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UNITED STATES v. KUBRICK: SCOPE AND APPLICATION

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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UNITED STATES v. KUBRICK: SCOPE AND APPLICATION

by Captain Carl M. Wagner

ABSTRACT: This thesis examines the federal court treatment given the FTCA statute of limitations claim accrual standard promulgated by the United States Supreme Court in United States v. Kubrick. It reviews decisions regarding the scope and application of the accrual standard, knowledge required to trigger claim accrual, components of the standard, the effect of lack of knowledge of the government's part in causing injury, the effect of various types of government conduct on claim accrual under the standard, and modifications or extentions courts made in the standard. It concludes that some courts have not given Kubrick the broad scope the Supreme Court intended. Nor have some courts heeded the Kubrick Court's admonition to apply the FTCA statute of limitations to protect only an injured party who is "blamelessly ignorant" of his claim.

TABLE OF CONTENTS

I. INTRODUCTION

A tort claim against the United States must be presented in writing to the appropriate agency within two years of accrual of the claim.[1] Furthermore, within six months of the denial of the claim, the claimant must begin an action in court. Failure to comply with these time limits results in a bar to the claim.[2]

Although the time limits are clearly stated in §2401(b) of the Federal Tort Claims Act (FTCA),[3] the Act does not define when a claim accrues. The lower federal courts developed tests with which to evaluate claim accrual. In United States v. Kubrick,[4] the United States Supreme Court rejected one of these FTCA claim accrual tests and established its own accrual standard.

Since Kubrick, the lower federal courts have answered several questions that the Kubrick Court left unanswered. Specifically, what is the scope of the Kubrick accrual standard? What degree and type of knowledge does the standard require to trigger the running of the statute of limitations? Additionally, the courts determined that the standard has both an objective and a subjective component. They also modified the standard to fit certain types of fact situations. Finally, the courts determined when the Kubrick standard requires deferral of claim accrual based on government conduct.

The courts did not uniformly interpret and apply the standard. This paper traces the evolution of the Kubrick accrual standard. It reviews several lower federal court interpretations of the Kubrick standard in the above mentioned subject areas, and evaluates whether the courts properly

applied it. It concludes that some courts misapplied or misinterpreted the standard.

II. PRE-KUBRICK DECISIONS

In Urie v. Thompson,[5] the United States Supreme Court considered the issue of when a claim accrued under the provisions of the Federal Employees Liability Act (FELA) for application of its three year statute of limitations.[6] In that case, Tom Urie, a railroad worker, contracted silicosis during the course of his thirty year employment with the Missouri Pacific Railroad. Urie alleged that the silicosis, a pulmonary disease, resulted from his exposure to silica dust that came into the locomotive cabs from sand the locomotive dropped on the railroad track to increase traction.

There was no evidence Urie should have been aware he had silicosis prior to the time he became ill. The Court referred to Urie's unawareness of his injury prior to this time as "blameless ignorance"[7] and noted the purpose of a statute of limitations is to "require the assertion of claims within a specified period of time after notice of the invasion of legal rights."[8]

The defendant argued that Urie's claim was time barred because he must have unknowingly contracted the disease some time long before November 25, 1938. Urie did not file suit until November 25, 1941, therefore if the claim accrued before November 25, 1938, it fell outside the FELA three year statute of limitiations. Alternatively, the defendant argued that each inhalation of silica dust was a separate tort giving rise to a separate cause of action. Application of this theory restricted recovery to only the incremental injury caused by inhalation of dust since 1938.

Urie argued that the claim did not accrue until he was incapacitated as a result of the disease manifesting itself. The Court rejected the defendant's arguments and accepted Urie's argument. The Court reasoned that the defendant's arguments barred or unfairly limited damages and thwarted the congressional purpose of the FELA.[9]

The Court of Appeals for the Fifth Circuit applied the Urie standard to a medical malpractice action brought under the FTCA in Quinton v. United States.[10] In that case, the plaintiff's wife received a blood transfusion at an Air Force hospital in May 1956. In December 1959, she gave birth to a stillborn child and discovered that the blood she received in 1956 was Rh positive, although her blood type was Rh negative. As a result, she could not have children without their likely being stillborn or suffering from birth defects.

The court rejected the government's argument to dismiss the claim on statute of limitations grounds although more than two years elapsed from the infliction of the injury until the claim was filed.[11] The court held that the claim could be filed "within two years after the claimant discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his claim is based."[12] The court interpreted Urie's definition of accrual as the point the injury manifests itself, rather than the time the injury was inflicted.[13] The court noted that there was no evidence the plaintiff or his wife knew or could have known of the erroneous transfusion prior to 1959.[14]

Quinton was followed by several cases involving plaintiffs who were aware they had been injured but who were unaware their injuries resulted from malpractice.[15] The courts considering the issue held that the statute of limitations did

not run until they became aware malpractice was involved in their treatment.[16]

Typical of these cases is Bridgford v. United States,[17] in which the Court of Appeals for the Forth Circuit considered the case of the dependent son of a military retiree who had a vein stripping operation at Bethesda Navy Hospital in 1964 to relieve varicose veins in his legs. During the surgery, a doctor erroneously severed a major vein. The doctor identified the mistake during the surgery when blood did not properly drain from the boy's legs. He joined the severed portion of the vein to another vein in order to provide adequate drainage. The doctor told the plaintiff about the mistake after surgery but assured him there would be no problem. When the boy experienced a slow recovery and pain, the doctor told him he was a slow healer, and that there had been nerve damage during surgery. The hospital released the plaintiff but readmitted him when the pain continued. Physicians then told him the pain was due to emotional problems.

Pain and swelling continued unabated until 1969 when a vein in his buttocks became noticeably larger. In 1970, the plaintiff obtained treatment from a private physician who discovered that the severed vein had apparently become blocked shortly after the vein stripping procedure. The new doctor told the plaintiff his condition was now untreatable and that he must wear support stockings. The plaintiff filed an administrative claim, and ultimately filed suit, in order to recover for the injury.

The court rejected the government's argument that the claim accrued in 1964 when the plaintiff and his mother were told about the erroneously severed vein.[18] At that time, reasoned the court, the plaintiff did not know he had damages

in the form of some actual loss.[19] Although he was told of the mistake, he was also told the mistake was corrected and there had been no harm. The mere threat of future harm was not sufficient to support a cause of action, and knowledge of some insignificant damage would not preclude a later action for substantial damage.[20] The court enunciated the rule that "until claimant has had a reasonable opportunity to discover all of the essential elements of a possible cause of action--duty, breach, causation, damages--his claim against the Government does not accrue."[21]

III. KUBRICK

In Kubrick v. United States,[22] the Court of Appeals for the Third Circuit considered the Bridgford test and followed the trend toward an expanded definition of the elements that a plaintiff must know to begin the running of the FTCA statute of limitations.

In 1968, Kubrick, a veteran, was treated in a Veterans Administration (VA) hospital for a leg infection by irrigating the infected area with neomycin, an antibiotic. Although the infection cleared up, six weeks after discharge Kubrick noticed some loss of hearing and a ringing sensation in his ears. Doctors diagnosed his condition as bilateral nerve deafness and, in 1969, told him the hearing loss was probably caused by the neomycin treatment at the VA hospital.

Kubrick was already receiving disability benefits for a service connected back injury. He filed for an increase in benefits alleging the neomycin treatment for his leg infection caused his deafness. The VA denied the initial claim and a resubmission. It stated there was no causal connection between the neomycin treatment and Kubrick's hearing loss.

The VA also claimed there was no evidence of carelessness, fault, or negligence, on the part of the government.

During his administrative appeal, the VA told Kubrick his doctor suggested that his hearing loss could have been caused by his occupation as a machinist. Kubrick questioned his doctor, who denied making the statement. The doctor told him the neomycin caused the hearing loss and should not have been administered. The VA ultimately denied Kubrick's appeal and he filed suit under the FTCA.

The district court rejected the government's position that Kubrick's claim was barred by the two year statute of limitations.[23] The government argued the statute began running in 1969 when Kubrick learned his hearing loss was a result of neomycin treatment. The court of appeals sustained the district court's finding that Kubrick's claim did not accrue until 1971 when Kubrick learned that the neomycin should not have been administered.[24]

The court of appeals noted that there is a special test to apply to determine when the claim accrues in situations where a plaintiff has no reason to believe he has been the victim of negligent treatment, even though he knows the treatment caused his injury. "In these situations, if the plaintiff can prove that in the exercise of due diligence he did not know, nor should he have known, facts that would have alerted a reasonable person to the possibility that the treatment was improper, then the limitation period is tolled."[25] The court reasoned that any other result would fail to accord with the Urie and Quinton "blameless ignorance" theory and would be inequitable.[26]

The Supreme Court reversed the lower courts' decision regarding when the claim accrued.[27] The Court first listed the purpose of statutes of limitation in general[28] and then

stressed that § 2401(b) represented Congress' decision on the role of limitations in barring tort claims against the government.[29] It emphasized that Congress' intent should be neither extended nor narrowed.[30]

The Court noted that in 1969, Kubrick knew that he had been injured and the cause of his injury. The Court stated that the lower courts' decisions that the limitations period did not run until Kubrick discovered, in 1971, that the neomycin treatment was malpractice, were not supported by the language of the FTCA, it's legislative history, or case law at the time of its passage.[31] The Court held that the final element, knowledge of negligence, was not necessary to begin the running of the statute.[32]

In a footnote, the Court distinguished Urie v. Thompson[33] and Quinton v. United States[34] as cases involving delayed manifestation of an injury.[35] These plaintiffs' situations differed from Kubrick's situation. Kubrick knew that he had been injured, but he did not know that his injury resulted from the violation of a legal duty. The Court also distinguished Bridgford and the cases relied on by the circuit court as cases requiring knowledge of malpractice before accrual of the claim. It said these cases misinterpreted Urie and Quinton and were a recent departure from the general rule.[36]

The Court stated that it was "unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its causes should receive identical treatment."[37] The Court reasoned that a plaintiff may not know he has been injured until the injury manifests itself.[38] Alternatively, the facts about the cause of the injury may be in the defendant's control, impossible for the plaintiff to obtain. However,

once a plaintiff knows he has been injured and by whom, he is no longer at the putative potential defendant's mercy.[39]

The plaintiff may consult other individuals who can tell him if his legal rights have been violated, and he has a duty to do so.[40] In Kubrick's situation, he only needed to ask other doctors if the neomycin treatment was appropriate to discover that he suffered from an actionable wrong. While Kubrick sought expert advise on the cause of his injury, the neomycin treatment, he did not ask if this treatment was improper. The Court opined that Congress did not intend that a claim should not accrue until the plaintiff knew his injury was negligently inflicted.[41] The court reasoned that failure to require a reasonably diligent effort to present a tort claim against the government undermined the purpose of the limitations statute.[42]

The Court also noted that even if a plaintiff seeks advice, he could be incompetently or mistakenly advised that his injury did not support a suit against the individual who inflicted the injury.[43] Alternatively, he could encounter a situation in which experts differed as to whether the defendant's conduct was negligent. In either case, the plaintiff must make the same decision other plaintiffs must make, whether or not to sue. The Court determined there was no reason to subject the defendant to potential stale claims because the plaintiff discovered he had a cause of action outside the two year limitations period.[44]

The lower courts also felt Kubrick's delay should be excused because of the complexity of the negligence issue in this case.[45] The Court rejected this contention, noting that negligence issues are frequently complicated.[46] Further, it stated that if statutes of limitation did not run until plaintiffs who failed to seek advice on the validity of their

negligence claims realized they had been negligently injured, the same provision must be made available to other injured plaintiffs with other tort claims under the FTCA or claims under other federal statutes.[47]

The Court noted that although statutes of limitations make otherwise valid claims unenforceable, courts must enforce these statutes in accordance with Congress' intent in establishing them.[48] Justice White, writing for the Court, concluded that if Congress was not satisfied with the result in the case, it could amend the FTCA.[49]

Writing for the dissent, Justice Stevens opined that the Urie blameless ignorance standard precluded the Court from distinguishing between a plaintiff's knowledge of the cause of his injury and his knowledge of his doctor's negligence.[50] He said that in both instances, the typical plaintiff accepted his doctor's explanation of the situation. Even if the plaintiff did not, there is no assurance another doctor will inform the plaintiff that his doctor was negligent. In Kubrick's situation, the government not only denied that the health care was negligent, but it may have misrepresented the cause of the injury to Kubrick.[51]

The dissent also noted that under the Urie rule, the statute of limitations ran if a reasonably diligent person, with knowledge of an injury or its cause, was on notice of a doctor's misconduct.[52] There was no need to distinguish unawareness of negligence from unawareness of an injury or of its cause. Justice Stevens argued that the district court found Kubrick's belief that there was no malpractice reasonable and the Supreme Court of the United States should not substitute its judgment for that decision.[53]

Case comment writers generally felt Kubrick's effect would be to deprive malpractice victims of an opportunity to recover under the FTCA.[54]

IV. SCOPE OF KUBRICK

Kubrick is a medical malpractice case. The Court noted that medical malpractice cases required discovery by the plaintiff of both his injury and its cause before the accrual of a cause of action.[55] Although the Court deleted the lower courts' requirement that a plaintiff be aware his injury was caused by negligence, it left the medical malpractice accrual standard a more plaintiff-oriented standard than the normal tort accrual standard under which accrual occurs at the time of the plaintiff's injury.[56]

Section 2401(b) does not establish a separate accrual standard for medical malpractice claims. It simply requires that a claim must be filed within "two years after such a claim accrues."[57] The Kubrick Court traced the evolution of the special malpractice rule and determined this exception was a judicial creation.[59] The Court did not indicate whether the more liberal standard used in medical malpractice cases was restricted to those cases. Thus lower courts were left to wrestle with the issue of the scope of the Kubrick accrual standard. Courts arrived at various results when they considered the issue of whether Kubrick's accrual standards are restricted to medical malpractice settings.

One of the broadest statements of Kubrick's applicability is the Fifth Circuit case of Dubose v. Kansas City Southern Railway Co.[59] In that case, the court faced a situation similar to the one the Supreme Court faced in Urie. The plaintiff was the widow of a railroad car repairman. She

alleged that her husband was exposed to various irritants in the course of his work. These irritants created breathing problems and ultimately resulted in his death from lung cancer. The plaintiff's husband did not realize that his breathing problems were job related until the cancer was diagnosed.

The railroad argued the claim accrued early enough to be barred by the FELA's three year statute of limitations. Its position was that Kubrick should be restricted to medical malpractice cases under the FTCA and Urie to occupational disease cases under the FELA. The court rejected this reasoning and said Kubrick was merely the Supreme Court's "latest definition of the discovery rule and should be applied in federal cases whenever a plaintiff is not aware of and has no reasonable opportunity to discover the critical facts of his injury and its cause."[60] Kubrick, the court determined, was a restatement of the Urie discovery rule and definition of its outer limits rather than a new test merely to be applied in medical malpractice actions.[61] The court held the correct standard to apply to the facts in this case was the Kubrick standard of when Dubose should have known his health problems were job related, rather than the old Urie standard of when the injury manifested itself.[62] Thus, the court used Kubrick to require knowledge of causation rather than just knowledge of injury before a claim accrued.

Similarly, the Seventh Circuit broadly construed Kubrick in Stoleson v. United States.[63] The court stated that there was no basis to exempt only medical malpractice plaintiffs from the harsh application of statutes of limitation.[64] The fact situation in Stoleson was similar to the one in Urie. In both cases, the plaintiffs experienced ill health, and accrual of their claims was deferred until they knew their working

conditions caused their problems. The court determined the focus should be on the nature of the problems the plaintiff encountered in recognizing his injury and its cause, rather than whether the defendant is a doctor. "[A]ny plaintiff who is blamelessly ignorant of the existence or cause of his injury shall be accorded the benefits of the discovery rule."[65]

Dubose and Stoleson logically analyze Kubrick as an accrual standard for general application rather than merely a malpractice standard. Congress did not establish separate accrual standards for different tort actions in §2401(b). Rather, the Court developed the Kubrick accrual standard as it tried to balance Congress' purpose in enacting the FTCA with the claim cut-off provision found in §2401(b). The Court found that different types of fact situations required a different accrual standard to achieve a proper balance in a particular type of case. Specifically, accrual is deferred in a situation where a plaintiff does not know both the fact of his injury and its cause.

