Fall 1987

CALIFORNIA PERSONAL INJURY STATUTES OF LIMITATIONS: The Modern Tort and the Judicial Abandonment of an Archaic Doctrine

Steven J. Andre

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I. INTRODUCTION

A new view of statutes of limitations in California can be traced to industrial development in the last century. Industrialization had two major impacts upon the viability of statutes of limitations. First, it created a new type of tort which does not manifest itself for extended periods and is undeterminable with regard to origination. Second, industrial development has also resulted in the rejection of a concept of social equity which favors social progress over individual loss and the acceptance of an equitable notion of corporate responsibility and risk apportionment for costs of injuries.[1] This article focuses its analysis on the post-industrialization development of tort law which extends beyond negligence. One commentator has described this development as a movement in social thinking from contract to norms of fiduciary ethic which rejects the doctrine of caveat emptor (buyer beware) and imposes more stringent duties on "those who act."[2]

Case law in California has long treated statutes of limitations as an equitable device, designed to prevent tortfeasors from being confronted with remote claims.[3] This has been the case in spite of the fact that limitations periods are not designed with equity in mind, inflexibly enforcing strict time limits.

Equity, however, is shaped and defined to conform to the exigencies of the contemporary world.[4] Industrial development and the series of transitions it has yielded have resulted in enhanced political power wielded by a traditionally exploited underclass. The application of the concepts of statutes of limitations has been transformed into a flexible

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** This is a revised version of an article published in the SANTA CLARA LAW REVIEW, Vol. 27, Fall 1987, Number 4 (27 Santa Clara L.Rev. 657)

[1] Generally, the process of industrialization has been regarded as contributing to the evolution of tort theory beyond rudimentary notions of direct torts, such as battery, to negligence concepts and beyonbd. See M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 85-99 (1977); E. WHITE, TORT LAW IN AMERICA 3-19 (1981); J. LIEBERMAN, THE LITIGIOUS SOCIETY 34-39 (1981); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 365 (1951) (crediting Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850), as the first decision to set forth a consistent theory of liability for recovering damages for unintentionally caused harm).

[2] J. LIEBERMAN, *supra* note 1, at 19.

[3] Davies v. Krasna, 14 Cal. 3d 502, 512, 535 P.2d 1161, 1167-68, 121 Cal. Rptr. 705, 711-12 (1975); Pashley v. Pacific Elec. Ry., 25 Cal. 2d 226, 229, 153 P.2d 325, 326-27 (1944).

[4] L. FRIEDMAN, A HISTORY OF AMERICAN LAW 295-99, 317 (1973). Friedman describes how the legal system historically pays deference to those who wield the most power. Thus, the laws reflect the goals and policies of those who are in control.

process searching for new analyses and straining to find justifications to support new visions of equity in established tort theory. A new perception of social justice has evolved, challenging the arbitrary bars posed by statutes of limitations to compensation for injury.

This article explores the California judiciary's reinterpretation of statutes of limitations in personal injury suits. First, the history of the modern industrial tort and its place in traditional concepts of equity is described. Second, the judicial and legislative applications of statutes of limitations to modern torts are compared. California's three exceptions to statutes of limitations - the rule of discovery, estoppel, and equitable tolling - are analyzed. Last, the viability of other proposed exceptions to limitations periods are discussed.

II. EQUITY AND THE MODERN INDUSTRIAL TORT

A. *The Development of the Modern Tort*

Changes in technology have yielded changes in torts.[5] The modern industrial tort is distinguishable from the classic *Palsgraf v. Long Island Railroad*[6] situation in two significant respects.

First, the cause of the injury is difficult to ascertain. In *Palsgraf*, the source of Ms. Palsgraf's injury was easily traced to the negligent conduct of an employee in assisting a firecracker toting passenger onto a train. Compare *Palsgraf* to a situation in which a mother is administered diethylstilbesterol (DES) and twenty-five years later witnesses her female children develop cancer of the uterus.[7] The causation problems encountered in the latter situation are much more complex.

Second, the modern tort is distinguished from torts of Cardozo's time because of the difficulty in proving that injury occurred simultaneously with the negligent conduct. There was nothing latent about Ms. Palsgraf's injuries. She immediately realized that the falling scales on the train platform were the source of her injury. Modern technology, however, has provided numerous instances where the cause and effect relationship is much less clear. Even the complicated task of proving the delayed effects of a whiplash injury resulting from a simple fender-bender pales in comparison with the burden imposed upon cancer victims trying to prove that asbestos exposure, which occurred fifteen years earlier, is the cause of their disease.[8]

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[5] *See* Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 Wis. L. REV. No. 3, 83, 86-87 (noting the difference between technology in the time of the nascent common law and modern technology: the number of persons potentially affected is greater, the mechanisms of injury are more unforeseeable and unpredictable, and the injuries often involve long periods of exposure before they are revealed).

[6] 248 N.Y. 339, 162 N.E. 99 (1928).

[7] Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

[8] *See* Puckett v. Johns-Manville Corp., 169 Cal. App. 3d 1010, 1016-17, 215 Cal. Rptr. 726, 730-31 (1985) (holding that the extended statute of limitations for asbestos injuries provided in California Civil Procedure Code section 340.2 applies to causes of action arising before the law became effective in January 1980 because the Legislature was remedying the inequities of applying statutes of limitations to gradually disabling injuries, and desired to extend this remedy to as many persons as possible); Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 496 (8th Cir. 1975) (detailing the difficult problems of proof involved in tying asbestos exposure to an injury).

1. *Development of the Modern Tort in the Products Service Area*

In considering the modern tort, the reader should realize that causation problems are not limited to situations involving products. Technical advances in service areas, such as complex surgical techniques, have also presented causation difficulties. Nevertheless, California case law pertaining to statutes of limitations and the modern tort has developed primarily in the products field. One reason for this is the dichotomy in liability theory drawn between products and service situations.

In the products liability field, courts have allowed strict liability of manufacturers of products because: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[9]

The willingness to saddle manufacturers of technology with such costs is in contrast to the protections afforded personal transactions. The courts have refused to impose this burden of liability upon services industries because service industries do not sell products, but rather provide professional skills. This article consequently emphasizes analysis of products litigation.[10]

2. *The Modern Tort: New Conceptions of Equity*

Treatment of tort recovery by California courts has evolved from a narrow view of compensation for tortious injury to an expansive perception of the right to compensation. This perception is founded in equitable concepts of fairness acknowledging the consumer's relative lack of knowledge, choice, and ability to absorb losses from injuries.[11]

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[9] Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

[10] In Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971), the court noted that:

> A hospital is not ordinarily engaged in the business of selling any of the products or equipment its [sic] uses in providing such services. The essence of the relationship between a hospital and its patients does not relate essentially to any product or piece of equipment it uses but to the professional services it provides.

Id. at 1027, 98 Cal. Rptr. at 190-91. On the basis of a legislative classification of pharmacists as service providers, the California Supreme Court held that a pharmacist who dispenses a prescription drug provides a service, not a product. Therefore, the pharmacist is not strictly liable in tort for a defective drug. Murphy v. E.R. Squibb & Sons, Inc., 40 Cal. 3d 672, 679-81, 710 P.2d 247, 251-52, 221 Cal. Rptr. 447, 451-52 (1985). *Compare*, Peterson v. Superior Court,10 Cal. 4th 1185 (1995) (rejecting extension of strict liability to landlords in the landlord-tenant relationship).

Another reason for the relative dearth of case law developing statutes of limitations in the service area is that the California Legislature has severely restricted development of common law analyses in particular service areas. *See, e.g*., CAL. CIV. PROC. CODE §340.5 (three year maximum on statute of limitations in suits against health care providers); CAL. CIV. PROC. CODE § 340.6 (four year maximum on statute of limitations in actions against attorneys for wrongful acts or omissions); CAL. CIV. PROC. CODE § 337.1 (West 1982) (setting forth a limit of four years from completion for suits relating to patent deficiencies in construction, design and planning of real property improvements). In Martinez v. Traubner, 32 Cal. 3d 755, 758-59, 653 P.2d 1046, 1047-48, 187 Cal. Rptr. 251, 252-53 (1982), the California Supreme Court held that California Civil Procedure Code section 337.15's ten year limit (providing a ten year statute of limitations for suits involving latent deficiencies in real property improvements) does not apply to direct actions for personal injury. CAL. CIV. PROC. CODE § 337.15 (West 1982).

In contrast, the Legislature has been willing to extend statutes of limitations in particular products areas. *See* CAL. CIV. PROC. CODE § 340.2 (West Supp. 1982) (extending the time in which an injured person is allowed to bring an action based on asbestos exposure).

[11] Morton Horwitz detailed how courts altered legal rules in order to subsidize the enterprises of industrialists. He noted: `By the time of the Civil War ... American courts had created a variety of legal doctrines whose primary effect was to force those injured by economic activities to bear the cost of these improvements." M. HORWITZ, supra note 1, at 70-71; C.

In early industrial America, large enterprises were sheltered from liability for tortious conduct. The injured were expected to bear the economic costs of improvements. Gradually, however, the no-liability rule deteriorated as industry expanded and prospered.[12] Even before this stage of corporate development was reached, forces were at work to undermine the legal developments which protected infant American industry at the expense of the injured. It is noted: "The no-liability rule could not last. . . . We reject the rule of caveat emptor because its essential prerequisite - knowledge of risk - cannot plausibly be maintained. The ordinary consumer does not and cannot understand the engineering and safety aspects of most modern goods. The world is too intricate."[13]

Today, industrial organizations have grown enormously in power as well as size. The position of large corporations in America has required corporate assumption of responsibility for community welfare.[14] The attainment of a secure position by manufacturing corporations marked the total reversal of the equitable notion that individuals should bear the burdens of injuries. Equity now requires the financially secure corporate entity to absorb the losses involved in compensating a person injured by its product, and to allocate this loss to other consumers in the form of higher prices.[15] The following sections describe how this has been reflected in developments in statutes of limitations.

III. THE IDEAL AND THE REALITY OF STATUTES OF LIMITATIONS

Courts regard limitations periods, in addition to eliminating stale claims and providing for a point at which repose is achieved, as designed to prevent unfair surprise to defendants who are confronted by claims which originated in the distant past.[16] A review of the relevant statutory scheme reveals no support for this equitable principle. California Civil Procedure Code section 312 states: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."[17]

Thus, an action can only be commenced within the statutorily prescribed period. Under California's Civil Procedure section 350, "[a]n action is commenced, within the meaning of this title, when the complaint is filed."[18] A statute of limitations in an action is tolled when the complaint is filed. Assuming the language of section 350 is exclusive of any other means of tolling the statute of limitations and refers to the filing of a complaint in a court,[19] a defendant who is served the same day a complaint for negligence is filed - two years and two days after

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STONE, WHERE THE LAW ENDS 38-39, 233 (1975).

[12] C. STONE, *supra* note 11, at 233

[13] J. Lieberman, *supra* note 1, at 39.

14. A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 166-67 (1954).

[15] *E.g.*, *Greenman*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

[16] Wood v. Elling Corp., 20 Cal. 3d 353, 362, 572 P.2d 755, 760, 142 Cal. Rptr. 696, 701 (1977).

[17] CAL. CIV. PROC. CODE § 312 (West 1982).

[18] *Id*. at §350.

[19] *See* Bold v. Board of Medical Examiners, 133 Cal. App. 23, 25, 23 P.2d 826, 82627 (1933); CAL. CIV. PROC. CODE § 411.10 (West 1973).

an auto accident - may successfully assert the statute of limitations provided by California's Civil Procedure section 340(3)[20] as a bar to the action.

At the same time, California Civil Procedure Code section 583.210[21] provides a three year period in which an injured person may serve a defendant with a complaint. This means an action can be commenced three days earlier by filing a complaint in the same auto accident case within the two year period. The complaint can then be served on a defendant almost five years after the accident occurred.[22]

Additionally, California Civil Procedure Code section 583.240[23], in contrast to section 312, provides for an exception allowing extension of the three year limit where circumstances beyond a plaintiff's control prevent effective service.[24]

How the act of filing a document with the court (constructive notice), rather than actual service of a lawsuit, better serves the objective of avoiding unfair surprise to defendants escapes reason. It is not realistic to expect that the average citizen would travel to the courthouse on a regular basis to see if any tort claims have been filed against him or her. Nevertheless, this manifestation of legal schizophrenia persists to the present day.

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[20] CAL. CIV. PROC. CODE § 340(3) (West Supp. 1987) (formerly a one year statute of limitations, now a two year period).

[21] *Id*. at § 583.210 (a).

[22] Given the realities of modern tort litigation, in many cases one year may not provide an injured plaintiff sufficient time to identify and locate all potential defendants. This is especially true in products liability cases. . . . By effectively extending the statutes of limitations by use of fictitious defendant provisions, sections 474 and 583.210 help to mitigate the harshness of the one-year limitations period prescribed by section 340(3).

Brennan v. Lermer Corp., 626 F. Supp. 926, 930 (N.D. Cal. 1986).

[23] CAL. CIV.. PROC. CODE § 583.240 (West Supp. 1987).

