

USALSA Report

United States Army Legal Services Agency

Litigation Division Note

Sometimes It Pays to Be Ignorant

Introduction

The federal statute of limitations in 28 U.S.C. § 2401(b) requires claims brought under the Federal Tort Claims Act (FTCA) to be filed within two years of the accrual of the claim.¹ The statute, however, does not define “accrual.” As tensions frequently arise between the desire to give fair treatment to possible victims of inadequate medical treatment and the need to resolve claims efficiently and rapidly, courts have long grappled with the term.²

Accrual and the “Blameless Ignorance” Rule

In its 1979 decision in *United States v. Kubrick*,³ the Supreme Court provided what has become the bedrock answer to the question of when such claims accrue under the FTCA. *Kubrick* stands for the proposition that accrual of a claim does not wait until the patient knows that his treatment was performed negligently, but instead, accrues when a patient knows he has been injured and what caused it. By its very reasoning, *Kubrick* requires a fact-based analysis of what the patient knew and when he knew it. Many courts wrestle with that issue, however, when it becomes apparent that doctors misled or misinformed a patient about the nature or cause of an injury.⁴ In those cases, some courts have adopted a “blameless ignorance” exception to *Kubrick* and held that the accrual of an FTCA claim—and thus, the tolling of the statute of limitations—is

delayed when a patient’s doctors give an inaccurate or incomplete explanation for complications. Because a patient may reasonably rely on such explanations, the claim for malpractice only accrues in those circumstances when the patient is aware of the true nature of her injury. The U.S. Court of Appeals for the Third Circuit (Third Circuit) became the latest court to jump on the “blameless ignorance” bandwagon when it decided *Hughes v. United States*.⁵ In *Hughes*, the court refused to grant the government’s motion to dismiss under the statute of limitations, and remanded the case to the district court.

Hughes v. United States

On 15 April 1997, Mr. Hughes went to a Veterans Administration (VA) hospital in South Carolina, complaining of neck pain. The same day, Mr. Hughes underwent a cardiac catheterization, which revealed coronary artery disease. In preparation for coronary bypass surgery, the hospital administered heparin, a blood thinner. After the surgery, Mr. Hughes remained unconscious and on a heparin drip for about one week, during which time he began to demonstrate signs of an allergic reaction to the heparin. Mr. Hughes’s physicians did not treat the allergic reaction until he had developed gangrene in his hands and legs. As a result of the gangrene, doctors had to amputate Mr. Hughes’s hands and his legs below the knees.⁶ When Mr. Hughes awoke from his coma, the doctors explained that the amputations were the result of the allergic reaction to the heparin. The doctors did not explain that they failed to notice or treat the reaction until after the gangrene made the amputations necessary. Mr. Hughes was discharged from the hospital on 23 July 1997, and did not file a claim with the VA until December 1999.⁷

1. Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2000).

2. This tension is not limited to the courts. See Bryan A. Liang, *Risks of Reporting Sentinel Events; A System for Reporting Medical Errors Could Be Used for Lawsuits Rather than Just for Safety Purposes*, HEALTH AFFAIRS, Sept.-Oct., 2000; Andrea Gerlin, *Senate Panel Gets Input on Medical Mistakes*, PHIL. INQUIRER, Jan. 27, 2000, at A14. Other newspapers report similar concerns from various quarters of society. Andrea Gerlin, *A Message to Doctors: Admit Errors and Apologize*, SEATTLE TIMES, Dec. 21, 1999, at A23; Andrea Gerlin, *Hospital Errors Often Buried in Internal Accident Reports; Families Belatedly Learn of Mistakes That Kill*, NEW ORLEANS TIMES-PICAYUNE, Sept. 26, 1999, at A22; Robert Pear, *Experts Cast Doubt on Medical Reporting Plan*, N.Y. TIMES, Feb. 23, 2000, at A12; Andrea Gerlin, *Clinton’s Plan to Cut Medical Mistakes Lacks Two Key Allies*, PHIL. INQUIRER, Feb. 27, 2000, at D3; *Diagnosing Error: Clinton Pushes for Reporting of Medical Mistakes*, PITTSBURGH POST-GAZETTE, Mar. 8, 2000, at A-18; Joanne Weintraub, *Lifting the Covers Off Hospital Mistakes*, MILWAUKEE SENTINEL J., Nov. 19, 2000, at 1E.

3. 444 U.S. 111 (1979).

4. See, e.g., *McDonald v. United States*, 843 F.2d 247, 249 (6th Cir. 1988); *Wehrman v. United States*, 830 F.2d 1480, 1484-85 (8th Cir. 1987); *Rosales v. United States*, 824 F.2d 799, 804 (9th Cir. 1987); *Otto v. Nat’l Inst. of Health*, 815 F.2d 985, 989 (4th Cir. 1987); *DuBose v. Kans. City S. Ry.*, 729 F.2d 1026 (5th Cir. 1984).