This broad application of the standard must be contrasted with that of the courts that have restricted Kubrick to medical malpractice cases. The Fourth Circuit rejected an extension of Kubrick beyond the medical malpractice area in Wilkinson v. United States.[66] There, a car driven by a sailor on temporary duty struck the plaintiff, a pedestrian. The plaintiff initiated his claim against the sailor. The United States removed the case to federal district court because the sailor was driving the car within the scope of his employment. The court substituted the United States as the party defendant and dismissed the case as time barred. The plaintiff argued that the untimely filing of an administrative claim should be excused because he did not know the sailor was acting within the scope of his employment.[67]

The plaintiff did not raise the Kubrick accrual standard, but Judge Butzner, who dissented, did.[68] He argued that Kubrick tolled the statute of limitations until the plaintiff knew his injury was caused by a government employee acting within the scope of his employment.[69] He reasoned that Kubrick's requirement of knowledge of who caused the injury was composed of both the name of a potential defendant and also his status as a government employee acting within the scope of his employment.[70]

The majority determined this argument was unpersuasive, and distinguished Kubrick as a case involving medical malpractice.[71] The court noted that in medical malpractice cases a patient may not know at the time of injury that he has been injured or that he has a cause of action against the doctor. The court reasoned that even if Kubrick applied, the plaintiff knew he was injured and who injured him at the time of the accident. As a result, there was no need to defer accrual of the claim and, therefore, the Kubrick test was inapplicable.[72] The court did not say it would restrict Kubrick to medical malpractice cases alone. However, its reference to Kubrick as a medical malpractice case and its comment that medical malpractice plaintiffs may lack information regarding injury and causation indicated that it regards Kubrick as having more restricted application than that expressed by the Dubose and Stoleson courts.

The Court of Appeals for the Eighth Circuit has commented on Kubrick's scope several times. In Snyder v. United States,[73] a medical malpractice case, the court cited Kubrick for the proposition that medical malpractice cases are the exception to the general FTCA rule that a claim accrues at the time of a plaintiff's injury.[74] However, the court did not

elaborate on why Kubrick should be restricted to medical malpractice only.

Likewise, in Wollman v. Gross,[75] the court did not discuss why the Kubrick standard was restricted to medical malpractice cases. It simply reviewed the standard and noted Kubrick's primary application had been in medical malpractice cases.[76] In Wollman, the court considered a claim from the plaintiff that his FTCA action should not be time barred because of his "blameless ignorance" of the fact that the driver of the car who injured him was acting within the scope of his employment. The plaintiff argued that he should have the benefit of the Kubrick delayed accrual standard. The court declined to determine whether Kubrick's "blameless ignorance" doctrine extended beyond the medical malpractice area.[77] However, the court stated that even if it did, this plaintiff would not benefit from the extension because the claim was also late under the Kubrick standard.[78]

Although the courts in both Wilkinson and Wollman treated Kubrick as applicable only to medical malpractice cases, both courts applied the standard and determined the outcome of the case was unchanged. It is difficult to determine whether the courts were searching for a fact situation in which to expand Kubrick or whether they were simply attempting to demonstrate why the Kubrick standard should be restricted to medical malpractice cases. The courts' failure to provide an analysis for their limited application of the Kubrick standard stands in sharp contrast to the analyses provided by the Dubose and Stoleson courts.

Both of the fact situations considered by the Wilkinson and Wollman courts involved plaintiffs who, like Kubrick, failed to appreciate the legal significance of facts they either knew or could have known if they inquired. Kubrick

only had to ask his doctor or lawyer whether his treatment was negligent. The Wilkinson and Wollman plaintiffs only had to ask their lawyers if the United States employee status of the other drivers impacted on their cases. The plaintiffs did not exercise the reasonable effort required by Kubrick to discover all of the legal implications of the factual causes of their injuries. Thus, these plaintiffs' ignorance was not blameless.[79] The courts, therefore, reasoned that even application of Kubrick did not extend the time of accrual of the claims. This reasoning only explained why the Kubrick standard would not be beneficial to the plaintiffs considered. It did not, however, explain or justify a restriction of Kubrick to medical malpractice cases.

In Gross v. United States,[90] an FTCA action for continuous intentional infliction of emotional distress, the Eighth Circuit held that Kubrick does not apply to continuing tort cases. The court rejected the government's assertion that the claim accrued when the plaintiff first knew or should have known of his injury and its cause.[91] In Gross, a farmer alleged the Agricultural Stabilization and Conservation Service Committee wrongfully denied him the opportunity to participate in a feed grain program for several years with knowledge their actions would cause him emotional distress.

The court stated the alleged tortious conduct was of a continuous nature and that as a result the claim did not accrue for statute of limitations purposes until the last tortious act.[92] The court specifically stated Kubrick did not apply to continuing tort situations and that it was a medical malpractice case rather than a continuing tort case.[93]

Even in the medical malpractice area, continuing torts may present fact situations in which strict application of the Kubrick standard would result in an unfair denial of a claim

as untimely. The Court of Appeals for the District of Columbia considered such a situation in Page v. United States.[94]

In Page, the court reviewed a veteran's claim that over a nineteen year period the VA prescribed quantities and combinations of drugs that resulted in his addiction and other injuries without properly supervising his condition. The plaintiff, Darrell Page, alleged he received routine delivery of drugs through the mail from the VA for years.

The court rejected the government's claim that under the Kubrick standard, a similar action, ten years prior to the one the court considered, began the running of the statute of limitations.[95] The court noted the questionable conduct continued until within the two year period prior to the current action and therefore the claim was not barred. "Just as res judicata cannot bar a claim predicated on events that have not yet transpired, knowledge acquired in 1972 that one has a claim could not trigger time limitations on allegedly tortious conduct that had not yet occurred."[96]

The court cited Gross v. United States[97] for the proposition that Kubrick is inapplicable to continuing torts,[98] and held that the claim accrued when the treatment ended.[99] It did not go so far as to state Kubrick is restricted to medical malpractice situations.

The Kubrick standard is not appropriate in continuing tort situations but not because Kubrick should be limited to medical malpractice cases. Rather, it is inappropriate because it could, as the Page court noted, prevent a plaintiff from bringing a cause of action for a wrongful act or omission by the government that occurred, as part of a continuous course of conduct, more than two years after the conduct started.

It may be that there are situations other than just the continuing tort area in which application of the Kubrick standard of accrual will not be appropriate because it will unfairly deprive a plaintiff of a cause of action. These situations, however, could be identified within specific types of cases or on a situation by situation basis as a result of an analysis of specific factors involved in a specific type of action. There should be a logical reason for applying or not applying the Kubrick standard rather than a mere recitation of the fact that Kubrick was a malpractice case.

The Kubrick Court anticipated that its standard would be applied outside the medical malpractice field. When the Court rejected the circuit court's determination that the technical complexity of the case supported deferral of accrual of the claim, it stated it would be difficult not to allow deferral of a claim in any complicated case.[90] Additionally, the Court did not specifically discuss medical malpractice when it remarked that it was "unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its causes should receive identical treatment."[91]

Congress decided to allow some tort claims against the government and required the presentation of those claims within two years of accrual.[92] Different standards of accrual are needed to insure all potential claimants are given the same opportunity to decide whether or not to file a claim.[93] The Kubrick standard puts claimants who do not know the cause of their injury at the time it is manifested in the same position as claimants with traditional claims. With the knowledge of the cause of their injury, both sets of plaintiffs must decide whether or not to file a claim.[94] They each have two years, from the time they know their injury and

its cause, to make this decision. It is reasonable to conclude that in any situation where a plaintiff cannot reasonably be expected to determine the fact that he has been injured and the cause of his injury, the Kubrick standard should apply.[95] It should not be restricted only to medical malpractice cases in which a plaintiff encounters this problem.

The Stoleson court's argument that the defendant's occupation should not control when a claim accrues has merit. The discovery doctrine protects blameless ignorance.[96] This doctrine did not develop in a malpractice case, but rather in Urie, a delayed manifestation of injury FELA case. There, the plaintiff faced the prospect of losing his cause of action before he could pursue it. In order to give plaintiffs an opportunity to present their claims for adjudication, the Court extended accrual of the claim from the time the injury was inflicted until it was manifested.[97] At this point, plaintiffs' failure to pursue the claim could be held against them.

The Urie court used broad language when it stated that the claim accrued when the plaintiff had "notice of the invasion of [his] legal rights."[98] It did not restrict the doctrine to the FELA, the statute under which the case arose. Rather, the Court attempted to discern the congressional purpose of the statute and how to balance this purpose with the need for a statute of limitations. The court's focus was on the "humane legislative plan" Congress intended, and how to avoid thwarting the congressional purpose.[99]

Although Kubrick arose in a medical malpractice setting, the court looked to Urie, a FELA case, for the doctrine it was interpreting. The Court again focused on congressional intent, but this time the congressional intent related to

imposing a cut off of the government's vulnerability to suit.[100] Quinton brought the Urie discovery rule to FTCA medical malpractice actions, but it did so with language as broad as the Urie language by delaying accrual until the plaintiff "discovered, or in the exercise of reasonable diligence should have discovered, the acts of malpractice upon which his claim is based."[101] Quinton's focus, as was Urie's, was on not depriving a plaintiff of the opportunity to litigate his claim. The court of appeals in Kubrick simply continued to focus on the need to allow plaintiffs to present their actions.

The Court recognized, in Kubrick, that its Urie discovery rule had been expanded beyond Congress' intent. It said Congress did not intend to require that a plaintiff be aware of more than the fact of his injury and its cause for a claim to accrue.[102] The Court balanced its concern for allowing plaintiffs to pursue causes of action against the government with the government's need to cut off claims at some point. The standard of accrual was not the knowledge of the legal consequences of an injury and its cause, but merely knowledge that an injury occurred and what caused it.[103] Armed with this knowledge a plaintiff must determine whether he has a valid claim.

The Dubose court recognized the Supreme Court was merely fine tuning its discovery rule with the Kubrick decision, rather than creating a separate new standard for FTCA medical malpractice actions. The Dubose court and the other courts that expanded Kubrick first examined the facts of the case to determine if it was a type of case in which the plaintiff could not know either that he had been injured or the cause of his injury.[104] If so, the general tort rule that a claim accrues when the injury is inflicted was not applied, and

Kubrick was. The analysis then proceeded using the Kubrick standard to determine if the plaintiff brought his claim in a timely manner.

This approach seems more reasonable than the approach proposed by the Court of Appeals for the Eighth Circuit in Brazzell v. United States.[105] In Brazzell, the court applied Kubrick's accrual standard to a swine flu vaccination case. The court reasoned that although the claim was a products liability type claim, the issues in the case, as in most medical malpractice claims, were the subject of conflicting medical opinions as to the cause of the plaintiff's injury. For this reason, the usual rule that a claim accrues at the time of injury, was not applied.[106]

Just as the Stoleson court noted defendants' occupations should not control when a claim accrues, the presence of conflicting medical testimony should not determine which accrual standard is applied. Certainly, conflicting testimony from engineers or chemists could occur in other cases. The Brazzell case does indicate the Eighth Circuit may apply the Kubrick standard outside the medical malpractice field. It is possible the court will extend the doctrine when the proper fact situation appears.

V. DEGREE AND TYPE OF KNOWLEDGE REQUIRED TO TRIGGER ACCRUAL OF THE CLAIM

A. BELIEF v. KNOWLEDGE

In Kubrick, the plaintiff clearly knew (1) that he had been injured, and (2) that the medical treatment he received caused his injury. An issue exists as to what degree of certainty about these factors is required to start the running

of the statute of limitations. The Fifth Circuit analyzed the degree of knowledge required to start the running of the statute of limitation in Harrison v. United States.[107] The plaintiff, Sibyl Harrison experienced severe headaches. In 1966 she sought treatment for them at a military hospital because her husband was a retired airman. Her doctors suspected a brain tumor and performed procedures to test for this possibility. The tests involved injecting air into the brain and spinal cord, then moving the patient into various positions and taking x-rays to observe the movement of the bubble. Mrs. Harrison lost consciousness during the test. When she regained consiousness she noted her arm was slightly numb. Her doctors assured her this was normal and other patients told Mrs. Harrison they had experienced this also. The numbness soon disappeared but the headaches did not. Additionally, she experienced a burning sensation and paralysis.

While they conducted the test the doctors allowed the needle they used to inject the air to be pushed into the center of Mrs. Harrison's brain. Although the doctors noted the problem on Mrs. Harrison's records, and the x-rays they took showed the problem, they failed to tell Mrs. Harrison. She left the hospital and continued to seek treatment for her problem. She consulted several different doctors, all in vain. Finally, she discovered she had a brain tumor and underwent surgery for removal of the tumor.

Prior to the operation, Mrs. Harrison's new doctor requested the x-rays and test results from the military hospital. The doctors there did not send the x-rays and did not report the needle incident when they summarized the test results.[108] After the operation, Mrs. Harrison's pain stopped for a short while but returned. At this time Mrs. Harrison

decided the original doctors at the military hospital damaged her brain. She told her attorney this but he was unable to obtain confirmation of her allegations from any of the doctors she consulted.

Mrs. Harrison's attorney attempted to obtain her records but was unable to do so for two and one half years. When she finally saw her records, Mrs. Harrison learned about the needle that damaged her thalamus and caused her pain. Armed with this knowledge, Mrs. Harrison filed a claim and ultimately brought suit.

Faced with the district court's dismissal of Mrs. Harrison's action as untimely, the court evaluated the degree of awareness that must be present to start the running of the statute of limitations. It distinguished between knowledge, which triggers the statute of limitations, and belief, which does not.[109] The court reasoned that knowledge required a person to believe that a fact is true and that that belief be reasonably based. A belief, without a factual basis for the belief, even if correct, will not start the running of the statute.

Applying the facts of the case to its reasoning, the court determined Mrs. Harrison only believed her condition was caused by her medical treatment. She could not know the cause of her condition until she obtained her records, the factual predicate to provide a reasonable basis for her knowledge. The court then analogized Mrs. Harrison's situation to the one Justice White mentioned in Kubrick, in which "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."[110]

When Mrs. Harrison sought advice, she was only able to present her unsubstantiated belief that she had been injured

by government provided health care. She was unable to identify anything that would allow other doctors to advise her whether her military doctors violated a standard of care when they allegedly injured her. By analogy, Kubrick could have simply stated that he had an operation on his leg at a VA facility and that he believed the VA made him deaf.

The Harrison standard established that this limited amount of information is insufficient to enable the doctor, consulted by the plaintiff, to competently advise the plaintiff as to whether he now has a cause of action.[111] Not enough specific information about the care is available to permit a determination of whether a standard of care was violated, or even if the government caused her injury. A doctor needs a more complete set of facts before he can offer an opinion on a case. This set of facts must include the acts that caused the injury. In Harrison, the facts had to include information that the needle penetrated Mrs. Harrison's brain.

The District Court for the District of Utah also evaluated the degree of knowledge required to cause a claim to accrue in Allen v. United States,[112] in the context of an action by a group of individuals suffering from cancer and leukemia allegedly caused by atomic testing by the Atomic Energy Commission prior to 1953. The court determined Kubrick provided the correct standard in a case such as this where the injury manifested itself only after a substantial delay. It stated that in a case where there are many complex scientific issues, there is a problem distinguishing between knowledge of the cause of harm and mere suspicion. The court said suspicion is tied to uncertainty, while knowledge implies certainty.[113] "[O]ne suspects what one can not prove, a more intuitive than demonstrative exercise."[114]

The court reasoned that in a complex case, common sense requires reasonable knowledge of a cause of injury rather than mere suspicion, no matter how well founded suspicion seems in retrospect.[115] "Knowledge requires at least a modest factual basis, one to which the perceptive minds of others may be pointed."[116]

Under the Harrison and Allen approaches, a claim will accrue if the plaintiff is aware of a fact that could objectively be said to establish government cause of an injury. In the Harrison case, Mrs. Harrison was correct that the government caused her injury, but she was simply unable to provide any facts to support this belief. Nor were any facts available that would have caused a reasonable person to suspect that the government caused her problems. There did not appear to be any cause for her pain.

