ORIGINAL

In the

Supreme Court of the United States

UNITED STATES,

PETITIONER,

v.

WILLIAM A. KUBRICK,

RESPONDENT.

No. 78-1014

Washington, D. C.
October 3, 1979

Pages 1 thru 37

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UNITED STATES, Petitioner,	:	
v.	:	No. 78-1014
WILLIAM A. KUBRICK, Respondent.	:	

Washington, D. C.

Wednesday, October 3, 1979

The above-entitled matter came on for oral argument at 1:51 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ELINOR H. STILLMAN, Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner

BENJAMIN KUBY, ESQ., Klovsky, Kuby and Harris, 15th and Chestnut Streets, Philadelphia, Pennsylvania 19102; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1-14, United States v. Kubrick.

Mrs. Stillman, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ELINOR H. STILLMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MRS. STILLMAN: Mr. Chief Justice, and may it please the Court:

This case is here on the government's petition for review of a decision of the Third Circuit construing 28 U.S.C. 2401(b), the statute of limitations provision of the Federal Tort Claims Act. Under that provision, a tort claim against the United States is barred if it is not presented in writing to the appropriate federal agency within two years after the claim accrues.

The question in this case is whether a claim for medical malpractice under the act accrues when the claimant knows both the existence and the cause of his injury even if he does not know that the injury amounted to medical negligence.

The facts are not here in dispute. The respondent entered a V.A. hospital in April 1968 and was treated for an infection of the femur of his right leg. Treatment consisted of a deep surgical incision followed by treatment by drugs,

including irrigation of the wound with a solution of neomycin sulfate for about 13 days.

In June, the respondent noticed a ringing in his ears and some loss of hearing. An ear specialist whom he consulted in August diagnosed his condition as bilateral nerve deafness. Another ear specialist, Dr. Joseph Sataloff, whom he visited in November, wrote for his VA records and discovered that he had been treated with neomycin. In January 1969, Dr. Sataloff told the respondent that it was highly possible or words to that effect that the neomycin treatment had caused his deafness.

In April 1969, the respondent who had been receiving VA disability benefits for a back injury filed a claim seeking increased benefits for the injury to his hearing. He asserted in this claim that his deafness resulted from medication given him by the VA and he cited Dr. Sataloff's opinion as the basis for this assertion.

A VA board of physicians denied the claim, stating among other things that the treatment -- that the deafness was not caused by the neomycin treatment and that the treatment was not negligent. The respondent vigorously disputed this denial of causation over the next several years, writing letters and claims and explaining why it was caused by neomycin in the course of appeal and remand proceedings before the VA respecting the disability benefits claim.

In May 1971, while those proceedings were going on, the VA sent him a report, a supplemental statement of the case that included a report by a VA investigator and this report stated that one of the doctors whom respondent had consulted had said that his deafness might be attributable to his previous occupation as a machinist. The respondent confronted the doctor who had allegedly made this statement, Dr. Soma, and Dr. Soma denied the statement attributed to him and told the respondent that neomycin had caused his deafness and that the VA doctors should not have given him that drug.

The Court of Appeals, affirming the District Court, held that the respondent's tort claim accrued for the first time at this time, June 1971. So his written statement of claim filed in January 1973 was timely under the act. The court's holding is predicated on the view that a malpractice claim under the Federal Tort Claims Act does not accrue until a claimant knows or should know causation, damages, existence of a duty of care and breach of the duty of care.

QUESTION: And you say it is the event, do you?

MRS. STILLMAN: No, we don't say it is the event, Your Honor. We accept that in cases where you didn't know you were injured, that it would begin at notice that you were injured by medical treatment.

QUESTION: The event of known injury.

MRS. STILLMAN: Knowledge of the known injury, yes,

sir.

For reasons that I am about to explain, we submit that the --

QUESTION: And the cause you would concede?

MRS. STILLMAN: Yes.

QUESTION: Not whether or not there was negligence but --

MRS. STILLMAN: Of course.

QUESTION: -- what art or episode was the causation.

MRS. STILLMAN: Exactly. As soon as they know the nexus between causation between injury and treatment or should know --

QUESTION: Right.

MRS. STILLMAN: -- we say that it accrues at that point.

QUESTION: There is no issue in this case, is there, of concealment, fraudulent concealment or any other kind of concealment?