[24] Delay of notice to a defendant may be drawn out even further. California Civil Procedure Code section 474 allows an injured person, who cannot identify a defendant or the facts supporting the cause of action at the time the complaint is filed to later amend the complaint to identify the defendant. A plaintiff has three years in which to amend, subject only to the caveat that defendant not show 1) plaintiff was dilatory in effecting the amendment, and 2) defendant was prejudiced as a result of plaintiff's undue delay in amending after discovering the identity or facts of liability. Barrows v. American Motors Corp. 144 Cal.App.3d 1, 192 Cal.Rptr. 380 (1983). This is also the rule accepted by the federal courts. Lindley v. General Elec. Co. 780 F.2d 797 (9th Cir. 1986); Brennan v. Lerner Corp. 626 F.Supp. 926 (N.D. Cal. 1986). In Barrington v. A.H. Robins, Co., 39 Cal. 3d 146, 702 P.2d 563, 216 Cal. Rptr. 405 (1986), the California Supreme Court held that the three year limitations period does not commence to run at the time the original complaint is filed as to a Doe defendant. In such a situation, the limitations period commences to run from the time of the filing of an amended complaint identifying the defendant and alleging a theory involving new operative facts. *Id*. at 154, 702 P.2d at 567, 216 Cal. Rptr. at 409.

Thus, a plaintiff who files a complaint within the one year period in order to preserve his or her cause of action, may amend it to add new allegations and defendants up to three years after filing. The plaintiff then has an additional three years from the date of the amendment to effect service. In all, seven years could elapse from the date of injury to the time a defendant is served with a complaint. In this regard, the plaintiff is generally not required to exercise diligence in ascertaining the cause of action or identifying a defendant. Joslin v. H.A.S. Ins. Brokerage, 184 Cal. App. 3d 369, 375-76, 228 Cal. Rptr. 878, 882-83 (1986). *But see* Luti v. Graco, Inc., 170 Cal. App. 3d 228, 215 Cal. Rptr. 902 (1985) (wherein the court upheld dismissal of an action based on a presumption of prejudice to the defendant because of plaintiff's lack of diligence in not serving the defendant or providing him with actual notice of the claim until almost three years from filing the complaint and almost four years from the date of injury). It should be noted, however, that failure to serve a Doe defendant within two years of filing a complaint may provide a basis for dismissal on the basis of delay in prosecution. Clark v. Stabend Corp. (1987) 197 Cal.App.3d 50, 242 Cal.Rptr. 676.

IV. THE LEGISLATIVE RESPONSE TO THE MODERN TORT

The California Legislature views the role of statutes of limitations differently than the judiciary. The courts apply statutes of limitations to prevent unfairness to *defendants* and avoid finding exceptions to limitations periods based upon unfairness to *plaintiffs*.

In contrast, legislative exceptions focus upon unfairness to plaintiffs without regard to unfairness which *defendants* suffer due to an exception.[25] However, legislative enactments manifest a distaste for the judicially adopted rule of discovery which effectively renders "open-ended" the period before which a limitations period will commence to run. With the exception of California Civil Procedure Code section 340.2,[26] which expands the limitations period for commencement of actions for asbestos injuries, the legislative response to modern torts has conflicted with the judicial approach.[27]

Recent legislative enactments represent a marked departure from past legislative attitudes toward the rule of discovery. In the past, the Legislature has acted to overturn judicial rejection of a delayed discovery analysis in a non-tort context.[28]

The legislative reaction to recent court decisions is revealed in the services area.[29] In the construction and medical industries, for example, the Legislature has diminished the time period allowed for filing suit.[30] Thus, when compared to the judiciary's liberal interpretations of statutes of limitations, recent legislative enactments represent a clear effort to limit such expansive rulings.

V. THE JUDICIAL RESPONSE TO THE MODERN TORT; CALIFORNIA'S EXCEPTIONS TO THE STATUTE OF LIMITATIONS

California courts have developed four exceptions to the statute of limitations as a bar

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[25] *See* CAL. CIV. PROC. CODE § 352 (West 1982 & Supp. 1987) (allowing extension of the statutory period while a plaintiff is a minor, insane or imprisoned); *Id*. at 352.5 (West 1982) (extending the time period while a defendant is under an order for restitution); *Id*. at § 353, 353.5 (providing an extension when the plaintiff or defendant dies); *Id*. at § 353.1 (West Supp. 1987) (extending the time period when a plaintiff's attorney's practice is assumed by the state); *Id*. at § 354 (West 1982) (extending the time period when a plaintiff is unable to commence an action due to the existence of a war); *Id*. at § 355 (West 1982) (providing an extension where a plaintiff's judgment is reversed on appeal on procedural grounds unrelated to the merits); and *Id*. at § 356 (allowing an extension where an action is stayed by injunction or statutory prohibition).

[26] CAL. CIV. PROC. CODE § 340.2.

[27] See i*nfra* text accompanying notes 28-31.

[28] In 1913, the Legislature effectively overruled the holding of Lattin v. Gillette, 95 Cal. 317, 30 P. 545 (1892), by allowing postponement of accrual of a cause of action relating to title searches until discovery of damage. *See* discussion in Neel v. Magana, Olney, Levy, Cathcart and Gelfand, 6 Cal. 3d 176, 183-84, 491 P.2d 421, 425, 98 Cal. Rptr. 837, 841 (1971).

[29] *See* CAL. CIV. PROC. CODE § 340.5 (West 1982) (which as part of the MICRA reform, provides a three year limit on the rule of discovery in suits against health care providers). *Id.* at §340.6 (which provides a similar limit in suits against attorneys); *Id*. at § 337.1 (setting forth a limit of four years from completion for suits relating to patent deficiencies in construction, design, and planning of real property improvements); *Martinez*, 32 Cal. 3d 755, 653 P.2d 1046, 187 Cal Rptr. 251 (1982) (where the California Supreme Court held that California Civil Procedure Code § 337.15, providing a similar ten year limit relating to latent deficiencies in real property improvements, does not limit direct actions for personal injury).

[30] This is certainly a consequence of the development of powerful lobbies in the state capital in Sacramento to protect the medical and construction industries. The self-serving impetus behind Code of Civil Procedure §340.6, which limits the time for suits against attorneys, is obvious.

without exceptions[31] to commencement of modern tort actions. The first, and most significant, is the rule of discovery. It relies on the language of section 312, stating that an action must be commenced within the prescribed period "after the cause of action shall have accrued."[32] Where discovery of a cause of action is delayed in spite of a plaintiff's exercise of reasonable diligence,[33] the cause of action has actually not yet accrued. If the cause of action is nonexistent, a defendant cannot be said to be prejudiced vis à vis the plaintiff with regard to discovery.

The second, third and fourth exceptions focus upon the defendant's knowledge and conduct. The second is an estoppel concept. This exception focuses upon a defendant's conduct in preventing a plaintiff from commencing an action within the statutory period. The final exception, known as equitable. tolling, tolls the statute if a defendant knows of a plaintiff's claim, has engaged in discovery, and has not been disadvantaged by plaintiff's good faith delay.[34]

A. *The Rule of Discovery*

The first major development in California law to deal with the inequities produced by a strict application of statutes of limitations was the acceptance of a rule of discovery. The oft-stated rule was that a cause of action accrued as soon as all elements of a tort were clearly evident. Thus, accrual depended entirely upon a defendant's actions, disregarding a plaintiff's awareness of this conduct.[35] Obvious difficulty exists in dogmatically applying such a rule to situations involving product defects or hazardous work environments. In the first situation, the defendant's wrongful conduct may occur years before injury.[36] In the second, a lengthy period of time involving many exposures makes it impossible to determine when the tortious conduct occurred.[37]

Currently, the accepted rule is that a cause of action accrues when a plaintiff discovers all of the elements of the cause of action.[38] Rather than commencing the statutory period from

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[31] CAL. CIV. PROC. CODE § 312 (West 1982). The supreme court has rejected the idea that statutes of limitations should operate as arbitrary bars providing simple resolutions to situations where problems of time, change and causation are troublesome. Regents v. Hartford Acc. & Indem. Co. 21 Cal.3d 624, 641, 147 Cal.Rptr. 486 (1978).

[32] *Id*.

[33] See *infra* note 90 and accompanying text.

[34] See *infra* note 128 and accompanying text.

[35] WITKIN, CALIFORNIA PROCEDURE Actions § 351 (3d ed. 1985).

[36] For a case where the court applied the idea that a product's warranty is related to a future event, see Firth v. Richter, 49 Cal. App. 545, 548-49, 196 P. 277, 278-79 (1920) (since defendant warranted trees were Valencia orange trees, defendant implicitly warranted that trees would bear Valencia oranges.).

[37] See Uric v. Thompson, 337 U.S. 163 (1949); see also Marsh v. Industrial Accident Comm'n, 217 Cal. 338, 351-52, 18 P.2d 933, 938-39 (1933) (accepting the point at which the effects of a progressive disease become manifest as the time when the cause of action accrues).

[38] *See* Kensinger v. Abbott Laboratories, 171 Cal. App. 3d 376, 381, 217 Cal. Rptr. 313, 315-16 (1985); *Glue-Fold, Inc. v. Slautterback Corp*. (2000) 82 Cal.App.4th 1018 at p. 1029 ("A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable.") (internal citations omitted.); *Pooshs v. Philip Morris USA, Inc*. (2011) 51 Cal.4th 788, 797 ("a cause of action accrues 'when [it] is complete with all of its elements' – those elements being wrongdoing, harm, and causation."); *Neel v. Magana, Olney, Levy, Cathcart & Gelfland* (1971) 6 Cal.3d 176, 187 (stating the rule as requiring that the statute of limitations runs from "the occurrence of the last element essential to the statute of limitations."; *see* generally O'Neal, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CALIF. L. REV. 106 (1980).

the date of the defendant's wrongful conduct, the courts find it more equitable to delay commencement of the statutory period until the injured person, exercising reasonable diligence, discovered or should have discovered the wrongful conduct and the resulting injury.

Two components of the rule of discovery are delineated in California case law. First, problems exist with determining when a plaintiff was injured and discovered, or reasonably should have discovered, the injury. Second, difficulties arise in ascertaining when a reasonable individual would have discovered the wrongful source of injury. The following discussion will illuminate why discovery of injury and cause are logically antecedent to commencement of the statutory period.

1. *Ignorance of Any Injury*

In *Avner v. Longridge Estates*,[39] the court dealt with the applicability of the three year property damage limitations period of California Civil Procedure Code section 338[40] to a situation of latent construction defects. The court referring to a "general rule," stated that the cause of action arose at the time of the injury, even if the plaintiff was unaware of its presence.[41]

In reality, the general rule stated by the Avner court is nonexistent. In fact, the court in Avner ignored the general rule it stated. The court noted that where the plaintiffs fell within an exception to the statute of limitations for continuing wrongs and where damage is difficult to discover, the cause of action would not commence to run until the date of discovery.[42]

In Witkin's esteemed volumes, this general rule is reiterated.[43] Numerous cases are cited in support of this proposition. But none of the holdings of these cases which cite the supposed rule provide support for its application in the personal injury context. The decisions are based on analytic and factual considerations other than the purported general rule as stated by the *Avner* court. The general rule, as will be illustrated, was only once given some slight support for its application to cases involving professional services and conversion.[44] Two of

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[39] 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969).

[40] CAL. CIV. PROC. CODE § 338 (West 1982 & Supp. 1987). In *Avne*r, the action arose before the enactment of California Civil Procedure Code §§ 337.1, 337.15.

[41] *Avner*, 272 Cal. App. 2d at 616, 77 Cal. Rptr. at 639-40. The *Avner* court's proposition that a cause of action arises at the time of the injury is hereinafter cited as the general rule.

[42] *Id*. at 617, 77 Cal. Rptr. at 640.

[43] WITKIN, CALIFORNIA PROCEDURE Actions p.381 (3d ed. 1985).

[44] *See infra* note 70. At common law, significantly different considerations governed statutory periods relating to property loss. For example, in relation to causes of action for adverse possession, it has been stated that:

> [Adverse possession] has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918).

Furthermore, while adverse possession principles have not yet been applied to personal property in California, in all property cases the basic common law principle of repose of title is inextricably tied to the basic statute of limitations purpose of barring stale claims. See Bufano v. City & County of San Francisco, 233 Cal. App. 2d 61, 70, 43 Cal. Rptr. 223, 229 (1965); 2 CAL. JUR. 3d *Adverse Possession* § 5 (1973).

The importance of protecting possessory interests is reflected in the fact that the actionable invasion of a property right can occur without any culpable mental state of the trespasser or convertor. *See* 3 AMERICAN LAW OF PROPERTY

the cases cited by Witkin involve conversion actions construing Code of Civil Procedure Section 338.[45]

Although the proposition that ignorance of injury does not toll the statute of limitations is relied upon by the courts, the following cases, which are often cited for the proposition, display that the general rule finds meager support in their analyses.[46]

Easton v. Geller,[47] for example, supports a delayed discovery rule. It involved a plaintiff suing for an accounting. The plaintiff was attempting to resurrect a complaint after a demurrer on the basis of the bar of the statute of limitations was sustained without leave to amend. Plaintiff's efforts to plead a delayed discovery were rejected by the court which noted that the plaintiff could "not give any reason why he did not obtain such information at an earlier date."[48] The court observed that from the facts alleged it "must presume that with reasonable diligence the plaintiff might have ascertained the matters of which he now complains."[49] Thus, the court implied that if the plaintiff had provided a valid reason for failing to discover the wrongful acts of the defendants, he would have been allowed to proceed.