Application of the Harrison and Allen accrual standard could protect a plaintiff who did not seek an easily discoverable cause of an injury. For example, if Mrs. Harrison did not attempt to get her treatment records or to obtain details of the treatment when she suspected the government caused her pain, she could have remained ignorant of the cause of her injury. The point of Kubrick was that only blameless ignorance should be protected. If Mrs. Harrison should have requested her records but did not, her ignorance would not be blameless.

Kubrick's goal is to encourage prompt presentation of claims. To prevent the plaintiff from being unfairly deprived of the opportunity to present the claim, Kubrick defined an accrual standard of knowledge of injury and its cause. A plaintiff who is aware of these facts but is not investigating a potential claim must do so or lose the opportunity to present the claim. This situation should be contrasted with

one in which a plaintiff is investigating a claim, but has no factual basis for the suspicion that motivated the inquiry. In other words, the plaintiff does not know the cause of the injury. This situation is like the one presented in Harrison. This plaintiff needs protection only if the cause of the injury is unknown or unknowable because the defendant controls relevant facts or because medical science does not recognize the causal connection.

If facts that establish the cause of an injury are reasonably available and the plaintiff has begun an inquiry based on mere belief without a factual basis for the inquiry, as Mrs. Harrison had, then the plaintiff should be charged with knowledge of those reasonably available facts.[117] Thus, a plaintiff could trigger the accrual of the claim before knowing the injury and its cause if a reasonable investigation would discover the information. Certainly it is reasonable to expect the plaintiff to request and to examine relevant records known to exist. One court described an aspect of the duty of inquiry as the duty "to get out the records and inquire further."[118] The gist of this requirement is to require a plaintiff who conducts an inquiry or investigation to do so in a reasonable manner.

Kubrick stated that competent expert advice is available as to whether a cause of action is valid. All the plaintiff must do is obtain that advice.[119] If a plaintiff believes the government caused his injury, the plaintiff should be required to obtain and present facts to an expert who can then evaluate the allegation. A reasonable investigation to obtain those facts should be required.

Application of this standard to Mrs. Harrison's situation would not have changed the result, because the government did not provide the requested records. Nor did Mrs. Harrison have

any basis to suspect the government injured her. Therefore, the cause of the injury was unknowable because the defendant held the information on causation. However, if the government provided Mrs. Harrison's records, she would have been charged with knowledge of what was in them. If, on the other hand, she had not requested the records, because her inquiry was not reasonable, she would still be charged with knowledge of the contents of her records and her claim would have accrued.

B. ABSENCE OF SCIENTIFIC RECOGNITION OF CLAIMANT'S THEORY OF CAUSATION

Occasionally a plaintiff believes that the harm he experienced was caused by a defendant. He may have some factual basis for that belief but medical science will not support the causal relationship. Will the claim accrue when the plaintiff knows the facts and forms his belief? If so, the plaintiff faces the unhappy prospect of having his claim extinguished by a statute of limitations before he could possibly prevail on the merits.

This issue presented itself in Stoleson v. United States.[120] Mrs. Stoleson, the plaintiff, worked in an ammunition plant. She was exposed to nitroglycerin in the munitions and rocket propellants she handled. One weekend in January 1968, she suffered a severe angina attack. She suffered several more weekend attacks before she stopped working in 1971. Mrs. Stoleson suspected a connection between her heart problems and working conditions.

In 1969 she read an article in a union newspaper about the possibility that sudden withdrawal from nitroglycerin caused severe angina. Additionally, an occupational safety inspector told Mrs. Stoleson that he believed her heart

problems were caused by nitroglycerin exposure. Mrs. Stoleson's treating physician and the physician at the ammunition plant denied nitroglycerin was a cause of Mrs. Stoleson's problems.

Finally, in 1971, Dr. R.L. Lange, the chief of cardiology at the Medical College of Wisconsin, examined Mrs. Stoleson and concluded that her heart problems were caused by exposure to nitroglycerin. Dr. Lange studied Mrs. Stoleson's case and the case of eight other workers at Mrs. Stoleson's plant and scientifically documented the connection between angina and exposure to nitroglycerin in the work place. Dr. Lange's study became the first published medical identification of the causal relationship Mrs. Stoleson suspected. Although nitroglycerin was known to be harmful, and regulations limited exposure to it, heart problems were not among the known risks.

The court rejected the government's contention that Mrs. Stoleson's claim accrued when she first suspected that her exposure to nitroglycerin caused her angina. "A layman's subjective belief, regardless of its sincerity or ultimate vindication, is potently inadequate to go to the trier of fact."[121] The court noted Kubrick would have been told he had a cause of action had he inquired, but that Mrs. Stoleson was correctly informed she did not have a valid claim. Neither the union newspaper article nor the opinion of the safety examiner, who was not a college graduate, were sufficient to start the running of the statute until medical science accepted the causal theory. Therefore, in a legal sense, although she suspected a connection, she did not have "knowledge" of the cause of her injury, which under Kubrick would allow the statute to run.[122]

The court acknowledged that its holding could subject defendants to potential liability for an extensive period of

time, but noted this would only happen where, as here, defendants breached some other preexisting duty of care.

Brazzell v. United States[123] was also a situation where new medical advances were necessary before the claim could accrue. Mrs. Brazzell, on her doctor's advice, got a swine flu vaccination on November 11, 1976. A few days later she complained to her doctor of aches, fever, and chills. Her condition worsened and she was hospitalized as a result of myalgia, intense muscle pain throughout her body. The doctor noted in her medical records that her condition was a result of the swine flu vaccination. After her release from the hospital, she again consulted her doctor because she still suffered muscle pain. Plaintiff asked him whether the vaccination was responsible for her problem. He had changed his mind at this point and assured her that the vaccination's effects had worn off.

Shortly thereafter, the plaintiff began to suffer emotional stress that increased in severity. She consulted a psychiatrist and was hospitalized from mid-April to late May 1977. Her psychiatrist attributed her problems to the physical stress caused by the myalgia. In 1980 plaintiff consulted an attorney and filed a claim for injuries she alleged were caused by her vaccination. The claim was denied and she filed suit.

The government argued that she should have known the cause of her injuries in 1977. The court rejected this argument and held that the plaintiff's suspicions about the cause of her injury did not cause her claim to accrue.[124] She could only be expected to know the cause of her injury when she could have been advised by a doctor that the vaccination was the cause. The court reasoned that her doctor advised her the inoculation did not cause her injury. Thus, further

inquiry would have been useless until her own doctor identified the vaccine as the cause of her myalgia.[125] He was most familiar with her medical history and therefore most likely to discover the cause of her myalgia. The court relied on evidence developed in the district court that this plaintiff was the only person in the country, at that time, to suffer myalgia as a result of the vaccination.[126]

It is unlikely that any court would hold a plaintiff to knowledge that was unknown within the scientific community. Nor, as these courts explained, does Kubrick require such a result. The Kubrick Court presumed that a standard of care existed within the scientific or medical community relative to some aspect of the government's conduct. The Court stated that a plaintiff could obtain advice as to whether this standard of care had been violated from competent individuals within a field.[127]

If, however, medical science has not established a standard of care because there is no known causal link between the conduct and injury, a competent individual in the field would advise the plaintiff that no negligence occurred. The Stoleson court stated that a defendant would not be liable for conduct that inflicted injury if the injurious nature of the conduct was unknown.[129] There must be a preexisting duty to act or avoid acting in a manner that is known to be potentially injurious.[129]

C. INCONCLUSIVE ADVICE REGARDING CAUSE OF INJURY

A plaintiff may be advised that there is only a possible causal relationship or that there is no causal relationship between an injury and a defendant's conduct. The First Circuit considered this issue in Fidler v. Eastman Kodak Co.[130]

There, the plaintiff, Deborah Fidler, brought a product liability action against the defendant for headaches and facial pain she experienced as a result of defendant's Pantopaque x-ray contrast medium. When the plaintiff first consulted her physician about the problem, he could not identify a specific cause of her pain but listed the Pantopaque as a possible cause.

A year later doctors performed more tests and again told the plaintiff that the Pantopaque could be a cause of her pain. However, none of the doctors could tell her that the Pantopaque definitely caused her pain. They told her many people had the substance remain in their systems with no harmful effects. She consulted several attorneys, all of whom told her she did not have a valid claim unless she found a doctor who positively attributed her head pain to Pantopaque. Plaintiff consulted several more doctors over the next two years. She then brought her action and at that point found a physician who established that Pantopaque caused her injuries. The action was dismissed as untimely under the Massachusetts product liability statute of limitations.

Plaintiff argued that her doctor's first statements of possible causation were speculation and therefore insufficient to start the running of the statute. She also argued medical knowledge had not progressed enough to make it possible for her to identify the cause of her injury. The court cited Kubrick for the proposition that notice of a cause of injury places a plaintiff in the position to investigate and determine if a cause of action exists.[131]

The court said the doctor's statement was not a neutral statement and that "[i]t was enough to lift the issue of causation out of the realm of the 'inherently unknowable' wrong."[132] The court also accepted the reasoning that if

medical or scientific knowledge do not exist to support evidence of causation, the statute of limitations will not run because no cause of action exists.[133] However, it noted that medical evidence existed that identified the connection between the plaintiff's type of injury and Pantopaque years before her claim was filed.

Fidler stands for the proposition that if the cause of an injury is knowable, and the plaintiff is alerted to the possibility the cause exists, the claim accrues regardless of the advice the plaintiff receives. Like Kubrick, Fidler presented the situation of a causal link between administration of a substance for treatment, here Pantopaque x-ray contrast medium, and injury, here headaches and facial pain. Although the causal link was apparently difficult to establish in the plaintiff's case, the court distinguished it from a completely unknown causal relationship.[134]

The Kubrick opinion noted that the experts were divided on the issue of negligence in that case. Part of the difference of opinion concerned the issue of whether the use of neomycin caused Kubrick's complained of hearing loss. There is no more reason to inflict the consequences of erroneous advice about the cause of injury upon the defendant than to inflict the consequences of erroneous advice about the issue of negligence.[135] In both situations, the erroneous advice could cause the plaintiff to decide not to file a claim.

The Fifth Circuit case of Dubose v. Kansas City Southern Railway Co.[136] also involved the degree of knowledge required to trigger the running of the statute of limitations. The court stated Kubrick should be flexibly applied to give effect to the rationale for the discovery rule.[137] It listed a variety of factors that must be considered before the

plaintiff will be charged with notice of the cause of his injury. These factors include "how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury."[138]

Application of the Dubose factors to the Fidler case could have lead to a different result. The court could have examined the facts and seen that Mrs. Fidler consulted several doctors who advised her of different possible causes of the pain. As a result, the court would probably have given her more time to identify the cause of her injury before imputing knowledge sufficient to begin the running of the statute of limitations.

The Dubose factors appear to ignore the Kubrick Court's admonition that negligent or erroneous advice about the validity of the claim will not defer accrual of the claim.[139] Although the Court did not direct this language toward the issue of causation but, rather, toward breach of a legal duty or violation of a standard of care, the result should be the same. A duty of inquiry should be created regarding each of the causes the plaintiff "knew" after being told of them. Certainly, in some remote sense, the number of causes listed could become important in determining when the plaintiff knew of a certain cause, but that circumstance should be rare. For example, if an expert mentioned five causes, then the plaintiff should have "knowledge", in the sense of creating a duty of inquiry as to those five causes. Each must be investigated. On the other hand, if 500 causes were listed, the actual cause or causes would not yet be lifted from the "realm of the inherently unknowable."[140]

D. TYPE OF KNOWLEDGE REQUIRED FOR CLAIM ACCRUAL

In Drazan v. United States,[141] the Seventh Circuit examined the issue of the type of knowledge required to start the running of a statute of limitations. A VA hospital treated Mr. Drazan, the plaintiff's husband, for tuberculosis. Mr. Drazan received annual chest x-rays as part of the treatment. One of the x-rays appeared to show a small tumor in one of his lungs and the report regarding the x-ray advised that Drazan be re-examined. No follow-up exam was conducted and the next annual x-ray showed a large cancerous tumor. The cancer killed Drazan the next month.

Later in that year, Mrs. Drazan requested her husband's medical records and discovered the earlier x-ray and recommendation for a follow-up examination. The court held that her claim may have accrued when she received the records rather than when her husband died.[142] It reasoned that the cancer may have killed him because the government negligently failed to follow up on the earlier x-ray.[143] The limitations period on her claim against the government only ran from the point she had reason to suspect the government as a cause of her husband's death.

Absolute certainty of the government cause was not required. The court said that the statute of limitations "begins to run either when the government cause is known or when a reasonably diligent person (in the tort claimant's position) reacting to any suspicious circumstance, of which he might be aware, would have discovered the cause--whichever comes first."[144] Thus, a reason to merely suspect government causation satisfies the Kubrick requirement of knowledge of the cause of injury.

The court declined to start the accrual of the claim at the point of the injury or death of someone in a VA hospital unless there was some notice of government cause of the injury. The court stated that accrual at the time of injury, without a specific reason to suspect government cause, would have the "rather ghoulish consequence" of requiring the injured person or his survivors to request his hospital records to determine if diagnosis or treatment caused the injury.[145]

The Drazan standard of "suspicious circumstances" requires some factual basis as a trigger for accrual of the claim. The court provided an example of a suspicious circumstance.[146] It suggested that Mr. Drazan could have remarked to his doctor that he was surprised to learn that his cancer had grown so much before being discovered, since he was receiving annual x-rays. The doctor could have responded that something must have been missed in an earlier x-ray. The court opined that if this scenario occurred, Mrs. Drazan might have had a reason to believe the government was a cause of her husband's death at the time of his death.

The example given was not a good one because it provided notice of both potential causation and potential negligence. That is, if someone noticed the problem on an earlier x-ray, the cancer could have been detected and possibly treated. When Kubrick discovered the cause of his injury he was not told that negligence was involved. He simply knew that the government-provided neomycin may have caused his hearing loss. The Drazan example is one that the Kubrick dissent anticipated, in which the cause of the injury cannot be separated from notice that the cause involved negligence.[147] Based on the example, the Drazan standard goes far beyond the Harrison and Allen standard as to the type of knowledge

required, because it includes an element of negligence. As a result, it requires notice specifically rejected by the Kubrick Court, notice of negligence.

In Nemmers v. United States,[148] the Court of Appeals for the Seventh Circuit reexamined the type of knowledge required to trigger the running of the statute. The factual issue in the case was whether negligent medical care at birth caused a child to have cerebral palsy or muscular dystrophy. The court noted that a plaintiff did not have to know the certain cause of an injury, because even after a trial the cause may not be known with absolute certainty.[149] What is required is that a plaintiff know a potential cause.

The court said that the plaintiff does not have to believe the "suspicious event is more likely than not the cause"[150] because discovery proceedings may be required to identify the most likely cause. This is true whether the injury is induced by a physician (iatrogenic) or whether it is caused by the worsening of a preexisting condition because of failure to diagnose or treat the condition. The standard of accrual is that the statute of limitations begins to run "when a reasonable person would know enough to prompt a deeper inquiry into a potential cause."[151]

As an example of a "suspicious event," the court suggested that a physician might have said there was a chance circumstances at birth caused the injury.[152] This suspicious event is much more neutral than the example of the suspicious circumstance the court gave in the Drazan case. Here, the example does not clearly imply negligence. It is more in line with the Harrison and Allen standard that simply requires some knowledge of causation. In Nemmers the knowledge of a suspicious event is simply knowledge of a potential cause. The court retreated from the Drazan standard of accrual that

combined notice of causation with notice of negligence.[153] The Nemmers' suspicious event knowledge of a potential cause test is consistent with Kubrick. Once on notice of a potential cause, the plaintiff can further investigate that cause, determine whether negligence was involved, and decide whether to file a claim.

VI. LACK OF KNOWLEDGE OF TORT FEASOR'S STATUS AS AN AGENT OF THE GOVERNMENT, OR OF GOVERNMENT CONDUCT AS A POSSIBLE CAUSE OF INJURY

A. GOVERNMENT AGENTS AS DRIVERS

Several courts faced plaintiffs who failed to discover the employment status of the individual who inflicted their injuries until after the time for filing the required administrative claim expired. One area where this has occurred since the Kubrick decision, is that of the federal employee who negligently injures someone while driving a motor vehicle. Courts are divided on the issue of whether accrual of the claim against the government is postponed until the plaintiff is aware of potential government involvement.