MRS. STILLMAN: No, Your Honor, unless you assume that the VA's denial that neomycin caused it or their denial of liability --

QUESTION: Is there any claim of concealment or fraudulent --

MRS. STILLMAN: No, I don't believe so. The VA believed up until litigating -- they eventually conceded that

there was evidence that meomycin caused the injury and for that reason gave him disability benefits in 1975. But during the time that he was litigating this question before the VA, there was no suggestion that the VA was sitting on secret knowledge that in fact --

QUESTION: They were not hiding anything from him.

MRS. STILLMAN: No, no. I don't believe there is any claim of that.

There are complaints that they didn't send complete records to Dr. Sataloff, they only send a letter saying -- but there is no real claim here about concealment or fraud.

Our basic contention in this case is a simple one. When a person knows that he has been injured and that his injury has been caused by a particular course of medical treatment, he is on notice to commence inquiries into the possibility that the treatment may have been negligent. The limitations period in a statute of limitations is the time set aside for making such inquiries and for filing suit if answers to the inquiries reveal the basis for legal action. In the case of the Federal Tort Claims Act, of course, you don't have to file your lawsuit within the two years, you file merely a written statement of claim with the federal agency, including a statement of the amount certain in damages that you are seeking.

When the statute of limitations operates to bar an

apparently meritorious claim, the result will often strike a court and certainly a plaintiff as harsh, but there are nonetheless sound and long recognized policy reasons supporting such a result.

Our review of the legislative history of the Federal Tort Claims Act statute of limitations indicates that Congress enacted and has retained the provision at issue here because it accepts the soundness of those reasons. Statutes of limitations exist because it is the judgment of legislatures that litigation of stale claims is undesirable. With the passage of time, reliable relevant evidence may disappear and it is thought unjust to subject an individual suit on even a possibly meritorious claim many years after the incident giving rise to it, when he is likely to find it difficult to collect evidence for his defense.

By barring even meritorious claims after an arbitrary period of time, the statute of limitations induces persons with possible legal claims to investigate and litigate them promptly. One cannot expect a person to commence an investigation, however, until he knows of something to investigate. That is the reason that this Court in Urie v. Thompson held that the action of the railroad worker against his employer under the Federal Employer's Liability Act was not barred when he sued within the prescribed limitations period as measured from the time he first discovered that he

had silicosis. It was not measured from the date many years before in the early symptomless stages as his disease began. Not until he knew he had the disease could he begin asking whether it could have been avoided by differently designed or maintained railroad equipment and whether the railroads had a duty to provide such equipment. To hold that the statute had run before he was on notice to make such inquiries would penalize the worker for what is called blameless ignorance because he could not know what was inherently unknowable, the harm that was inherently unknowable.

QUESTION: Mrs. Stillman --

MRS. STILLMAN: Yes.

QUESTION: -- this ringing in the ears, is that when it happened?

MRS. STILLMAN: He had ringing in the ears and loss of -- some loss of hearing in June. By --

QUESTION: Is that when he knew?

MRS. STILLMAN: Well, we say that his claim ran from later than that. We would say his claim ran from January 1969, which is when -- by that time he was severely deaf, could hear very little, had been diagnosed as having irreversable, almost total deafness, functional deafness and knew that neomycin -

QUESTION: And that diagnosis was by the same people he has got this case against.

MRS. STILLMAN: No, this diagnosis was by a private

practitioner, an ear specialist.

QUESTION: But he had been to the VA hospital, too, hadn't he?

MRS. STILLMAN: He went --

QUESTION: I thought he had this running letter business going.

MRS. STILLMAN: Well, he was writing the VA hospital for two years, denying --

QUESTION: Well, do you mean an average person would say that because I am getting older and I am getting deafer, so therefore neomycin is the cause of it?

MRS. STILLMAN: We would say --

QUESTION: Would that be normal?

MRS. STILLMAN: This would be quite a different case if he had not consulted his doctor and then told that it was highly possible that the drug had caused his deafness.

QUESTION: Possible.

MRS. STILLMAN: Yes, but he then filed a claim in April stating that the VA medication had made his deaf and seeking benefits on that basis.

QUESTION: And what did the VA say, that it had not.

MRS. STILLMAN: They denied it but he was never deterred by this denial.

QUESTION: That's right. Well, shouldn't he trust that?

MRS. STILLMAN: But he didn't.

QUESTION: But that claim was not and did not have to be based on any negligence, did it?