Medley v. Hill[50] involved an action against a sheriff for failure to give proper notice of a lien sale of property purchased by plaintiff. The court quoted the rule as stated in *Lightner*

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§ 15.2, at 762 (1952). *See also* Poggi v. Scott, 167 Cal. 372, 375, 139 P. 815 (1914). Nor is knowledge by the true owner of invasion of the property required to commence the statute running, since the broad considerations pertaining to property interests outweigh the different considerations mitigating in favor of such a rule in personal injury actions. *See* B. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY 764 (1984). While the concern for reasonable and proper diligence in enforcement of rights exists outside the property context, these broader reasons do not. *E.g.*, *Pashley*, 25 Cal. 2d 226, 153 P.2d 325 (1944).

[45] Rose v. Dunk-Harbison Co. 7 Cal.App.2d 502 (1935), 505; First National Bank v. Thompson 60 Cal.App.2d 79 (1943). *But see* Mehl v. People ex rel. Dep't of Public Works 13 Cal3d 710 (1975) (applying a discovery standard to a taking).

[46] Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (1954) involved a plaintiff who suffered food poisoning from eating the defendant's canned peas. The court noted that the discovery of injury was immediate (plaintiffs immediately became violently ill). Hence, the question before the court was limited to whether ignorance of the cause of injury would toll the running of the statute. *Id*. at 20, 266 P.2d at 164.

Collins v. Los Angeles, 241 Cal. App. 2d 451, 50 Cal. Rptr. 586 (1966) involved an action for false imprisonment. The court was concerned primarily with determining when such a cause of action would accrue. The court held that the statute began running before the criminal action against plaintiff was resolved. *Id*. at 456, 50 Cal. Rptr. at 589. The action accrued at the time plaintiffs were released, since they knew at the moment of arrest both that the police acted without warrant and that they had been deprived of liberty. *Id*. at 457, 50 Cal. Rptr. at 590-91. This holding is entirely consistent with a rule of delayed discovery.

Piazza Properties, Ltd. v. Department of Motor Vehicles, 71 Cal. App. 3d 622, 138 Cal. Rptr. 357 (1977), involved an action to recover monies paid in error and the statutory right of recovery of such monies created by California Vehicle Code sections 42231 and 42232. The court found that under these statutory authorizations for applications of refund, the concept of accrual of plaintiff's cause of action under California Civil Procedure Code section 312 is simply irrelevant.

Priola v. Paulino, 72 Cal. App. 3d 380, 140 Cal. Rptr. 186 (1977) involved a husband's tardy effort to state a cause of action for loss of consortium. This was apparently spurred by the recognition of a right to compensation for loss of consortium in Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974). In *Priola*, it was held that "[t]he plaintiff . . . is in no position to claim that there was no discovery of the wrong that resulted in injuries to his wife which in turn led to his loss of consortium." 72 Cal. App. 3d at 388, 140 Cal. Rptr. at 190. The court pointed out that "[i]t is clear that the husband's loss, although not recognized in this state as actionable at that time, was apparent on March 28, 1973. It was only a question of the degree of that loss that remained to be discovered." *Id*. at 390, 140 Cal. Rptr. at 192.

[47] 116 Cal. App. 577, 3 P.2dh 74 (1931).

[48] *Id*. at 580, 3 P.2d at 76.

[49] *Id*.

[50] 104 Cal. App. 309, 285 P. 891 (1930).

Mining Co. v. Lane[51] that, "mere ignorance of the existence of the injury complained of . . . will not prevent the running of the statute of limitations."[52] In holding against the plaintiff, however, the court stressed the fact that more than two years before filing the plaintiff had actually discovered the questionable nature of his title to property due to the sheriff's misconduct.[53]

Calabrese v. County of Monterey [54] involved an attorney who was unable to locate the party indebted to his client for highway construction work among the myriad of county and state government agencies. There was no question relating to plaintiff's discovery of the damage. The problem was that plaintiff's attorney had proceeded against the wrong government agency.[55]

Similarly, *Howe v. Pioneer Manufacturing Co.*[56] involved tenants who suffered injuries after their heating system leaked gas. Although the court noted the general rule,[57] it concluded that the rule of discovery allowed plaintiffs' action.[58] The court reasoned that "if the plaintiffs' allegations of lack of knowledge" were proven, then they could not be accused of neglect in enforcing their rights.[59]

Section 340 of the Code of Civil Procedure as enacted in 1872 applied only to intentional torts resulting in injury. It is really quite difficult to imagine an actual case arising of an intentional tort where the point of discovery of injury does not coincide with the act.[60] Section 340 was amended in 1905 to include negligence actions. Two of cases cited by Witkin were decided before that time. The first, *Lambert v. McKenzie*[61] provides support for the discovery rule and none for the general rule. It involves an action against a sheriff who, in executing a levy, failed to collect the full amount of the plaintiff's judgment debt. The court noted, ". . . the sheriff had furnished plaintiff's attorney with a cost bill showing his disbursements on, January 12, 1892, and the court finds that plaintiff had actual knowledge of what defendant had done on the last named date."[62]

The only case cited by Witkin which would possibly provide support to the general rule is *Lattin v. Gillette,*[63] which concerns an attorney's negligence in conducting a title search. The supreme court held that the cause of action arose at the time of the negligent act, discounting the concept that the accrual should be delayed until the plaintiff discovered the errant title

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[51] 161 Cal. 689, 120 P. 771 (1911).
[52] *Medley*, 104 Cal. App. at 311-12, 285 P. at 892-93. For a criticism of *Lightner*, see infra text accompanying notes 59-63.
[53] *Medley*, 104 Cal. App. at 312, 285 P. at 893.
[54] 251 Cal. App. 2d 131, 59 Cal. Rptr. 224 (1967).
[55] *Id*. at 135-36, 59 Cal. Rptr. at 227. Plaintiff advanced an estoppel theory, arguing that the state was the county's agent and misadvised plaintiff regarding its principal so that the county was estopped from asserting the statute of limitations. The court rejected this argument. *Id*. at 138-39, 59 Cal. Rptr. at 231-33. Plaintiff's claim might have survived had an equitable tolling theory been available at that time. *See, e.g.*, Collier v. City of Pasadena, 142 Cal. App. 3d 917, 191 Cal. Rptr. 681 (1983).
[56] 262 Cal. App. 2d 330, 68 Cal. Rptr. 617 (1968).
[57] *Id*. at 339-40, 68 Cal. Rptr. at 623.
[58] *Id*. at 341-48, 68 Cal. Rptr. at 623-26.
[59] *Id*. at 346, 68 Cal. Rptr. at 625.
[60] *See, e.g.* Sonberg v. MacQuarrie, 112 Cal.App.2d 771 (1952).
[61] 135 Cal. 100 (1901).
[62] *Id*. at 102.
[63] 95 Cal. 317, 30 P. 545 (1892).

report. More recently, the supreme court commented unfavorably on the *Lattin* holding.[64]

If, as the above cases demonstrate, California law provides no valid support for the `general rule,' then where did it come from?[65] It is this author's impression that the general rule was the misbegotten child of the trespass case, *Lightner Mining Co. v. Lane*.[66] *Lightner* dealt with the question of whether a trespass which was fraudulently concealed would delay the running of the statutory period until discovery.[67] Before weighing the authorities and deciding that the statute should be tolled until discovery,[68] the court noted that:

> It was the settled rule in actions at law that the plaintiff's mere ignorance of the existence of the injury complained of, or of the facts constituting such injury, or of the identity of the person liable therefore, until the period of limitation had passed, will not prevent the running of the statute. This rule has been followed in this state in several cases in which the point that there was fraud involved in the cause of action itself; or a fraudulent concealment thereof, was not raised or considered.[69]

The statement in *Lightner* was dictum. The cases cited by the court for the "settled rule" really provide little support for it.[70] It nevertheless spawned a logarithmic progression of assertions of the concept that ignorance of the injury will not toll the statute of limitations in

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[64] *Neel*, 6 Cal. 3d 176, 183-84, 491 P.2d 421, 424-25, 98 Cal. Rptr. 837, 840-41 (1971) (discussing the lone exception to the delayed accrual of actions for professional malpractice-legal malpractice cases). The court observed:

> The court held that the action accrued at the time of the negligent act; it specifically rejected contentions that accrual should be deferred until damage occurred or until the client ascertained the error in the title report. The opinion in *Lattin* facilely ignores its practical consequences – that a title report which cannot be relied upon two years after its issuance is practically valueless. [citation] In 1913 the Legislature amended section 339 to provide expressly that an action founded upon an abstract of title shall not be deemed to accrue until the discovery of the loss or damage, thereby effectively overuling *Lattin v. Gillette*.

[65] No doubt intentional tort concepts, which generally do not lend themselves to dealing with fact situations where injury and act were not simultaneous, played a role in determining how statutes of limitations would be applied to negligence actions. An exception is situations involving fraud. Statutory California Civil Procedure Code section 380(4) enacted in 1872 and judicial exceptions (Kane v. Cook, 8 Cal. 449 (1857)) evolved early to meet such situations.

The more unlikely exception is in the hypothetical situation of the sleeping plaintiff who suffers an unconsented touching or confinement. *See* RESTATEMENT (SECOND) OF TORTS §§ 18, 42 (1965); Prosser, *False Imprisonment: Consciousness of Confinement*, 55 COLUM. L. REV. 847 (1955); Note, *A New Conception of Restraint in False Imprisonment*, 68 U. PA. L. REV. 360 (1919-20); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905). In any event, the problem did not arise until after the 1905 amendment of section 340.

[66] 161 Cal. 689, 120 P. 771 (1911).

[67] *Id*. at 696, 120 P. at 774.

[68] *Id*. at 697-701, 120 P. at 775-76.

[69] *Id*. at 696, 120 P. at 774.

[70] Gale v. McDaniel, 72 Cal. 334 (1887), dealt with a plaintiff whose property was destroyed by an arsonist over three years before the arsonists's identity was discovered. The court held, "The fact that plaintiff only recently discovered who did the wrong makes no difference." *Id*. at 335; People v. Melone, 73 Cal. 574 (1887), involved an action to get the Secretary of State to turn over monies collected. The case discussed the question of what code section the action fell under. No discussion is made of delayed discovery; Paige v. Carroll, 61 Cal. 211 (1882), was an action against a sheriff relating to a seizure of property. This case was also limited to construing what statutory period was applicable and makes no discussion relative to delayed discovery; Lattin v. Gillette, 95 Cal. 317 (1892), the only case on point, dealt with the "peculiar rule" pertaining to professional negligence in the legal profession, and the court's holding was relegated to the dustbins of history by the Legislature only two years after *Lightner*. *See also* Lambert v. McKenzie, 135 Cal. 100 (1901).

subsequent case law. However, as the previous cases demonstrate, there is no published California opinion that lends any significant credence to the existence of such a rule.[71] It simply does not exist. Recognition of this fact is long overdue.

2. *Ignorance of the Extent of Injury*

The impact of technological innovation on the nature of modern injuries[72] has presented new hurdles for injured persons attempting to gain compensation within the statutory period.

Consider the situation of the would-be plaintiff who ignored a cause of action for a minor discomfort manifested over a year earlier. The same wrongful conduct which produced the minor injury may also be the cause of a second injury which later results in a lifelong, disabling injury."[73] Thus, failure to file a lawsuit may invite disaster. Conversely, a plaintiff who files suit and secures a small judgment for lung ailments suffered as a consequence of fiberglass inhalation may have problems when filing suit ten years later for cancer resulting from the same exposure.[74]

Probably the greatest obstacle to allowing recovery in these situations is the difficulty in characterizing the later, more severe injuries as *separate*. In *Davies v. Krasna*,[75] the California Supreme Court rejected an argument that the statute of limitations should be tolled until the total extent of harm was determined.[76]

The court did conclude, however, that the statutory period would commence to run at the point of "the infliction of appreciable and actual harm, however uncertain in amount."[77] Depending upon the interpretation of the term "appreciable," this may or may not represent an

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[71] The sole exception to this is the bizarre treatment given in cases dealing with legal malpractice. The unusual evolution of this rule in the legal malpractice context is traced by the California Supreme Court in *Neel*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971). Justice Tobriner, writing for the court noted that "[t]he rule against delayed accrual dates only from *Griffith v. Zavlaris* [a court of appeal decision] . . . and has never been the subject of an express holding by this court." *Id*. at 191, 491 P.2d at 429, 98 Cal. Rptr. at 845.

In Budd v. Nixen, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971), the companion case to *Neel*, the court held that a cause of action for legal malpractice does not accrue until damage is suffered. *Id*. at 200-01, 491 P.2d at 437, 98 Cal. Rptr. 853. But the court tempered its holding with an analysis that the fiduciary nature of an attorney-client relationship reduces the client's duty to exercise diligence in discerning a cause of action. This limiting analysis had been pressed by Justice McComb in several previous cases. *See* Heyer v. Flaig 70 Cal.2d 223 (1969), McComb, J., Dissenting; U.S. Liability Ins. Co. v. Haidinger-Hayes, Inc. 1 Cal.3d 586 (1970).

Lower courts have not limited the implications of the *Neel* holding. A 1975 case, Allred v. Bekins World Wide Services, Inc., 45 Cal. App. 3d 984, 120 Cal. Rptr. 312 (1975), involved a moving firm's wrongful act in 1968. The cause of a serious rash - Bekin's negligence in packing belongings in urine and vermin contaminated straw - was discovered in 1970. The court relied upon *Budd* and *Neel* and held that the statute was tolled "until the Allreds' sustained damage and discovered or should have discovered their cause of action against Bekins." *Id*. at 987, 120 Cal. Rptr. at 316. *See* Frederick v. Calbio Pharmaceuticals, which states: "The rule in malpractice cases . . . was merely a specific application of a more general rule determining commencement of the statutory period...." 89 Cal. App. 3d 49, 55-56, 152 Cal. Rptr. 292, 296 (1979). *But see also* Seelenfreund v. Terminex of Northern California, Inc., 84 Cal. App. 3d 133, 148 Cal. Rptr. 307 (1978) (applying fiduciary relationship analysis); Nelson v. A.H. Robins Co., 515 F. Supp. 623 (N.D. Cal. 1981).