In Wollman v. Gross,[154] Jake Gross, a government employee, drove his personal car from a government office to his home, which was his duty station for mileage reimbursement purposes. On the way he collided with one of his neighbors. Neither individual thought Gross was driving in the scope of his employment, and Gross did not report the accident to his government office. Gross's personal insurance company recognized that he was driving within the scope of his employment after a suit was filed against him more than two years after the accident.

The court held the claim accrued on the date of the accident rather than the date the plaintiff discovered Gross was driving within the scope of his federal employment.[155] The court reasoned that, at the time of the accident, the plaintiff knew Gross was employed by the government. The only thing he did not know was the legal significance of Gross's federal employment. The court opined that the statute of limitations exists to encourage reasonably diligent presentation of claims against the government. As a result, plaintiffs may be required to obtain legal advice about the possible ramifications of the facts of a particular claim, in order to ensure timely presentation of the claim.[156]

The court noted the only thing Gross did not do that he should have done, was to notify his superiors of the accident. The government did not lull the plaintiff to fail to promptly exercise his rights.[157] The plaintiff did not file a claim with Gross's insurer until after two years had passed, and even though he knew Gross was a government employee, he did nothing to investigate whether there was government involvement. The court questioned whether the plaintiff was "blamelessly ignorant."[158]

In Wilkinson v. United States,[159] the Court of Appeals for the Fourth Circuit relied on Wollman when it affirmed the dismissal of a suit as untimely. The case involved a sailor who struck a pedestrian while driving within the scope of his employment. The plaintiff knew the driver, Gray, was a sailor. Additionally, Gray notified his commanding officer of the accident. The court noted that the government did not lull the plaintiff into a false sense of security, and that the plaintiff's lawyer did nothing to investigate the legal effect of Gray's federal employment at the time of the accident. The court stated that the plaintiff should have

known that an inquiry into the scope of employment issue was required.[160] It also stated that Gray's commanding officer, to whom Gray reported the accident, had no duty to supply information to the plaintiff or his attorney.[161]

The District Court for the Northern District of New York reached a different result in Van Lieu v. United States.[162] There, the court allowed a late action against the United States where the driver, an Army captain, did not disclose his military status to the plaintiff or police accident investigator. The court noted that the plaintiff filed a timely state claim and that she did not voluntarily involve herself with the government. The court stated the government did not have a duty to disclose its involvement to every potential claimant, but here, the government withheld the information necessary to identify the government as a defendant so that a proper claim could not be filed.[163]

The court distinguished this case from Wollman by noting that in Wollman the driver did not inform his superiors of the accident, but rather simply notified his private insurance company. Therefore, the government could not identify itself as the proper party defendant. The court reasoned that "[i]f it were not for the irresponsible behavior of the defendant in withholding his military identity while ostensibly in the course of his military responsibilities, the plaintiff could have been in a position to fully comply with the [required] administrative requisites."[164]

Interestingly, the court did not consider Kubrick, but quoted Harris v. Burris Chemical, Inc.[165] for the proposition that

> [w]here the driver of a motor vehicle is sued individually in state court because the plaintiff did not know and had no reason to know that the defendant was (1)

> a federal employee (2) on federal business at the time of the accident and the United States subsequently removes the action to federal court...no exhaustion of administrative remedies is required.[166]

The court's analysis suggested that it felt the government was guilty of bad faith in the Van Lieu case and that the government lulled the plaintiff into a false sense of security. The captain was required to have a military driver's license, but he only presented a civilian one to both the plaintiff and police accident investigator.

This result, however, is not supported by Kubrick. At the time of the accident, the plaintiff knew who injured her. The captain did not actively conceal his government affiliation. There is no suggestion the captain would have denied his military affiliation if he had been asked. Nor does it seem unreasonable to expect the plaintiff to investigate the captain's employment status and whether someone else could be vicariously liable for his alleged negligence.[167]

The primary difference in the facts of the Van Lieu case and Wollman and Wilkinson is that in Van Lieu the plaintiff did not know the tort feasor's government affiliation. In both Wollman and Wilkinson the plaintiffs were aware of the affiliation but unaware of the legal effect of that affiliation. In all three cases, all the plaintiffs had to do was to ask in order to determine that the government should have been a defendant.

Kubrick was required to ask about the legal effect of his injury and its cause to determine whether to file his claim. The Van Lieu court should have applied Kubrick and required the plaintiff to ask if any other individuals or parties could

be legally responsible for the captain's automobile accident.[168]

B. LACK OF KNOWLEDGE OF GOVERNMENT CONDUCT AS A CAUSE OF INJURY

The Drazan court also considered the issue of whether the government cause of an injury must be known to cause the accrual of the claim.[169] It explained that when there are two causes of an injury, one of which is a government cause, the claim will not accrue for statute of limitations purposes until the government cause is known.[170]

The court used as an example the situation of someone who is struck by a postal van and dies. One cause of death is the injuries he suffered in the accident. Another cause is the postal service van that caused the accident. The court stated the statute of limitations would not run until the postal service cause of the accident is known or should be known.[171]

The Drazan court chose an example that implies government fault, here, a hit and run automobile accident with government participation actively concealed.[172] A better example would have been one of the government employee within the scope of employment cases, where no active concealment is involved.[173] In those cases, the plaintiffs simply did not inquire about information readily available.[174]

The Drazan court relied on the Fifth Circuit case of Waits v. United States[175] as support for its decision. In Waits, an automobile hit the plaintiff who was riding a motorcycle. He was taken to a VA hospital for treatment. The injuries and a later infection caused the amputation of the plaintiff's leg. In preparation for a suit against the driver that hit him, the plaintiff requested the VA hospital records.

The hospital did not respond to the request for several months. Only after he received his hospital records did the plaintiff learn the VA improperly treated the infection in his leg. Prior to the receipt of his records, the plaintiff knew his leg was amputated because of an infection, but he did not know the VA failed to properly treat it. The plaintiff filed his administrative claim more than two years after he was released from the VA hospital.

The court held the claim did not accrue until the plaintiff knew the specific acts that caused the loss of his leg.[176] It reasoned that he could not be properly advised as to the validity of his claim without the records for an attorney or doctor to review.[177] Without the records, he could only state his treatment did not turn out as he hoped it would.[178]

The Waits court relied on its Quinton[179] decision rather than fully embracing Kubrick. Although it noted Kubrick did not protect a plaintiff ignorant only of the legal significance of a known act or injury, it analyzed the facts in terms of discovery of "the specific acts of negligence causing his injury."[180]

Waits knew his infection resulted from having a contaminated pin placed in his leg. His condition worsened under VA care. He contacted a non-VA doctor who demanded that Waits be released for treatment at a different hospital. The court said that these facts were not the basis of the allegation of negligence, therefore they should not be considered in determining when the claim accrued for negligent failure to treat the infection.[181]

Waits should have known that the VA set in motion the chain of events that resulted in the loss of his leg. He should have inquired about the legal effect of the VA's

failure to treat an infection that it started. In terms of the Drazan example, the contaminated pin was the postal service van that caused the injury. The Waits court said that this act may not have been negligent and wanted Waits to know the specific acts of negligence, the specific failures that allowed the infection to continue.[102]

Again, using the Drazan accrual standard, knowledge that VA doctors implanted a contaminated pin in his leg was a "suspicious circumstance" that should have immediately triggered a duty of further investigation. Waits should have requested his VA medical records in order to seek advice about the validity of a claim against the government. In any case, Waits knew facts that pointed to government responsibility for his injury prior to receipt of the medical records. This is all Kubrick required. Armed with these facts he should have sought medical and legal advice.

Arguably, proper application of the Kubrick standard could have achieved the same result. The government withheld the medical records. Even if the claim accrued when Waits knew that doctors implanted a contaminated pin, the limitations period could have been tolled while the facts of causation were "in the hands of the putative defendant, unavailable to the plaintiff or at least very difficult of obtain."[103]

Courts do not universally accept the philosophy of deferral until government causation is known. In Dyniewicz v. United States,[104] the Ninth Circuit rejected an argument that the statute of limitations should be tolled until the plaintiff becomes aware of the government's involvement in the plaintiff's injury.[105] The plaintiff's parents died when flood waters washed their car away. During a state suit more than two years after the deaths, plaintiffs discovered that the

National Park Service rangers responsible for the area may have been negligent, and that this negligence may have caused the accident.

The court held the claim accrued at the time the bodies were found, in keeping with the general rule of tort law that a claim accrues at the time of injury.[196] The court reasoned that the discovery rule was inapplicable, because discovery of the cause of the injury means discovery of the physical cause only. It does not include knowing who is responsible.[197]

The court also distinguished government silence about the rangers' negligence from fraudulent concealment. In the opinion of the court, the government has no duty to announce that it has been negligent.[198] Silence alone, therefore, did not toll the running of the statute.

The District Court for the District of Columbia reached a similar result in Marbley v. United States.[199] In that case, the plaintiff's wife was murdered while working as a custodian at the Washington Navy Shipyard. A court convicted a former employee at the yard of the murder over a year later. Two years after that, the plaintiff filed an administrative claim, and ultimately filed suit for wrongful death. The court held the claim was untimely because the action accrued when the body was found, rather than when the killer was convicted.[190] The court found no reason to delay filing the claim until the murderer was convicted.[191]

In Zeleznik v. United States[192] the Court of Appeals for the Third Circuit affirmed the dismissal of a suit against the government for negligent failure to retain an illegal alien after he attempted to turn himself in to the Immigration and Naturalization Service (INS). In Zeleznik, an illegal alien murdered the plaintiffs' son . After the murder, the plaintiffs investigated the murderer's background and learned

that a state psychiatric hospital released him shortly before the murder. They did not discover that he unsuccessfully tried to turn himself in to the INS. The murderer told an INS employee that he had a fraudulent United States passport and that he had been involved in an illegal drug transaction. The Zelezniks learned this fact eight years after the murder, and within two years filed an administrative claim alleging INS negligence. The claim and a later district court action were characterized as untimely.

The court noted that the Kubrick Court admonished lower courts to construe the FTCA statute of limitations so as not to extend it beyond the point intended by Congress.[193] Analyzing the facts of the case, the court observed that the Zelezniks knew who killed their son at the time of his death. The court held that the discovery of the cause of one's injury does not mean knowing who is responsible, but rather that "cause" implies only the physical cause.[194] The court distinguished the case relied on by the Zelezniks as a case of active concealment by the government.[195]

The court also rejected the Zelezniks' arguments that if a reasonably diligent investigation does not discover the government's action, the claim should not accrue. The court noted that Kubrick started the running of the statue even if the plaintiff received erroneous advice about the validity of his cause of action. Thus, once a plaintiff knows that he has been injured and the immediate cause of the injury, reasonable diligence becomes irrelevant for statute of limitations purposes.[196]

The court reasoned that Congress decided two years from accrual of the claim was sufficient time for a claimant to discover any facts necessary and determine whether to file a claim. The purpose of the statute of limitations was not to

guarantee that every possible claim against the government was presented.[197] The court said that in some situations two years will not be enough time to present a claim and in others it will be too much.

The results in these cases may seem harsh, but they are consistent with Kubrick. Once a plaintiff is aware of an injury and its physical cause, he is in the same position as any other plaintiff.[198] He must then investigate all the aspects of his claim and "determine whether and whom to sue. Kubrick makes this plain."[199]

Kubrick required a plaintiff to determine whether fault was involved in the cause of his injury. In making this determination, the court said that a plaintiff can seek advice if he is unable to make the decision on his own.[200] Thus, an investigation into fault is required. As part of this investigation, the plaintiff should determine whether any other entity shares fault for the cause of the harm.[201] The Dyniewicz, Marbley, and Zeleznik courts merely required the plaintiffs to determine the existence of fault once on notice of injury and its cause. The government did not conceal its participation or identity in these cases. Therefore, the government did not prevent the plaintiff from finding out about its participation in causing the injury. As the Zeleznik court said, the statute of limitations does not guarantee that a claim can be presented, it merely provides a time during which some claims may be presented.[202]

VII. SUBJECTIVE AND OBJECTIVE COMPONENTS OF THE KUBRICK ACCRUAL STANDARD

The Kubrick Court quoted, with apparent approval, the Restatement of Torts[203] in its presentation of the development

of the doctrine of "blameless ignorance".[204] The "blameless ignorance" accrual standard that was presented stated "the statute [of limitations] must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it."[205] This accrual test is composed of a subjective component, "the plaintiff has in fact discovered", and an objective component "by the exercise of reasonable diligence should have discovered". When the Court discussed the standard it included knowledge of the cause of the injury with knowledge of injury.[206] Therefore, a subjective and objective evaluation should be made to determine whether the claimant knew that he was injured and whether he knew the cause of his injury.

In the recent case of Nemmers v. United States,[207] the court analyzed both branches of the test. In Nemmers, the Court of Appeals for the Seventh Circuit remanded a district court decision for a proper determination of whether a medical malpractice claim was timely filed.

Eric Nemmers was born in July 1973 after his mother experienced a difficult labor. Mrs. Nemmers came to a Navy hospital complaining of pain. Navy doctors did not perform any tests and told Mrs. Nemmers to go home and stay there until she had regular pains five minutes apart. Mrs. Nemmers called and complained of irregular pains but was told to stop calling until they became regular. After two days of irregular pains, she went back to the hospital, where a Cesarean section was performed.[209]

By the time Eric was eighteen months old, his parents knew he had cerebral palsy or muscular dystrophy. They also learned Eric was retarded. From 1973 until 1976, Eric's treating physician stated he did not know what caused Eric's

condition. In 1977, Eric's parents took him to a new physician who wrote a report that stated Eric's condition could have been caused by the "severe influenza-like high fever illness"[209] Mrs. Nemmers experienced during the third month of pregnancy with Eric. He also said the difficult labor and delivery could have contributed to Eric's condition. Unbeknownst to the doctor, Mrs. Nemmers had not had a "severe influenza-like high fever illness," but rather, merely had a cold.[210]

In spite of this, the Nemmers contended the two year limitations period did not begin to run until 1981 when they read a newspaper article about a child who suffered from problems like those Eric experienced as a result of negligent care at delivery. The district court agreed that the medical advice the Nemmers received prior to 1977 diverted them from the information in the 1977 report. The district court also found that at the time the Nemmers received the report, they were no longer trying to assess the blame for Eric's condition.[211] They were trying to rehabilitate him.

The court of appeals said this analysis was faulty because the district court used a subjective, rather than the objective standard required by Kubrick.[212] The court of appeals analyzed the test "knew or should have known of the cause of injury," as composed of both an actual knowledge and an objective component.[213] Whether the plaintiff actually had knowledge is a subjective inquiry. Whether a plaintiff should have known, based on the information available, and applying a reasonable man standard, is an objective inquiry. On the facts presented, the court concluded that if a medical report stated there was a significant chance that an event caused an injury, then there was sufficient notice of cause to require a plaintiff to begin an inquiry.[214]

In remanding the case, the court offered the district court the guidance that the term "birth trauma", contained in the 1977 report, standing alone, might be too ambiguous to place a reasonable person on notice that medical care at the time of birth could have caused Eric's problems. The court went on to note that the Nemmers' knowledge that contrary to the information in the report, Mrs. Nemmers did not suffer severe influenza during pregnancy and that she was in unsupervised labor for over two days prior to the birth could indicate a "significant chance" that medical treatment or the absence of supervision near the time of birth may have been a causal factor.[215]

Finally, the court noted that the Nemmers bore the burden to show that they had no reason to believe the government caused Eric's condition because the government showed the suit was untimely.[216]

The Nemmers case is a stark contrast to the Seventh Circuit case of Jastremski v. United States.[217] In Jastremski, the court affirmed a district court decision that a claim for injuries caused by a traumatic birth did not accrue until approximately four years after that birth. Doctors gave drugs to Theodore Jastremski's mother to induce labor, but against her wishes and the wishes of her pediatrician husband, who was present at the time, they also administered a spinal anesthetic. The anesthetic dosage was too large and the contractions stopped. Theodore was being born in the breech position. The doctor in attendance instructed Dr. Jastremski and a nurse to push as hard as they could against Theodore's head through the mother's abdomen. At this time the doctor pulled Theodore from his mother.

