension is that some states require not only knowledge of the injury, but knowledge of the cause as well.⁹⁰ For example, in *Rathje v. Mercy Hospital*, the Iowa Supreme Court stated that a plaintiff must not only discover her injury, but also realize what caused her injury for a cause of action to be triggered in a medical malpractice suit.⁹¹ Iowa did not extend the discovery rule so far as to require that a plaintiff have knowledge that the doctor was negligent.⁹² In this instance, the *Rathje* decision tolled the statute of limitations even further, as the patient needed time to discover the injury and the fact that it was caused by negligence.⁹³ Thus, in certain instances this extension is very patient-friendly.⁹⁴

Discovery is the most common and the most patient-friendly rule for determining when a cause of action begins to accrue. In a cancer misdiagnosis situation, the discovery rule gives a patient time to realize that he was in fact misdiagnosed.⁹⁵ In other words, the discovery rule allows a patient to discover he was injured, while still allowing a specified time for a claim to be brought.⁹⁶ Without the discovery rule, a claim could be time-barred before a plaintiff even discovers his injury.⁹⁷ The discovery rule is especially important in states that have short time periods to bring medical malpractice actions.⁹⁸ For example, Ohio has a one-year statute of limitations for medical malpractice actions.⁹⁹ Applying the discovery rule, a plaintiff then has one year from the time when he discovers the injury to bring a claim.¹⁰⁰ For instance, assume a patient sees her physician on November 1, 2007 and is told that the lump on her breast is benign and then two months later, on January 5, 2008, a different physician discovers that the lump is in fact cancerous. In Ohio, the patient would have until January 5, 2009 to file a claim.

Although the discovery rule is considered the majority rule,¹⁰¹ some courts have explicitly rejected this rule.¹⁰² For example, in *Amu v. Barnes*, the Georgia

89. See, e.g., *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461 (Iowa 2008).

90. See, e.g., *id.*

91. *Id.*

92. *Id.* at 462-63.

93. *Id.* at 463.

94. *Id.* at 461 (“The fundamental objective of applying the discovery rule to the statute of limitations is to put malpractice plaintiffs on comparable footing as ‘other tort claimants’”).

95. See O’Malley, *supra* note 58, § 21.

96. See *id.*

97. See *id.* (“In cases of incorrect diagnosis, there is frequently a considerable lapse of time between the physician’s negligent act or acts and the manifestation of the patient’s cancer or other disease.”).

98. See OHIO REV. CODE ANN. § 2305.113(D) (West 2008) (which recognized that in instances where a patient is ill or suffering, having only a year to file a lawsuit is an insufficient period of time).

99. *Id.* § 2305.113(A).

100. *Id.* § 2305.113(D).

101. See O’Malley, *supra* note 58, § 21 (“The limitations period in medical malpractice actions is generally two or three years from the date of injury or the date of discovery of the injury.”).

Supreme Court faced a cancer misdiagnosis situation and continued to reject the discovery rule, observing that “[t]he misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis.”¹⁰³ Likewise, the Arizona legislature has limited the discovery rule to the application of foreign substance in the body claims.¹⁰⁴ Typically, states that reject or limit the discovery rule apply the occurrence rule or damage rule to medical malpractice actions.¹⁰⁵

2. *The Occurrence Rule*

In an occurrence rule (also referred to as injury rule) jurisdiction, a cause of action begins to accrue when the injury occurs, regardless of whether the plaintiff has discovered the injury.¹⁰⁶ This rule is based on basic tort law, which provides that a cause of action begins to accrue on the date the injury occurs.¹⁰⁷ Further, in the majority of tort actions, the injury occurs on the same date as the negligent act.¹⁰⁸ For example, in personal injury claim arising out of an automobile accident, the plaintiff will typically be injured on the same day as the car accident occurred. While this rule is the most straightforward, it does have limitations for patients.¹⁰⁹ In a latent-disease situation, this rule can be problematic, as “frequently [there is] a considerable lapse of time between the physician’s negligent act or acts and the manifestation of the patient’s cancer or other disease.”¹¹⁰

States have several variances of the occurrence rule.¹¹¹ For example, in the Arizona case *DeBoer v. Brown*, the plaintiff’s skin cancer was initially misdiagnosed as a wart.¹¹² Three years after the original diagnosis, the “wart” began growing.¹¹³ The “wart” was then properly diagnosed as cancer, and the plaintiff filed a medical malpractice claim.¹¹⁴ The court of appeals granted

102. See, e.g., *Amu v. Barnes*, 662 S.E.2d 113, 118 (Ga. 2008).

103. *Id.* at 551 (quoting *Surgery Assocs. v. Kearby*, 405 S.E.2d 723, 724 (Ga. Ct. App. 1991)).

104. *DeBoer v. Brown*, 673 P.2d 912, 913 (Ariz. 1983) (citing ARIZ. REV. STAT. ANN. § 12-564(B) (1982)).

105. See, e.g., *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 719 (Minn. 2008) (rejecting “both the occurrence and discovery approaches in favor of a ‘middle ground’—the ‘damage’ rule of accrual”).

106. O’Malley, *supra* note 58, § 21.

107. See, e.g., OHIO REV. CODE ANN. § 2305.10 (West 2004) (“An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.”).

108. See, e.g., *id.* See also *Benge v. Davis*, 553 A.2d 1180, 1183 (Del. 1989) (“In construing the statutory language of Section 6856, this Court has said that the phrase ‘the date upon which such injury occurred’ refers to the date when the ‘wrongful act or omission occurred.’” (quoting *Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77, 80 (Del. 1979))).

109. O’Malley, *supra* note 58, § 21.

110. *Id.*

111. See, e.g., *DeBoer v. Brown*, 673 P.2d 912, 913 (Ariz. 1983); IDAHO CODE ANN. § 5-201 (2008); *Conway v. Sonntag*, 106 P.3d 470, 472-73 (Idaho 2005).

112. *DeBoer*, 673 P.2d at 913.

113. *Id.*

114. *Id.*

summary judgment due to the claim being barred by the statute of limitations.¹¹⁵ On appeal, the Arizona Supreme Court highlighted that it was not re-adopting the previously discarded “discovery rule,” but that the cause of action began when the “‘wart’ began to grow.”¹¹⁶ This ruling was based on the statute that stated that the three-year statute of limitations begins on the “date of [the] injury.”¹¹⁷

Similarly, Idaho adopted the occurrence rule, reserving the discovery rule for cases where foreign substances are left in the body.¹¹⁸ In *Conway v. Sonntag*, the Idaho Supreme Court found that the negligent act was the puncturing of the plaintiff’s lens capsule,¹¹⁹ but that the injury *occurred* when the defendant failed to administer proper post-operative care, which in turn resulted in the plaintiff losing her eye.¹²⁰ The occurrence rule focuses on the injury occurring from the negligent act,¹²¹ whereas the discovery rule focuses on when the plaintiff discovered the injury or cause of injury.¹²²

The occurrence rule is not as forgiving for cancer misdiagnosis plaintiffs as the discovery rule. The occurrence rule can be particularly unjust for patients with latent-disease malpractice claims.¹²³ For example, in *Street v. Anniston*, the plaintiff had a mole biopsied and was told that it was benign.¹²⁴ Four years later, when the plaintiff had a malignant lump removed from her breast, the original mole biopsy was reexamined and found to be malignant.¹²⁵ The court held that the action was barred, stating “legal injury occurs at the time of the negligent act or omission, whether or not the injury is or could be discovered within the statutory period.”¹²⁶ Therefore, because the injury occurred at the time the plaintiff was misdiagnosed, the claim was time-barred.¹²⁷ Like the occurrence rule, the damage rule can also provide harsh results for sufferers of latent diseases.

3. *The Damage Rule*

Similar to the occurrence rule, the damage rule provides that a cause of action accrues when some injury or damage from the negligent act actually occurs.¹²⁸ Furthermore, like the occurrence rule, the damage rule is rooted in

115. *Id.*

116. *Id.*

117. *Id.*

118. See IDAHO CODE ANN. § 5-201 (2008).

119. 106 P.3d 470, 472-73 (Idaho 2005).

120. *Id.* at 473.

121. See O’Malley, *supra* note 58, § 21.

122. *Id.*

123. See generally *id.* (“Proving injury is a more difficult task where a physician has failed to diagnose cancer. The patient’s injury is generally the result of two concurrent causes: the cancer itself, and the physician’s failure to diagnose and treat the cancer.”).

124. 381 So. 2d 26, 27 (Ala. 1980).

125. *Id.*

126. *Id.* at 31.

127. *Id.*

128. *Antone v. Mirviss*, 720 N.W.2d 331, 335-36 (Minn. 2006).

strict tort theory such that a negligence action may not be brought without legally compensable damages.¹²⁹ From a legal standpoint, the damage rule is the most logical of the rules because it is based on the basic elements necessary to bring a negligence claim.¹³⁰ Following that theory, because a plaintiff is unable to bring a negligence claim without compensatory damages,¹³¹ the statute of limitations does not begin to run until there are compensatory damages.¹³² While the most logical from a legal point of view, the damage rule has its limitations when applied to latent-disease causes of action, the exact issue faced in *MacRae*.¹³³

According to the Minnesota Supreme Court, this rule provides a “middle-ground” approach to when a cause of action begins to accrue for a medical malpractice claim,¹³⁴ however, this rule is the least used and could be labeled the ultra-minority rule.¹³⁵ The damage rule differs from the occurrence rule in that the occurrence of a negligent act alone is insufficient to trigger the statute of limitations under the damage rule.¹³⁶ For example, in *Molloy v. Meier*, the plaintiff brought a claim against a doctor for failing to diagnose a genetic predisposition, which manifested itself in a genetic disorder in her first child.¹³⁷ In an occurrence jurisdiction, the statute of limitations would have been triggered when the physician failed to diagnose the genetic disorder.¹³⁸ In contrast, in Minnesota, which follows the damage rule, the court held that the cause of action did not begin to accrue until the plaintiff was damaged,¹³⁹ which happened when her second child was born with the same genetic disorder as her first child.¹⁴⁰

129. *Id.* at 343 n.3 (Hanson, J., dissenting) (“Consistent with our holding that a cause of action accrues upon the occurrence of any compensable damages, the statute of limitations began at the latest when Antone incurred these legal expenses.”)

130. *See* HEYDEMANN ET AL., *supra* note 32, § 12.04.

The patient must establish that: (1) the health care facility or practitioner owed the patient a duty to exercise due care, (2) the health care facility or practitioner ‘breached’ that duty, (3) the breach of duty resulted in injury to the patient, and (4) the patient sustained legally recognized damages as a result.