[72] *See supra* note 1 and accompanying text.

[73] *See* Sonbergh v. MacQuarrie, 112 Cal. App. 2d 771, 247 P.2d 133 (1952).

[74] *See* Pereira v. Dow Chem. Co., 129 Cal. App. 3d 865, 181 Cal. Rptr. 364 (1982) (chemical exposure which caused temporary burns on plaintiffs legs later caused a permanent severe kidney disorder).

[75] 14 Cal. 3d 502, 535 P.2d 1161, 121 Cal. Rptr. 705 (1975).

[76] *Id*. at 513-14, 535 P.2d at 1169, 121 Cal. Rptr. at 713.

[77] *Id*. at 514, 535 P.2d at 1169, 121 Cal. Rptr. at 713.

improvement over the *Howe v. Pioneer Manufacturing Co.*[78] rule that "when the fact of injury and the identity of the party responsible for it are known, the failure to discover some or most of the resulting damage until later will not toll the running of the statute."[79]

It could be argued that the suffering of minor discomfort does not amount to an appreciable injury because nominal damages or speculative harm are not sufficient to create a cause of action.[80] Consequently, it remains unclear whether a viable cause of action might involve a minor injury which will not be deemed appreciable. Certainly a sliver is an injury, and while often *de minimis*, the harm is actionable. When that sliver turns out years later to have contained a carcinogenic agent resulting in far greater harm, does the court look at the causal source of injury (a painful sliver) or the type of harm suffered in gauging appreciability?

One approach is to argue that the earlier problems are distinct from the later manifestation of injury and are different types of injuries. This approach has received judicial approval,[81] as well as disapproval.[82] Arguing that earlier problems were not sufficient to commence the running of the statute conflicts with the established rule that awareness of a slight injury which is transformed into a major injury, will commence running of the statute of limitations.[83]

The more liberal approach to confronting this area of statutes of limitations analysis was expressed in *Martinez-Ferrer v. Richardson Merrell, Inc.*[84] The plaintiff used a drug, MER/29, in 1960 and discontinued use when he detected eye problems and dermatitis. These conditions disappeared when he stopped using the drug until 1976, when he developed cataracts. The court decided that defendants' motion for summary judgment should fail, indicating that since causation was disputed, it could not be argued plaintiff knew of the cause of his injury in 1960. Thus, plaintiff's cause of action did not accrue until it was established that his problems were caused by the drug."[85]

The court relied upon several factors in determining whether the plaintiff's knowledge that his 1960 injuries were caused by the drug would bar his action.[86] It noted: (1) the difficulty plaintiff would have encountered had he attempted to establish the cause of his cataracts in 1960;[87] (2) the judiciary's recent trend of recognizing the practical needs of plaintiffs suffering

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[78] 262 Cal. App. 2d 330, 68 Cal. Rptr. 617 (1968).

[79] *Id*. at 340-41, 68 Cal. Rptr. at 623-24.

[80] *Budd*, 6 Cal. 3d at 200, 491 P.2d at 436, 98 Cal. Rptr. at 852.

[81] See Zambrano v. Dorough, 179 Cal. App. 3d 169, 174, 224 Cal. Rptr. 323, 325 (1986).

[82] *Sonbergh*, 112 Cal. App. 2d 771, 247 P.2d 143 (1952).

[83] *Priola*, 72 Cal. App. 3d 380, 140 Cal. Rptr. 186 (1977); Calvin v. Thayer, 150 Cal. App. 2d 610, 310 P.2d 59 (1957).

This theory does, however, enjoy some support in the worker's compensation, creeping disease cases. *See* Coots v. Southern Pac. Co., 49 Cal. 2d 805, 322 P.2d 460 (1958); *Marsh*, 217 Cal. at 351-52, 18 P.2d at 938-39. However, courts have remained reluctant to extend this support beyond the worker's compensation context. *See* Velasquez v. Fibreboard Paper Prod. Corp., 97 Cal. App. 3d 881, 886, 159 Cal. Rptr. 113, 116 (1979) (stating: "We assume that the Supreme court in *Coots* meant what it said about the general inapplicability of a disability standard to ordinary tort actions. . . ." *Id*.).

[84] 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980).

[85] *Id*. at 320-21, 164 Cal. Rptr. at 594. Taken to its extreme, this analysis would result in the statutory period failing to commence running until a jury brought in a verdict determining causation against the defendant. This problem is probed further in the following section.

[86] *Id*. at 320, 164 Cal. Rptr. at 594.

[87] *Id*. at 323-24, 164 Cal. Rptr. at 596-97. The court stated: "The simple fact is that rules developed against the relatively unsophisticated backdrops of barroom brawls, intersection collisions and slips and falls lose some of their relevance in these

from delayed injuries;[88] and (3) the trend away from an unthinking application of the doctrine of merger.[89]

Another factor which may be significant in the recognition of the need for mitigating the harsh consequences of limitations periods stems from the novel types of injuries which modern courts recognize. Emotional distress, unlike physical trauma, may not have a readily cognizable manifestation at the moment a defendant's wrongful act takes place. Its consequences may develop only after a considerable period of time has elapsed.[90]

No elaboration on the salient considerations pinpointed in *Martinez-Ferrer* is offered in a decision following its lead. But the court in *Zambrano v. Dorough*[91] did, after citing the above factors, offer an additional basis for allowing the plaintiff to proceed. The court was convinced that the plaintiff's loss of her reproductive capacity was of a different type than her earlier emotional distress, pain and suffering. Since the complaint alleged facts of a violation of a different "primary right," it stated a different cause of action rather than a different legal theory.[92] The California supreme court has now accepted the view that where a later harm is "separate and distinct" from an earlier discovered harm, the statute of limitations does not commence with the earlier harm despite the common cause.[93]

This approach of finding that a later manifestation of injury entails a separate legal right introduces a large grey area into the application of statutes of limitations.[94] For example, how is one to determine where a cause of action for a temporary loss of eyesight ends and a different cause of action for subsequent manifestation of cataracts begins? Is the right to be free from cataracts different from the right to be free of temporary vision problems, or is an injury to one's eyes just an injury to one's eyes?

In the face of the novel risks and mechanisms of injury presented by modern technology, the facts presented in *Pooshs*, *Martinez-Ferrer* and *Zambrano* are likely to become less peculiar. No doubt further judicial elaboration of the considerations and conclusions of *Martinez-Ferrer* will be forthcoming.[95]

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days of miracle drugs with their wondrous, unintended, unanticipated and frequently long-delayed side effects." *Id*. at 323-24, 164 Cal. Rptr. at 597.

[88] *Id*. at 325, 164 Cal. Rptr. at 597.

[89] The court then held: "We make no attempt to even summarize where all of this may lead. We are, however, convinced that under the peculiar circumstances of this case it would be a miscarriage of justice not to permit plaintiff to go to trial." *Id*. at 327, 164 Cal. Rptr. at 598.

[90] Aldaco v. Tropic Ice Cream Company 110 Cal.App.3d 523 (1980) (Parents apparently witnessed their child get run over by an ice cream truck).

[91] 179 Cal.App.3d 169, 174 (1986).

[92] *Id*. at 174. California law, accepting Pomeroy's approach, does not determine questions regarding the existence of separate causes of action by focusing on the same factual circumstances producing the injury, but by looking to the more flexible concept of "legal right." WITKIN, CALIFORNIA PROCEDURE Pleading §§ 23, 24 (3d ed. 1985).

[93] *Pooshs v. Phillip Morris* (2011) 51 Cal.4th 788, 792.

[94] *See* De Rose v. Carswell 196 Cal.App.3d 1011, 242 Cal.Rptr. 368 (1987) (criticizing the *Zambrano* analysis that two different legal rights can be invaded by the same wrongful conduct and holding that a child-molestation victim, who experienced emotional distress after reaching majority, could not assert that the statute of limitations had not commenced to run as to the emotional distress at the time she reached adulthood.

[95] *Arroyo v. Plosay* 225 Cal.App.4th 279 (2014), applied the rule expressed by the supreme court in *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807, that a court looks to whether a plaintiff has reason to at least suspect that a type of wrongdoing has caused injury, to overturn a trial court's determination that the limitations period had expired. Plaintiffs

3. *Discovery of the Cause of Action*

That a plaintiff's awareness of the wrongful cause of injury is a prerequisite to the running of the statutory period was first developed in the areas of worker's compensation[96] and medical malpractice.[97]

The earlier judicial decisions reflected an unwillingness to recognize that a plaintiff could suffer an injury and not recognize its source. The court in *Rubino v. Utah Canning Co*.,[98] for example, refused to apply the delayed discovery principle where plaintiffs became violently ill immediately after eating canned peas, but did not recognize the product as the source of injury until years later.

Where the discovery principle was applied, it was limited by the rationale that plaintiff's diligence was diminished in the worker's compensation context by the nature of the Compensation Act, which had as its purpose the protection of workers.[99] Similarly, when the discovery principle was applied in the malpractice context, it was limited by the fiduciary nature of the relationship involved.[100]

In modern times, the notion of "diligence" is an obstacle to a clear understanding of the appropriate place of the discovery of the cause of a plaintiff's injury in the accrual of a cause of action. Trial courts courts tended to interpret the term diligence as meaning that a plaintiff assumes an enhanced obligation - greater than that imposed on the reasonable person in such circumstances - to search for the cause of injury.

The meaning of diligence was first evaluated by the California Supreme Court in a fraud action, *Hobart v. Hobart Estate Co.*[101] The court rejected the idea that the plaintiff had the burden of proving diligent inquiry. The court held:

> Where there is a duty to investigate, the plaintiff may be charged with knowledge of the facts which would have been disclosed by an investigation; but where, as here, there is no prior duty to investigate, the statute does not run until he has

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timely sued alleging postmortem mutilation injuries to an 80 year old grandmother's corpse by a hospital. Over a year later, and after the statutory period imposed by CAL. CODE CIV. PROC. §340.5, elapsed, an expert opined that the grandmother's injuries resulted because she had been prematurely declared dead, then frozen alive in the hospital morgue, waking up due to the extreme cold and injuring herself trying to "escape her frozen tomb." The defendant sought to shut down the new pre-mortem injury claim based upon the running of the statutory period. The court held that because the elements of harm for the postmortem injuries were different than the later discovered pre-mortem harm, plaintiffs were not placed on inquiry by the fact that the grandmother's body had been mutilated such that by reasonable investigation of all potential causes of the injury suspected they should have discovered within one year the factual basis for the medical negligence and wrongful death causes of action.

[96] *Marsh*, 217 Cal. 338, 18 P.2d 933 (1933).

[97] Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936).

[98] 123 Cal. App. 2d 18, 266 P.2d 163 (1954).

[99] *See Marsh*, 217 Cal. at 345-46, 18 P.2d at 936.

[100] *See, e.g.*, Sanchez v. South Hoover Hosp., 18 Cal. 3d 93, 97, 102, 533 P.2d 1129, 1132, 1135, 132 Cal. Rptr. 657, 660, 663 (1976) (describing the rationale for the judicially adopted exception and the application to other professional relationships).

[101] 26 Cal. 2d 412, 436-44, 159 P.2d 958, 971-75 (1945). "Defendants assert that in addition to these requirements plaintiff must show that he made a diligent inquiry to . . . discover whether or not he had been defrauded. . . ." *Id*. at 437, 159 P.2d at 972.

> notice or knowledge of acts sufficient to put a reasonable man on inquiry . . . .He need only establish facts sufficient to show that he made an actual discovery of hitherto unknown information . . .[102]

Although *Hobart* enunciated a reasonable man standard for showing "diligence," many lower courts have insisted upon reading a different meaning into the term. Even appellate courts have required an enhanced duty to investigate on the part of the plaintiff.[103]

One case illustrates the difficulty courts have encountered in defining this term. In *Snow v. A.H. Robins Company, Inc*.,[104] the plaintiff was aware that the defendant's IUD failed to prevent her pregnancy. The plaintiff chose to terminate the 1974 pregnancy with an abortion. She understood when the IUD was inserted in 1973, however, that it was not foolproof, that pregnancy was possible and that use of the IUD entailed a pregnancy rate of one or two percent.[105] After viewing an expose' in 1981 concerning defendant's wrongful concealment of higher pregnancy rates, plaintiff filed suit within one year. Nevertheless, the court held that the plaintiff failed to exercise reasonable diligence in discovering her cause of action.[106]

The court in Snow reasoned that an unexpected injury should place a plaintiff on notice to sue. Since there were no warnings that an abortion might be medically necessary as the result of using the IUD, it was an "unusual enough circumstance to put her on notice that the IUD was either defective or not safe."[107]

The first problem with this reasoning is that it does not fit the facts. The choice of an abortion to terminate her pregnancy was merely the plaintiff's means of dealing with the injury of pregnancy. It is doubtful whether a pregnancy can be considered unusual enough to place one on notice. Second, even if plaintiff's pregnancy was unusual, the assumption that plaintiff should have then been required to investigate the cause of her injury for wrongful conduct is unwarranted. The rule, as stated in *Hobart*, is otherwise. The mere fact that means of discovery were available to plaintiff is not sufficient. A reasonable person in Ms. Snow's situation would have been in no position to suspect concealment of actual pregnancy rates merely because she became pregnant. At most, she would suspect that she was among the unlucky one or two percent.