Fifty one hours later, Theodore suffered grand mal seizures. Tests administered at the time did not disclose the

cause of the seizures. At the suggestion of hospital personnel, a pediatric neurologist examined Theodore upon his discharge. The neurologist was unable to find a neurological cause for the seizures.

Theodore developed a problem walking when he was two and received treatment from two orthopedic specialists. Neither of these individuals told the Jastremskis that the problems could be neurological. When Theodore was four years old, a neurologist visiting the Jastremskis' home saw Theodore and mentioned that he might have cerebral palsy. This opinion proved correct and the Jastremskis filed an administrative claim when Theodore was five years old. In the suit that followed, the district court found the government was negligent at the time of birth and the negligence caused Theodore's brain injury during birth.

The court of appeals said that minority does not toll the running of the statute of limitations, and then cited the Kubrick accrual standard.[218] The court first applied the subjective test of whether the plaintiff knows the injury and its cause. It noted that Dr. Jastremski testified that neither he nor his wife suspected Theodore had brain damage until doctors diagnosed the cerebral palsy when Theodore was four years old. The court found this testimony credible, although it opined that the seizures shortly after birth and later the walking problems could have been regarded by a doctor as manifestations of a neurological injury.[219] The court refused to impute to Dr. Jastremski, "contrary to his testimony, knowledge he did not have in 1973 or before; namely, that his son suffered from a brain injury and that such an injury was caused by acts of the defendant when Theodore was born."[220] After it completed the subjective test, the court applied an objective test. It reviewed the

Jastremskis' activity after Theodore's birth and concluded they exercised reasonable diligence in attempting to identify Theodore's injury and its cause and failed.[221]

It should be noted that Dr. Jastremski testified as an expert that the extended labor and undue pressure on Theodore's head during the birth caused Theodore's injuries. The court stated it was not inconsistent for Dr. Jastremski to testify as on expert on the basis of information he had at the time of trial and yet be unaware of the cause of his son's injury earlier.[222]

The Jastremski case is interesting because Dr. Jastremski knew that the standard of care was violated before the injury manifested itself. He also knew that his son suffered seizures shortly after birth. Hospital personnel advised him that he should consult a civilian neurologist for his son's seizures. Therefore, he knew that some sort of neurological irregularity existed.

At that time, Dr. Jastremski knew that his son received negligent treatment and that he had an injury, or at least a neurological abnormality. The only thing Dr. Jastremski did not have direct evidence of was the connection between the negligent health care and the neurological problems. The Nemmers court would probably have decided the case differently. Applying its objective standard of whether Dr. Jastremski should have known the cause of the injury, the court would have held he was aware of a potential cause.[223] Armed with awareness of a potential cause, Dr. Jastremski's subsequent inquiry to the civilian neurologist would have been characterized as the type of consultation of experts referred to in Kubrick in which an erroneous response does not defer accrual of the claim.[224]

In Kubrick the consultation was to determine whether the standard of care was violated. However, even in Kubrick, there was uncertainty about whether the drug caused Kubrick's deafness.[225] In Jastremski, the consultation was on the issue of the likelihood of causation. Erroneous advice in such a setting should not prevent the running of the statute of limitations. There is no reason to burden the government with the delayed claim that resulted from the erroneous advice.

The results of the Nemmers court's subjective test would probably be the same because it is unlikely the court would find that Dr. Jastremski lied.

Another court that considered the duty of inquiry by the plaintiff changed the duty to one of disclosure by the defendant. In Wilson v. United States,[226] the District Court for the Middle District of Alabama considered a claim that failure to properly diagnose and treat a ruptured appendix ten years earlier resulted in sterility.

The court said that, at the time of her injuries, the doctor treating the plaintiff did not tell her about her injuries in a way that was meaningful to either her or her mother. The doctor did not specifically say that the plaintiff would not be able to have children, but merely told her there was severe internal scarring. According to his testimony, he told the plaintiff and her mother that her fallopian tubes were severely scarred. The court imposed a duty on the doctor to tell the plaintiff the full extent of her injuries.[227] It stated that the doctor failed to clearly disclose to the plaintiff that the injuries she sustained created a probability of sterility. Therefore, the statute of limitations was tolled until the plaintiff actually knew she was sterile and why.[228]

The court only used a subjective approach in this case. Although it quoted the Kubrick standard, the court said that neither the plaintiff nor her mother had any special medical knowledge that allowed them to attribute any significance to the information they were told or to the information in the medical records regarding damage to the plaintiff's fallopian tubes. The court did not apply the objective prong of the test. The objective prong would have required the court to consider whether the plaintiff or her mother should have inquired about the effect of the injury the doctor described, or sought clarification of the information in the records.[229]

The Wilson result is incorrect under the Kubrick standard. Not only did the court release the plaintiff from a duty of inquiry, but it imposed a duty of disclosure on the government. As a result, a plaintiff can allege that he did not understand the information he received and obtain an infinitely deferred claim accrual. The Kubrick Court specifically rejected this contention as excusing a failure to promptly present a claim. The Court said such a "rule would reach any case where an untutored plaintiff, without the benefit of medical or legal advice and because of the 'technical complexity' of the case...would not suspect that his doctors negligently treated him"[230] and would allow suit anytime beyond two years when the plaintiff finally realized the doctor was negligent.[231] This case demonstrates courts' reluctance to subject injured plaintiffs to the harsh consequences of losing a claim on statute of limitations grounds.

VIII. SEPARATE ACCRUAL STANDARD FOR FAILURE TO PROPERLY DIAGNOSE AND TREAT

A. DUTY OF INQUIRY INTO CAUSE OF INJURY

One of the problems the court encountered in Drazan v. United States[232] was the type of injury alleged. In Kubrick, the harm was actively caused during a course of treatment. In Drazan, the harm was the failure of government doctors to promptly diagnose and treat the cancer that showed on the x-ray. In other words, Kubrick involved negligence in the form of commission and Drazan involved negligence in the form of omission.

The Tenth Circuit recognized this difference and established a duty of inquiry about causation in some failure to diagnose and treat cases. In Arvayo v. United States,[233] the court held that the parents of a child who suffered brain damage as a result of bacterial meningitis had a duty to inquire about the full cause of the injury. The plaintiffs brought their son, Jose, to an Air Force Hospital for treatment of a fever. The doctor diagnosed an upper respiratory infection, prescribed some medication and told Mrs. Arvayo to bring him back in a week if his condition did not improve. The next morning, the child was in much worse condition. His mother took him back to the Air Force hospital where the critical nature of his condition was immediately recognized. Jose was transferred to a civilian hospital for specialized care and there diagnosed as having bacterial meningitis.

Within the next several months the Arvayos were aware Jose had suffered brain damage as a result of meningitis. It was not until two years later, while discussing the child's

case with an attorney assisting them with insurance coverage of Jose's meningitis, that the Arvayos discovered Jose's retardation could have been caused by a delayed diagnosis of meningitis. They filed their administrative claim more than two years after the diagnosis.

The government appealed the district court award in the Arvayos' favor and argued Kubrick controlled the case because the Arvayos knew Jose's injury, retardation, and its cause, meningitis, more that two years before they filed their claim. The court rejected this argument and reasoned that the cause was not only meningitis, but was also a failure to timely diagnose and treat the meningitis.[234]

The court decided the Arvayos had a duty to inquire about the cause of Jose's injuries before they discovered the information from their attorney. This duty was triggered by the receipt of two very different diagnoses within a short period. Although Kubrick created a duty of inquiry only after a plaintiff knew both the fact of injury and its cause, the court stated that in a failure to diagnose and treat case, the extension of the duty was unavoidable.[235] The court explained that this requirement was not a departure from Kubrick, because Kubrick was a negligent treatment situation. There, the plaintiff's duty was to inquire whether the treatment received was negligent. In a failure to diagnose and treat situation the cause of the injury is an omission or failure. This implies the doctor failed to do what he had a duty to do. Therefore, sometimes it is not possible to distinguish between the concept of the cause of injury and negligence.[236]

Analyzed with the Drazan accrual standard, the two very different diagnoses within a day could have constituted "suspicious circumstances."[237] As in the Drazan example, the obvious implication is that the first diagnosis, the

government diagnosis, was erroneous. Therefore, not only does this circumstance indicate the government may have been the cause of injury, it also indicates the government was at fault for the injury.

Conversely, applying the Arvayo standard to Drazan, it is not altogether certain the result would be different. There, the previous x-ray was taken more than a year earlier than the one that finally revealed the existence of the large tumor. This time period could have been too great to create the Arvayo duty of inquiry based on disparate diagnoses. Common sense, however, could still tend to raise the question of how the cancer became so severe without being detected.

It is likely the Tenth Circuit intends for the Arvayo standard to be broadly construed.[238] The court cited Gustavson v. United States[239] for its basis of imposing a duty of inquiry about causation in Arvayo.[240] In Gustavson, military doctors treated the son of a member of the Air Force for a bedwetting problem. During this time, the boy, Terry, also received treatment for a painful mass in his neck and for fever. The military doctors misdiagnosed the bedwetting as anxiety rather than as a vesico-ureteral reflux and the infection resulting from the condition. They also failed to connect the fever and lump in his neck to his kidney problems.

Terry's parents ultimately consulted civilian physicians who corrected the reflux problem surgically. Unfortunately, severe kidney damage occurred by this time. These doctors said the bedwetting problems were symptomatic of the reflux problems. They did not mention that the fever or mass in his neck were also related to the problem. More than two years passed before an administrative claim was filed. Because the claim was late, the court said that all claims related to the

misdiagnosis should be dismissed, to include the misdiagnosis of the lump in his neck and of the fever.

The court reasoned that once Terry knew of the misdiagnosis, he had an obligation to inquire as to whether the lump in his neck and fever were also caused by the reflux problem.[241] He should have determined whether his doctors should have diagnosed the kidney problem based on the fever and lump. The court held that the doctors who told him that his bedwetting was caused by the reflux could have also told him the other problems were caused by it.[242] All he had to do was ask.

Kubrick required knowledge of injury and its cause because this information enables a diligent potential claimant to seek advice about whether to file a claim. The Kubrick Court determined that this information was needed to protect a blamelessly ignorant claimant. Arvayo's holding, that a duty of inquiry exists as to the cause of injury, did not leave a blamelessly ignorant claimant unprotected. The Arvayo court reasoned that the Arvayos' failure to inquire was unreasonable. They received widely different diagnoses within a short time and they knew Jose's injury was caused by the menigitis, yet they failed to ask if there was a connection. "A plaintiff who remains ignorant through lack of diligence cannot be characterized as 'blameless.'"[243] While Arvayo required a plaintiff to inquire as to both causation and negligence in a failure to diagnose and treat setting, the result is consistent with Kubrick. In both situations, a potential claimant must exercise reasonable diligence in deciding whether to present a claim.

B. INJURY REDEFINED

Another difference between a failure to diagnose and treat case and a case in which injury is inflicted during an actual course of treatment, is the definition of the term "injury."

In Augustine v. United States,[244] the Ninth Circuit defined "injury" in a failure to diagnose setting. The plaintiff, Richard Augustine, consulted an Air Force dentist about having a dental plate made. The dentist informed him the plate could not be made until a small bump on his palate was treated. The dentist referred him to an Air Force oral surgeon who performed a needle aspiration of the bump and made a radiograph of Augustine's palate. He did no other tests and was unable to diagnose the cause of the bump.

During a routine physical two years later, Augustine mentioned the bump to the doctor conducting the physical. The doctor referred him to another doctor who determined the growth was cancerous. Augustine had two operations to remove the cancer, but by that time the lump had developed into metastic cancer. More than two years after the failure to diagnose the cancer, Augustine filed his administrative claim and subsequently a suit alleging negligent failure to diagnose and treat. The district court dismissed the action as untimely and Augustine appealed.

The court distinguished the situation in this case from Kubrick's facts.[245] There, the harm was caused by an affirmative act of negligence that inflicted specifically identifiable injuries on the plaintiff. The statute of limitations began to run upon the identification of the cause of the injury. In Augustine's situation, identification of both the injury and its cause were more difficult. The court

decided the injury in a failure to diagnose case "is the development of the problem into a more serious condition that poses greater danger to the patient or that requires more extensive treatment."[246] Therefore, accrual of the claim does not occur until the plaintiff knows the preexisting condition has developed into a more serious one.

The court said that the injury was not the bump Augustine had on his palate, but rather its development from a controllable condition into metastic cancer. Therefore, the claim did not accrue, as the government argued, when the plaintiff consulted the Air Force oral surgeon.[247]

In Raddatz v. United States[248] the Ninth Circuit again considered the issue of when a claim accrues in a failure to diagnose and treat situation. There, the plaintiff, Charleen Raddatz, received an intrauterine contraceptive device (IUD) at an Army medical center after she was referred there by her Navy doctor. The devise was improperly inserted and perforated the right side of her uterus. The Army doctor removed the IUD and told Mrs. Raddatz she would experience pain and cramping for a few days. During the next week Mrs. Raddatz made two visits to the emergency room at the medical center. An emergency room doctor noted in her records that she might have pelvic inflammatory disease.

Mrs. Raddatz went back to her Navy doctor, who told her she would continue to experience the pain and cramps. He told her these were acceptable side effects of her injury and would continue for four to six weeks. The doctor gave her codeine for the pain but no antibiotics. She consulted her Navy doctor about the pain two more times during the following week. The doctor assured Mrs. Raddatz her problems were normal and gave her more pain killers.

After two more weeks, Mrs. Raddatz developed a fever and painful urination in addition to her other symptoms. She then consulted a civilian doctor who prescribed antibiotics and after surgery, identified her condition as pelvic inflammatory disease. Ultimately, a hysterectomy was required to eliminate the pain Mrs. Raddatz experienced.

The court held that only the Army claim would be governed by the Kubrick accrual standard. The Navy claim should be governed by the Augustine standard of accrual when the plaintiff "becomes aware or through the exercise of reasonable diligence should have become aware of the development of a preexisting problem into a more serious condition."[249]

The Augustine standard is not appropriate in all failure to diagnose and treat situations. If a preexisting condition merely continues because of failure to diagnose and properly treat, without getting worse, the claim will not accrue for statute of limitations purposes. The government could be left vulnerable to suit indefinitely, yet the plaintiff could be aware of the fact of injury, continuation of the pre-existing condition, and the possible cause, ineffective treatment. This result is inconsistent with Kubrick's focus on prompt investigation and presentation of claims. Therefore, the Augustine standard must be distinguished as applicable only to those situations where a preexisting condition will become worse as a result of the failure to diagnose and treat. Application of Augustine to all failure to diagnose and treat situations unreasonably delays accrual of the claim in violation of Kubrick's teachings.[250]

C. UNNECESSARY TREATMENT

Occasionally a misdiagnosis results in unnecessary treatment. In those situations, the treatment provided becomes the injury. The Eighth Circuit considered this issue in Snyder v. United States.[251] The plaintiff, Donald Snyder sought treatment for chest pains at a VA hospital after undergoing surgery for lung cancer. His doctor told him that he had an extensive tumor and that he had six months to live. The doctor recommended a surgical procedure to relieve the pain. The procedure was unsuccessful. Shortly thereafter, Snyder discovered that he did not have a tumor and that he would not die in six months. More than two years later he filed his administrative claim and ultimately, filed suit.

Without discussion, the court held the claim was barred by the statute of limitations. It determined the claim accrued when the plaintiff discovered the procedure was unnecessary because he did not have cancer.[252]

Although it is not a medical malpractice case, Ware v. United States[253] presents facts that could be analogized to the facts in Snyder. The court also explained its decision. In Ware the Fifth Circuit considered a dairy farmer's claim that his cause of action against the government for negligent destruction of his cattle did not accrue when the cattle were destroyed.