MRS. STILLMAN: It is not based on negligence, according to the tort standard. The VA standard, they won't compensate an injury if it is an expectable risk of an operation, for example, but they would compensate if it was an unexpected and untoward event, I think.

QUESTION: If it had happened.

MRS. STILLMAN: Whether or not doctors at that time should have known. In other words, it is not exactly --

QUESTION: It is not the same as negligence.

MRS. STILLMAN: Not attributable to the tort standard, no, Your Honor. Of course, the rule that the Third Circuit applied in this case is based on their understanding that he knew causation and damages but did not know that it might be due to malpractice. So clearly the rule that is being tested here is based on an understanding that the person --

QUESTION: How many courts of appeal are against you on this?

MRS. STILLMAN: Well --

QUESTION: All but one?

MRS. STILLMAN: Among the courts of appeal that have cited this rule, the Sixth Circuit in Jordan, the Tenth Circuit in Exnicious, the Seventh Circuit in DeWitt, the Third Circuit

in this case.

QUESTION: Who is with you?

MRS. STILLMAN: We say the Eighth Circuit and the Ninth Circuit are with us, Your Honor, but we would say that in fact the Kubrick case is the first case that really squarely presents this issue because Bridgford and some of those other cases can be understood as cases where the plaintiffs might have been confused about the nature of the injury and the connection with causation. For example, in one of those cases, the plaintiff was suffering an injury which for a while he confused with an automobile accident and was not fully aware, of course, and the court thought in fact that it resulted from an operation that he had.

QUESTION: Did the government try to bring any of those cases that were against you here on cert?

MRS. STILLMAN: We have not tried to bring those cases, Your Honor, but I think this case presents the issue much more plainly because we have here so clear an acknowledgement that the person knew causation and it can't be interpreted in any way as a case that might come under a construction of the rule that the claim accrues at the time that you know injury and its cause.

QUESTION: How do you understand your opponents to apply the rule in terms of knew or should have known that it constituted malpractice? Do they have to take a lawyer's --

be advised by a lawyer or what?

MRS. STILLMAN: We understand them to be interpreting the rule rather broadly and we think that the courts below, although they claim that this had limits and was very narrow, we think that in fact it is really a very broad rule. The court said that one reason -- the District Court said that it was really only recognizing a rebuttale presumption here. They said that there is a presumption that when you know knowledge and that you have knowledge of injury and its cause, that you would be on notice, that there would be possible negligence but that this may be rebutted in some instances, and they said that in this case it could be rebutted because the case was technically complex. And I may point out that respondents in their brief, at pages 11 and 14, say that medical malpractice cases are often technicall complex and at page 14 they say that just laymen generally cannot understand the issues. So I think that really is no limitation at all. And it is quite clear that the District Court found that alone enough to rebut the presumption because the District Court said that even in April of 1969, when he first filed the disability claim, at which point the VA had made no denials of causation or negligence, it said the technicality complexity of the case alone was enough to allow him not to be on notice of possible negligence.

The government says that when you have gone into a

hospital for a leg operation and they have given you a drug that makes you deaf, you are on notice that something might have -- someone might have erred and you are on notice to check that out.

QUESTION: Mrs. Stillman, let me just be sure about what you just now said. You do not, as I understand you, question the District Court's finding that in this particular case the plaintiff's belief that there was no malpractice was a reasonable belief. He expressly found that and I thought you didn't disagree with that.

MRS. STILLMAN: Well, it depends on how you characterize that. We say that when this kind of harm and injury occurred, you are on notice, you should be expected to believe -- we would quarrel with the word "reasonably," I suppose. We would --

QUESTION: Well, you are asking --

MRS. STILLMAN: -- court's finding that he didn't believe, but we can't attack --

QUESTION: It is a finding of fact that was approved by the Court of Appeals and I thought we probably had to start with the assumption that he reasonably assumed there was no malpractice.

MRS. STILLMAN: I don't think we could accept the word "reasonably," because --

QUESTION: It is in the finding. Then you are

asking us to set aside a finding of fact.

MRS. STILLMAN: I think that is --

QUESTION: Page 29a of the appendix to the petition for writ of certiorari.

MRS. STILLMAN: Your Honor, I am aware --

QUESTION: It is really quite important to know whether you are asking us to set aside a finding of fact or not.

MRS. STILLMAN: Well, if Your Honor regards that as a finding of fact, we are asking you to set it aside.