In *Kensinger v. Abbott Laboratories*,[108] a court reached a different conclusion than the *Snow* court. *Kensinger* involved a plaintiff who contracted cervical cancer as a result of her mother's ingestion of DES while pregnant with plaintiff. Before plaintiff reached majority in 1977, she had been treated for her injuries and was informed in 1974 that DES was the cause.

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[102] *Id*. at 442, 159 P.2d at 974; *see also* Bedolla v. Logan & Frazer, 52 Cal. App. 3d 118, 125-31, 125 Cal. Rptr. 59, 64-69 (1975).

[103] *See* Baker v. Beech Aircraft Corp., 96 Cal. App. 3d 321, 157 Cal. Rptr. 779 (1979). The court stated that "a person who claims that the statute of limitations is suspended because of someone's fraudulent concealment has an independent duty to pursue an inquiry into the cause of the injury with reasonable diligence." *Id*. at 332, 157 Cal. Rptr. at 786; Note, *Baker v. Beech Aircraft Corp.: Plaintiff's Burden of Reasonable Diligence Grows Heavier*, 13 Univ. West Los Angeles L.Rev. 235.

[104] 165 Cal. App. 3d 120, 211 Cal. Rptr. 271 (1985).

[105] Id. at 126, 211 Cal. Rptr. at 273.

[106] Id. at 129-30, 211 Cal. Rptr. at 275-76.

[107] *Id*.

[108] 171 Cal. App. 3d 376, 217 Cal. Rptr. 313 (1985).

In 1980, plaintiff became aware of wrongful conduct when she read in the newspapers that DES victims had the right to sue for their injuries.

The court recognized that "a plaintiff may be aware of an injury and its cause, while possessing no knowledge of facts indicating wrongdoing by a particular defendant."[109] The court held that the statute began to run only when plaintiff discovered, or should have discovered, the drug manufacturer's wrongful conduct. Since the record failed to show facts demonstrating as a matter of law plaintiff's knowledge of wrongful conduct before 1980, summary judgment against plaintiff could not be granted.[110]

While the court in *Kensinger* stated the rule that "[r]easonable diligence in discovering wrongful conduct . . . continues to be required . . . ,"[111] it attached a different meaning to the term diligence. As in *Hobart*, the meaning was interpreted to require reasonable conduct on the part of the plaintiff. In view of the difficulty in applying, "diligence," perhaps it would be best to simply abandon it and to adopt the more accurate reference of reasonableness.

Recognition that a personal injury claim accrues upon discovery of all the elements of a cause of action, including tortious conduct, is now accepted by the appellate courts.[112] Likewise, it is recognized that the fact of an injury, by itself, imposes no enhanced duty upon an injured person to search for a wrongful cause or any presumption of inquiry notice.[113] The decision in *Kensinger* and (in spite of the inexact interpretation of the term diligence) the *Snow* decision are affirmations of this rule.[114] The concept of discovery of a cause of action comprehends that a plaintiff should have reasonably suspected and discovered that injury was the result of tortious conduct of another, rather than accepting the injury as merely an unfortunate consequence of chance.[115]

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[109] *Id*. at 384, 216 Cal. Rptr. at 317.

[110] *Id*. at 386, 216 Cal. Rptr. at 319.

[111] *Id.* The California supreme court has observed that the *Kensinger* holding should not be construed to mean that the statute of limitations does not begin running until a plaintiff has knowledge of facts constituting wrongful conduct. Suspicion that an injury was caused by wrongdoing is sufficient to commence the clock running once the plaintiff has knowledge of the injury and causation. Jolly v. Eli Lilly and Company 44 Cal. 3d 1103, 245 Cal. Rptr. 658 (1988).

[112] Discovery of wrongdoing does not supersede the requirement of discovery of injury. In other words, a plaintiff must realize he or she suffered harm connected to wrongful conduct before there is a cause of action. *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 (“’the cause of action does not accrue until the damages have been sustained. . . when the wrongful act does not result in immediate damage, `the cause of action does not accrue prior to the maturation of perceptible harm.'") Thus, reasonable suspicion of the defendant’s wrongful conduct or a causal connection preceding injury might be a basis for an affirmative defense of contributory fault or failure to mitigate, but it does not commence accrual of a cause of action prior to the time actual harm is suffered.

[113] *See, Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, where the court rejected a trial court’s conclusion on a motion for summary judgment that, as a matter of law, a plaintiff had knowledge of facts sufficient to make a reasonably prudent person suspicious of wrongdoing, observing the rule that "[w]here the facts are susceptible to opposing inferences whether there was sufficient information to put one on constructive notice, the matter is a question to be determined by a trier of fact". (Id. at 31).

[114] The requirement of the discovery of wrongful conduct found application earlier. *See* Warrington v. Charles Pfizer & Co. 247 Cal.App.2d 564, 569-570 (1969); Heyer v. Haig 70 Cal.2d 223, fn.7 (1969).

[115] The supreme court has concisely stated the standard in *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797: "Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.” Id. at 808-809.

Acceptance of this principle, however, is tantamount to a virtual judicial emasculation of statutory limitations in cases involving questions of causation and product defect. This is the case where the plaintiff's cause of action is not deemed to have accrued until the plaintiff should have known defendant's wrongful conduct was the cause of injury. Obviously, a plaintiff cannot be charged with knowledge of causation or suspecting wrongful conduct until a court or jury has resolved these issues.

This analysis can be illustrated by a product liability action where accrual of a plaintiff's cause of action is that point in time when a plaintiff is aware (suspects) that a defective product is the cause of injury. Whether a product caused injury and the product's defectiveness are generally subject to dispute in litigation. Since a plaintiff is faced with the same problems of complexity posed to the jury for determination by a mere preponderance of the evidence, then accrual may not realistically occur until a jury delivers its verdict resolving as "more likely than not" the issues of defectiveness and causation.

The test is that the discovery of facts, rather than a legislatively established timeline, determines accrual of a cause of action.[116] Knowledge of wrongful conduct entails a discovery of facts. However, this assertion does not apply to situations involving complex causation. The ordinary person cannot be expected to surmise that a pregnancy was caused by an IUD manufacturer's wrongful conduct, rather than the operation of an anticipated risk factor.

Generally, the quandary presented by extending the discovery principle to its logical conclusion has been avoided by the courts. This has occurred through application of the requirement that facts demonstrating a late discovery be pleaded with specificity.[117] Application of this requirement has resulted in statutes of limitations challenges being determined on the face of the pleadings. In addition, the courts have operated on the assumption that a plaintiff's belief regarding causation is the same as knowledge of actual cause by wrongdoing. Thus, decisions are rendered on the record presented for summary judgment on the basis of what a plaintiff asserted was known in deposition or other testimony.[118]

If the ultimate determination is left to the trier of fact, the question of when the plaintiff reasonably should have discovered the wrongful cause of injury, where the defendant disputes causation and defect, would likely be decided favorably for the plaintiff. This is the case even where statutes of limitations issues are tried prior to the main case. It may be desirable, in modern tort cases, to recognize the difficulties in applying limitations periods and to simply abandon statutes of limitations as a tired anachronism.

4. *Summary: The Need for a Liberal Interpretation of the Discovery Principle*

Two special statutes of limitations problems are presented in dealing with modern torts

[116] *Nelson*, 515 F. Supp. 623, 626 (N.D. Cal. 1981); Davies, 14 Cal. 3d at 512, 535 P.2d at 1169, 121 Cal. Rptr. at 713.
[117] G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).
[118] *See Martinez-Ferrer* 105 Cal. App. 3d 316, 321, 164 Cal. Rptr. 591, 593 (1980) (noting that a factual issue over the causation of injury prevented the court from attributing knowledge of causation to the plaintiff); "Raul makes no claim that his 1960 problems were caused by MER/29 and unless the record establishes without substantial contradiction that they were, the summary judgment must be reversed whatever Raul knew or, rather, thought he knew at the time." *Id*

and the rule of discovery. First, there is a problem with determining when a plaintiff has suffered an identifiable injury and is, thereby, placed on notice of the actionable injury. Second, a difficulty exists in ascertaining when a reasonable individual would have discovered the source of injury.[119]

The increase in a need for a broad application of a discovery principle has paralleled development of the technology which produced the modern tort. As was seen, the courts deemed plaintiffs to be on notice of a cause of action once they became aware of an injury.[120] This conception reflected a judicial mind set developed in a time of simpler torts. The idea was that awareness of one's injury would serve as the motivation to look for another's wrongdoing as a cause.[121] That view utterly fails to recognize the practical problems inherent in discovering modern torts.

In the first place, awareness of injury is no longer necessarily a basis for suspecting cause, let alone wrongdoing. Feeling ill is hardly going to cause an individual to check the home for an extraordinarily high radon count. Second, even if the nature of the injury is such that it is evident that some cause of injury may exist, the average layman - especially when suffering from a disabling malady – lacks the expertise needed to pinpoint that source and identify wrongdoing out of a multitude of possible agents encountered in that individual's daily life.[122]

The layman also lacks the legal understanding to recognize either that redress is available, or the means to secure redress.[123] The general rule of inflexible commencement of a cause of action upon commission of the wrongful act has never been applied by the appellate courts in the personal injury context. Nor would it be appropriate. The modern circumstances and nature of injuries have rendered such analyses archaic.

B. *Estoppel*

In situations where fraud is involved in causing or concealing a plaintiff's injuries, the

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[119] A related practical problem for a plaintiff pleading a delayed discovery is that the present insurance coverage of the defendant may not cover the injury. Illston, *Insurance Coverage and Toxic Torts: Who's Suing Whom?*, TRIAL, October 1986, at 51; Gyler v. Mission Insurance Co., 10 Cal. 3d 216, 514 P.2d 1219, 110 Cal. Rptr. 139 (1973).

[120] Gray v. Reeves, 76 Cal. App. 3d 567, 142 Cal. Rptr. 716 (1977); Mock v. Santa Monica Hosp., 187 Cal. App. 2d 57, 9 Cal. Rptr. 555 (1960).

[121] It should be noted, however, that while courts have paid considerable lip-service to this "general rule," it is extremely difficult to find case law which does not merely pay its respects to this moribund doctrine in one breath, while finding exception to it in the next.

[122] California State Bar Annual Meeting Seminar, "Pesticides: Litigation and Legislation," (Sept. 14, 1986). Salinas attorney Bill Monning noted that many field workers injured by dangerous pesticides or improper pesticide use were, until recently, not pursuing legal avenues to deal with resultant birth defects and serious illnesses because they failed to make the connection to the apparently innocuous pesticide. They attributed the fact that tragedy had touched their lives to the notion that God was punishing them.

[123] One is simply not inclined to rush off to an attorney when a tumor manifests itself in order to secure a thorough researching of all exposures to potentially hazardous and carcinogenic substances encountered over the years by oneself and one's parents. Indeed, one is probably more interested in understanding and securing treatment of the mysterious ailment than in determining the cause. Even one's physician, who may be better equipped to identify the legal cause to the extent that scientific postulation permits, has little professional motivation or training to recognize that cause as entailing wrongdoing or to advise a patient of a possible legal action.

defendant may be estopped from asserting the statute of limitations.[124] Estoppel reflects recognition of the gross inequality in the bargaining positions of the injured person and the large corporate entity specializing in the processing of claims.[125]

The estoppel doctrine is not limited to situations involving fraud in the underlying tort. Consequently, a defendant's conduct inducing a plaintiff not to file a complaint may estop a defendant from asserting a statute of limitations as a defense.[126]

The doctrine has developed primarily in the context of worker's compensation and insurance negotiations.[127] Both of these industries have, of course, developed and become firmly established as essential components of the modern personal injury compensation process.

Moreover, as is the case with determinations of the reasonableness of plaintiff's conduct in the rule of discovery, the determination of estoppel and the length of the estoppel is generally for the jury.[128] However, once a defendant's conduct produces a delay resulting in an estoppel, a "substantial period" following the defendant's conduct is allowed for the estoppel to come to an end. The plaintiff is then allowed a reasonable time to file after the estoppel expires.[129]

Certain conditions are prerequisites to an estoppel tolling the statute of limitations: 1) the party to be estopped must be apprised of the facts; 2) the other party must be ignorant of the true state of facts, and the party to be estopped must have acted so that the other party had a right to believe that the party intended its conduct to be acted upon; and 3) the other party relied on the conduct to its prejudice.[130]

1. *Notice to the Defendant*

The first condition to the creation of an estoppel, is that a defendant is entitled to notice

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[124] Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771 (1911).

[125] G. GILMORE, THE DEATH OF CONTRACT 65 (1974). Professor Gilmore describes the rise in the last fifty years of concepts of promissory estoppel, unconscionability and quasi-contract in the bargaining context.

[126] The statement of this excuse for late filing given by the courts has been quite broad. The California Supreme Court first gave expression to this doctrine in 1945. Benner v. Industrial Accident Comm'n, 26 Cal. 2d 346, 159 P.2d 24 (1945).