During a five year period, the Department of Agriculture tested the plaintiff's cattle for tuberculosis and destroyed 246 of them. The plaintiff filed his administrative claim more than two years after the cattle were destroyed, but within two years of when he learned the cattle did not have tuberculosis. The court defined the injury suffered as destruction of healthy cattle. It reasoned that, at the time

the cattle were destroyed, the plaintiff could not identify the injury because the destroyed cattle were misdiagnosed as tubercular. It was only when the plaintiff obtained information that indicated the diagnosis was incorrect that he realized he had been injured.[254]

The improper treatment based on erroneous diagnosis case is different from other negligent treatment cases. Although the claimant may know the injury and its cause at the time of treatment, he does not know his injury is, in fact, an injury. Rather, he believes the injury is treatment. For example, if a doctor tells a claimant that he has cancer and that his leg must be removed to stop the spread of cancer, the patient will probably accept the treatment. If the diagnosis of cancer was erroneous, the treatment, removal of the leg, is an injury. The plaintiff knows both the injury and its cause, however, it is not until he learns of the misdiagnosis that he realizes that he has been injured. Until that time, he does not know and cannot know that he has a duty to inquire whether the standard of care has been violated. Under the Drazan accrual standard, there must be some suspicious circumstance or suspicious event to trigger the duty to inquire.

The results in Snyder and Ware are consistent with Kubrick in the sense that once a plaintiff knows his injury, in this case the wrong treatment, and its cause, he must decide within the limitations period whether to file a claim. This result also leaves the government vulnerable to claims almost indefinitely. Using the example, if the plaintiff discovered he did not have cancer ten years after his "cancer" operation, he could still file a claim. This aspect of the accrual standard is inconsistent with Kubrick's goal of encouraging prompt presentation of claims against the government. However, if accrual occurred earlier, an entire

category of blamelessly ignorant claimants would be deprived of an opportunity to file a claim.

On balance, the result is probably consistent with Kubrick because a blamelessly ignorant plaintiff is protected. The alternative is to require patients or other potential claimants subjected to an unpleasant treatment or government action to gather information and seek advice to determine whether the government action was appropriate.[255]

IX. SEPARATE ACCRUAL STANDARD FOR INJURY MANIFESTED AS AN EXPECTED SIDE EFFECT

Occasionally, a procedure properly performed, may produce side effects, or may be unsuccessful. Claimants must determine when a side effect is actually an injury. In Rispoli v. United States,[256] the United States District Court for the Eastern District of New York considered this issue. In Rispoli, the plaintiff underwent extensive treatment at a VA hospital for injuries he received when a car struck him. He received wounds on both legs and VA plastic surgeons worked for several years to close them. Although the plaintiff complained about one of his doctors, he remained in the VA hospital.

The plaintiff's surgeons advised him that a procedure used to close his leg wounds would be very painful and that there could be complications. The procedure involved sewing the plaintiff's arm to his leg and putting him in a cast in order to obtain a proper skin graft. During the time in the cast, the plaintiff's leg would healed. However, when the doctors removed the cast, the plaintiff's heel and the top of his foot came off. The doctors said this side effect could be treated and performed several operative procedures. The

operations failed and Mr. Rispoli consulted a private plastic surgeon. Shortly thereafter, he filed an administrative claim and ultimately a law suit. The government argued that the claim was time barred because the plaintiff complained of the treatment he received more than two years before he filed his claim.

The court determined those complaints were about the doctor's bedside manner rather than the medical treatment he provided. The court held the claim did not accrue based on these complaints.[257] The court also said that the claim did not accrue when the doctors removed the cast and the plaintiff discovered that his heel and part of his foot were missing. These injuries were expected side effects that he was assured could be treated. The court stated that a plaintiff could not be charged with knowledge of his injury "where (1) he knows a procedure normally involves the type of results that also could be considered signs of malpractice; and (2) he is assured by his doctor that his pain and unseemly side effects are normal given the nature of the treatment."[258] The court stated that the proper time to charge a patient with knowledge of his injury is after a sufficient time has passed to put him on notice that the treatment is not successful.[259]

The court did not specifically determine when the claim accrued, but decided the time of accrual fell somewhere within the two years before the administrative claim was filed.

The accrual standard the court proposed is similar to the Augustine failure to properly diagnose and treat standard,[260] but it includes the element of what advice the plaintiff received from the treating physician.[261] This aspect could be treated as a fraudulent misrepresentation or active concealment by the government of its responsibility for the injury.[262] However, at the time of the bad result or side

effect, the injured party knows that he has been injured and the cause of his injury. This is all Kubrick requires. All a claimant needs to do is ask if he has a cause of action. If he asks, he can be told whether the result is truly a side effect, or whether the injury is a result of negligence. Kubrick only knew that he suffered a side effect of the treatment for his leg infection. He did not know the side effect was negligently caused. The Rispoli standard excessively defers a claimant's duty of inquiry. It is not consistent with the Kubrick accrual formula.

In Green v. United States,[263] the Seventh Circuit considered a claim by a veteran allegedly injured as a result of over exposure to radiation during treatment for oral cancer. The plaintiff, Earl Green, received treatment for two separate oral cancers at a VA hospital during a two year period. Shortly after the treatment ended, Green sought treatment for oral hemorrhaging at a civilian hospital where he underwent several surgical procedures during the next few months. Doctors told him that his problems were caused by osteoradionecrosis, dead bone tissue, as a result of radiation treatments he received for cancer. More than two years after he was told, Mr. Green filed an administrative claim that alleged that the VA gave him excessive doses of radiation.

Mr. Green argued that his claim did not accrue when he experienced osteoradionecrosis because his doctors warned him to expect this as a possible side effect of radiation treatment. When the condition manifested itself, the plaintiff thought he merely experienced an expected side effect. He did not realize that he was injured. Therefore, he reasoned the claim did not run until he experienced injuries in excess of those expected as side effects.

The court stated that Kubrick required the rejection of this argument. The court said that a plaintiff must seek medical or legal advice, otherwise it would undermine the goal of prompt presentation of claims against the government.[264] The court declined to excuse Green from seeking medical and legal advice because he knew the facts about his injury.[265]

Alternatively, Green argued that his case involved a failure to diagnose and treat his preexisting condition. He said that the court should use the Augustine standard of accrual that defined the injury as the development of his condition into a more serious one, and accrual as awareness of this development.[266] The court applied the Augustine standard and noted the result was the same. Green knew that his condition was osteoradionecrosis when he started treatment in the civilian hospital. At this point he knew both his injury and its cause.

The Green court applied the Kubrick accrual standard. Application of this standard was easier than application of the standard proposed by the Rispoli court. The Green court simply determined when the injury manifested itself and when the doctors told Green its cause. Under the Rispoli test, in Green, the court would have determined when Green realized that his condition was more than just a routine side effect. Green underwent several surgical procedures to correct the osteoradionecrosis. The court would have had to determine when in the treatment process he should have realized his side effect was an injury. This test is very imprecise because usually no specific event can be identified. Rispoli itself demonstrated the difficulty in defining a specific time of claim accrual. The Rispoli court did not specifically state when the claim accrued. It simply said Rispoli's claim was filed in a timely manner.

X. UNCERTAINTY ABOUT EXTENT AND PERMANENCE OF INJURY

Occasionally, a claimant, aware that he has been injured as a result of government negligence, fails to promptly file a claim because he is unaware of the full extent of his injury or its permanence. In Robbins v. United States,[267] the Court of Appeals for the Tenth Circuit determined that a plaintiff's lack of knowledge of the degree or permanence of his injury does not prevent the running of the statute of limitations.[268]

The plaintiff, Bruce Robbins, received treatment for psoriasis when he was fifteen years old by an Air Force doctor. The doctor prescribed the drug Prednisone for the condition. Bruce developed stria, marks on the skin of his thighs, back, and groin. A dermatologist told him the stria were caused by the drug but that the marks might go away as he grew older. The dermatologist also said the drug should not have been used because of Bruce's young age.

Four years later, the stria were still visible and a doctor told Bruce they may be permanent. The claim plaintiff subsequently filed was denied, and the suit he filed was dismissed because the claim was not filed in a timely manner. The court stated "a legally cognizable injury or damage begins the running of the statutory period of § 2401(b) even though the ultimate damage is unknown or unpredictable."[269] Therefore, the claim accrued when Bruce knew the cause of the stria, and his belief that his injury was only temporary was irrelevant.[270]

In Gustavson v. United States,[271] the Tenth Circuit relied on Robbins and held that a plaintiff's claim accrued when he knew his kidneys were damaged rather than when he

realized the condition was irreversible. The court stated "[l]ack of knowledge of the injury's permanence, extent, and ramifications does not toll the statute."[272]

The issue of whether a claimant must know that an injury is permanent for the accrual of a claim did not arise in Kubrick. However, as the Kubrick Court noted, armed with the knowledge of an injury and its cause, a plaintiff must decide whether or not to bring an action within the period of limitations.[273] Section 2401(b) allows a two year period for the plaintiff to wait before filing the claim. If an injury is not corrected during this period, it seems likely a reasonable plaintiff will file a claim. In any case, there is no requirement that an injury be permanent before a claim is filed. The court's holding that a claim must be filed within two years after notice of the injury and its cause, even if a plaintiff is uncertain about the extent or permanence of the injury, is consistent with Kubrick's goal of encouraging prompt presentation of claims.

This approach was not followed by the Court of Appeals for the Eleventh Circuit in Burgess v. United States.[274] There the court considered when the claim for medical malpractice should accrue against the government for injuries inflicted on a child at birth. When Omar Burgess was born in a military hospital, his clavicles were broken because his head emerged but his shoulders would not fit through the birth canal. The fracture caused Erb's Palsy, a paralysis of the muscles of the upper arm, because the fracture injured his right brachial plexus, a nerve center.

Shortly after his birth, Omar's parents knew that his clavicles were broken and that his right arm was not working properly. They did not know, however, that there was any nerve damage. Records established that twenty four days after

his birth, Omar's parents learned of the possible nerve damage. They contended that this was the first time they knew that Omar might not have full use of his right arm.

More than two years after they learned Omar's clavicles were broken, but less than two years after they knew he had Erb's Palsy, the Burgesses filed a claim for Omar's injuries. Although the district court held the claim accrued when the Burgesses discovered Omar's clavicles were broken, the court of appeals held the claim did not accrue until they knew of the damage to his brachial plexus.[275]

The court reasoned that although the harm to the brachial plexus occurred when Omar's clavicles were broken, the injury to the brachial plexus was a separate injury. The Burgesses did not discover this injury until they were told about it. The court distinguished this case from one in which the plaintiff knows his injury and its cause, but not the extent or permanence of his injury.[276] However, the court also said the physical therapy prescribed for the arm that did not function properly was insufficient to "place a reasonable person on notice of nerve injury or other permanent injury."[277] Thus, the court was influenced by the permanence of the injury.

The difference the court seized upon to distinguish the facts of this case from other extent of injury cases is illusory. Any injury can be subdivided into a variety of different components. The force that broke the bone in Burgess probably also damaged blood vessels and other soft tissue surrounding the site of the break. Under the Burgess approach, each injury is treated as a separate injury, even if it manifested itself at the time of the primary injury. Until a claimant knows the specific physiological identity of an injury, the claim for that injury will not accrue.

This result is not consistent with Kubrick. Kubrick only knew the general cause and effect of his injury. He received neomycin treatments that damaged his hearing. At that point he should have inquired more specifically to determine whether his cause of action was valid. In this case, the Burgesses knew that Omar's clavicles were broken and as a result, his right arm did not work properly. At this time they knew enough about the injury and its cause to seek advice about whether they should file a claim. The Burgess court, therefore, should have held that the claim accrued when the plaintiffs discovered that Omar's clavicles were broken.

XI. GOVERNMENT CONDUCT AS A BASIS FOR DEFERRING CLAIM ACCRUAL

A. GOVERNMENT CAUSED INCOMPETENCE

Courts faced with a plaintiff rendered incompetent as a result of some fault on the part of the government tolled the statute of limitations for the period of incompetence. This action is in contrast to the general FTCA rule that incompetence or insanity does not toll the running of the statute.[278] Additionally, if the government caused the incompetence, the court will likely take a subjective view of claim accrual.

The Eighth Circuit considered this issue in Clifford by Clifford v. United States.[279] In Clifford, Allen Clifford, a twenty four year old college student received treatment from the VA for depression with suicidal tendencies. He took an antidepressant drug as part of his treatment. Clifford received long term prescriptions for the drug, Elavil, without checkups or re-evaluations. He took an overdose of Elavil and went into a coma that continued through the time the suit was

instituted in his behalf. More than two years after the overdose, Clifford's father was appointed his guardian. Less than two years after that, his father filed an administrative claim and filed suit in Clifford's behalf.

The government argued the claim was time barred because Clifford's father and girlfriend knew of his injury and its cause when he took the overdose. The court rejected this argument, noting that Clifford "was an emancipated adult, and that neither his girlfriend nor his family had a legal duty to act in his behalf."[290] The court reasoned that it would be unfair to penalize Clifford for these individuals' inaction. The court stressed that the conduct complained of, prescribing the Elavil, was the conduct that incapacitated the plaintiff so he was unable to realize his cause of action.[291]

The court distinguished this situation from nongovernment caused incapacity, insanity, infancy, or death, none of which toll the statute.[292] It stated the government would be able to profit from its wrongs because the injury the government caused would prevent the plaintiff from bringing his action at a time when no one else had a legal duty to do so. The court conceded, however, this decision could leave the government open to suit indefinitely.[293]

The Ninth Circuit cited Clifford in Washington v. United States,[294] in which it allowed a wrongful death action by the survivors of a woman who died after fourteen years in a coma. New York state law, the applicable law in the case, required that a decedent have a valid personal injury action at the time of death in order for the survivor to bring a wrongful death action.

The court held the cause of action did not accrue until Mrs. Washington died, because she was never aware of her injury or its cause.[295] The court also noted that her

husband's knowledge was irrelevant. Although he could have requested the appointment of a guardian, he was not required to do so. Therefore, no one had a legal duty to file an action in her behalf.[296] The court reasoned that it was possible she could have recovered before she died and filed the claim herself.

The court also noted the statute of limitations was not tolled, rather, based on Kubrick, the claim did not accrue until Mrs. Washington died.[297]

The courts' holdings are correct under the Kubrick analysis. The plaintiffs did not know they had been injured, nor did they know the cause of their injury. Kubrick's accrual standard requires knowledge of both of those factors. In a situation where the government caused the incompetence that prevented a plaintiff from knowing the critical facts required for claim accrual, the plaintiff is truly blamelessly ignorant. Kubrick's goal was to encourage prompt presentation of claims after fair notice of an injury and its cause. The Kubrick Court stated a plaintiff could inquire as to the validity of his cause of action and then determine whether to file a claim. If the government rendered the plaintiff incompetent, the plaintiff could not make the required inquiry. Therefore, the claim should not accrue.

B. CONCEALMENT OF GOVERNMENT CONDUCT

In situations where the government concealed its part in causing the injury, the courts allow deferral of the accrual of the claim. In Liuzzo v. United States,[298] the District Court for the Eastern District of Michigan considered the timeliness of a claim against the Federal Bureau of

Investigation (FBI). The children of a murdered civil rights worker filed the claim twelve years after the murder.

In 1965, Viola Liuzzo participated in a voting rights march in Alabama. After the march, Ku Klux Klan members shot and killed her as she drove toward Montgomery. The Klansmen, who were also in a car, fired into Mrs. Liuzzo's car after pulling along side.

One of the Klansmen was an FBI informant who gave the FBI the names of the individuals involved in the killing. President Johnson announced the names of the killers the day after the shooting and commended the FBI. All three Klansmen involved were tried and convicted of the federal charges of conspiring to violate Mrs. Liuzzo's rights.

During the trials, defense attorneys cross examined the informant about his involvement in violence against civil rights personnel, the information he gave the FBI, and threats he made on the night of the murders. He denied all allegations but disclosed that he received expense money and payment for information he gave.

Ten years later, congressional investigators questioned the informant about his activities and the FBI's knowledge of activities related to violence against civil rights movement personnel. He related that he had given the FBI a substantial amount of information in advance of Klan action but that the FBI usually failed to act on it. He also admitted he participated in violence against civil rights personnel with the knowledge of the FBI agent who supervised him. The informant also acknowledged that on the morning of the murder, Klansmen told him that he was going to be given the opportunity to perform the greatest deed of his life for the Klan. He said he told his FBI supervisor this information before he left with the other Klansmen for the shooting.