QUESTION: Why? You are just saying it doesn't make any difference whether he reasonably believed it or not.

MRS. STILLMAN: Exactly, Your Honor.

QUESTION: That as long as he knew that he was injured and causation, that is enough.

MRS. STILLMAN: That is enough.

QUESTION: Whether he reasonably believed it was malpractice or not.

MRS. STILLMAN: Perhaps there is a semantics problem here.

QUESTION: Does the record show that he knew he was given this neomycin?

MRS. STILLMAN: Oh, yes, Your Honor, there is no question about that.

QUESTION: Does the record show that?

MRS. STILLMAN: Yes, the record does. It --

QUESTION: Affirmatively? I don't need the citation, but I didn't find it.

MRS. STILLMAN: Well, in January of 1969, when he was told by Dr. Sataloff that neomycin --

QUESTION: That wasn't my question. My question was when it was given to him, did he know it?

MRS. STILLMAN: Oh, at the time. No, Your Honor, I don't think the record shows that he knew what the drug was at that time.

QUESTION: So how could he -- he couldn't have assumed it until somebody told him, could he?

MRS. STILLMAN: Your Honor, for that reason we say the statute did not start to run until the following January. We are not arguing that the statute started to run when he was in the hospital or even when he first noticed deafness.

We think that the rule that this Court applies in Urie and which was taken over by the Fifth Circuit in the Quinton case is a basically reasonable rule if it is interpreted with the limits which we understand it to have, because we think it is reasonable that one would not be on notice to investigate possible negligence until he knows he has been injured.

We submit that the construction given the statute by the Court of Appeals, however, would be wrong as to any

statute of limitations that lacks a tolling provision to permit the kind of delay which the Court of Appeals would permit. And where the limitations provision is in this suit, a condition on a waiver of sovereign immunity and hence a provision to be strictly construed, we think that the construction is clearly impermissible.

The courts below, I have noted, suggested that the rule was quite narrow. They said that it was technically complex and that would be one reason for limiting the rule here.

They also said that because the VA denied causation and negligence, this was a reason for saying that he would not be on notice. The denial of negligence, of course, is irrelevant where there is a finding by the court that he knew -- the denial of a finding of causation is irrelevent where there is a finding by the court that he knew that the neomycin had caused his deafness and, as I say, the Court of Appeals' rule is predicated on that understanding.

And as to the denial of liability, we would say that in technically complex cases of the sort posited by the Court of Appeals here, a denial of liability by someone who is confronted with someone demanding damages for his injury is to be expected and not an excuse for ceasing any investigations. We will concede, of course, that the court made no finding, although the plaintiff was not deterred by their

denials of causation he was somehow deterred by their conclusory denials of liability.

Finally, the courts below relied on the fact that none of the physicians that he consulted ever spontaneously advised him that neomycin treatment was medically negligent. This, however, is not logically a factor supporting the conclusion that the respondent did not and could not in the exercise of reasonable diligence have known that the neomycin treatment was negligent. It is itself a legal conclusion that the respondent had no duty to ask physicians or lawyers about the possibility of negligence once he knew his deafness had been caused by neomycin. The Court of Appeals is simply using the conclusion in support of itself.

The respondent begs the question in a similar manner when he argues in his brief at pages 14 and 15 that what he terms a conspiracy of silence among physicians and difficulties in obtaining access to medical records make it unreasonable to hold that a layman is on notice of possible negligence when he knows only that a course of medical treatment has harmed him.

If as we submit the limitation period begins running at the time the claimant gains knowledge of the nexus in treatment and injury, it is irrelevant whether physicians are unduly reluctant to accuse each other of malpractice. The respondent's complaint is more logically understood as a

contention that problems in obtaining medical testimony and in gaining access to records make the investigation of medical negligence a long and difficult task with the result that a proper claim cannot be prepared in the time allotted by the statute.

But the remedy for this problem, if the problem exists, is not to devise a rule that relieves the claimant of any duty to inquire into possible negligence but to extend the limitations periods under the Tort Claims Act and a remedy such as that, of course, may only be governed by Congress.

In sum, we have a statute of limitations under the Federal Tort Claims Act, a provision that must be construed strictly because it is a condition on the waiver of the government's immunity to suit. At the very least, strict construction demands avoiding constructions that undermine the basic policies of the provisions.