Id.

131. *See id.*

132. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 719 (Minn. 2008) (holding that “a negligent act is not itself sufficient for a negligence cause of action to accrue” since damages are also required).

133. *Id.* at 715.

134. *Id.* at 719-20.

135. *See, e.g.*, *DeBoer v. Brown*, 673 P.2d 912, 914 (Ariz. 1983); *St. George v. Pariser*, 484 S.E.2d 888, 891 (Va. 1997). The Minnesota Supreme Court relied on both cases in its discussion of their damage rule. *MacRae*, 753 N.W.2d at 720-21.

136. *MacRae*, 753 N.W.2d at 719.

137. 679 N.W.2d 711, 713 (Minn. 2004).

138. *See, e.g.*, *Street v. City of Anniston*, 381 So. 2d 26, 31 (Ala. 1980).

139. *Molloy*, 679 N.W.2d at 722.

139. *Id.* at 721-22.

140. *Id.* at 722.

Additionally, the “some damage” rule is frequently applied in conjunction with either the discovery rule or the occurrence rule.¹⁴¹ For instance, in Idaho, a cause of action begins to accrue at the time of the “occurrence, act, or omission complained of,” and when there is “some damage.”¹⁴² Therefore, the negligent act must occur and there must be some damage in order for the statute of limitations to run.¹⁴³ In *MacRae*, the Minnesota Supreme Court determined that in order to apply the damage rule to the case at hand, the court would have to determine as a matter of law that “some legally compensable¹⁴⁴ damage” occurred at the time of misdiagnosis.¹⁴⁵

This rule appears to be the most favorable to defendants since the doctor is not liable until “some damage” presents itself, rather than at the time of the negligence act.¹⁴⁶ When applied in a cancer misdiagnosis situation, the “some damage” rule is extremely doctor-friendly.¹⁴⁷ For instance, if a physician fails to properly diagnose a patient with cancer, but a month later renders a proper diagnosis, the patient may have a cause of action against the physician in an occurrence jurisdiction because the statute of limitations begins to accrue at the point of misdiagnosis, not at the point of “some damage.”¹⁴⁸ Consequently, in a damage jurisdiction, the patient would need to prove some damage occurred during the month-long period.¹⁴⁹ The some damage approach may be patient-friendly in circumstances where some damage is apparent to the patient, such as pain, appearance, or discomfort.¹⁵⁰ In a situation involving cancer, however, the some damage requirement is likely to present itself unknowingly to the patient and require additional expert testimony in litigation.¹⁵¹ Regardless of which rule a jurisdiction applies, some uncertainty arises when the rule is applied to a situation involving a latent disease.

4. *Uncertainty and the Three Rules*

When medical malpractice law first began developing, the claims facing the courts were easier to ascertain.¹⁵² For example, it was easy to determine when a cause of action began to accrue if the wrong limb was removed during surgery or

141. See, e.g., *Conway v. Sonntag*, 106 P.3d 470, 472 (Idaho 2005).

142. *Id.*

143. See *id.*

144. *Antone v. Mirviss*, 720 N.W.2d 331, 336 (Minn. 2006) (interpreting “some damage” to mean “compensable damage”).

145. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 720 (Minn. 2008) (declining to adopt this “broad rule of law” and adopted a case-by-case approach).

146. See generally *id.*

147. See generally *id.*

148. See *id.* at 721.

149. See *id.*

150. See generally *id.*

151. See e.g., *id.* at 722.

152. See, e.g., *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967) (foreign object left in patient’s body).

a procedure was improperly performed. The confusion and uncertainty results when courts deal with the issue of delayed manifestation of symptoms.

The some damage approach is the most vague and the most uncertain of the three rules, especially in cases involving a latent disease.¹⁵³ Jurisdictions that adopt this approach strongly rely on expert testimony or affidavits to determine when some damage existed in the patient.¹⁵⁴ Likewise, in jurisdictions where the point of some damage has not been determined, the need for additional analysis presents itself. While discovery rule jurisdictions appear to be wholly uncertain, the uncertainty mostly revolves around the issue of whether the plaintiff should have reasonably discovered the injury.¹⁵⁵ When this situation arises, there is a question of fact as to when the plaintiff should have reasonably discovered his injury.¹⁵⁶ For purposes of this comment, the discovery rule is rather straightforward: it is easy for judges, plaintiffs, defendants, and litigators to determine that a cause of action begins to accrue when the previously misdiagnosed patient is properly diagnosed or informed of a former misdiagnosis.¹⁵⁷

Finally, the rule providing the most certainty, but the least justice, for patients is the occurrence rule. In a pure occurrence jurisdiction, it is clear on its face that a cause of action begins to accrue at the “occurrence” of the negligent act or omission.¹⁵⁸ Again, for purposes of this comment, it is easy to determine when a doctor failed to diagnose or misdiagnosed cancer, as it will most likely be evident in the patient’s medical record.¹⁵⁹ While the occurrence rule provides the most certainty, it can also be the harshest rule to patients in latent-disease situations.¹⁶⁰ Weighing the amount of certainty against the fairness to plaintiffs, it is easy to see why the discovery rule is the majority rule.¹⁶¹

D. Other Doctrines That May Affect the Statute of Limitations

1. The Continued/Continuous Treatment Exception

The continuous-treatment exception is a frequent concept in medical malpractice claims.¹⁶² The exception arises when a negligent act occurs over the

153. See generally O’Malley, *supra* note 58, § 21.

154. See MacRae, 753 N.W.2d at 722 (Minn. 2008).

155. O’Malley, *supra* note 58, § 21.

156. See generally LaGesse v. PrimaCare, Inc., 899 S.W.2d 43 (Tex. App. 1995).

157. See, e.g., Davidson v. Lazcano, 204 S.W.3d 213, 216 (Mo. Ct. App. 2006) (concluding that the defendant’s “alleged malpractice occurred no later than ... the date he issued a report [correcting the misdiagnosis]”).

158. See, e.g., Conway v. Sonntag, 106 P.3d 470, 472 (Idaho 2005).

159. See, e.g., *id.* (“The Conways’ expert witness stated that Dr. Sonntag’s medical records show the optic nerve was still alive ...”).

160. See, e.g., Payton v. Benson, 717 F. Supp. 1346, 1347 (S.D. Ind. 1989) (where the plaintiff’s action was time-barred under the occurrence rule in Indiana).

161. O’Malley, *supra* note 58, § 21.

162. Paul Coltoff et al., 54 C.J.S. *Limitations of Actions* § 215 (2008) [hereinafter *Limitations of Actions*].

course of treatment.¹⁶³ In this situation, the statute of limitations begins to run when treatment with the negligent medical provider terminates.¹⁶⁴ For this exception to apply, “there must be an on-going, continuous, developing, and dependent relationship between the physician and patient.”¹⁶⁵ Courts created this exception to encourage the trust necessary for successful patient-client relationships.¹⁶⁶ In a typical physician-patient relationship, a patient relies on and trusts her physician.¹⁶⁷ This relationship may hinder the opportunity to realize acts of malpractice.¹⁶⁸ Further, this exception may not apply if the treatment is more “intermittent” than “continuous,”¹⁶⁹ or if the time between visits with a medical provider exceeds the applicable statute of limitations.¹⁷⁰

Minnesota uses the terminology “termination of treatment” and states that a cause of action does not begin to accrue if there is continuous treatment until the treatment ceases.¹⁷¹ Regardless of the terminology, if the continuous-treatment exception applies to a cancer misdiagnosis claim, it effectively eliminates the inquiry into when a cause of action begins to accrue because the statute of limitations begins to run when the treatment or the relationship with the physician terminates.¹⁷² Further, if questions still remain, such as whether the continuous-treatment doctrine applies and on what date the statute of limitations was triggered, those questions are questions of fact for the jury and, therefore, would not bar a suit on summary judgment.¹⁷³ Some courts have held that there is an exception to the continuous-treatment doctrine in instances of single, discrete negligent acts.¹⁷⁴

2. *Single Discrete Act Rule*

Whereas the continuous-treatment exception operates to extend the statute of limitations in a medical malpractice claim,¹⁷⁵ the single discrete act rule serves to limit the extension of the statutory period.¹⁷⁶ The single discrete act rule applies when there is one instance of negligence, rather than continued

163. *Id.*

164. *Id.*

165. *Id.* (citing *Liffengren v. Bendt*, 612 N.W.2d 629, 632 (S.D. 2000)).

166. *See, e.g., Swang v. Hauser*, 180 N.W.2d 187, 189-90 (Minn. 1970) (“A policy reason [for the doctrine] is that the patient must repose reliance upon his physician in the completion of the course of curative treatment, a relationship of trust which inhibits the patient’s ability to discover acts of omission or commission constituting malpractice.”).

167. *Id.* at 190.

168. *Id.*

169. *Limitations of Actions*, *supra* note 162.

170. *Id.*

171. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988).

172. *See generally Limitations of Actions*, *supra* note 162.

173. *See, e.g., Reyes v. Kent Gen. Hosp., Inc.*, 487 A.2d 1142, 1143-44 (Del. 1984).

174. *See, e.g., Fabio v. Bellomo*, 504 N.W.2d 758, 761-62 (Minn. 1993).

175. *Limitations of Actions*, *supra* note 162.

176. *See, e.g., Fabio*, 504 N.W.2d at 761-62.

treatment.¹⁷⁷ To illustrate, in *Offerdahl v. University of Minnesota Hospitals and Clinics*, the Minnesota Supreme Court stated that the continuous-treatment exception did not apply to the single discrete act of the defendant failing to advise the plaintiff of the risks associated with the insertion of a Copper-7-IUD.¹⁷⁸ Thus, if the act of negligently misdiagnosing or failing to diagnose cancer in a plaintiff is considered to be a single discrete act, the court must determine when the plaintiff's cause of action began to accrue based on one of the three rules discussed previously.¹⁷⁹ Even if a court finds that this rule applies, the statute of limitations may be tolled by other means, such as minority.¹⁸⁰

3. *Other Tolling Provisions*

In addition to the continuous-treatment doctrine, classic exceptions, such as age and disability, also toll the statute of limitations.¹⁸¹ When a minority or disability tolling provision applies, the statute of limitations does not begin to run until the minor reaches the age indicated in the statute, or the disability is removed.¹⁸² Likewise, while the discovery rule may be applied differently from jurisdiction to jurisdiction, whenever a medical provider fraudulently conceals his or her negligent acts, the discovery rule acts to toll the running of the statute.¹⁸³ While tolling periods and statutes of limitations go hand-in-hand, medical malpractice actions frequently involve the loss of chance theory.