[127] For example, in Industrial Indem. Co. v. Industrial Accident Comm'n, 115 Cal. App. 2d 684, 252 P.2d 649 (1953), the court held that actual fraud in the technical sense, bad faith, or an intent to mislead, are not essential to create such an estoppel. It is sufficient that the debtor made representations or so conducted himself that he misled the creditor, who acted thereon in good faith to the extent that he failed to commence action within the statutory period. *Id*. at 690, 252 P.2d at 652-53.

[128] *Id*.

[129] *Id*. *See also* Van Hook v. Southern California Waiters Alliance, 158 Cal. App. 2d 556, 323 P.2d 212 (1958). It remains uncertain whether an estoppel has the same effect upon tolling the statutory period as a defendant's absence from the state. The defendant's absence extends the time for filing by the time of absence. *See* CAL. CIV. PROC. CODE § 351 (West 1982). It may be that an estoppel can only be found where a plaintiff is induced to delay filing at a point in time when the statute is about to run. *Id*. *See* Lobrovich v. Georgison 144 Cal.App.2d 567, 573-74 (1956) ("If there is still ample time to institute the action within the statutory period after the circumstances inducing delay have ceased to operate, the plaintiff who failed to do so cannot claim an estoppel. [cites]"). *But see* Delson v. Minogue (1961. DC NY) 190 F.Supp 935 (extending the period by the number of days plaintiff's retention of counsel was delayed by defendant's conduct).

[130] These conditions are set forth with approval by the California Supreme Court in California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal. 2d 865, 869, 350 P.2d 715, 718, 3 Cal. Rptr. 675, 678 (1960) (dealing with a taxpayer's unsuccessful efforts to secure return of overpaid taxes which involved reliance upon correspondence from the city clerk advising the taxpayer's attorney to file suit to avoid the statute of limitations).

of a claim in order to avoid surprise and prepare an adequate defense.[131]

The amount of information about a claim which defendant must be given is not clear. In *Industrial Indemnity Co. v. Industrial Accident Commission*,[132] for example, the insurance carrier had undertaken to secure medical reports"[133] and had interviewed the injured claimant.[134]

Most likely a situation will not arise in which the two other conditions required to effect an estoppel exist without the notice requirement having already been satisfied. For example, a plaintiff could not reasonably rely on a defendant's agent's conduct without having first told the defendant about the lawsuit.

2. *A Right to Believe in the Defendant's Conduct*

In *California Cigarette Con., Inc. v. City of Los Angeles*,[135] the California Supreme Court stated that among the conditions necessary for an estoppel "the other party must be ignorant of the true state of the facts [and] the party to be estopped must have intended that its conduct be acted upon, or so act that the other party had a right to believe that it was so intended. . . ."[136] The extent to which a plaintiff must be ignorant of certain facts is unclear. The court stated that it was significant that "[i]n the present case there was no showing of a state of facts known to defendant but unknown to plaintiff." [137] Thus, the court implied that the reliance requirement was meant to apply to situations in which a plaintiff is ignorant of the pertinent statute of limitations.[138]

The courts have been fairly generous in finding sufficient conduct by a defendant to allow a plaintiff's estoppel allegation to reach a trier of fact. The court in *Sumrall v. Cypress*,[139] found defendant's assertions that he desired to settle, coupled with a request that plaintiff delay in filing suit, were sufficient to allow plaintiff to invoke the estoppel doctrine.

Perhaps the weakest set of facts found sufficient to satisfy the estoppel requirements is found in *Rupley v. Huntsman*.[140] The court found the estoppel doctrine applicable when plaintiffs were delayed by little more than an insurance agent's discussions and negotiations.

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[131] Wood v. Elling Corp., 20 Cal. 3d 353, 362, 572 P.2d 755, 760, 142 Cal. Rptr. 696, 701 (1977). The United States Supreme Court has recognized the purpose of assuring fairness to defendants through the complimentary aspects of notice and repose. Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944).

[132] 115 Cal. App. 2d 684, 252 P.2d 649 (1953).

[133] *Id*. at 688, 252 P.2d at 651-52.

[134] *Id*. at 686-87, 252 P.2d at 650-51.

[135] 53 Cal. 2d 865, 350 P.2d 715, 3 Cal. Rptr. 675 (1960).

[136] *Id*. at 869, 350 P.2d at 718, 3 Cal. Rptr. at 678.

[137] *Id*. at 870, 350 P.2d at 718, 3 Cal. Rptr. at 678.

[138] *Id*. at 870-71, 350 P.2d at 718-19, 3 Cal. Rptr. at 678-79. *See also* Schaefer v. Kerber, 105 Cal. App. 2d 645, 646, 234 P.2d 109, 109 (1951). *But see* Muroaka v Budget Rent-A-Car, 160 Cal. App. 3d 107, 206 Cal. Rptr. 476 (1984) (where the reliance requirement was apparently abandoned).

[139] 258 Cal. App. 2d 565, 65 Cal. Rptr. 755 (1968). Melvin Belli's client prevailed in Benner v. Industrial Acci. Com., 26 Cal. 2d 346, 159 P.2d 24 (1945), where "the repeated requests by the employer and the representative of the insurance carrier for `more time' to complete their medical investigation constituted conduct on which the claimant had a right to rely and which should operate as an estoppel to the plea of the statute of limitations." *Benner*, 26 Cal. 2d at 349, 159 P.2d at 26.

[140] 159 Cal. App. 2d 307, 324 P.2d 19 (1958).

No representations were made that settlement would be obtained, and no requests were made that plaintiff refrain from filing suit. Defendant, however, did not deny his liability; nor did he request proof of loss.[141]

Quite clearly, courts are prepared to recognize that a harsh injustice would result if, after the claimant and an insurance agent have engaged in settlement negotiations, claims were barred because the ministerial task of filing a complaint was not fulfilled. Thus, very little evidence is required to allow a jury to find that an insurance agent's conduct reasonably induced delay in filing suit.

3. *Detrimental Reliance*

The requirement of detrimental reliance was illustrated in *Isaacson v. City of Oakland.*[142] In that case, the plaintiff's attorney did not realize that a new law had shortened the time required to bring suit against a governmental entity to six months. In deciding against the plaintiff, the court stated that the "[p]laintiff did not withhold filing of his action because of a reliance upon conduct of defendants. As determined by the court, it was because he, as well as defendants, were under the impression that the pertinent statute of limitations was one year."[143] The court reasoned that plaintiff's error resulted from ignorance of the law, not from reliance on defendants' statements.

In *Golden v. Faust*[144] and the case it relied upon, *Muraoka v. Budget Rent-A-Car*,[145] both dealt with protracted settlement negotiations subsequent to automobile collisions. In both cases, the defendant's insurance company was alleged to have made promises and acted such that the plaintiff's actions in delaying suit were reasonable.[146] In *Golden*, however, it was plaintiff's New Mexico attorney who was induced to file late in California. The court distinguished the earlier case, *Kunstman v. Mirizzi*,[147] where a court granted a demurrer. In *Kunstman*, the plaintiff's attorney was promised that liability was clear and that settlement could be made. However, plaintiff's attorney waited beyond the statutory period for the plaintiff's injuries to resolve before commencing negotiations. The court did not buy the argument that the insurance company's conduct lulled plaintiff's attorney into "a sense of security which caused him to defer the filing . . ."[148] In contrast, the attorney in *Golden* was promised that settlement would be effected if he did not file.[149]

Only a dissenting opinion in *Golden* raises the issue of the plaintiff's representation by an attorney as bearing on the inducement of delayed filing. This would seem to have an effect

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[141] *Id*. at 314, 324 P.2d at 23. *See* Jackson v. Andco Farms, Inc., 130 Cal. App. 3d 475, 181 Cal. Rptr. 815 (1982). *See also* Schaefer, 105 Cal. App. 2d at 646, 234 P.2d at 109 ("[T]he defendant's insurance company informed the plaintiff that it was necessary to secure the approval of the home office before the claim could be settled, and thereby caused the plaintiff to believe that the only question in dispute was the amount of the claim; the company told the plaintiff that she would be informed as to the company's disposition of her claim." *Id*.).
[142] 263 Cal. App. 2d 414, 69 Cal. Rptr. 379 (1968).
[143] *Id*. at 419, 69 Cal. Rptr. at 382.
[144] (9th Cir. 1985) 766 F.2d 1339.
[145] 160 Cal.App.3d 107 (1984).
[146] *Golden* involved a summary judgment motion. *Muraoka* involved a demurrer to the complaint.
[147] 234 Cal.App.2d 753 (1965).
[148] *Id* at 755.
[149] *Golden* at 1340.

on equalizing relative bargaining strength of the negotiating parties. Review of the similar facts of *Kunstman* and *Muraoka* indicates that this factor may have played a role in their different dispositions.

In *Muraoka*, the plaintiff alleged that because of the insurer's investigation and acknowledgment of liability he was lulled into a false sense of security.[150] The court distinguished *Kunstman* by noting that plaintiff had alleged that the insurance company was the proponent of delay in the settlement discussions.[151]

It is difficult to see what difference it should make who is seeking a delay in settlement so long as this delay is an acceptable one to the parties pursuing settlement. Perhaps the real reason for the different results in the two cases stems from a recognition that an attorney has a greater legal knowledge than the layman coupled with a duty to protect a client's interests.[152] An attorney simply should not be "lulled into a sense of security" by the settlement process.

The doctrine of estoppel represents a judicial recognition of the potential for unfairness inherent in the modern system of processing injured persons' claims. While some aspects of the doctrine remain to be clarified, an attorney dealing with a claimant acting *in propria persona* should proceed cautiously when the limitations time draws near.

C. *Equitable Tolling*

If more than one legal remedy applies to the same transaction and against the same defendant, courts allow plaintiffs to pursue one remedy, while tolling the statute on the other.[153] The purpose of the equitable tolling doctrine, as stated by the California Supreme Court in *Addison v. State*[154] is "to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court."[155] This judicially created exception has been applied in spite of exclusive statutory provisions which would not otherwise allow a plaintiff to proceed.[156]

The doctrine of equitable tolling developed out of an exception to the statutes of limitations which allowed tolling of the statutory period in circumstances where plaintiffs were required to exhaust administrative procedures prior to filing a complaint on a single cause of

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[150] *Id*. at 117.
[151] *Id.* at 117.
[152] *See* Jackson v. Andco Farms, Inc. 130 Cal.App.3d 815 (1982) holding that negotiation correspondence between plaintiff's attorney and defendant's insurance company did not support a claim that the plaintiff was induced to delay filing. "Plaintiff was represented by counsel . . . his attorney is charged with knowledge of California law relative to the statute of limitations." *Id*. at 818.
[153] Elkins v. Derby, 12 Cal. 3d 410, 525 P.2d 81, 115 Cal. Rptr. 641 (1974).
[154] 21 Cal. 3d 313, 578 P.2d 941, 146 Cal. Rptr. 224 (1978).
[155] *Id*. at 316, 578 P.2d at 944, 146 Cal. Rptr. at 227. The supreme court in Addison held that this purpose did not conflict with that of a statute of limitations where defendants suffered no prejudice in defending an action brought late in state court, where timely filing had occurred in an action arising out of the same transaction in federal court, which was dismissed for lack of jurisdiction
[156] The court in Afroozmehr v. Asherson 20 Cal.App.3d 704, 247 Cal.Rptr. 296 (1988), applied equitable tolling in a case involving legal malpractice subject to Code of Civil Procedure section 340.6's four year limit on the rule of discovery.

action.[157]

The courts have recognized three factors in deciding whether to apply the doctrine: (1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim.[158]

The first and second factors are inextricably linked. The two elements are essentially indistinguishable from the estoppel requirement that the defendant be apprised of the facts relating to a claim. The court in *Collier v. City of Pasadena* [159] considered each factor independently in holding that a plaintiff's pursuit of a worker's compensation claim against a public entity employer would toll the period for filing a disability pension claim against the city. When several claims are similar, notice to defendant about one claim will allow the defendant to prepare an adequate defense for the others.[160]

The third factor of good faith conduct is discussed in *Mercury Casualty Co. v. State Board of Equalization.*[161] That case considered a plaintiff's efforts to secure a refund of taxes erroneously collected. The court held that plaintiff's checks marked under protest did not constitute a claim because they were not specific enough. Even if the checks were valid refund claims, plaintiff was disallowed from pursuing that right in a second action because he had not acted promptly after discovering that a right to a refund existed.[162]

The requirement of good faith and reasonable conduct matches the estoppel concern that a plaintiff file suit within a reasonable time after expiration of the estoppel.[163]

The purpose of the second element is met where a defendant undertakes an investigation

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[157] *Elkins*, 12 Cal. at 414-16, 525 P.2d at 84-85, 115 Cal. Rptr. at 644-45. The equitable tolling doctrine established in the 1970s has applied only to situations where more than one legal remedy for the same transaction and against the same defendant could have been pursued. Where an injured person pursued one avenue of redress, courts have allowed the limitations period on a second to be tolled.

[158] *Collier*, 142 Cal. App. 3d 917, 924, 191 Cal. Rptr. 681, 685 (1983) (footnote omitted).

[159] The court noted:

> It is not altogether clear whether the Supreme Court would insist on all three prerequisites. The policy rationale of Elkins and Addison suggests that in an appropriate case a statute of limitations might be equitably tolled where only the second prerequisite was fulfilled. But it is difficult to imagine a situation where the defendant had a full opportunity to gather evidence relevant to the second claim unless the other two prerequisites were satisfied.

Id. at 924 n.5, 191 Cal. Rptr. at 685 n.5.

[160] *Id* at 927, 191 Cal.Rptr. at 687.