By holding that persons who know or should know that they have been injured by government medical treatment may postpone the operation of the limitations provision of the act simply by failing to inquire of anyone whether treatment may have been negligent. The Court of Appeals has underline the policy of encouraging prompt investigation of claims which lies at the heart of any statute of limitations.

We submit that however many Court of Appeals may

have been drawn into reciting the rule which the court below has adopted, that they are wrong and that this Court sits to correct such errors. Accordingly, we submit that the rule was erroneous, that under a proper construction of the provision of the Federal Tort Claims Act, the respondent's claim was clearly barred and we ask the judgment of the Court of Appeals to be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Stillman.

Mr. Kuby.

ORAL ARGUMENT OF BENJAMIN KUBY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KUBY: Mr. Chief Justice, and may it please the Court:

I would like to commence my brief remarks against a background of the congressional history found in the 1949 amendments to the Federal Tort Claims Act, where Congress said it is not the intention of the federal government to deprive tort claimants of their day in court or of their remedies; nor on the other hand does it propose to incur a delay in the enforcement of plaintiff rights or to harass the government by increasing difficulty of securing evidence.

Against this backdrop --

QUESTION: Did they change the statute of limitations at that time?

MR. KUBY: They changed the statute of limitations, Mr. Justice Rehnquist, at that time to a two-year statute of limitations but kept the word "accural."

QUESTION: As it was.

MR. KUBY: As it was. And we are here basically to define the term "accrual." I think in connection with that that it is important to note the factual basis -- and I may elaborate a little bit on what the government's counsel has said.

This is not a simple case. This was a situation where this Korean veteran, with an osteomyelitis condition in his right femur, was fed for 13 days neomycin sulfate, a one percent solution. He had never heard of this drug before. He didn't know anything about it. It was fed in such a way through tubes, through a suction apparatus with the matter being -- bottles being constantly changed, until he left the hospital. That is all he knew about it.

He goes home. He then proceeds to have in the months to come a reduction in his hearing. He in fact goes back to the veterans hospital in WIlkes-Barre and they finally do oreometric tests on him in June of 1978. While he was in the hospital they did nothing. Now --

QUESTION: Well, he wasn't hard of hearing in the hospital, was he?

MR. KUBY: He was not hard of hearing in the

hospital but, Mr. Justice Stewart, that I would submit -- and there is no question about malpractice here, there is no question about negligence, goes to the issue of what they were doing for him and what he trusted them with.

QUESTION: Well, I just wasnt to be sure. My question was addressed only to be sure that I understood your argument. You said he went back for audio metric tests which I suppose are hearing tests and --

MR. KUBY: That's right, sir.

QUESTION: -- and while he had previously been in the hospital they had done noathing and I wanted to be sure that I understood that there was no need to give him audio metric tests while he had previously been in the hospital because he wasn't hard of hearing.

MR. KUBY: Unfortunately, in the negligence aspects of the case, it became abundantly clear that it was necessary to give him audio metric tests when you are feeding someone neomycin which has ototoxic effects as well as neurotoxic effects.

QUESTION: I don't understand either one of those words, but how long does it take you to become hard of hearing?

MR. KUBY: In this situation, it took a number of months before --

QUESTION: That is what I thought.

MR. KUBY: -- it started to develop.

QUESTION: That is what I thought.

MR. KUBY: In the Portis case, another case under the Federal Tort Claims Act, it took years to develop with the same drug.

QUESTION: Well, in both of those cases, they are not unlike Urie v. Thompson with the gradual development of silocosis, are they?

MR. KUBY: For instance --

QUESTION: Well, the gradual onset, the long period of time in which it takes to develop the condition for which remedy is sought.

MR. KUBY: Yes. This is not the type of case such as the classic basis for the courts of this country utilizing the discovery doctrine, and that was the classic case of a surgeon leaving a sponge in someone's stomach or a clip in someone's stomach, that he does not become aware of the injury until he is opened up.

QUESTION: But in Urie the court said in what seems to me quite a similar case that the inflicted employee can be held to be injured only when the accumulated effect of the deleterious substance manifests themselves. That sounds to me like he has to know that something is wrong with him and not necessarily when it began to happen but that he need not know that it was a result of any particular malpractice.