4. *The Loss of Chance Doctrine*

In misdiagnosis situations, the loss of chance doctrine can provide relief for plaintiffs by allowing the plaintiff to prove either causation or damages.¹⁸⁴ If a

177. See generally *Limitations of Actions*, *supra* note 162.

178. *Offerdahl*, 426 N.W.2d at 427-29.

179. See generally *Limitations of Actions*, *supra* note 162. See also *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 718 (Minn. 2008).

180. See DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 334-35 (5th ed. 2005).

181. *Id.*

182. See, e.g., OHIO REV. CODE ANN. § 2305.113(C) (2008).

Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply: (1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim. (2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.

Id.

183. See O'Malley, *supra* note 58, § 21 ("Under the discovery rule, the period of limitations does not begin to run until the patient discovers, or reasonably should discover, the injury.").

184. See generally Martin J. McMahon, Annotation, *Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance*, 81 A.L.R. 4th at 485 § 2 (2008).

plaintiff brings a claim under the loss of chance causation theory, the plaintiff will argue that, had the defendant diagnosed and began treating the plaintiff earlier, “better results allegedly would have occurred.”¹⁸⁵ Using this doctrine, a plaintiff is able to show causation in the face of the medical provider who is renouncing responsibility by claiming that the cancer or other latent disease caused the harm.¹⁸⁶ Further, if loss of chance is used as a theory for damages, the plaintiff would be entitled to the amount of damages reflective to the “amount of chance that was lost.”¹⁸⁷ If, for example, a plaintiff had a 50% chance of survival at the time her doctor failed to diagnose the cancer, and then a 25% chance of survival at the time she is actually diagnosed, in a loss of chance jurisdiction, the plaintiff would be able to recover for the 25% decrease.¹⁸⁸ Because this rule does not relate to the statute of limitations and the loss of chance doctrine does not provide a specific rule, courts applying this doctrine still need to determine when a cause of action begins to accrue.

Any of the above-mentioned doctrines may arise in medical malpractice claims, but only one is present in the *MacRae* decision.¹⁸⁹ The Minnesota Supreme Court immediately rejected the application of the continuous-treatment exception and applied the single discrete act rule.¹⁹⁰ Further, no tolling provisions applied and the plaintiff did not argue loss of chance.

III. THE CASE AT HAND—A SYNOPSIS OF *MACRAE V. GROUP HEALTH PLAN, INC.*

MacRae presented an issue of first impression for the Minnesota Supreme Court.¹⁹¹ The Minnesota Supreme Court tried to determine how the damage rule should be applied to a cancer misdiagnosis claim.¹⁹² After reviewing the applicable precedent, the court determined that a case-by-case approach would be reasonable.¹⁹³ A case-by-case approach, however, causes uncertainty and confusion. This section presents the facts of the *MacRae* case, then discusses the

Certain cases, involving medical malpractice actions based on loss of chance, support the view that damages, once proved, are subject to reduction, since they are recoverable only as measured by the reduction in the patient's chances for recovery Other cases, however, while noting that recovery was sought on the basis that the alleged malpractice caused only a decrease in the percentage chance of cure or survival, nevertheless support the view that the resulting damages to the patient and family are recoverable in full.

Id.

185. *Id.* § 1(a).

186. *See id.*

187. *Id.* § 3.

188. *Id.* §§ 2, 3. *See also* Sanders v. Ghrist, 421 N.W.2d 520 (Iowa 1988).

189. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 718 (Minn. 2008).

190. *Id.*

191. *Id.* at 719.

192. *Id.*

193. *Id.* at 720.

arguments on appeal and finally analyzes the Minnesota Supreme Court's decision.

A. Facts of the Case

On January 15, 2001, Dr. Michael Kelly, Roderick MacRae's primary care physician, conducted a routine physical examination on MacRae.¹⁹⁴ During the exam, Dr. Kelly performed a shave biopsy on MacRae's left leg and sent tissue to pathology for analysis.¹⁹⁵ The pathologist, Dr. Submaranian, analyzed the tissue sample and, on January 18, 2001, reported that it was not cancerous, diagnosing it as a "compound nevus."¹⁹⁶ More than eighteen months later, MacRae went back to Dr. Kelly due to a bulge in his groin.¹⁹⁷ Dr. Kelly diagnosed the bulge as a hernia and referred MacRae to Dr. Mestitz for a surgical consultation.¹⁹⁸

During surgery preparation on December 9, 2002, Dr. Kelly performed a pre-op exam of the groin area.¹⁹⁹ "According to the expert affidavit submitted by [plaintiff MacRae's widow] in this case, '[t]he standard of care requires palpitation of both inguinal²⁰⁰ lymph nodes as part of the preoperative physical.'"²⁰¹ The examination and the medical records did not indicate that the lymph nodes were found to be abnormal in any way during the pre-op examination.²⁰² The hernia surgery was successfully performed, but on September 15, 2004, MacRae again saw Dr. Kelly for swelling in his groin and left leg.²⁰³ A CT scan showed enlarged lymph nodes in the left groin and pelvic area.²⁰⁴

Again, Dr. Kelly referred MacRae to Dr. Mestitz, who performed two surgical biopsy procedures. The procedures yielded a diagnosis of metastatic malignant melanoma.²⁰⁵ The 2001 tissue biopsy was re-examined and also determined to be malignant melanoma.²⁰⁶ An amended pathology report was filed on November 2, 2004, and MacRae was finally informed of the misdiagnosis on November 3, 2004.²⁰⁷ MacRae died less than a year later on August 26, 2005, with the cause of death being "extensive metastatic malignant melanoma."²⁰⁸ The cancer had spread from its origin, the left leg, to MacRae's

194. *Id.* at 714.

195. *Id.*

196. *Id.* A nervus is a small mole. *Id.* at n.1.

197. *Id.*

198. *Id.*

199. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 714 (Minn. 2008).

200. Meaning groin lymph nodes.

201. *MacRae*, 753 N.W.2d at 714.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

“brain, neck, liver, pancreas, small intestine, adrenal gland, and abdominal wall.”²⁰⁹

In response to MacRae’s death, his widow, Margaret MacRae, brought a wrongful death action on the theory of medical malpractice against Group Health Plan, Inc., HealthPartners, Inc., Dr. Subramanian (the pathologist), and Dr. Kelly (MacRae’s primary care physician) on February 20, 2006.²¹⁰ The Hennepin County District Court of Minnesota dismissed the complaint, granting summary judgment to the defendants on the basis that the claim was barred by Minnesota’s four-year statute of limitations for medical malpractice claims.²¹¹ On appeal, the Minnesota Court of Appeals affirmed and the Minnesota Supreme Court granted certiorari.²¹²

B. Arguments on Appeal

Mrs. MacRae’s argument focused on when her husband’s cause of action began to accrue. Specifically, Mrs. MacRae argued that, based on the facts of the wrongful-death suit, the “earliest” the cause of action could begin to accrue was “when it was more probable than not that Mr. MacRae” would die from his cancer.²¹³ To dodge the causation bullet, Mrs. MacRae argued that “a person with a better than fifty percent chance of recovery with timely diagnosis and treatment has a cause of action against a doctor whose negligent misdiagnosis has reduced the patient’s chance to survive below fifty percent.”²¹⁴ “In such a case, the doctor’s negligence is more likely than the preexisting condition to have caused the plaintiff’s death.”²¹⁵ Therefore, because the defendants’ failure to diagnose MacRae’s cancer delayed his treatment for nearly forty-four months, Mr. MacRae’s untimely death was caused by the defendants and not just by the cancer.²¹⁶

Mrs. MacRae based this theory on *Leubner v. Sterner*.²¹⁷ In *Leubner*, the Minnesota Supreme Court stated that the “injury claimed to be caused is a decreased percentage chance of surviving, whether or not the patient, in fact, has survived.”²¹⁸ Further, Mrs. MacRae argued that the injury was not caused by the defendants’ negligent act because the cancer misdiagnosis alone did not result in “some compensable damage” at the point of misdiagnosis.²¹⁹ Thus, Mrs. MacRae urged the court to hold that her cause of action began to accrue when it

209. MacRae v. Group Health Plan, Inc., 753 N.W.2d 711, 714-15 (Minn. 2008).

210. *Id.* at 715.

211. *Id.*

212. *Id.* at 716.

213. Brief and Appendix of Petitioner Margaret MacRae, Trustee for the Next of Kin of Roderick MacRae at 16, MacRae v. Group Health Plan, Inc., 753 N.W.2d 711 (Minn. 2008).

214. *Id.* at 15.

215. *Id.*

216. *See id.*

217. 493 N.W.2d 119 (Minn. 1992).

218. *Id.* at 121.

219. Brief and Appendix of Petitioner Margaret MacRae, Trustee for the Next of Kin of Roderick MacRae at 11, MacRae v. Group Health Plan, Inc., 753 N.W.2d 711 (Minn. 2008).

was more probable than not that Mr. MacRae would die, and thus her cause of action was not time-barred.²²⁰

The defendants' primarily argued that the cause of action began to run at the time of the misdiagnosis because the misdiagnosis resulted in damage to the plaintiff.²²¹ This argument was based on the long-standing Minnesota law that a cause of action begins to run when a plaintiff can bring a claim without fear of dismissal for failure to state a claim.²²² The defendants further argued that "some compensable damage" occurred at the time of misdiagnosis.²²³ Relying on *Fabio v. Bellomo*, the defendants contended that "'immediate injury'" resulted from the "'continually growing cancer.'"²²⁴ Therefore, the defendants argued that "[t]he action accrued at the time of misdiagnosis because some damage occurred immediately."²²⁵

Additionally, the defendants relied on dicta in *Peterson v. St. Cloud Hospital*, which stated that in a cancer misdiagnosis instance, the time of misdiagnosis starts the statute of limitations.²²⁶ Further, the defendants argued that MacRae was trying to change settled law in Minnesota by claiming that "some" damage is not enough, and that the statute of limitations should begin to run when a misdiagnosis "becomes fatal."²²⁷ Overall, the defendants argued that the statute of limitations began to run on January 17, 2001, the date that Mr. MacRae was allegedly misdiagnosed,²²⁸ and expired four years later (per the Minnesota statute)²²⁹ on January 17, 2005.²³⁰

C. The Minnesota Supreme Court's Decision

The Minnesota Supreme Court began its analysis by stating the relevant statute of limitations.²³¹ Under Minnesota Statute § 573.02(1),

When death is caused by the wrongful act or omission of any person or corporation, the [plaintiff] ... may maintain an action ... to recover damages for a death caused by the alleged professional negligence of a physician [but the action] shall be commenced within *three years* of the date of death.²³²

220. *Id.* at 25.