[161] 179 Cal. App. 3d 34, 224 Cal. Rptr. 781 (1986).

[162] *Id*. at 42-43, 224 Cal. Rptr. at 785-86. *See also Collier*, 142 Cal. App. 3d at 926, 191 Cal. Rptr. at 686-87.

[163] *See supra* note 129 and accompanying text. It is interesting to note that in Mercury, the court's determination that the checks did not constitute a proper claim against the public entity was considered with regard to the requirement that a claim for refund be filed within six months. 179 Cal. App. 3d at 38-39, 224 Cal. Rptr. at 783-84. It was not considered relating to the equitable tolling elements of notice and lack of prejudice in gathering evidence. It remains unclear exactly what sort of evidence gathering must occur or be available to a defendant to satisfactorily address these factors. The court in *Collier* seemed to assume that formal discovery mechanisms must be available to a defendant in order to meet this prerequisite. Yet, neither the terms in which it is expressed nor the policy concern behind the second element that a defendant be placed in a position to fairly defend appear to make this mandatory. *Elkins*, 12 Cal. 3d at 417-18, 525 P.2d at 86-87, 115 Cal. Rptr. at 646-47.

of a claim and the plaintiff has not initiated court proceedings. It may be met where a defendant merely has an opportunity to engage in such investigation.[164] Certainly, a claimant's conduct in hindering an investigation and in refusing to comply with requests to provide discoverable information may operate against the claimant on this element. Moreover, in light of the fact that actual notice to a defendant - through service of a complaint - may not occur until a considerable time after filing of the complaint,[165] a defendant may be better off conducting an investigation before a complaint is filed and ultimately served.

The estoppel requirement which demands that a defendant be apprised of the facts of a claim does not require commencement of formal discovery. But estoppel addresses a different underlying policy concern - that a defendant's wrongful conduct should not be utilized as a defense. Equitable tolling operates where there is no wrongful conduct by a defendant. Its concern is that a defendant should be placed in a position adequately protected from stale claims and deteriorated evidence.[166] Nevertheless, where there is a lack of prejudice to a defendant it makes no sense to impose a requirement that formal discovery mechanisms have been extant.

The logical conclusion is that if the commencement of formal litigation is unnecessary, then there is no reason to limit the equitable tolling concept to situations where two different claims may be pursued and a legal claim has been filed with the state. Settlement negotiations involving investigation between an injured person and an insurance company would be sufficient to meet all of the equitable tolling elements and concerns.

D. *Judicial Rejection of a Fourth Proposed Exception*

The focus of the three judicial exceptions described above is upon prejudice to the defendant resulting from late filing. A recent state supreme court decision has reaffirmed the rationale underlying these exceptions by rejecting a fourth proposed exception. The court in *Gutierrez v. Mofid*[167] was faced with a third party's conduct which did not delay discovery, but which had the same effect as would a defendant's conduct under an estoppel theory:[168] it prevented the plaintiff from filing suit.

An attorney incorrectly advised a client that she did not have a malpractice cause of action against a doctor. Consequently, the client did not pursue her action until after the statutory period had expired.[169] The focus of the proposed *Gutierrez* exception was not upon the defendant, but upon the plaintiff who was prejudiced by the conduct of the attorney. The estoppel requirements[170] are not met in these facts. This is evident because the primary

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[164] An insurance company or person represented by an attorney may be in a far better position to take steps to protect their position than most laymen.
[165] *See generally supra* notes 20-23 and accompanying text.
[166] *Collier*, 142 Cal. App. 3d at 925, 191 Cal. Rptr. at 685-86
[167] 39 Cal. 3d 892, 705 P.2d 886, 218 Cal. Rptr 313 (1985). The court did not decide whether reliance upon inaccurate legal advice might, in some circumstances involving exercise of reasonable diligence inquiring into the source of injury, act to postpone discovery of a cause of action.
[168] *See* Carruth v. Fritch, 36 Cal. 2d 426, 224 P.2d 702 (1950).
[169] CAL. CIV. PROC. CODE § 340.5 (West 1986).
[170] *See supra* note 130 and accompanying text.

purpose'[171] of preventing surprises by providing notice to a defendant is not even addressed.

Under the *Gutierrez* facts, holding in the plaintiff's favor would have subjected the defendant to the same sort of prejudice which statutes of limitations are designed to prevent.[172] The court distinguished the running of the statute of limitations in ordinary tort actions from certain instances where exceptions are made "because of the need to balance `the practical purpose that a statute of limitations serves in our legal system' against the `practical needs of prospective plaintiffs.' "[173] This rationale indicates the court's willingness to consider unfairness to plaintiffs in applying statutes of limitations to modern torts. However the court made certain that this concern was applicable only when unfair treatment of a defendant would not result. The court noted that in the tort of malpractice, the rule of discovery looks to the diminished "force of the *defendant's* argument that he is entitled to the early protection of the statutory bar."[174]

The court delineated equitable considerations favoring the plaintiff's position relating to the balance of knowledge between a professional and a patient or client. The court noted, "the professional's fiduciary and confidential relationship with his client or patient both compels the professional to disclose, rather than conceal, his error and mitigates the injured person's duty to discover it independently."[175]

The court, however, rejected the plaintiff's proposed exception to the statute of limitations and held that "the risk that discouraging legal advice will lead to loss of a cause of action must fall upon the plaintiff . . . rather than upon a wholly uninvolved defendant."[176] *Gutierrez*, therefore, reasserts the purpose of statutes of limitations. They exist to protect defendants from unfairness resulting from the assertion of late claims; any unfairness which results to a plaintiff from the plaintiff's tardiness is not to be considered.

In *Lewis v. Superior Court*,[177] a lower court accepted the exception rejected by the supreme court in *Gutierrez*, but under circumstances indicating lack of prejudice to the defendant. In *Lewis*, the third person causing plaintiff to delay filing suit was a driver who hit plaintiff's attorney, leaving the attorney incapacitated and unable to file the plaintiff's complaint within the applicable statutory period. The court, in deriving an implied exception to the statute of limitations, relied heavily upon the legislatively enacted exceptions which emphasize fairness to plaintiffs.[178] The court also noted the judiciary's willingness to allow implied exceptions in the estoppel and equitable tolling exceptions. These judicial exceptions have both

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[171] *Elkins*, 12 Cal. 3d at 417, 525 P.2d at 86, 115 Cal. Rptr. at 641.
[172] *See Wood*, 20 Cal. 3d at 362, 572 P.2d at 760, 142 Cal. Rptr. at 701.
[173] Gutierrez v. Mofid, 39 Cal. 3d 892, 899, 705 P.2d 886, 890, 218 Cal. Rptr. 313, 317 (1985).
[174] *Id*.
[175] *Id*. The rule of discovery was characterized by the court as an incentive to performance of the professional's duty to disclose, since the professional would be unable to assert the statute of limitations as a bar in a claim involving professional concealment.
[176] *Id*. at 900, 705 P.2d at 890-91, 218 Cal. Rptr. at 319-20.
[177] 175 Cal. App. 3d 366, 220 Cal. Rptr. 594 (1985).
[178] Id. at 371-73, 220 Cal. Rptr. 594, 596-97. The court went beyond interpreting the language of Code of Civil Procedure section 353.1 and Business and Professions Code section 6180, which deal with a court assuming responsibility for an incapacitated attorney's cases, and included an "impossibility" analysis.

stressed the importance of avoiding prejudice to the defendant. Yet, the court in *Lewis* made no effort to acknowledge this concern, in spite of the fact that the existence of settlement negotiations probably made this a relatively simple matter to address.[179]

Lewis may mark the beginning of judicial application of equitable concepts in finding exceptions to the statutes of limitations beyond the situation where a defendant suffers no prejudice. More likely, in light of the contrary outcome of *Gutierrez*, it represents a judicial unwillingness to apply the harsh consequences of limitations periods where settlement negotiations have commenced and the filing of a complaint would amount to no more than a formality

E. *Alleging a More Favorable Cause of Action*

It may be possible for the plaintiff, confronted with a statute of limitations which bars an action, to state facts and elements of another cause of action which is not barred.[180] This is not simply a matter of stating allegations sufficient to support an action on an alternative legal theory.[181] Current judicial analysis compels a court to look beyond the form of the action in discerning the right sued upon for determining the applicable statute of limitations. [182]

Statutes of limitations are drafted to prohibit actions involving particular types of circumstances out of which damages arise. Rather than restricting an entire common law right of recovery to a particular time period, statutes of limitations focus on fact situations falling under the larger rubric of a common law theory. They are procedural only, affecting the remedy, not the substantive right.[183]

A review of judicial decisions, however, reveals that the courts frame their analysis of claims in terms of concepts of tort or contract rather than "for injury to . . . one caused by the wrongful act or neglect of another"[184] or "an obligation or liability not founded upon an instrument in writing."[185] The correlative of this tendency is an effort to adapt the facts to match common-law concepts, rather than assessing whether the specific statutory provisions apply to the facts. The problem encountered is that the modern tort often cannot be caged within the language of a limitations period designed for common-law fact patterns.

Judicial myopia is particularly evident when the courts have dealt with novel circumstances of damages which are not directly addressed by statutory language. For example, in *Guess, Inc. v. Superior Court*,[186] the court considered whether trade libel was covered by the

[179] *Id*. at 370, 220 Cal. Rptr. at 594.
[180] Each count must contain all factual allegations necessary to constitute a cause of action. Hopkins v. Contra Costa County, 106 Cal. 566, 570, 39 P. 933, 934 (1895); Cameron v. Ah Quong, 8 Cal. App. 310, 96 P. 1025 (1908); WITKIN, CALIFORNIA PROCEDURE Pleading § 323 (2d ed. 1971).
[181] One problem may be the unavailability of or difficulty in obtaining acceptable remedies on the alternative right of recovery.
[182] Jefferson v. J.E. French Co., 54 Cal. 2d 717, 355 P.2d 643, 7 Cal. Rptr. 899 (1960).
[183] *See* WITKIN, CALIFORNIA PROCEDURE Actions § 224 (3d ed. 1985).
[184] CAL CIV. PROC. CODE § 340(3) (West Supp. 1987).
[185] CAL. CIV. PROC. CODE § 339(1) (West 1982 & Supp. 1987).
[186] 176 Cal. App. 3d 473, 222 Cal. Rptr. 79 (1986).

terms of section 340(3) or section 339(1). The court did not consider, in applying section 339(1), that perhaps *neither* statute's provisions controlled. The rule in applying statutes of limitations has been that the courts will interpret such statutes to avoid depriving plaintiffs of remedies. Courts also struggle to avoid strained construction and construe statutory limitations to allow a cause of action.[187] Nevertheless, in dealing with actions that draw from a range of fertile legal theories, but lack unambiguous description in particular statutory language, courts are inclined to force such causes of action into preexisting statutory stereotypes.[188]

The field of products liability is an area which provides illustrations of analytic confusion resulting from efforts to apply a statute of limitations beyond the specific terms of the statute. The courts have applied the one year period of section 340(3) to product liability actions.[189] Application of section 340(3) is based upon the determination that the actions sound in tort.

This analysis presupposes that under California Civil Procedure Code section 340(3) all tort actions are subject to a one year statute of limitations. Section 340(3) is not so extensive, however, and on its face is concerned with actions involving personal injury, forged checks and maltreatment of animals. It reads:

> (3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.[190]

To argue that the entire scope of the term tort is encompassed in the above provision is wrong. The California Legislature has established different statutes of limitations for different types of tort. For example, California Civil Procedure Code section 338[191] provides a three year period for filing of actions based upon such torts as fraud and injury to property. Therefore an action based in facts allowing imposition of strict liability, without regard for the level of care a defendant exercises, has no relation to the "wrongful act or neglect" covered by section 340(3).[192]

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[187] Sevilla v. Stearns-Roger, Inc., 101 Cal. App. 3d 608, 611, 161 Cal. Rptr. 700, 702 (1980); *Pashley*, 25 Cal. 2d at 228-29, 153 P.2d at 326-27.

[188] The statutory scheme provides no directive impelling such judicial categorization. On the contrary, the California Civil Procedure Code section 343 specifically provides for application of a four year period for "actions not otherwise provided for." CAL. CIV. PROC. CODE § 343 (West 1982).

[189] Becker v. Volkswagen of Am., Inc., 52 Cal. App. 3d 794, 125 Cal. Rptr. 326 (1975) (holding that an action for personal injury caused by a leaking and defective gas tank was essentially a tort action).

[190] CAL. CIV. PROC. CODE § 340(3) (West 1982 & Supp. 1987).

[191] CAL. CIV. PROC. CODE § 338 (West 1982 & Supp. 1987).

[192] *See Rubino*, 123 Cal. App. 2d at 22-23, 266 P.2d at 165-66 (considering the need for negligence or wrongful conduct for

In *Voth v. Wasco Public Utility District*,[193] the court dealt with a claim by farmers against a public utility from which they purchased a product (water) to care for their crops. The crops were damaged when the water was not suitable for irrigation. The court distinguished *Becker*,[194] and held that the action was essentially based in contract.[195]

The essence of Becker's relationship with Volkswagen was not directly concerned with a warranty of the fitness of the gas tank for a particular purpose. Becker bought the car for transportation. Presumably, it functioned in this capacity. Quite clearly, had the vehicle failed in this respect, Becker would have had an action for breach of warranty. The gas tank defect and the damages resulting therefrom did not constitute infringements of contract rights, but of *personal* rights.