MR. KUBY: Well, that was not, if I may submit, a malpractice case. That was an FELA case where the standards were different, where in this situation, I would submit, that knowing that he has had a loss of hearing develop in a situation where a doctor has told him there is a possibility that it came from neomycin does not set him off in searching -- does not set off this man and, as the court found below, would not have set off a reasonable man both in an objective and subjective test in going further when the United States government through the Veterans Administration kept saying, one, there is no casuation because our doctors say when you get neomycin topically through an irrigation process it doesn't produce these toxic effects, it is only when you get it peremptorily -- and I am sure he didn't know what the word "peremptorily" meant --

QUESTION: And I don't, either.

MR. KUBY: That is the typical example of --

QUESTION: You helped him out; will you help me out? What do you mean by it?

MR. KUBY: Systemically pumped into the blood stream.

QUESTION: I see.

MR. KUBY: They were running it in and out of his system. Now, that is what we are trying to show and what the courts below and the courts in most of the circuits have said, that in situations where you have a man such as Kubrick

who has less than a high school education, that you look at those things and you are determining whether or not he utilized reasonable diligence, and that is the standard as to when the cause of action accrues, when by the reason of discovery or by reasonable diligence he should have discovered all the aspects of his claim.

QUESTION: Well, my point was the other side, I should have asked them, but when at this stage should he have suspected negligence?

MR. KUBY: Because of the complexity of this drug treatment, we submit that he should not have suspected ngligence until Dr. Soma told him that it was negligent for the governemnt to have given it to him, and that was in June of 1971, and it was only as a result of the government saying wait a second, it wasn't what you have been saying for the last two years which has caused your deafness, it is something entirely different because you worked for RCA up in the Wilkes-Barre area and were subjected to this noise. He says, no, that is not true. He had letters from all of his prior workers which are in the court record which say he had perfect hearing before and it was then that the government was in effect misleading him.

But let me also say this, that the government not only reversed itself on the issue of causation, but reversed itself on the issue of malpractice in 1965. And I would beg

to differ with government counsel because the VA regulations provide that you don't get benefits under section 351 unless in addition to showing causation you show that it was done as a result of negligence or medical error, and every time they said no causation they said no negligence, no medical error, and in his testimony he said I never believed that they were guilty of medical error, all I knew was that as a veteran it is like a service-connected disability, if I go into a veterans' hospital I am entitled as long as their is causation to get a pension, to get an increase on my pension. He never believed that there was malpractice and he so said in the record.

QUESTION: Well, is his belief the controlling test?

MR. KUBY: It is a fact that the trial court who takes the evidence -- which I submit, Mr. Chief Justice Burger, must be both a subjective and an objective test -- in making this determination as to when the cause of action acrrues, and I would submit that it must be balanced, it must be balanced with what was the harm to the government.

QUESTION: Well, that sounds like the equitable doctrine of Latches rather than the statute of limitations which has been imposed by the Federal Tort Claims Act.

MR. KUBY: But if the legislative history says on the one hand we want to have -- we want to give the people of this country their day in court, but we also have to

balance it, that was part of the legislative history. And in this case there was absolutely no prejudice whatsoever because --

QUESTION: Do you think the legislative history intended to amend the Federal Tort Claims Act to substitute a doctrine of Latches for the two-year statute of limitations which it virtually enacted?

MR. KUBY: No. I think the legislative history indicates that a person who is one year from date of accrual -- that was two years from date of accrual, and that was to be interpreted by this Court, that is the duty of this Court, to interpret what that legal word means, accrual. And I would like to say that in the most recent case of Steel v. United States, which was published subsequent to the printing of our brief, the Seventh Circuit in a Federal Tort Claims Act differentiated between a medical malpractice case and a case based upon an electrical injury as a result of failure to properly wire parts of an airport, made reference as they made this distinction, because they put medical malpractice cases in a separate area, made reference to the regulations of the Defense Department of this country which provide under the regulations concerning the Federal Tort Claims Act in dealing with accrual, under the Federal Tort Claims Act it says "except in medical malpractice cases, a claim accrues on the date on which the alleged wrongful act or omission

results in some actionable injury or damage to the claimant. In medical malpractice cases, accrual is postponed until such time as the claimant reasonably discovers or reasonably should have discovered the act or omissions which are alleged to be wrongful.

Now, that is what the federal government says for the Department of the Army in its regulations at the present time.

QUESTION: Well, that is their position in this case, too.

MR. KUBY: Their position in this case is that -- if I might --

QUESTION: If I understand it.