221. *Id.* at 5.

222. *Id.* at 9.

223. *Id.* at 11.

224. *Id.* at 21 (quoting *Molloy v. Meier*, 679 N.W.2d 711, 722 (Minn. 2004)).

225. Respondent's Brief at 5, *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008) (quoting *Molloy*, 679 N.W.2d at 722).

226. *Id.* at 11 (citing *Peterson v. St. Cloud Hosp.*, 460 N.W.2d 635, 639 (Minn. Ct. App. 1990)).

227. *Id.* at 10.

228. *Id.* at 4.

229. MINN. STAT. § 573.02(1) (2006).

230. Respondent's Brief at 18-19, *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711 (Minn. 2008).

231. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008).

232. MINN. STAT. § 573.02(1) (2006).

This statute must be read in combination with Minnesota Statute § 541.076(b), which provides: “An action by a patient or former patient against a health care provider alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, must be commenced within four years from the date the cause of action accrued.”²³³ Thus, Mrs. MacRae had four years from when the cause of action began to bring her claim.²³⁴ The Court was left to determine when a cause of action begins to accrue for a cancer misdiagnosis claim.²³⁵

Initially, the Court addressed the applicable precedent regarding medical malpractice claims and the statute of limitations.²³⁶ Reviewing the applicable precedent, the Court opined that, in Minnesota, a cause of action begins to accrue when a plaintiff “can allege each of the essential elements of a claim.”²³⁷ While this is the general rule, it did not provide much guidance to the issue before the court.²³⁸ The Court discussed the main cases relied on by the defendants: *Fabio v. Bellomo* and *Molloy v. Meier*.²³⁹ *Fabio* also involved a cancer misdiagnosis claim in which the plaintiff sued her health care providers for failing to further test a lump in her breast.²⁴⁰ The Court pointed out that *Fabio* is distinguishable from *MacRae* in that, on appeal, Fabio argued that the termination-of-treatment rule applied.²⁴¹ Further, the *Fabio* decision primarily used the date of the negligent act to determine whether the termination of treatment rule applied, not to determine when “some damage” occurred.²⁴²

Likewise, the Court distinguished *Molloy*.²⁴³ In *Molloy*, the plaintiff brought a claim against her doctor for negligently-performed genetic testing, which resulted in the plaintiff having a second developmentally-delayed child.²⁴⁴ The *Molloy* court held that, while in *Fabio* damage occurred at the misdiagnosis, Molloy suffered damage at the time she conceived her second child, not the time of misdiagnosis.²⁴⁵ The defendants in *MacRae* relied on dicta in *Molloy*,²⁴⁶

233. MINN. STAT. § 541.076(b) (2006).

234. See MINN. STAT. § 541.076 (2006); MINN. STAT. § 573.02(1) (2006).

235. *MacRae*, 753 N.W.2d at 716.

236. *Id.* at 716-17.

237. *Id.* at 717 (citing *Molloy v. Meier*, 679 N.W.2d 711, 721 (Minn. 2004)).

238. See generally *id.*

239. *Id.* at 717-19.

240. *Fabio v. Bellomo*, 504 N.W.2d 758, 760-61 (Minn. 1993).

241. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 717-18 (Minn. 2008).

242. See *id.*

243. *Id.* at 718-19.

244. *Molloy*, 679 N.W.2d at 713.

245. *MacRae*, 753 N.W.2d at 718.

246. *Id.* at 718-19.

In reaching this conclusion, we attempted to distinguish *Fabio* as follows: “The misdiagnosis in *Fabio* caused the plaintiff immediate injury in the form of a continually growing cancer, which became more dangerous to the plaintiff each day it was left untreated. The action accrued at the time of misdiagnosis because some damage occurred immediately.” [citations omitted]. We recognize that our attempt to distinguish *Fabio* from the facts in *Molloy* suggested a *per se* rule that a cause of action for the misdiagnosis of cancer accrues, and the statutory limitations period begins to run, at the time of the negligent misdiagnosis. But

wherein the Court suggested that *Fabio* provided that a cancer misdiagnosis plaintiff suffers an “immediate injury” because the cancer “continually grow[s].”²⁴⁷ The *MacRae* Court admitted that the Court inadvertently created a “per se” rule in *Molloy*, while trying to distinguish the facts from *Fabio*,²⁴⁸ but declared that the *Molloy* rule was not intended as a broad rule.²⁴⁹ The Court then acknowledged that *MacRae* presented an issue of first impression: whether, as a matter of law, there is damage at the time of a cancer misdiagnosis.²⁵⁰

After a brief discussion of how other jurisdictions handle the statute of limitations question in medical malpractice claims, the *MacRae* Court continued to reject the discovery rule and the occurrence rule in favor of the damage rule.²⁵¹ There is long-standing jurisprudence in Minnesota that a negligent act itself is insufficient to trigger the statute of limitations in negligence actions.²⁵² Thus, Minnesota courts reject the occurrence rule.²⁵³ The Court also explicitly affirmed Minnesota’s rejection of the discovery rule.²⁵⁴

The Court stated that in order to uphold the precedent of the damage rule and justify the implication of *Fabio*, it would have to determine that some damage occurred immediately at the time of the cancer misdiagnosis as a matter of law.²⁵⁵ The Court declined to adopt such a broad rule and instead created a case-by-case approach.²⁵⁶ Under the Court’s approach, the unique facts of each case determine when a cause of action begins to accrue for a cancer misdiagnosis claim.²⁵⁷ Although the Court favored a case-by-case approach, its opinion muddled the “some damage” rule even further. The Court failed to provide guidelines for when a cause of action should begin to accrue in the cancer misdiagnosis context.²⁵⁸ This more uncertain ruling was justified by *Leubner v. Sterner*, which involved a delayed cancer diagnosis claim wherein the Court found that the “presence of the tumor is not itself compensable damage.”²⁵⁹

Molloy did not involve a cancer misdiagnosis, and our statement that a cause of action accrues immediately upon such a misdiagnosis was not necessary to our holding in that case. That statement therefore is not binding precedent.

Id. (internal quotations and citations omitted).

247. *Id.* at 717-18. *See also* *Molloy v. Meier*, 679 N.W.2d 711, 722 (Minn. 2004).

248. *MacRae*, 753 N.W.2d at 718-19.

249. *Id.* at 719.

250. *Id.*

251. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 719 (Minn. 2008).

252. *Id.* *See also, e.g.*, *Golden v. Lerch Bros., Inc.*, 281 N.W. 249, 253-54 (Minn. 1938) (“[N]egligence without injury or damage gives no cause of action”).

253. *MacRae*, 753 N.W.2d at 719.

254. *Id.*

255. *Id.* at 720.

256. *Id.*

257. *Id.* at 721-22.

258. *Id.*

259. *Id.* at 720 (citing *Leubner v. Sterner*, 493 N.W.2d 119, 120 (Minn. 1992) (holding that the growing cancer was not enough to prove damages)). *See also* *St. George v. Pariser*, 484 S.E.2d 888, 890 (Va. 1997) (stating that a “cause of action accrues on ‘the date the injury is sustained in the case of injury to the person’”) (internal citations omitted).

The Court recognized that MacRae suffered compensable damage when his cancer turned fatal, but, because it was not the only type of compensable damage in this misdiagnosis situation, the Court disagreed with Mrs. MacRae's argument.²⁶⁰ The Court listed various situations in which "compensable damage[s]" could arise in a cancer misdiagnosis claim, but refused to adopt them as guidelines or parameters.²⁶¹ In the spirit of guidelines, the Court stated: "Where the record reflects that some damage was suffered because of the negligent act, the cause of action has accrued for statute of limitations purposes."²⁶² Therefore, even though the Court rejected MacRae's argument²⁶³ and failed to adopt a bright-line rule, it found that the defendants did not meet their burden of proof.²⁶⁴ The defendants failed to show that Mr. MacRae did not suffer compensable damage more than four years prior to Mrs. MacRae filing suit.²⁶⁵ As such, the Court reversed the motion for summary judgment and remanded the case for further fact-finding.²⁶⁶

IV. ANALYSIS OF THE ISSUE: THE PROBLEM OF UNCERTAINTY

A. *The Effect of the MacRae Decision*

The uncertainty surrounding Minnesota's some-damage rule²⁶⁷ was compounded by the *MacRae* decision, and its impact is felt by patients, doctors, and insurance companies alike.²⁶⁸ First, the *MacRae* decision will have the greatest impact on patients.²⁶⁹ Because there are no bright-line rules or guidelines, patients will have difficulty determining when a claim exists.²⁷⁰ If the Minnesota Supreme Court had decided, as a matter of law, that a cause of action for a cancer misdiagnosis claim begins to accrue on the day of the misdiagnosis,

260. *MacRae*, 753 N.W.2d at 722-23.

261. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 722 (Minn. 2008).

Although the continued presence of a patient's cancer alone might not be compensable damage, the progression of the disease may require the patient to undergo a different course of treatment or to incur additional medical expenses. Moreover, the continued presence of the cancer may cause the patient to suffer pain, loss of bodily functions, or some other damage. Any of these developments, and undoubtedly other scenarios that we have not mentioned, could be a compensable injury that would result in the accrual of a cause of action for medical malpractice if that injury is substantiated by evidence in the record.

Id.

262. *Id.* at 723.

263. *Id.* at 722-23.

264. *Id.* at 721.

265. *Id.* at 723.

266. *Id.*

267. *See Antone v. Mirviss*, 720 N.W.2d 331, 336 (Minn. 2006).

268. *MacRae*, 753 N.W.2d at 721-22.

269. *See id.* (rejecting a bright-line rule and only giving examples of what may be considered "some damage" regarding a cancer misdiagnosis claim).