In this case, the government argued that the claim accrued in 1965, when the plaintiffs discovered that their mother had been murdered. Plaintiffs argued that the claim did not accrue until 1975 when evidence established the FBI's involvement in their mother's death.

The court reviewed the purpose of statutes of limitation and the Kubrick decision. It first determined the scope of Kubrick, deciding it should not be restricted to medical malpractice cases.[289] Next, it examined the scope of the term "cause" in the Kubrick accrual formula. The court analyzed cause as composed of both a "who" and a "what" element.[290] The court reasoned that if the purpose of §2401(b) was to require a plaintiff to promptly investigate the possibility of a claim against the government, the plaintiff needed to know that the government was a potential defendant before the claim accrued. The court decided that knowledge of the "who" component, that is, the government cause of the injury, could in certain circumstances, be as important as the "what" element of causation.[291]

The court applied the standard to the facts before it and reasoned that in 1965 the plaintiffs had no reason to investigate the government's involvement in their mother's death. The FBI informant's testimony was not contradicted and all other factors available indicated those responsible for the murder were apprehended and convicted. It was not until 1975 that the plaintiffs knew enough to ask about the government's responsibility for their mother's death. The informant's new story in 1975 provided the first evidence of government involvement.

The court distinguished those cases that did not require knowledge of the "who" element to begin accrual as cases where the tort feasor was known. The only missing element was the

tort feasor's "legal" identity, or whether any other entity was vicariously liable for his acts.[292] The Liuzzo plaintiffs did not know the identity of a potential tort feasor, the FBI. The court reasoned that it would be unreasonable to expect the plaintiffs to investigate the agency given credit for identifying the murderers merely because one of its informants witnessed the murder.

A similar result was reached in Barrett v. United States,[293] where the Second Circuit reviewed a claim based on the death of an individual who received chemicals as part of an Army chemical warfare experiment. The victim's daughter discovered the experiment when the Secretary of the Army released information twenty two years after her father's death. She filed a claim that alleged negligence in the creation and administration of the program and a conspiracy to cover up the facts surrounding her father's death.

At the time of the chemical warfare experiment, the plaintiff's father accepted voluntary treatment at the New York State Psychiatric Institute. The Psychiatric Institute did not tell him of his participation in the chemical warfare experiment. The Army classified the details of the chemical administered and attempted to create the false impression that a therapeutic drug was administered. Additionally, the government threatened individuals with prosecution under the Espionage Act if they testified or disclosed information about the program.

The plaintiff's father received an injection of a mescaline derivative and died. At the time of his death, officials mislead the plaintiff to believe the injection was not the sole cause of her father's death. She filed a suit in New York state court at that time and ultimately settled. The United States government paid half of the settlement on

condition its identity and reason for supplying the drug was kept secret. Finally, when the information was released the plaintiff learned that her father died solely as a result of the drug. She also learned of the chemical warfare experiment and the government cover up.

The court determined the Kubrick "diligent discovery" rule should be applied to the statute of limitations in any situation in which the government deliberately concealed material facts relating to its wrongdoing. This application deferred the running of the statute until the "plaintiff discovers, or by reasonable diligence should have discovered, the basis of the lawsuit."[294]

Applying the rule to the facts, the court concluded that the plaintiff was mislead about the type of drug or chemical administered, the purpose of its administration, the source of the drug, and the government's involvement in the administration of the drug. The court said these factors were material facts and that the Kubrick rule, rather than the usual rule of accrual at injury, should apply.[295] Although the plaintiff knew her father died because of a drug administered while he was in the Psychiatric Institute, she did not know or have an opportunity to know the "what" or the "who" component of the cause of the injury.[296]

The court explained that although the "who" element is not usually required to start the accrual of an action, where the government concealed its involvement, lack of knowledge of this element will prevent accrual of the claim.[297]

Unless the United States itself concealed the tort feasor's identity, or the tort feasor acted within the scope of his federal employment to conceal his identity, the misrepresentation will not be imputed to the government. This situation occurred in Diminnie v. United States.[298] In

Diminnie, a court erroneously convicted the plaintiff of sending extortion letters to the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). Before Diminnie was sentenced, the actual perpetrator, an ATF agent, confessed. After investigators corroborated the confession, Diminnie was released. He argued in his subsequent suit that his claim accrued when he knew the identity of the true culprit, not before.

The court distinguished this situation from the ones in Barrett and Liuzzo, where the government actively concealed material facts about the cause of the injury. The court decided that the extortionist had been acting outside the scope of his government employment and therefore his conduct was not chargeable to the government.[299] The court held that:

> before the accrual of a cause of action against the United States under the FTCA may be deferred because of the plaintiff's inability to identify the party whose conduct triggered the injury, it must be shown that the United States itself played a wrongful role in concealing the culprit's identity.[300]

The results in Barrett and Liuzzo are consistent with Kubrick. The Kubrick Court noted Congress waived the immunity of the United States in the FTCA.[301] The Court said a delayed accrual standard developed to give potential claimants an opportunity to investigate and obtain advice about the validity of their claims before the expiration of the statute of limitations. Failure to defer accrual of a claim when the government actively covers up its involvement as a tort feasor violates both the intent of Congress and the Kubrick principle of protecting a blamelessly ignorant claimant.

Congress decided the United States should be subject to claims for some torts. The FTCA reflects this decision.

Government agency action that conceals government involvement in torts runs contrary to that congressional determination. A claimant cannot file a claim if he is unaware the government caused his injury. The courts that deferred accrual of a claim until a claimant is aware of government involvement when the government concealed that information, correctly applied Kubrick. At the point the plaintiff knows the fact and cause of his injury, he is in a similar position to other plaintiffs.[302]

XII. CONCLUSION

The Kubrick accrual standard did not find its origin in a medical malpractice case. It should not therefore be restricted to that type of case. The standard should be applied whenever a plaintiff is unable to present a claim at the time injury is inflicted because he is unaware of the injury or its cause. However, when the standard is applied, it should be applied to excuse only ignorance that is truly blameless. Some courts are reluctant to properly apply the Kubrick claim accrual standard to a situation in which an otherwise deserving claimant may be denied a possible recovery because he did not know that his claim accrued. However, the objective component of the standard requires analysis of what the claimant should have known, not what he knew.

When the standard is applied, the objective component must be truly objective rather than based on the effect of erroneous advice about causation or negligence to excuse late filing of a claim. On the other hand, deferral of accrual of a claim may be appropriate where government conduct impeded a claimant's investigation into his cause of action. Where a claimant is unfortunate enough to receive erroneous advice,

however, the standard does not provide relief and courts should not give it.

Finally, the standard should not be read as inflexible and requiring inquiry only as to whether the cause of the injury was negligence. Particularly in the failure to diagnose and treat area, it may not be possible to distinguish between inquiry into causation and inquiry into negligence. Where a reasonable claimant would inquire, inquiry should be required into causation or the fact of injury. The concept of protecting only blameless ignorance requires this.

[1]28 U.S.C. § 2401(b) (1982) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such a claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final determination of the claim by the agency to which it was presented.

[2]Id.

[3]Id. 28 U.S.C. §§ 1346(b); 2671-2680 (1982). The Federal Tort Claims Act waives the sovereign immunity of the United States for certain tort claims.

[4]444 U.S. 111 (1979).

[5]337 U.S. 163 (1949).

[6]45 U.S.C. § 56 (1982).

[7]Urie, 337 U.S. at 170.

[8]Id.

[9]Id. at 169.

[10]304 F.2d 234 (5th Cir. 1962).

[11]Id. at 235.

[12]Id.

[13]Id. at 241 n.12.

[14]Id. at 241.

[15]E.g., Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977); Bridgford v. United States, 550 F.2d 978 (4th Cir. 1977); Jordan v. United States, 503 F.2d 620 (6th Cir. 1974).

[16]See cases cited supra note 15.

[17]550 F.2d 978 (4th Cir. 1977).

[18]Id. at 982.

[19]Id.

[20]Id. See also Marrapese v. Rhode Island, 749 F.2d 934 (1st Cir. 1984), cert. denied, __U.S.__, 106 S. Ct. 252 (1985) for a general discussion of the rule against claim splitting.

[21]550 F.2d at 981-82.

[22]581 F.2d 1092 (3rd Cir. 1978), rev'd, 444 U.S. 111 (1979).

[23]435 F. Supp. 166, 179 (E.D. Pa. 1977).

[24]581 F.2d at 1096-97.

[25]Id. at 1097.

[26]Id.

[27]United States v. Kubrick, 444 U.S. 111 (1979).

[28]The Court stated that statutes of limitations are found in most systems of jurisprudence and that they represent the point at which legislatures have determined the right to present a claim is outweighed by the right to be free from stale claims. Plaintiffs are given a reasonable time to present their claims before the statute has run. Afterward, courts and defendants are shielded from cases where evidence may have been lost because of fading memories and the loss of documents and witnesses. Id. at 117.

[29]Congress determined two years was the appropriate balance between plaintiffs' interests in presenting their claims and governments' interests in being free from them. The statute of limitations serves a valid public purpose. Id.

[30]Id. at 117-18.

[31]Id. at 118-19.

[32]Id. at 122-24.

[33]337 U.S. 163 (1949).

[34]304 F.2d 234 (5th Cir. 1962).

[35]Kubrick, 444 U.S. at 120 n.7.

[36]Id. at 121 n.8.

[37]Id. at 122.

[38]Id.

[39]Id.

[40]Id.

[41]Id. at 123.

[42]Id.

[43]Id. at 124.

[44]Id.

[45]435 F. Supp. at 185; 581 F.2d at 1097.

[46]444 U.S. at 124.

[47]Id.

[48]Id. at 125.

[49]Id.

[50]Id. at 127. Justice Brennan and Justice Marshall joined Justice Stevens's dissent.

[51]Id. at 128.

[52]Id. at 127.

[53]Id. at 128.

[54]See, e.g., Comment, Federal Tort Claims Act--Accrual of Medical Malpractice Action--United States v. Kubrick, 4 W. New Eng. L. Rev. 155, 168-70 (1981).

[55]444 U.S. at 120.

[56]Id.

[57]Id. at 120 n.6. See also supra note 1.

[58]444 U.S. at 120 n.7.

[59]729 F.2d 1026 (5th Cir. 1984), cert. denied, 469 U.S. 854 (1984).

[60]729 F.2d at 1030.

[61]Id.

[62]Id. at 1031-32.

[63]629 F.2d 1265 (7th Cir. 1980).

[64]Id. at 1269.

[65]Id.

[66]677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982).

[67]677 F.2d at 998-99.

[68]Id. at 1001-06.

[69]Id. at 1003-06.

[70]Id. at 1005.

[71]Id. at 1001-02.

[72]Id.

[73]717 F.2d 1193 (8th Cir. 1983).

[74]Id. at 1195.

[75]637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

[76]637 F.2d at 548.

[77]Id.

[78]Id. at 549.

[79]"We also have some question as to whether Wollman was in fact "blamelessly ignorant"." Id. at 549 n.6.

[80]676 F.2d 295 (8th Cir. 1982).

[81]Id. at 300.

[82]Id.

[83]Id.

[84]729 F.2d 818 (D.C. Cir. 1984).

[85]Id. at 821.

[86]Id.

[87]676 F.2d 295 (8th Cir. 1982).

[88]Id. at 822 & nn. 31-35. See supra text accompanying notes 80-83.

[89]729 F.2d at 822-23.

[90]444 U.S. at 124.

[91]Id. at 122.

[92]See supra notes 1 & 3.

[93]444 U.S. at 123-24.

[94]Id. at 124.

[95] [A]ny plaintiff who is blamelessly ignorant of the existence or cause of his injury shall be accorded the benefits of the discovery rule. Many malpractice plaintiffs face serious problems in discovering these critical facts. But as Urie demonstrates, the rule was not created in a medical malpractice context and is not limited to such cases.

Stoleson v. United States, 629 F.2d 1265, 1269 (7th Cir. 1980).

[96]Id.

[97]Urie, 337 U.S. at 170.

[98]Id.

[99]Id. at 169-70.

[100]444 U.S. at 118-20.

[101]Quinton, 304 F.2d at 235.

[102]444 U.S. at 118-20.

[103]Id. at 122-24.

[104]See supra notes 59-64 and accompanying text. See also Liuzzo v. United States, 485 F. Supp. 1274, 1281-1284 (E. D. Mich. 1980).

[105]788 F.2d 1352 (8th Cir. 1986). On a motion for rehearing, the court vacated its judgment and remanded the case to the district court for reconsideration and adjudication of plaintiff's alternative grounds for relief. The opinion is representative of one approach that may be taken to expand Kubrick's scope beyond medical malpractice cases.

[106]Id. at 1356-57.

[107]708 F.2d 1023 (5th Cir. 1983).

[108]This action could be considered fraudulent concealment. Fraudulent concealment by the government of its part in

causing a tort prevents accrual of a claim. See infra notes 288-302 and accompanying text.

[109]708 F.2d at 1027.

[110]Id. at 1028 (quoting Kubrick, 444 U.S. at 122).

[111]If there is a standard of care, and if it has been violated, it is likely a competent doctor will tell the plaintiff of the violation if the plaintiff asks. Kubrick, 444 U.S. at 122.

[112]558 F. Supp. 247 (D. Utah 1984).

[113]Id. at 344.

[114]Id. at 344-45.

[115]Id. at 345.

[116]Id.

[117]"Under a regime of notice pleading, a person may file suit and use discovery to bring out essential facts." Nemmers v. United States, 795 F.2d 631, 632 (7th Cir. 1986).

[118]Id. at 631.

[119]444 U.S. at 123-24.

[120]629 F.2d 1265 (7th Cir. 1980).

[121]Id. at 1270.

[122]Id. at 1270-71.

[123]788 F.2d 1352 (8th Cir. 1986). See supra note 105.

[124]Id. at 1357.

[125]Id.

[126]Id. But see In re Swine Flu Products Liability Litigation, 764 F.2d 637, 638 (9th Cir. 1985) (swine flu program suspended on 16 December 1976 after published reports of connection between neurological disorders and vaccination).

[127]444 U.S. at 123-24.

[128]Stoleson, 629 F.2d at 1271.

[129]Id.

[130]714 F.2d 192 (1st Cir. 1983).

[131]Id. at 199-200.

[132]Id.

[133]Id. at 200.

[134]The plaintiff consulted several doctors and underwent tests before finding a doctor who correctly identified the causal link. Id. at 194-95.

[135]If a plaintiff is erroneously advised that he does not have a case, there is no reason to subject the defendant to the consequences of the error by deferring accrual until the plaintiff realizes he does have a valid cause of action. Kubrick, 444 U.S. at 124.

[136]729 F.2d 1026 (5th Cir.), cert. denied, 469 U.S. 854 (1984).

[137]729 F.2d at 1031.

[138]Id.

[139]444 U.S. at 124.

[140]Fidler, 714 F.2d at 200.

[141]762 F.2d 56 (7th Cir. 1985).

[142]Id. at 58-59.

[143]Id.

[144]Id. at 59.

[145]Id. This consequence may be ghoulish, but it would prevent situations like the one that arose in Drazan. If an individual goes to a hospital for treatment, and the treatment results in a worsening of the original condition or death, it could reasonably be argued that this is a suspicious circumstance. Certainly the plaintiff should wonder why the treatment did not work. Requiring an examination of the medical records is not an onerous requirement.

[146]Id. at 60.

[147]Kubrick, 444 U.S. at 127.

[148]795 F.2d 628 (7th Cir. 1986).

[149]Id. at 631. This statement seems to conflict with the court's statement that the statute would not begin to run if a competent medical professional disagreed with an injured party's assertion that the government was responsible for his injury. Id. This ignores Kubrick's guidance that negligent or mistaken advice would not prevent the running of the statute. Kubrick, 444 U.S. at 124. Later in the opinion, however, the Nemmers court also states that the time period of the statute of limitations may run even if the plaintiff was told the government was not negligent. Nemmers, 795 F.2d at 632.

[150]795 F.2d at 631.

[151]Id. at 632.

[152]The court stated the term "birth trauma" could refer to either a normal birth or to a difficult birth. Further, a reasonable person could believe this meant medical care at the time of birth did not cause the injury. Id. at 631.

[153]The different example may only be because Drazan was a failure to diagnose case. See infra text accompanying note 232.