MR. KUBY: If I understand it, Mr. Justice Stevens -- is that the mere knowledge of the happening, not the wrongful acts --

QUESTION: No, it is the harm plus the causation, you have to know what happened and why it happened but not know if it invaded any legal right, that separates it.

MR. KUBY: That separates us, but I think that the reading of this regulation, as the Seventh Circuit makes note of it, because it also cites a regulation from the airports which talks about the Hungerford case out of the Ninth Circuit, and says these two departments of the United States government aren't talking about the same thing.

QUESTION: What is the citation of that case or the date of it -- it is the Seventh Circuit, and what is the caption of it?

MR. KUBY: The caption is 599 F. 2d 823, decided June 12, 1979.

QUESTION: 823. Thank you.

QUESTION: Is that the opinion by Judge Tuttle or was his the earlier one?

MR. KUBY: This was the opinion by Harlington Wood, Jr.

QUESTION: I am surprised you don't refer to the Seventh Circuit case written by Judge Tuttle where he construed his earlier Fifth Circuit --

MR. KUBY: That is DeWitt.

QUESTION: That is DeWitt.

MR. KUBY: That is DeWitt. That is in our brief, sir.

QUESTION: That was Wisdom, wasn't it?

MR. KUBY: I think it was Judge Tuttle. It was Wisdom, I'm correct, sir.

QUESTION: Wisdom. And Harlington Wood dissented?

MR. KUBY: Yes. In this case, however, in dealing with the situation, he says he put medical malpractice cases in a separate category.

QUESTION: The government agrees with that. There is no fight about that.

MR. KUBY: That's right. The only fight is what has to be included in the doctrine of accrual, is it reasonable in language without the medical knowledge to start the wheels rolling, or is it reasonable and should it be for the District Court judge, based upon all the circumstances, to make that finding which is done here and under the cases of this Court if affirmed by the Court of Appeals it is rarely if ever explored by this Court.

QUESTION: By the way, do you interpret the Ashley case in the Ninth Circuit to be contrary to your position?

MR. KUBY: The Ashley case again took up the position from just knowing injury.

QUESTION: Well, didn't it say knew or should have known in that case, that he knew or should have known at that time? That is all you are contending for, isn't it?

MR. KUBY: I am submitting, sir, that the Eighth and Ninth Circuit both adopted this limited discovery rule that whoever the party may be, it might be a man with a fifth grade education, a lawyer with so many years of education, it starts to run when he knows of that injury. All the other --

QUESTION: And the causation.

MR. KUBY: Not as to the causation. All the other

circuits say that is not enough to open up and to give knowledge to the layman who is injured.

QUESTION: Would you draw a different rule depending on the awareness of the individual, thus if the injured person were, say, an elder laryngologist, he might have a shorter period of limitation than your client?

MR. KUBY: Well, Mr. Justice Blackmun, in the Sanders case, decided by the District Court here in Washington, said when you are dealing with a nurse, yes, she has special knowledge and we take that into account and we say that when she knew about her injury because of that factor, it became known to her or should have been known to her. So answer to your question, sir, if it were a laryngologist, of course.

QUESTION: Then you will not be content with the standard of a reasonable person?

MR. KUBY: I think the courts have used the standard, those who have enunciated it of both the reasonable man, the objective standard and the subjective standard of the person involved, a person such as Mr. Kubrick who trusted his government.

QUESTION: So you have a different result then, whether he is less than a high school graduate, as you have described him, or one who has had two years of college, you might have an extra half year maybe?

MR. KUBY: You might have a different result based upon the knowledge acquired by the trial judge in assessing the facts of the case. And as the courts have said, these are to be dealt with on an ad hoc basis, accrual is to be dealt with on an ad hoc basis, based upon the circumstances.

QUESTION: You say that is inherent in the test to know or should have known, knowledge or -- it is bound to be ad hoc, is that your position?

MR. KUBY: That is the test, Mr. Justice, that we espouse, that for the citizens of the United States dealing with the government, that the basis should be as expressed by the Court of Appeals of the Third Circuit. Now, that is the outward parameter. I would submit that there are many situations where the court will not deal with that but will on the basis of the knowledge of who the injured party was, the circumstances, what he knew, then on certain subjects it will be the knowledge of the injured, the causation.

I would feel that the government rested a great trust in Mr. Kubrick. I would only close by saying from a Pennsylvania Supreme Court case decided over a hundred years ago, in Menges v. Depper, where men naturally trust in their government and they ought to do so, and they ought not to suffer more.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything

further, Mrs. Stillman?