270. *See id.* (adopting a case-by-case approach).

there would still be some instances of injustice, but patients would at least have certainty regarding the existence of a claim.²⁷¹

Second, the uncertainty of the *MacRae* decision impacts a lawyer's decision to represent a patient.²⁷² Attorneys often accept medical malpractice claims with a retainer or on a contingency fee basis.²⁷³ Because of the case-by-case approach, lawyers may be even more reluctant to take on a complicated cancer misdiagnosis claim, as litigation will almost certainly be necessary to determine when the statute of limitations was triggered.²⁷⁴

Third, the uncertainty of the ruling has both a positive and a negative impact on doctors.²⁷⁵ In an article on the *MacRae* decision, written by the Minnesota Medical Association ("MMA"), regarded the decision as positive for physicians because the Court rejected Mrs. MacRae's "fatal damage"²⁷⁶ argument.²⁷⁷ Acceptance of that argument, according to the MMA, would have decreased the likelihood of physician-defendants winning on summary judgment because "every cancer misdiagnosis case would hinge on expert witness testimony."²⁷⁸ The MMA also noted the negative consequence the *MacRae* decision had for doctors because it is still unclear when doctor liability begins and ends—a determination that depends upon the unique circumstances of each case.²⁷⁹

Fourth, this uncertainty may negatively impact insurance companies.²⁸⁰ Because insurance companies are unable to predict with certainty the liabilities that their clients will face, medical malpractice insurance premiums may rise.²⁸¹

271. See *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 721 (Minn. 2008).

272. See *id.*

Given the complexities associated with the development of a disease like cancer, and the variety of ways that such a disease may manifest itself in a particular patient, we cannot say that some compensable damage necessarily occurs as a matter of law at the time of every negligent misdiagnosis of cancer.

Id.

273. A "retainer" is "[a] fee paid to a lawyer to maintain a cause or to a professional advisor for advice or for a claim upon his services in case of need." WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1938 (1966). For an example of a firm charging a retainer fee in medical malpractice cases, see Medico-Legal Information Services: Our Fees, <http://www.medicolegalexperts.com/fees.php> (last visited Jan. 24, 2010).

274. See *MacRae*, 753 N.W.2d at 721-22 (determining that the case's unique circumstances should be used to determine when the patient suffers from "some damage").

275. *State High Court Issues Opinion on Statutes of Limitations for Cancer Misdiagnoses*, Minnesota Medical Association: News, July 31, 2008, <http://mmaonline.net/News/NewsFullStory/tabid/2266/ArticleID/2693/CBModuleID/3490/Default.aspx>.

276. See Reply Brief of Petitioner Margaret MacRae, Trustee for the Next of Kin of Roderick MacRae at 6-7, *MacRae v. Group Health Plan, Inc.*, 735 N.W.2d 711 (Minn. 2008). See also *MacRae*, 753 N.W.2d at 722-23.

277. *State High Court Issues Opinion on Statutes of Limitations for Cancer Misdiagnoses*, *supra* note 275.

278. *Id.*

279. *Id.*

280. See U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 41-42 (2003).

281. *Id.* at 42.

The relationship between malpractice liability and malpractice insurance rates, however, is not conclusive.²⁸² Many empirical studies have attempted to prove a link between increased litigation and increased medical malpractice insurance premiums, but this correlation has proved tenuous.²⁸³ In turn, tort reform has had little impact on insurance premiums because tort reform policies and statutes fail to reform the insurance market.²⁸⁴ Thus, it is unclear what effect the *MacRae* decision will have on insurance premiums in Minnesota.²⁸⁵ Also unclear is how this rule will be applied in future medical malpractice actions; however, it is clear that uncertainty promotes further litigation and possibly legislation.

B. A Brief Look at the Effect of Open-Ended and Uncertain Statute of Limitations in Other States

Just as in Minnesota, courts in both Delaware and Texas have dealt with vague statutes of limitations in the medical malpractice arena that have required extensive litigation.²⁸⁶ This kind of iterative jurisprudence is an undertaking Minnesota is destined to engage in as a result of the confusion created by an approach that yields uncertain and inconsistent results.

1. Delaware

In 1968, the Delaware Supreme Court created an uncertain rule that significantly extended the statute of limitations in certain circumstances.²⁸⁷ In *Layton v. Allen*, the Court created an open-ended exception to the statute of limitations for “inherently unknowable injuries.”²⁸⁸ For inherently unknowable injuries, the cause of action does not begin until the injury presents itself and “becomes physically ascertainable.”²⁸⁹ Under the right conditions, this could leave a doctor liable for years, even decades, until the injury becomes apparent.²⁹⁰

282. See Geoffrey Christopher Rapp, *Doctors, Duties, Death and Data: A Critical Review of the Empirical Literature on Medical Malpractice and Tort Reform*, 26 N. ILL. U. L. REV. 439, 446, 448 (2006).

283. *Id.* at 446.

284. *Id.*

285. See *id.* at 446, 448.

286. See Charles Brandt, *Recent Developments in Delaware Case Law: It's Time to Return to the Layton Rule for Delaware's Medical Malpractice Statute of Limitations*, 3 DEL. L. REV. 247, 248 (2000); Craig Baker, Note, *Potentiality for Ongoing Liability under the "Absolute" Two Year Statute of Limitations in Texas Medical Malpractice Actions*: *Chambers v. Conaway*, 37 Tex. Sup. Ct. J. 60 (Oct. 27, 1993), 25 TEX. TECH L. REV. 1123, 1123-24 (1994).

287. See *Layton v. Allen*, 246 A.2d 794, 797 (Del. 1968).

288. *Id.*

289. *Id.* at 798. See also Brandt, *supra* note 286, at 248.

290. See Brandt, *supra* note 286, at 248.

The Delaware Supreme Court responded to the seemingly infinite statute of limitations with a series of restrictions placed upon the *Layton* rule.²⁹¹ For example, in *Collins v. Wilmington Medical Center*, the plaintiff argued that his cause of action should not have begun to accrue until his condition was diagnosed.²⁹² The Court rejected the plaintiff's argument, stating "manifestation of the problem, not its cure, is the test under *Layton*."²⁹³ Additionally, Delaware courts limited *Layton* further by holding that plaintiffs do not need to be aware of both the physical manifestation and the causal connection as awareness of the injury is sufficient.²⁹⁴

In 1976, the legislature reacted to the restriction in *Layton*²⁹⁵ by adopting a two-year-limitations period for injuries discovered within two years of the wrongful act and three years for "inherently unknowable injuries" that could not have been discovered during the initial two years.²⁹⁶ At first glance, this reform appears to be a logical and fair limitation of the former *Layton* rule, but this reform has had devastating consequences (such as time-barred cases where malpractice was clearly committed) for some plaintiffs.²⁹⁷ Charles Brandt explained the magnitude of injustice, uncertainty, and inconsistency in the statute: "Each day an injury remains unknown, the plaintiff loses another day of the two-year statute of limitations. The unfortunate plaintiff who discovers an inherently unknowable injury just two days before the plaintiff who gets the additional year has, instead of an additional year, only one day."²⁹⁸

Despite various criticisms, this statute is still in effect.²⁹⁹ Thus, because of the uncertainty created by *Layton*, the Delaware legislature enacted an even more inconsistent and, in some cases, unjust statute.³⁰⁰

More recently, Delaware faced an issue similar to that decided in *MacRae*.³⁰¹ In *Meyer v. Dambro*, a woman brought a claim against her doctor seeking damages for his failure to diagnose her cancer.³⁰² The issue presented to the Court was whether the statute of limitations should be extended to accommodate claims in which the "negligent act typically does not itself cause

291. See Andrea C. Rodgers & John A. Parkins, Jr., *Recent Developments in Delaware Case Law: No Need to Revert to the Unfair Burdens of an Open-Ended Medical Malpractice Statute of Limitations*, 3 DEL. L. REV. 253, 257-58 & n.21-22 (2000).

292. *Collins v. Wilmington Med. Ctr.*, 319 A.2d 107, 108 (Del. 1974).

293. *Id.*

294. Rogers & Parkins, *supra* note 291, at 258.

295. *Id.* at 260-61.

296. See *id.* at 261 ("The statute provides for a two-year limitation with the addition of a third year if the injury could not reasonably have been discovered during the initial two-year period."). See also Brandt, *supra* note 286, at 249.

297. See generally *Meekins v. Barnes*, 745 A.2d 893 (Del. 2000).

298. Brandt, *supra* note 286, at 250.

299. DEL. CODE ANN. tit. 18, § 6856(1) (2008).

300. Brandt, *supra* note 286, at 250 (noting that determining which plaintiff's receive an additional year may seem harsh).

301. *Meyer v. Dambro*, C.A. No. 07C-10-224-JRS, 2008 WL 4455634, at *1 (Del. Super. Ct. Sept. 30 2008).

302. *Id.* at *2.

injury at, or even near, the time of the act.”³⁰³ Realizing that this was an issue of first impression, the Court formed its opinion on the issue and certified the case for an interlocutory appeal to the Delaware Supreme Court.³⁰⁴ A similar situation of uncertainty occurred in Texas, then taking years to resolve.

2. *Texas*

Texas has experienced similar uncertainty in its medical malpractice claim accrual jurisprudence.³⁰⁵ Texas courts have a long history of determining the most advantageous statute of limitations in medical malpractice actions.³⁰⁶ Initially, Texas followed the occurrence rule, with the statute beginning to run when the negligent act occurred.³⁰⁷ In 1967, Texas adopted the discovery rule,³⁰⁸ but, physicians were unhappy with the discovery rule because it was not coupled with an outer limit of when suits could be brought.³⁰⁹ The Texas legislature enacted a two-year limitation on bringing medical malpractice claims in 1977.³¹⁰

After the two-year limitation took effect, Texas courts battled over which statute to apply for medical malpractice cases involving wrongful deaths.³¹¹ Under the 1977 medical malpractice legislation, all claims had to be brought within two years of the alleged injury,³¹² whereas under the Texas wrongful death statute, the cause of action did not begin until the person’s death.³¹³ Based on the unique circumstances of each action, Texas courts had to decide whether to apply the wrongful death statute of limitations or the medical malpractice statute of limitations—a decision which led to inconsistency and uncertainty for plaintiffs.³¹⁴

Finally, in *Bala v. Maxwell*, another cancer misdiagnosis wrongful death action, the Texas Supreme Court determined that the plain language of the medical malpractice statute provided that a two-year statute of limitations applied in healthcare liability actions.³¹⁵ As the law currently stands,

303. *Id.* at *5.

304. *Id.*

305. See generally Baker, *supra* note 286; Cheryl A. Fisher, Comment, *Is There Light at the End of the Tunnel? Putting a Stop to the Controversy of Which Statute of Limitations to Use in a Medical Malpractice Action in Texas: Bala v. Maxwell*, 909 S.W.2d 889 (Tex. 1995), 22 T. MARSHALL L. REV. 345 (1997).

306. See generally Fisher, *supra* note 305.

307. *Id.* at 348.

308. *Id.*

309. *Id.* at 349.

310. *Id.*

311. *Id.* at 360.

312. *Id.* at 360-61. See also Shidaker v. Winsett, 805 S.W.2d 941, 942 (Tex. App. 1991).