Conversely, in *Voth*, the defective product and consequent damages involved infringements of rights of a contractual nature. The essence of the plaintiffs' relationship with the defendant was contractual: it was the nature of the defendant's warranty that its water was fit for use on plaintiffs' crops. This was exactly the manner in which the warranty was not met.

A defective smoke detector, warranted and purchased to ensure safety in the home provides a basis for an action in contract when the device malfunctions and causes, or fails to warn of, a fire. If the device had exploded in the consumer's face while installing it, the consumer's action would fall under a tort theory of recovery.[196]

However, this understanding, while it reveals an approach to distinguishing products liability cases sounding in contract from those based in tort,[197] does not reveal the more basic analytic flaw employed by courts in determining applicable statutes of limitations. When the court in *Voth* referred to "the quintessence of the action" and "the nature of the right sued upon,"[198] it provided little assistance in yielding a determination of an appropriate statute of limitations.[199] At best, this method reveals whether an action is founded in contract, tort, or

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the application of section 340(3)). The court in Voth v.Wasco Public Util Dist., 56 Cal. App. 3d 353, 128 Cal. Rptr. 608 (1976) stated the accepted
judicial analysis employed in determining what cubbyhole to shove an action into:

> Whether an action is contractual or tortious *depends upon the nature of the right sued upon*, and not the form of the pleading or the relief demanded. If the action is based on a breach of a promise, it is contractual; if it is based on a breach of a noncontractual duty, it is a tort.
> If the breach is both contractual and tortious, we must ascertain which duty is the quintessence of the action. If it is unclear, courts generally will consider the action to be in contract rather than in tort. However, if the action is predicated on a duty independent of the contract, it will be deemed to be tort regardless of the contractual relation of the parties.

Id. at 356-57, 128 Cal. Rptr. at 611-12.

[193] 56 Cal. App. 3d 353, 128 Cal. Rptr. 608 (1976).

[194] *Supra* at note 189.

[195] *Id*. at 359-60, 128 Cal. Rptr. at 612.

[196] *See* Fundin v. Chicago Pneumatic Tool Co., 152 Cal. App. 3d 951, 958-60, 199 Cal. Rptr. 789, 795-96 (1984).

[197] Two caveats to the practitioner regarding stating the ambiguous cause of action in the form of "contract" are: (1) The warranty provisions of the Commercial Code eliminate the rule of discovery; and (2) The contract cause of action may result in less favorable damages for the plaintiff. See CAL. COM. CODE § 2725 (West Supp. 1987); Frazier v. Metropolitan Life Ins. Co., 169 Cal. App. 3d 90, 105-07, 214 Cal. Rptr. 883, 891-93 (1985).

[198] 56 Cal. App. 3d at 356, 128 Cal. Rptr. at 610.

[199] In *Voth*, however, the particular statute concerned Government Code section 911.2, making this approach an effective

both. It does little to advance the discernment of a particular statute of limitations dealing with contract or tort actions which should be applied to the particular facts of the case at bar.[200]

The courts have confused legal rights of recovery with the narrower factual circumstances covered by statutes of limitations. Another illustrative area in which this confusion is apparent is in insurance bad faith litigation. The action for damages caused by an insurer's failure to adhere to its implied duty and covenant of good faith and fair dealing sounds in both contract and tort.[201] No statute of limitations states a period for actions for breach of this duty.

The court in *Richardson v. Allstate Insurance Co.*,[202] dealt with the appropriate statute of limitations in bad faith cases. The court there again looked to "the nature of the right upon which plaintiff is suing."[203] The Richardson court felt that both contract and tort actions against an insurer for bad faith are subject to the two-year limitations period of section 339(1).[204]

The same analytic inadequacy exists in the approach taken in Richardson that was seen in *Voth*. The essence of the action is not tort or contract, but bad faith. Forcing it to fit into the language of section 339, dealing with actions on unwritten contracts, fails to address the reality of evolving modern torts. Nevertheless, this is the judicial approach facing the practitioner seeking to state a cause of action not barred by a statute of limitations. Where the facts of a plaintiff's right of action cannot be stated in a fashion which is clear - such that it could be either tort or contract, allowing an election[205] - a court may look beyond the form of the allegations to the quintessence in applying an unfavorable statute of limitations.

Consider California Civil Procedure Code section 340.5.[206] Section 340.5 essentially bars actions "against a health care provider based upon . . . professional negligence . . ." brought after three years where there is late discovery, except where tolled by fraud, intentional

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one.

[200] A more accurate evaluation was undertaken in *Sevilla*, where the court dealt with the question of whether an injury caused by a defective syrup pan at a sugar-processing plant was due to a "product" under section 340(3) (subject to the rule of discovery) or an "improvement of real property" under sections 337.1 and 337.15 (subject to a limit on the discovery rule). 101 Cal. App. 3d at 608, 161 Cal. Rptr. at 700. In deciding for the plaintiff, the court held that doubt must be resolved against a defendant in construing a technical statute of limitations defense to avoid forfeiture of a plaintiff's just claim. Id. at 611, 161 Cal. Rptr. at 703.

[201] Egan v. Mutual of Omaha, 24 Cal. 3d 809, 820, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 573, 510 P.2d 1032, 1036, 108 Cal. Rptr. 480, 484 (1973); Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 663, 328 P.2d 198, 206 (1958).

[202] 117 Cal. App. 3d 8, 172 Cal. Rptr. 423 (1981).

[203] *Id*. at 12, 172 Cal. Rptr. at 427. The court stated:

> Courts have frequently been asked to choose between the one-year period of section 340, subdivision 3, and the two-year period of section 339, subdivision 1. The principle of selection which has emerged is that the one-year period applies to all alleged infringements of personal rights, whereas the two-year period applies only to alleged infringements of property rights.

Id.

[204] *Id*. at 13, 172 Cal. Rptr. at 428. *See also Frazier*, 169 Cal. App. 3d 90, 100-04, 214 Cal. Rptr. 883, 888-91 (1985) (indicating that the four year period of California Civil Procedure Code section 337 should apply if the plaintiff elects to proceed on a contract theory rather than tort); Umann v. Excess Ins. Co., 190 Cal. App. 3d 1532, 236 Cal. Rptr. 89 (1987) (refusing to follow *Frazier*).

[205] Regarding election of remedies, see generally L.B. Laboratories, Inc. v. Mitchell, 39 Cal. 2d 56, 244 P.2d 385 (1952).

[206] CAL. CIV. PROC. CODE § 340.5 (West 1982).

concealment or the presence of a foreign object in the plaintiff's body. Professional negligence is defined as negligence in the rendering of licensed professional services.[207]

It appears possible to avoid the legislative amputation of the rule of discovery in certain fact situations by characterizing the action as an intentional tort.[208] For example, a cause of action for battery may be established by treating the medical operation at issue as an unconsented touching of the plaintiff. Perhaps the plaintiff was not informed of the risks involved and was thus unable to give adequate consent. Where discovery of the risk and injury occurred after three years elapsed, but an action was commenced within one year of discovery and within the period provided by section 340, the action for battery should be allowed.[209]

On the other hand, it may be that a court would regard the failure to acquire informed consent not as fraudulent and not an as act of intentional concealment, but as an act of professional negligence upon which the action is based.[210] The question is what controls this determination – the legislature's effort to delineate a factual umbrella covering certain scenarios, the courts' efforts to ascertain the essential nature of a plaintiff's cause of action in terms of common law rights, or the plaintiff's effort to frame a claim in its most favorable light.

While pleading facts for an alternative cause of action sufficient to withstand judicial scrutiny is not simply a matter of alleging the requisite elements and appropriate damages, the possibility should always be considered by the practitioner. The defendant's counsel, meanwhile, should scrutinize the complaint to determine whether the essence of a plaintiff's cause of action might more appropriately be categorized within the scope of a shorter limitations period.

F. Continuing Violation

Another avenue presents itself where a series of harms or causal occurrences is involved. Arising out of nuisance case law, this recently developed judicial doctrine holds that where a series of tortious acts is at issue, the statute of limitations runs from the time of the last overt act. Because of difficulty in cases entailing a series of injuries from continuing or recurring wrongdoing of ascertaining when a plaintiff's cause of action accrues, courts have adopted the continuing violation doctrine.[211] The California supreme court has recognized that this doctrine "aggregates a series of wrongs or injuries for purposes of the statute of limitations,

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[207] *Id.*

[208] Brown v. Bleiberg, 32 Cal. 3d 426, 651 P.2d 815, 186 Cal. Rptr. 815 (1982).

[209] *See* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (allowing the husband of medical malpractice victim to recover under a contract theory for emotional distress). *But see* Mosely v. Abrams, 170 Cal. App. 3d 355, 216 Cal. Rptr. 40 (1985) (rejecting application of California Civil Procedure Code section 337(1) - limiting the time for actions on contracts in writing - in dealing with a construction defect subject to California Civil Procedure Code section 337.15); Krebenios v. Lindauer, 175 Cal. 431, 432, 166 P. 17, 18 (1917); Southland Mechanical Constructors v. Nixen, 119 Cal. App. 3d 433, 173 Cal. Rptr. 917 (1981) (rejecting a contract theory in medical and attorney malpractice actions); and Tell v. Taylor, 191 Cal. App. 2d 266, 12 Cal. Rptr. 648 (1961) (rejecting a fraud theory in a medical malpractice action).

[210] *See* Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972). The California Supreme Court in that case held that where no consent to the medical procedure performed was given, a battery theory would apply. However, where permission is given for performing a certain treatment procedure and a known, but "undisclosed inherent complication with a low probability occurs," liability would depend upon a negligence theory. *Id.* at 240, 502 P.2d at 8, 104 Cal. Rptr. at 512.

[211] *Huysman v. Kirsch* (1936) 6 Cal.2d 302, 311-313

treating the limitations period as accruing for all of them upon commission or sufferance of the last of them."[212] The supreme court in *Wyatt v. Union Mortgage Co.*,[213] recognized that in such cases as harassment and conspiracy, where a defendant, defendant's agents or defendant's co-conspirators commit a series of tortious acts, the clock starts running anew each time there is a new act.

This would seem to primarily apply to situations where the plaintiff and defendant have some ongoing associational relationship, such as neighbors and co-workers. For example, where a neighbor backs their automobile into the plaintiff and subsequently over the next decade or more various affronts and animosities ensue such as the neighbor's dog pooping on the plaintiff's lawn, the neighbor stealing the plaintiff's newspaper and trespassory conduct, the statute of limitation period would seemingly be met – allowing suit for the automobile collision - so long as the last annoyance occurred within a year of filing suit.

The extent of this doctrine remains uncertain, especially so in view of the nature of modern torts.[214] Whether it would allow a plaintiff injured in a car crash to avoid the bar of the statute of limitations by asserting that subsequent intentional infliction of emotional distress by the defendant or their insurance adjuster extends the period within which to bring suit is doubtful. How it might apply to a recurring manifestation of harm, such as a re-emergent rash or infection produced by a toxic exposure, has yet to be defined, But the potential application to numerous situations involving repeated contacts between a plaintiff and a defendant or defendant's agents or defendant's product or waste is obvious.

VI. CONCLUSION

Post-industrial development has engendered both a new type of tort and a new equitable conception of the relationship between victim and tort-feasor. Limitations periods in personal injury actions have begun to develop to meet the challenges posed to the innocent victim of the modern tort.

Statutes of limitations formulated in a time of simpler causation and injury do not fit the modern tort. The judicial gymnastics performed in attempting to make modern torts fit outdated statutory concepts are simply a sign that legislatively imposed efforts to confine the time within which relief may be sought have been outgrown. In several respects, the courts have recognized the need to expand the narrow common law interpretations of limitations periods.[215] A modern tort plaintiff, faced with the problem of ascertaining the wrongful cause of an injury, simply cannot be expected to recognize many of the mysterious biochemical mechanisms involved in producing certain injuries or the times and places when such hidden mechanisms do their

[212] *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal. 4th 1185, 1192.
[213] 24 Cal.3d 773 (1979).
[214] It may be confined to conduct which is part of a common purpose such as intentional harassment.
[215] In Copeland v. Celotex 447 So.2d 908 (Fla.Ct.App. 1984), 913,(reversed 471 So.2d 533 (Fla. 1985)), the court commented upon the difficulty of pleading specificity of time and place of injury in the context of the modern tort: "Just as the California Supreme Court recognized in *Sindell*, however, we now acknowledge that traditional theories of causation may not be realistic in light of advances in science and technology and the complexity of an industrialized society, such as ours, which creates harmful products that cannot be traced to a simple producer."

damage. Nor can a modern tort victim be expected to anticipate that today's minor irritation may disguise next decade's disabling injury.

Increasingly liberal interpretations of limitations periods are necessary to meet the ineluctable growth in injury claims involving latent injuries and complex causation. The judicially created discovery rule allows the virtual abandonment of limitations periods where causation is an issue. Developments in estoppel and equitable tolling doctrines signal a judicial willingness to abandon imposing limitations periods where notice of the details of a claim have been provided to a defendant through settlement negotiations or discovery in related actions. Inadequacies in judicial efforts to depart from the outworn habit of analyzing a claim in terms of what “primary right” is at issue and to constrain new or hybrid torts to fit the language of limitations periods may ultimately be acknowledged and result in the recognition that the fact patterns of a century ago simply do not accommodate modern exigencies. The statutory objective of limitations periods - providing fairness to plaintiffs - mandates this principle. The judicially perceived purpose - avoiding prejudice to defendants - allows growth in this area of the law to meet the modern age.