[154]637 F.2d 544 (8th Cir. 1980), cert. denied 454 U.S. 893 (1981).

[155]637 F.2d at 547.

[156]Id. at 549.

[157]In Kelly v. United States, 568 F.2d 259 (2nd Cir.), cert. denied, 439 U.S. 830 (1978) the plaintiff filed a claim in state court. The United States waited until after the two year period for filing the claim expired, and then removed the case to federal court and requested the court to dismiss the case on statute of limitations grounds. The court found that the government lulled the plaintiff into a false sense of security and allowed the claim. Kelly, 568 F.2d at 262.

[150]Wollman, 637 F.2d at 549 n.6.

[159]677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982).

[160]677 F.2d at 1000.

[161]The court stated that Gray's commanding officer did not know the government was the proper defendant because "after all, he was a sailor, not a lawyer. (Even a sea lawyer should not be charged with knowledge of such legal intricacies)." Id. The court also distinguished Kelly v. United States, 568 F.2d 259 (2nd Cir. 1978), where the government lulled a plaintiff into a false sense of security by waiting until the statute of limitations ran for filing an administrative claim and then raised the issue in a previously filed suit.

[162]542 F. Supp. 862 (N.D.N.Y. 1982).

[163]Id. at 866.

[164]Id. at 868.

[165]490 F. Supp. 968 (N.D. Ga. 1980).

[166]552 F. Supp. at 865 (quoting Harris, 490 F. Supp. at 971).

[167]It is reasonable to impose a duty to investigate the legal identity of a tort feasor and determine whether any other entity is vicariously liable for the tort feasor's conduct. Liuzzo v. United States, 485 F. Supp. 1274, 1283 (E.D. Mich. 1980).

[168]Id.

[169]See supra notes 141-47 and accompanying text.

[170]Drazan, 762 F.2d at 59.

[171]Id.

[172]Government concealment of its participation defers claim accrual. See infra notes 288-302 and accompanying text.

[173]See, e.g., Wilkinson v. United States, 677 F.2d 1978 (4th Cir.), cert. denied 459 U.S. 906 (1982); Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

[174]See supra notes 154-61 and accompanying text.

[175]611 F.2d 550 (5th Cir. 1980).

[176]Id. at 552-53.

[177]Id. at 553. If a plaintiff is in possession of the facts about the harm done to him, he can protect himself by obtaining advice from doctors and lawyers. Kubrick, 444 U.S. at 123.

[178]The court stated that mere dissatisfaction with the results of treatment is not equated with knowledge of negligence. Waits, 611 F.2d at 553. However, Kubrick does not require knowledge of the legal cause of injury, i.e. negligence, only knowledge of the factual cause of the injury. The Drazan court also expressed concern that the Waits opinion suggested the statute of limitations would not run until the plaintiff knew he was a victim of negligence. Drazan, 762 F.2d at 59.

[179]See supra notes 10-14 and accompanying text.

[180]611 F.2d at 552 (quoting Quinton v. United States, 304 F.2d 234, 235 (5th Cir. 1962)).

[181]611 F.2d 551-53.

[182]The court found infections resulting from severe injuries were a common problem and did not necessarily indicate negligent treatment. Id. at 553.

[183]Kubrick, 444 U.S. at 122. See also Barrett v. United States, 689 F.2d 324, 327 (2nd Cir. 1982) (government failure to release medical records was concealment of facts and prevented accrual of the claim). Alternatively, the court could have required Waits to file his claim within two years of the time he learned that doctors implanted a contaminated

pin. At this time he was not certain of the specific acts that caused the injury, but he knew that the government caused the infection and then failed to treat it. He could have discovered the specific reason the government did not treat the infection after he filed his claim. See Nemmers v. United States, 795 F.2d 631, 632 (7th Cir. 1986) (plaintiff may file a claim and use discovery to bring out essential facts).

[184]742 F.2d 484 (9th Cir. 1984).

[185]Id. at 487.

[186]Id.

[187]Id. See also Davis v. United States 642 F.2d 328 (9th Cir.), cert. denied, 455 U.S. 919 (1982) (knowledge of government cause not necessary to start running of statute of limitations; knowledge of physical cause is sufficient). But cf. Liuzzo v. United States 485 F. Supp. 1274 (E.D. Mich. 1980) (due to goverment coverup, claim did not accrue until plaintiffs knew of government's involvement).

[188]742 F.2d at 487. Contra Van Lieu v. United States 542 F. Supp. 862 (N.D.N.Y. 1982) (government should notify plaintiff of its involvement and identity when plaintiff is involved with government tort feasor through no affirmative effort on plaintiff's part).

[189]620 F. Supp. 811 (D.C. D.C. 1985).

[190]Id. at 813.

[191]When the body was found, the plaintiff knew both the injury and its cause. He could have filed a claim against the government at that time. The court distinguished Liuzzo v. United States 485 F. Supp. 1274 (E.D. Mich. 1980) where the plaintiff was unaware of government involvement as a cause of injury. Marbley, 620 F. Supp. at 813.

[192]770 F.2d 20 (3rd Cir. 1985), cert. denied, __U.S.__ , 106 S. Ct. 1513 (1986).

[193]The FTCA provided only a limited waiver of the sovereign immunity of the United States. 770 F.2d at 22.

[194]Id. at 23.

[195]Id.

[196]Id. at 24.

[197]Id.

[198]Kubrick, 444 U.S. at 124.

[199]Davis v. United States, 642 F.2d 328, 331 (9th Cir. 1982) (claim for polio caused by polio vaccine accrued when plaintiff realized the vaccine caused his disease).

[200]444 U.S. at 123-24.

[201]Cf. Liuzzo v. United States, 485 F. Supp. 1274, 1283 (E.D. Mich. 1980) (obligation to investigate legal identity of tort feasor and other entities' vicarious liability for tort feasor's conduct is reasonable).

[202]770 F.2d at 24. The Kubrick Court noted that Congress extended the FTCA statute of limitations from one year to two years to increase the number of claimants who could discover that they had a potential claim before the limitations period ran on their claim. 444 U.S. at 120 n.6. Presumably, even though the limitations period was doubled, there will still be plaintiffs who will not have enough time to file a claim, even in the exercise of reasonable diligence.

[203]Restatement (Second) of Torts (1979).

[204]444 U.S. at 120 n.7.

[205]Id. (quoting Restatement (Second) of Torts §899, Comment e (1979)).

[206]444 U.S. at 122.

[207]795 F.2d 628 (7th Cir. 1986).

[208]Id. at 629.

[209]Id. at 630.

[210]Id.

[211]Id. at 630-31. (quoting Nemmers v. United States, 621 F. Supp 928, 930-31 (C.D. Ill. 1985)).

[212]795 F.2d at 631.

[213]Id.

[214]A plaintiff is not required to search his medical records to determine if the government injured him if there is nothing that would indicate the government may have caused the injury. Nor is a plaintiff required to search his records simply because he believes the government may have injured him. However, if a competent medical professional advised a plaintiff there was a "20% chance that the problem comes from the circumstances of birth," the plaintiff would be under a duty of further inquiry. Id at 631-32.

[215]Id. at 633.

[216]Id. Although statute of limitations is an affirmative defense, once the government establishes that a claim was not filed in a timely manner, the burden is on the plaintiff to establish that he had no reason to believe the government caused the complained of injury. Drazan, 762 F.2d at 60.

[217]737 F.2d 666 (7th Cir. 1984).

[218]Id. at 669. See also Robbins v. United States, 624 F.2d 971, 972 (10th Cir. 1980)(it is well established that a claimant's minority does not toll the running of the FTCA statute of limitations).

[219]The tenor of the opinion indicated that the court did not strongly approve of the district court's decision. The court said it would not disturb that decision because the decision was not clearly erroneous. 737 F.2d at 670.

[220]Id.

[221]But see Zeleznik v. United States, 770 F.2d 20, 24 (3rd Cir. 1985) (unsuccessful exercise of reasonable diligence does not toll running of FTCA statute of limitations).

[222]737 F.2d at 671. But cf. Arvayo v. United States, 766 F.2d 1416, 1418 (10th Cir. 1985) (testimony of government doctors on behalf of government rejected as biased).

[223]Nemmers, 795 F.2d at 631-32. See also supra notes 149-51 and accompanying text.

[224]795 F.2d at 632.

[225]Id. at 631.

[226]594 F. Supp. 843, (M.D. Ala. 1984).

[227]Id. at 849. This duty apparently was a duty to use language the plaintiff could understand.

[228]The court analogized the doctor's alleged lack of full disclosure to fraudulent concealment that tolled the running of the statute of limitations. Id. The court also distinguished an ordinary personal injury case from a medical malpractice case. In a medical malpractice case, a plaintiff "may not know that her doctor's negligence contributed to the injury." Id. The Kubrick court rejected this lack of knowledge as a reason to toll the running of the statute. In Kubrick, just as in this situtation, the plaintiff could have sought advice about whether her ruptured appendix should have been diagnosed earlier.

[229]Lack of knowledge about the extent of injuries does not toll the FTCA statute of limitations. Robbins v. United States, 624 F.2d 971,973 (10th Cir. 1980). The Wilson court distinguished this situation as one where knowledge of the extent of the injuries was necessary for the plaintiff to have a fair opportunity to assert her claim. Wilson, 594 F. Supp. at 849.

[230]444 U.S. at 118.

[231]Id.

[232]See supra notes 141-47 and accompanying text.

[233]766 F.2d 1416 (10th Cir. 1985).

[234]Id. at 1419-20.

[235]Id. at 1421.

[236]The court noted that the Kubrick dissenters recognized the dilemma of attempting "to distinguish between a plaintiff's knowledge of the cause of his injury on the one hand and his knowledge of the doctor's failure to meet acceptable medical standards on the other." Id. (quoting Kubrick, 444 U.S. at 127).

[237]Drazan, 762 F.2d at 59-60. Drazan was also a failure to diagnose case. For this reason, the example used by the court may have implied government negligence. When the Seventh Circuit again presented an example of claims accrual in Nemmers, it considered a negligent treatment case instead of another failure to diagnose and treat case. This may be the reason the Nemmers example of knowledge of the cause did not imply fault. See also supra notes 146-53 and accompanying text.

[238]Although the court said that not every failure to diagnose and treat case accrues at the time a plaintiff receives a diagnosis different than an earlier diagnosis, it rejected the Arvayo's argument that a claim did not accrue until the plaintiff is informed of a possible connection between a misdiagnosis and an injury. 766 F.2d at 1422.

[239]655 F.2d 1034 (10th Cir. 1981).

[240]Arvayo, 766 F.2d at 1419-22.

[241]655 F.2d at 1036-37.

[242]Id.

[243]Arvayo, 766 F.2d at 1423 (quoting the Kubrick dissent, Kubrick, 444 U.S. at 128).

[244]704 F.2d 1074 (9th Cir. 1983).

[245]Id. at 1078.

[246]Id. (emphasis in original).

[247]Id.

[248]750 F.2d 791 (9th Cir.).

[249]Id. at 796 (quoting Augustine, 704 F.2d at 1078).

[250]But see Nicolazzo v. United States, 786 F.2d 454 (1st Cir. 1986). The plaintiff unsuccessfully sought treatment for a pre-existing condition from a variety of government doctors for ten years. Finally, he was correctly diagnosed and treated. The court held the claim accrued when the plaintiff received a correct diagnosis. In so doing, the court rejected the government's argument that the claim began to run when the plaintiff became aware the treatment he received did not help his condition. The court reasoned Kubrick required this result because the plaintiff did not know the cause of his injury until he finally received the correct diagnosis.

[251]717 F.2d 1193 (8th Cir. 1983).

[252]Id. at 1195.

[253]626 F.2d 1278 (5th Cir. 1980). The court did not apply the Kubrick standard. It said the Kubrick standard was restricted to medical malpractice. It chose to use a test found in Mendiola v. United States, 401 F.2d 695 (5th Cir. 1968), and noted it contained the same discovery element as the Kubrick test.

[254]626 F.2d at 1284.

[255]The Drazan court refused to require all patients who suffered pain, illness or death while under government care to review their records to determine whether the government might have caused their injury. Drazan, 762 F.2d at 59. Query whether that requirement is unreasonable. A person undergoing treatment expects to be cured. If he isn't cured, he may wonder why. However, a patient who believes his leg must be amputated to prevent the spread of cancer is not likely to

wonder why. There is no reason to inquire until the patient learns the diagnosis was incorrect.

[256]576 F. Supp. 1398 (E.D. N.Y. 1983).

[257]Id. at 1402.

[258]Id.

[259]The court reasoned that if a patient experiences complications he was told to expect, and he is told the complications can be treated, he cannot be deemed to have knowledge of an injury. Id. at 1403. But see DeWitt v. United States, 593 F.2d 276, 280 (7th Cir. 1978) (unsuccessful surgical procedure not always malpractice).

[260]See supra note 246 and accompanying text.

[261]In this regard the standard is similar to the Dubose accrual standard. The court in Dubose said that the medical advice given to a claimant could defer accrual if it suggested an erroneous causal connection or laid to rest a claimant's suspicions regarding his condition. See supra note 138 and accompanying text.

[262]See infra notes 288-302 and accompanying text. Alternatively, the "continuing treatment" doctrine could be used to prevent accrual. While treatment by the same physician continues, the claim fails to accrue. Page v. United States, 729 F.2d 818, 823 n.36 (D.C. Cir. 1984).

[263]765 F.2d 105 (7th Cir. 1985).

[264]Id. at 108.

[265]The court reasoned that Green underwent eight surgical procedures and developed other problems, all of which would have put a reasonable plaintiff on notice that he needed to seek advice about the propriety of his treatment. Id.

[266]Id. at 108-09.

[267]624 F.2d 971 (10th Cir. 1980).

[268]Id. at 973.

[269]Id.

[270]Id.

[271]655 F.2d 1034 (10th Cir. 1984), see supra notes 239-42 and accompanying text.

[272]Id. at 1036.

[273]444 U.S. at 123-24.

[274]744 F.2d 771 (11th Cir. 1984).

[275]Id. at 774.

[276]The court distinguished Robbins as a case in which the only new information the plaintiff knew at the later date was the permanence of his injury. In Burgess, the plaintiff discovered a new injury. Id. at 775 & n.9.

[277]Id. at 775 n.8.

[278]See Casias v. United States, 532 F.2d 1339, 1342 (10th Cir. 1976).

[279]738 F.2d 977 (8th Cir. 1984).

[280]Id. at 979.

[281]Id.

[282]The court reasoned that "[W]hen a person is an infant, there are others legally responsible for his or her well-being. The parents or guardians would be under a duty to investigate the injury and its cause, and to take legal action within the time prescribed." Id. at 980. The court also noted this was not normal incompetence or insanity but rather government induced incompetence. Id.

[283]The court determined this would only occur in the rare situation where the alleged negligence itself prevented the claimant from learning the government injured him. Non-government caused incompetence would not prevent the running of the statute of limitations. Id.

[284]769 F.2d 1436 (9th Cir. 1985).

[285]Id. at 1439.

[296]Id.

[297]Id. Cf. Dundon v. United States, 559 F. Supp. 469, 474 (E.D. N.Y. 1983) (government caused incompetence after claim accrual tolled statute of limitations because incompetent claimant incapable of pursuing remedy for the injury).

[298]485 F. Supp. 1274 (E.D. Mich. 1980).

[299]Id. at 1281.

[300]Id. at 1281-82.

[301]Id.

[302]Id. at 1283.

[303]689 F.2d 324 (2nd Cir. 1982), cert. denied, 462 U.S. 1131 (1983).

[304]689 F.2d at 327 (quoting Fitzgerald v. Seamans, 553 F.2d 220, 228 (D.C. Cir. 1977)).

[305]689 F.2d at 328.

[306]Id. at 330.

[307]This is because with knowledge of the "cause" element, the plaintiff can discover the "who" element through the exercise of reasonable diligence. Id.

[308]728 F.2d 301 (6th Cir.), cert. denied 469 U.S. 842 (1984).

[309]Id. at 305.

[310]The court reasoned that it made little sense to hold a party responsible for misrepresentation if that party did not cause the misrepresentation. Id.

[311]444 U.S. at 117-18.

[312]Id. at 124.