313. Fisher, *supra* note 305, at 361. See also Shidaker, 805 S.W.2d at 942.

314. Fisher, *supra* note 305, at 361-70.

315. *Bala v. Maxwell*, 909 S.W.2d 889, 891-92 (Tex. 1995) (holding that, according to Texas law, in claims for wrongful death based on medical malpractice, the statute of limitations begins running when the negligent act occurred, absent a showing of a continued negligent course of treatment). The court determined that a failure to diagnose because of an act of negligence was not considered a negligent course of treatment. Therefore, the statute of limitations began tolling at the

[A] plaintiff has two-years from one of three dates in which to file a wrongful death action based on medical malpractice; the date the tort occurred; the date that the medical or health care treatment that is the subject of the claim is completed or; the date the hospitalization that is the subject of the claim is completed.³¹⁶

Thus, *Bala* cleared up nearly thirty years of uncertainty in Texas medical malpractice wrongful death suits.³¹⁷

Both the Delaware and Texas examples demonstrate that a great deal of time has been wasted in litigation trying to determine whether or not a plaintiff's claim is time-barred. Statute of limitations defenses are frequently raised,³¹⁸ and in medical malpractice claims, there is no room for such uncertainty and inconsistency. Therefore, it is advisable that Minnesota learn a lesson from Texas's and Delaware's experiences and further define when a cause of action begins to accrue.

C. Application of the *MacRae* Decision to Other Cases

The purpose of this comment is to highlight how the Minnesota Supreme Court's decision in *MacRae* makes it nearly impossible to predict whether an action will be time-barred. This section highlights the unpredictability of the *MacRae* decision by applying the *MacRae* standard to the fact patterns of (previously decided) cancer misdiagnosis cases from a variety of jurisdictions to illustrate the inconsistent results the *MacRae* standard allows and encourages.

1. Winder v. Avet

Winder v. Avet, a Louisiana case that was decided prior to the *MacRae* decision, is factually distinguishable from *MacRae*.³¹⁹ Winder was told he had cancer when, in reality, he was free from disease.³²⁰ Applying *MacRae* to *Winder*'s facts, however, it is uncertain whether Winder would have filed a timely claim in Minnesota. When Winder sought treatment for symptoms of jaundice on February 2, 1982, he was diagnosed as having "obstructive jaundice."³²¹ Health care providers conducted exploratory surgery and, based on surgical observations and needle biopsies, determined that Winder had pancreatic

specific act of negligence that led to the failure to diagnose. *Id.* See also Fisher, *supra* note 305, at 375.

316. Fisher, *supra* note 305, at 376 (analyzing TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon 1996)).

317. See *id.*

318. Allen N. David et al., *Recent Developments in Law Governing Professionals', Officers', and Directors' Liability*, 44 TORT TRIAL & INS. PRAC. L.J. 679, 710 (2009) (noting that a recent "trend among courts [is] expanding the class of plaintiffs entitled to sue and ... an increasing focus on the discovery rule and continuous representation doctrine").

319. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711 (Minn. 2008).

320. *Winder v. Avet*, 613 So. 2d 199, 200 (La. Ct. App. 1992).

321. *Id.*

cancer.³²² The physician concluded that the pancreas could not be surgically removed, so in order to treat the jaundice, the doctor performed a bile duct bypass.³²³ Health care providers administered additional treatments, including radioactive seeds and radiation, to treat the pancreatic cancer.³²⁴ In November 1985, Dr. Avet reviewed the original diagnosis in light of Winder's extended survival.³²⁵ At that time, doctors determined that Winder did not have pancreatic cancer.³²⁶ To offset the effects of the radiation and combat Winder's chronic pancreatitis, doctors administered additional treatment and performed further surgery.³²⁷ The treatments were unsuccessful and Winder died on January 14, 1986, presumably from "liver failure and infection."³²⁸

Louisiana requires that medical malpractice actions be brought within one year of the negligent act or date of discovery of the alleged act.³²⁹ All claims, regardless of the discovery rule, must be brought within three years of the negligent act.³³⁰ The court found that the statute of limitations did not begin to run until November 1985, when Winder received a proper diagnosis as not having cancer.³³¹ Accordingly, under the discovery rule, the court found that Winder had one year from November 1985 to file his claim, thus his claim was timely filed.³³²

Applying the *MacRae* holding to *Winder*,³³³ there could be four different instances in which "some damage" occurred. The first instance occurred when Winder and his loved ones were told that he had pancreatic cancer.³³⁴ Typically, those diagnosed with pancreatic cancer have a very grim prognosis.³³⁵ Thus, it is easy to see that any emotional damages, if recognized, could have triggered the

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 200-01.

328. *Id.* at 201.

329. LA. REV. STAT. ANN. § 9:5628 (2007).

330. *Winder v. Avet*, 613 So. 2d 199, 201 (La. Ct. App. 1992). *See also* LA. REV. STAT. ANN. § 9:5628(A) (2007).

[A]ction for damages for injury or death against any physician ... as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

Id.

331. *Winder*, 613 So. 2d at 201.

332. *Id.*

333. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 723 (Minn. 2008).

334. *Winder*, 613 So. 2d at 200.

335. *Id.* ("As a general rule, a person with pancreatic cancer has a very short life expectancy. Often pancreatic cancer victims die within six months of the diagnosis.").

statute of limitations. The second instance arose when Winder began receiving cancer treatment in the form of radioactive beads, which would have caused physical and financial damage.³³⁶ In a third instance, Winder would have incurred “some damage” during the month he received external radiation treatments.³³⁷ Finally, the fourth instance in which “some damage” could have occurred was when Winder underwent treatment and surgeries to reverse the negative effects of the radiation.³³⁸ If the court found damage occurred at the time of the misdiagnosis, the radioactive seed treatment, or the external radiation treatments, the claim would be untimely. This is a harsh result for someone who dealt with three years of unnecessary cancer treatments that ultimately killed him.

2. St. George v. Pariser

The facts in *St. George*, a Virginia decision decided in 1997, are substantially similar to those found in *MacRae*.³³⁹ As such, *St. George* best demonstrates the inconsistent results the damage rule can produce.

In June 1991, Linda St. George visited a dermatologist, Dr. Pariser, to have a mole on her lower left leg examined.³⁴⁰ Dr. Pariser performed a biopsy and told St. George that her mole was non-cancerous.³⁴¹ Two years later, in March 1993, St. George went to a plastic surgeon, Dr. Grenga, to discuss removal of the mole.³⁴² Dr. Grenga asked St. George to obtain a copy of the record from her visit with Dr. Pariser.³⁴³ Dr. Pariser reviewed the medical record before sending them to Dr. Grenga³⁴⁴ and discovered that the mole was in fact cancerous.³⁴⁵ Dr. Pariser amended the record to show the new diagnosis.³⁴⁶ After review of the record, including the addition, Dr. Grenga determined that the entire mole should be removed.³⁴⁷ Dr. Grenga removed the mole and conducted a biopsy, which showed “invasive superficial spreading malignant melanoma.”³⁴⁸ Based on this finding, Dr. Grenga operated on St. George again to remove the surrounding tissue.³⁴⁹ St. George required subsequent surgeries, including the “implantation of a tissue expander,” which caused great pain.³⁵⁰ Additionally, St. George’s condition required periodic examinations and tests to check for cancer

336. *Id.*

337. *Id.*

338. *Id.* at 200-01.

339. *St. George v. Pariser*, 484 S.E.2d 888, 889 (Va. 1997); *MacRae*, 753 N.W.2d at 713-16.

340. *St. George*, 484 S.E.2d at 889.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *St. George v. Pariser*, 484 S.E.2d 888, 889 (Va. 1997).

350. *Id.*

recurrence.³⁵¹ St. George filed a complaint against Dr. Pariser in October 1993.³⁵²

Dr. Pariser argued that St. George's cause of action began to accrue at the time of misdiagnosis in 1991 and, therefore, was time-barred under the Virginia two-year statute of limitations period.³⁵³ According to Virginia law, the statute begins to run on "the date the injury is sustained,"³⁵⁴ regardless of how slight. Courts have defined injury to mean "a positive, physical or mental hurt."³⁵⁵ At trial, experts testified that in 1991 the cancer was confined to St. George's epidermis, which is significant because melanoma cannot metastasize until it moves beyond the epidermis to the dermis.³⁵⁶ Dr. Pariser argued that because the cancer was present in 1991, St. George was injured as of the date of misdiagnosis.³⁵⁷ St. George contended that her injury did not occur until the cancer spread from the epidermis to the dermis, when it became capable of metastasizing and fatal.³⁵⁸ The Virginia court agreed with St. George.³⁵⁹

Applying *MacRae*, it is unclear how *St. George* would turn out. At first glance, it is unlikely that the *MacRae* rule would produce a ruling that damage occurred on the date of St. George's misdiagnosis. But, the experts in *St. George* stated that on the date of St. George's diagnosis, the cancer had not yet metastasized,³⁶⁰ while in *MacRae*, experts could only state that the cancer "likely" had not metastasized.³⁶¹ Thus, it is possible that in applying *MacRae*, courts could determine that St. George was injured at misdiagnosis, resulting in an untimely claim, and an unjust result for St. George. Further, "some damage" could be argued to have occurred during the removal and subsequent treatment of the advanced melanoma. Again, it is indeterminate what a court would decide, but the decision would likely produce very different results for St. George.

3. Kaplan v. Berger

Kaplan v. Berger, a 1989 Illinois decision, presented a unique fact scenario in which multiple factors could have led to the misdiagnosis.³⁶² The already confusing fact pattern becomes even more muddled when the law of *MacRae* is applied.

351. *Id.*

352. *Id.*

353. *Id.* (citing VA. CODE ANN. § 8.01-243(A) (1997)).

354. VA. CODE ANN. § 8.01-230 (2007).

355. *St. George*, 484 S.E.2d at 890 (quoting *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900, 904 (1981)).

356. *Id.* at 890.

357. *Id.*

358. *Id.* at 890-91.

359. *St. George v. Pariser*, 484 S.E.2d 888, 891 (Va. 1997).

360. *Id.* at 890.

361. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 715 (Minn. 2008).

362. 539 N.E.2d 1267 (Ill. App. Ct. 1989).