ORAL ARGUMENT OF ELINOR H. STILLMAN, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MRS. STILLMAN: First, with respect to the Department of Defense regulation that was quoted from the Steel case, I would say that that is simply another way of stating the Quinton rule, and we would interpret either one the same way as consistent with the position we are taking here.

QUESTION: Well, I may not have heard it correctly, but as I understood that regulation, it was that the potential plaintiff has to discover the wrongful act --

MRS. STILLMAN: It said when he has knowledge of the acts alleged to be wrongful.

QUESTION: Alleged to be wrongful.

MRS. STILLMAN: Well, the Quinton rule says when he discovers the acts constituting the malpractice, and we would interpret either one to mean when you discover the acts which turn out to be provable.

QUESTION: I was just wondering if he had to have knowledge of the wrongfulness of the acts.

MRS. STILLMAN: Yes. Right. We think the distinction -- it doesn't say discover knowledge of the wrongful --

QUESTION: How did this man find out that there was a possibility that he was given this drug in the wrong way?

MRS. STILLMAN: Well, we say he was on notice to

start finding out in January of 1969 or April of 1969 at the latest.

QUESTION: On the basis of --

MRS. STILLMAN: And whether he found out or not during the ten years

QUESTION: On the basis of -- what put him on notice of that?

MRS. STILLMAN: Put him on notice simply because he went into the hospital and was harmed by a treatment and knew himself to have been harmed by the --

QUESTION: So the best thing to do from now on --

MRS. STILLMAN: Is to consult --

QUESTION: -- is to sue the day you come out.

MRS. STILLMAN: I don't think file suit but I think investigate the basis for a possible suit.

QUESTION: You should investigate the possibility -- you assume that the medical authorities of the United States government are negligent?

MRS. STILLMAN: No, we make no such assumption and we assume --

QUESTION: Well, I don't think anybody should. Do you?

MRS. STILLMAN: Most people are not harmed by or are not made deaf by --

QUESTION: But that is what the respondent says, he

trusted them.

MRS. STILLMAN: Well, we think that the decision would rest on different issues.

QUESTION: Mrs. Stillman, going back to the standard for just a moment that Mr. Justice Stewart asked you about --

MRS. STILLMAN: Yes.

QUESTION: -- in the Urie case, which Mr. Justice Rutledge wrote, he said the critical time is the specified period of time after notice of the invasion of legal right.

MRS. STILLMAN: Your Honor, we would --

QUESTION: Do you accept that language?

MRS. STILLMAN: Yes. We would interpret that to mean that he has notice of the possible invasion once he understands --

QUESTION: No, not possible but notice of the invasion of legal rights which -- doesn't that imply knowledge of a possible breach of duty?

MRS. STILLMAN: Well, of course, in Urie they weren't focusing on the question that is involved here.

QUESTION: But you did rely on the Urie case.

MRS. STILLMAN: We do rely on Urie because we think that on the facts, they are similar to the facts that we say should put you on notice, and I suppose we just interpret that phrase too implicitly in --

QUESTION: You say notice of the invasion of legal rights should be paraphrased to say notice of the harm and its cause?

MRS. STILLMAN: Yes. Yes, I think so.

Also as to the VA standard which he says is negligence, I simply would refer the Court to the VA regulations and that regulation is printed at page 4, Footnote 2 of our brief, and it refers to -- it says compensation is not payable for either the usual or the unusual after-results of approved medical care properly administered, in the absence of a showing that the disability approximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment or similar incidences of indicated fault on the part of the Veterans Administration. And obviously this is a different standard from an error in judgment which you had a duty of care to avoid at the time. So it is a fault standard but it is not the medical malpractice standard.

Finally, I simply would observe that the respondent's explanation of how the rule would work, how accrual would be determined under his test would simply leave us with no rule at all. There is really no point in having a fixed time if it is going to be some kind of balancing test where you consider the state of mind and the state of education of the plaintiff and whether the government was

prejudiced, and so on.

We would agree with Mr. Justice Rehnquist that if Congress had intended any such test they simply would have said apply the doctrine of Latches and they clearly have not done that here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Stillman. Thank you, Mr. Kuby. The case is submitted.

(Whereupon, at 2:39 o'clock p.m., the case in the above-entitled matter was submitted.)

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