In 1976, Kaplan underwent treatment for breast cancer.³⁶³ The defendant, Dr. Berger (a general surgeon, also practicing in the area of surgical oncology), performed a mastectomy.³⁶⁴ In July 1981, Kaplan's dog ran into her right leg, causing temporary pain.³⁶⁵ In September 1981, Kaplan noticed numbness in her lower right leg and, by October, Kaplan had a lump under her right knee.³⁶⁶ Kaplan originally thought she broke something during the incident with her dog, so she visited Dr. Rosenzweig (an orthopedic surgeon).³⁶⁷ During his examination, Dr. Rosenzweig took X-rays, which did not reveal any broken bones, and subsequently referred Kaplan for three ultrasound treatments.³⁶⁸ Dr. Rosenzweig did not tell Kaplan the purpose of these treatments.³⁶⁹

During an examination in January 1982, Dr. Berger found and removed a lump in Kaplan's left breast.³⁷⁰ Kaplan and Dr. Berger did not discuss Kaplan's leg ailment.³⁷¹ A month later, Kaplan again visited Dr. Berger and brought the pain in her leg to his attention.³⁷² Dr. Berger briefly examined her leg, stating that he did not see or feel the lump felt by Dr. Rosenzweig, and told Kaplan to see someone else about her leg, without offering a referral.³⁷³ Between 1982 and 1983, Kaplan visited two other doctors and, with no relief from her pain, again complained to Dr. Berger.³⁷⁴ Finally, in February 1983, Kaplan was admitted to the emergency room.³⁷⁵ After visiting a string of doctors, Kaplan was referred to Dr. Kline, a nerve specialist.³⁷⁶ Dr. Kline removed the lump in April 1983 and through a biopsy determined that the lump was a malignant schwannoma tumor.³⁷⁷ Kaplan continued receiving treatment from various doctors to correct the damage to her leg and surrounding nerves caused by the tumor.³⁷⁸ During this further treatment, health care providers found enlarged lymph nodes in Kaplan's groin. The health care providers removed the lymph nodes and

363. *Id.* at 1270.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Kaplan v. Berger*, 539 N.E.2d 1267, 1270 (Ill. App. Ct. 1989).

373. *Id.*

374. *Id.* at 1271.

375. *Id.*

376. *Id.*

377. *Id.* at 1271-72.

378. *Id.* at 1272.

Upon recuperation from the surgery to remove the growth, plaintiff saw two Chicago physicians, Dr. Dasgupta and Dr. Gitelis in or about May 1983. Dr. Dasgupta wanted to remove the affected nerve, which would have left plaintiff with a nonfunctional right leg. Dr. Gitelis, an orthopedic surgeon, when informed by plaintiff that she did not want her right leg partially amputated, suggested radiation treatment.

Id.

determined that they were malignant metastasis from Kaplan's right leg tumor in August 1983.³⁷⁹ Kaplan filed a medical malpractice action on March 25, 1985.³⁸⁰

In Illinois, the statute begins to run when a person knows or "should know" of his injury and also knows or reasonably should know that a negligent act caused the injury.³⁸¹ After the trial court found Kaplan's claim to be time-barred, the Illinois appellate court reversed this finding.³⁸² The appellate court held that a trier of fact could determine that the statute began to run when Kaplan discovered that the cancer had metastasized to her lymph nodes in August 1983.³⁸³ Additionally, the Court found that there was a question of fact as to when Kaplan became aware that her injury was "wrongfully caused."³⁸⁴

Kaplan involves a very sordid series of events resulting in Kaplan's proper diagnosis. As such, there are various points at which a Minnesota court could find "some damage." Damage could have been found any time Kaplan complained of pain prior to being properly diagnosed.³⁸⁵ Kaplan complained of pain in her leg on nine different occasions, to six different physicians.³⁸⁶ Additionally, "some damage" could have occurred when Kaplan had her lump removed and experienced subsequent damage to her right leg that needed repair.³⁸⁷ One doctor even suggested amputation.³⁸⁸ Further, "some damage" could have occurred when doctors discovered the metastasis of the cancer.³⁸⁹ It took doctors two years to properly diagnose Kaplan and discover the extent of her condition.³⁹⁰ During that time period, there are various instances where "some damage" could have occurred.³⁹¹ The only instance in which Kaplan's claim is not time-barred is if the court found that Kaplan suffered "some damage" upon learning of the metastasis to her lymph nodes.³⁹² Applying *MacRae*, Kaplan would have had to litigate to determine whether she had a cause of action.

4. Johnson v. Mullee

Johnson v. Mullee, a 1980 decision of the Florida appellate court, presented a classic cancer misdiagnosis fact situation: one doctor failed to perform a biopsy and another doctor subsequently diagnosed the cancer.³⁹³ Due to variances in

379. *Id.*

380. *Id.* at 1273.

381. *Id.* at 1269 (citing *Witherell v. Weimer*, 421 N.E.2d 869 (Ill. 1981)).

382. *Kaplan v. Berger*, 539 N.E.2d 1267, 1273 (Ill. App. Ct. 1989).

383. *Id.*

384. *Id.* at 1273-74.

385. *Id.* at 1272-74.

386. *Id.* at 1270-72.

387. *Id.* at 1272.

388. *Id.*

389. *Id.*

390. *Id.* at 1270-72.

391. *Id.* at 1272-74.

392. *Kaplan v. Berger*, 539 N.E.2d 1267, 1272 (Ill. App. Ct. 1989).

393. 385 So. 2d 1038, 1039 (Fla. Dist. Ct. App. 1980).

cancer growth rates³⁹⁴ and uncertainty in the application of the some-damage rule, it is unclear whether Johnson's claim would be time-barred in Minnesota. During a routine breast examination on September 1972, the defendant doctor found lumps in Johnson's left breast, but failed to investigate further.³⁹⁵ Johnson visited the same doctor a year later for a different reason, still the doctor failed to perform a breast exam.³⁹⁶ Six days later, Johnson noticed discharge from her left breast.³⁹⁷ Johnson approached her father (a surgeon) with the problem, who examined her breast and ordered a biopsy and a radical mastectomy on March 12, 1973.³⁹⁸ The mastectomy confirmed that the lumps were malignant.³⁹⁹ Further pathology reports indicated that the cancer had metastasized to three lymph nodes.⁴⁰⁰ In February 1975, a bone scan showed that the breast cancer had metastasized to Johnson's ribs and skull.⁴⁰¹ Prior to this scan, no other evidence showed further metastasis.⁴⁰² In January 1978, Johnson died from the metastatic breast cancer.⁴⁰³ Immediately following Johnson's death, her estate filed an amended wrongful death complaint against the defendant.⁴⁰⁴

The trial court determined that Johnson's cause of action began to accrue when she was properly diagnosed by her father and, thus, her claim was time-barred.⁴⁰⁵ On appeal, the court reversed, holding that there was no cause of action at the time of discovery of the misdiagnosis because Johnson had no evidence of harm from the defendant's failure to diagnose her.⁴⁰⁶ Additionally, the court stated that "[i]t was only in February 1975, when the cancer appeared in other parts of her body, that she discovered her cause of action. It was only then

394. See, e.g., American Cancer Society: ACS News Center—Faster Tumor Growth Rate Proof Younger Women Need Yearly Mammograms, May 10, 2008, http://www.cancer.org/docroot/NWS/content/NWS_1_1x_Faster_Tumor_Growth_Rate_Evidence_for_Yearly_Mammograms_in_Younger_Women.asp (discussing varying breast cancer growth rates).

395. *Mullee*, 385 So. 2d at 1039.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Johnson v. Mullee*, 385 So. 2d 1038, 1039 (Fla. Dist. Ct. App. 1980).

404. *Id.*

The deceased and her husband Erik Johnson (now personal representative of the Estate of Nancy M. Johnson, deceased) began this action by filing a medical liability mediation claim for medical malpractice against appellee on November 29, 1976. The mediation panel found that appellee was not guilty of actionable negligence. Within 60 days of the conclusion of the mediation claim, the deceased and her husband filed a personal injury action against appellee. When Nancy Johnson died on January 3, 1978, appellant filed an amended complaint for wrongful death against appellee doctor and his medical malpractice insurer.

Id.

405. *Id.*

406. *Id.* at 1040.

that she could have known she had been harmed by the alleged negligent diagnosis.”⁴⁰⁷

Under *MacRae*, it is uncertain whether Johnson’s claim was time-barred. Arguably, Johnson could claim that some damage occurred when she discovered the proper diagnosis,⁴⁰⁸ especially since all that is necessary in Minnesota is “legally compensable” damage. Further, the defendant could argue that some damage occurred when Johnson had to undergo a radical mastectomy, which may not have been required if the defendant had investigated the lumps found in 1972.⁴⁰⁹ Also, following the Florida appellate court’s reasoning, the defendant could argue that some damage occurred when the cancer metastasized to the bones, or when (if determinable) the cancer spread from the breast to the lymph nodes.⁴¹⁰ If either of the first two approaches are accepted, Johnson’s claim would be time-barred in Florida under its two-year statute of limitations.⁴¹¹ This seems unjust, as it is questionable whether or not any damage occurred from 1972 to the removal of her breast in 1973 (since the continued presence of cancer is not enough “damage” in Minnesota). One could argue that if Johnson had not died from metastatic cancer,⁴¹² she would have suffered no damages from the negligent actions of the defendant.

5. Hawley v. Green

Hawley v. Green, an Idaho decision from 1993, is another factually complex case that illustrates the multiple instances in which “some damages” could be shown under the *MacRae* rule.⁴¹³ Julie Hawley, the plaintiff, went to Caldwell Memorial Hospital on September 1, 1979 for a pre-operative chest X-ray.⁴¹⁴ One of the defendants, Dr. Bennett, reviewed the X-ray and reported the results.⁴¹⁵ Over a year and a half later, Hawley had an additional X-ray taken, reviewed, and reported by Dr. Matheson.⁴¹⁶ At the time both of the X-rays were taken, Hawley had tumors that were not discovered.⁴¹⁷ Two years later, Hawley visited an ophthalmologist, Dr. Chen, for a routine eye exam.⁴¹⁸ During the eye exam,

407. *Id.*

408. *See id.* at 1039 (discussing trial court’s ruling that when the correct diagnosis was made, “Nancy had notice of the alleged negligent act and of an allegedly resultant injury and consequent damage, although she may not have had actual notice of the ultimate extent of the injury and consequent damage until a later date”).

409. *See id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *See Hawley v. Green*, 860 P.2d 1, 2 (Idaho Ct. App. 1993).

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 3.

418. *Id.* at 2.

Dr. Chen observed symptoms⁴¹⁹ of a syndrome caused by tumors and suggested that Hawley see a neurologist.⁴²⁰ Later that same month, Hawley visited a neurologist, Dr. Green, who scheduled a neck X-ray and CT scan.⁴²¹ Dr. Matheson and Dr. Allen reviewed the scans and after a clean report, Dr. Green told Hawley that all of the tests were negative.⁴²² According to Dr. Green, the symptoms observed by Dr. Chen were likely caused by a sinus infection or allergies.⁴²³

In late 1983, Hawley moved to Oregon.⁴²⁴ She experienced no medical problems until three years after her visit with Dr. Green.⁴²⁵ Due to neck and shoulder pain, Hawley sought medical advice.⁴²⁶ On September 8, 1986, a chest X-ray and CT scan were performed, which showed a large tumor in Hawley's neck and chest area.⁴²⁷ Two weeks later, Hawley had the tumor removed and biopsy results showed that the tumor was malignant.⁴²⁸ The doctors in Oregon informed Hawley that her tumor was visible in all the previous X-rays taken at Caldwell Memorial Hospital.⁴²⁹

The Court considered the issue of whether or not Hawley's action was time-barred by Idaho Code § 5-219(4),⁴³⁰ which provides a two-year statute of

419. *Id.* ("Hawley and Dr. Green discussed a possible droopy eyelid and small pupil which the ophthalmologist had noticed, and a possible puffiness on the left side of Hawley's face.").

420. *Id.*

421. *Id.*

422. *Id.* at 4.

423. *Hawley v. Green*, 860 P.2d 1, 2 (Idaho Ct. App. 1993).

424. *Id.*

425. *Id.*

426. *Id.* at 2-3.

427. *Id.*

428. *Id.* at 3.

429. *Id.*

430. IDAHO CODE ANN. § 5-219(4) (2004):

Actions against officers, for penalties, on bonds, and for professional malpractice or for personal injuries—Within two (2) years: ... (4) An action to recover damages for professional malpractice, or for an injury to the person, or for the death of one caused by the wrongful act or neglect of another, including any such action arising from breach of an implied warranty or implied covenant; provided, however, when the action is for damages arising out of the placement and inadvertent, accidental or unintentional leaving of any foreign object in the body of any person by reason of the professional malpractice of any hospital, physician or other person or institution practicing any of the healing arts or when the fact of damage has, for the purpose of escaping responsibility therefor, been fraudulently and knowingly concealed from the injured party by an alleged wrongdoer standing at the time of the wrongful act, neglect or breach in a professional or commercial relationship with the injured party, the same shall be deemed to accrue when the injured party knows or in the exercise of reasonable care should have been put on inquiry regarding the condition or matter complained of; but in all other actions, whether arising from professional malpractice or otherwise, the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer, and, provided further, that an action within the foregoing foreign object or fraudulent concealment

limitations, beginning at the time of occurrence.⁴³¹ Similar to Minnesota, Idaho couples its occurrence rule with a damage rule holding that “a cause of action does not accrue at the time of the act complained of unless some damage has occurred.”⁴³² After reviewing the record, the Idaho Supreme Court concluded that there were insufficient facts to show that Hawley’s misdiagnosis resulted in damages more than two years before filing and remanded the case for further fact finding.⁴³³

Applying the *MacRae* holding to these facts, it is unlikely that the Minnesota Supreme Court would determine that an injury occurred between the negligently read X-rays and the properly read X-rays, as “continued presence of cancer following a negligent misdiagnosis, by itself, may not be compensable damage.”⁴³⁴ Thus, more expert evidence would be necessary to show how the continued cancer presence damaged Hawley. It is important to point out, however, that a Minnesota court could determine that some damage occurred between 1979 and 1986, which, depending on when that damage is found, could bar Hawley’s claim up to seven years before she was informed she had cancer. Under the *MacRae* decision,⁴³⁵ unless Minnesota found that “some damage” occurred when Hawley began experiencing pain and discomfort in 1986, her claim would be time-barred in Idaho.

Overall, the application of the *MacRae* holding to other factually similar cases yields uncertain and inconsistent results. These inconsistent results make it very difficult for patients, doctors, insurance companies, and lawyers alike to predict the outcome of any given case. Additionally, because the some-damage rule in a cancer misdiagnosis or failed diagnosis situation is so dependent on expert testimony, a battle of the experts is likely to ensue, making it more difficult for summary judgment motions to be successful and leading to additional litigation. While the some-damage rule is firmly rooted in tort law and is a very logical legal concept, the outcome in application leaves one hoping for more. With so many other options and variations of rules for when a cause of action accrues, another more balanced and consistent theory could be adopted.

exceptions must be commenced within one (1) year following the date of accrual as aforesaid or two (2) years following the occurrence, act or omission complained of, whichever is later. The term “professional malpractice” as used herein refers to wrongful acts or omissions in the performance of professional services by any person, firm, association, entity or corporation licensed to perform such services under the law of the state of Idaho. This subsection shall not affect the application of section 5-243, Idaho Code, except as to actions arising from professional malpractice. Neither shall this subsection be deemed or construed to amend, or repeal section 5-241, Idaho Code.

Id.

431. *Id.*

432. *Hawley*, 788 P.2d at 1325.

433. *Hawley v. Green*, 788 P.2d 1321, 1327 (Idaho Ct. App. 1990).

434. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 720 (Minn. 2008).

435. *Id.* at 721.

V. MAKING MINNESOTA SAFER FOR THOSE WHO ARE MISDIAGNOSED WITH
CANCER: OTHER POTENTIAL THEORIES FOR THE STATUTE OF LIMITATIONS

Minnesota's uncertain approach to when a cause of action should begin to accrue is the minority approach and the *MacRae* decision has only created more ambiguity. Today, some states today have developed a hybrid statute of limitations to restrict the amount of time a doctor remains open to liability, but also to provide justice for those patients with legitimate claims.⁴³⁶ For example, in Massachusetts, the discovery rule has been adopted, but the legislature has supplemented that rule with a statute of repose, limiting the overall time period that a medical malpractice claim can be brought regardless of the date of discovery.⁴³⁷ The Massachusetts' approach appears to be balanced in deterring physicians and encouraging timeliness in filing claims on the part of patients.

Another option for cancer misdiagnosis claims is the approach Mrs. MacRae advocated for—the statute of limitations should be triggered at the point where it is “more probable than not” that the patient is going to die.⁴³⁸ Adopting such a rule could be very controversial, but would also follow in the footsteps of those jurisdictions that have adopted the “loss of chance doctrine.”⁴³⁹ This rule would provide a just result for those patients whose lives are shortened as a result of misdiagnosis; and, thus, it would not be applicable in every cancer diagnosis claim. The worst damage a person or family can face is the loss of life; therefore, this rule for instances resulting in death might deter physicians and better compensate victims and their families.

The final theory worth mentioning is a variation of the occurrence/injury rule. This theory would require Minnesota to fully embrace the rule that Arizona applies.⁴⁴⁰ While Minnesota accepted Arizona's reasoning that the continued presence of cancer is not enough to constitute an injury, Minnesota did not fully adopt Arizona's reasoning.⁴⁴¹ In *DeBoer v. Brown*, the Arizona Supreme Court held “[w]here a medical malpractice claim is based on a misdiagnosis or a failure to diagnose a condition, the ‘injury’ ... is the development of the problem into a

436. See, e.g., *Harlfinger v. Martin*, 754 N.E.2d 63, 67-68 (Mass. 2001).

437. See *id.* at 67. See also MASS. GEN. LAWS ch. 260, § 4 (2004).

Actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanatoria shall be commenced only within three years after the cause of action accrues, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.

Id.

438. Brief and Appendix of Petitioner Margaret MacRae, Trustee for the Next of Kin of Roderick MacRae at 16, *MacRae v. Group Health Plan, Inc.*, 735 N.W.2d 711 (Minn. 2008). See also *MacRae*, 753 N.W.2d at 715.

439. See, e.g., *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 823 (Mass. 2008) (“We conclude that recognizing loss of chance in the limited domain of medical negligence advances the fundamental goals and principles of our tort law.”).

440. See *DeBoer v. Brown*, 673 P.2d 912, 914 (Ariz. 1983).

441. *MacRae*, 753 N.W.2d at 721-22.

more serious condition which poses greater danger to the patient or which requires more extensive treatment.”⁴⁴² This rule—specific to misdiagnosis cases while still a variation of one of the main rules⁴⁴³—highlights that damage really begins when the failure to diagnose or misdiagnosis further endangers the patient.⁴⁴⁴ This rule would again provide justice for patients and would only hold a physician liable if his failure to diagnose or misdiagnosis further endangered his patient.

VI. CONCLUSION

While tort reform has been a hot topic in recent years, and has led to efforts to decrease medical malpractice suits and cap damages, the point of tort reform is not to discourage legitimate lawsuits.⁴⁴⁵ Due to the nature of the disease, a misdiagnosis of cancer or a delayed diagnosis can literally be the difference between life and death.⁴⁴⁶ Minnesota needs to decide on a bright-line rule for when the statute of limitations begins to run for a cancer misdiagnosis claim.

While each cancer misdiagnosis claim is undoubtedly factually different, it is unfair to both patients and doctors to allow uncertainty as to when a claim can be brought or to the period during which they are exposed to liability. Further, the Minnesota case-by-case approach sets a dangerous precedent that could be used by other states as well. This case-by-case basis will likely create unnecessary litigation, as plaintiffs may have to litigate simply to determine whether or not their claim is ripe. Conversely, this precedent could have another negative effect by discouraging patients from bringing claims, resulting in a lack of compensation for legitimate claims. Such uncertainty could cause medical malpractice insurance premiums to rise, as the case-by-case approach makes it more difficult for insurance companies to predict or estimate the number of claims that could be brought in a given year.

Overall, the judicial system in Minnesota needs to adopt some guidelines or a test to determine when a cause of action begins for a cancer misdiagnosis claim to ensure the most just result. As shown in the case studies of Texas and Delaware, health care providers and insurance companies have more pull with the legislature than patients; therefore, medical malpractice tort reform tends to favor defendants. Plaintiff verdicts are already rare in medical malpractice claims and the last thing a plaintiff needs is to have her claim time-barred before even realizing there was a cause of action.

Doctors are human and undoubtedly make mistakes.⁴⁴⁷ Cancer is a disease that is still widely misunderstood. These observations, however, do not comfort

442. *DeBoer*, 673 P.2d at 914.

443. Discovery, injury/occurrence, or damage.

444. *See generally* *DeBoer*, 673 P.2d at 912.

445. Jeffrey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merits?*, 1997 B.Y.U. L. REV. 537, 578.

446. *See, e.g.*, Dr. Susan Taylor’s Brownskin.net: Skin-Skin Cancer, <http://www.brownskin.net/cancer.html> (last visited Jan. 24, 2010).

447. *See, e.g.*, *DeBoer*, 673 P.2d at 912.

victims and their family and friends when they are negligently misdiagnosed and precious time is shaved off their lives. Those victims with legitimate claims deserve their day in court.