5. 263 F.3d 272, 278 (3d Cir. 2001), *reh’g denied*, No. 00-3606 (3d Cir. Oct. 30, 2001) (order denying rehearing). At the time of this writing, the district court had ordered the case held in suspense pending settlement mediation. Telephone interview with Nuriye Uygur, Assistant United States Attorney, Eastern District of Pennsylvania (Sept. 25, 2002) [hereinafter Uygur Interview].

6. *Hughes*, 263 F.3d at 274.

7. *Id.* at 274-75.

The VA rejected the claim as beyond the statute of limitations, and Mr. Hughes brought suit in July 2000.⁸ The United States filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Hughes's claim accrued when his doctors explained his allergic reaction to the heparin in July 1997.⁹ The district court agreed and dismissed the suit.¹⁰ On appeal, however, the Third Circuit overruled and remanded.¹¹

The Third Circuit's reasoning in *Hughes* is similar to the positions of the Fourth, Fifth, Sixth, Eighth, and Ninth Circuits, all of which have adopted the "blameless ignorance" exception. These courts have held that the claim of a patient who reasonably relies on explanations from his doctor will not accrue until the patient gains accurate knowledge about the cause of the injury.¹² The Third Circuit came to the same conclusion in *Hughes*, asserting that Hughes's claim did not accrue when he left the hospital because his doctors "led [him] to believe that the formation of the gangrene was a natural, albeit unexpected allergic reaction to the heparin dosage."¹³ The court determined that although Hughes's doctors informed him of his injury before he left the hospital,¹⁴ they did so in a misleading fashion.¹⁵ The Third Circuit joined five other circuits in holding that a doctor's inaccuracy, deliberate or otherwise, will not be held against the patient in determining when a claim accrues under the FTCA.¹⁶

Significantly, courts that recognize the blameless ignorance exception have continued to apply *Kubrick* and have narrowed the exception to only the most necessary cases—those in which physicians misinform patients through faulty assurances.¹⁷ In *Hughes*, the Third Circuit likewise did not reject *Kubrick*. The

court rejected the government's argument that the claim accrued when Mr. Hughes left the hospital because doctors had informed him of the allergic reaction; this, coupled with the amputations, was sufficient to put a reasonable patient on notice.¹⁸ Instead, the court pointed out that Mr. Hughes's injury arose not from the application of the drug and the subsequent allergic reaction, but from the doctors' failure to treat that reaction.¹⁹ The court reasoned that because of his doctors' incomplete explanations, Mr. Hughes was not aware that the failure to treat the allergic reaction had caused his injury when he left the hospital. The Third Circuit remanded the case to the district court to determine when Mr. Hughes learned of the doctors' failure to treat the gangrene.²⁰ While there is reason to believe that district courts in the Third Circuit will also construe this exception narrowly,²¹ judge advocates must consider the blameless ignorance exception in their analysis of medical malpractice cases; they must also ensure that medical providers know the legal risks they run when they are less than forthcoming with patients.

Practice Points

Before *Hughes*, the law in the Third Circuit governing the accrual of medical malpractice claims was significantly more favorable to the government. Judge advocates, however, can limit the impact of this decision and encourage better service to patients by taking some prudent steps.²² Claims judge advocates and attorneys must, of course, continue to thoroughly investigate questions of what medical providers did or did not do with respect to their patients. They must now also investi-

8. *Id.*

9. *Hughes v. United States*, No. 00-3065, 2000 U.S. Dist. LEXIS 15470, at *4 (E.D. Pa. Oct. 23, 2000).

10. *Id.* at *9.

11. *Hughes*, 263 F.3d at 278.

12. *See supra* note 4.

13. *Hughes*, 263 F.3d at 276.

14. *Id.* at 276-77.

15. *Id.* at 274, 277.

16. *See supra* note 4.

17. *See, e.g.*, *Hanafin v. United States*, No. 1:95:CV:128, 1995 U.S. Dist. LEXIS 14450 (W.D. Mich. Aug. 14, 1995).

18. *Hughes*, 263 F.3d at 276.

19. *Id.* at 276-77.

20. *Id.* at 277-79.

21. It is unlikely that the U.S. District Court for the Eastern District of Pennsylvania (District Court) will hear *Hughes* on remand; the District Court has ordered the case held in suspense pending settlement mediation, and it appears that the case may settle without further assistance from the court. Uygur Interview, *supra* note 5.

22. Anecdotal evidence indicates that patients may file fewer lawsuits if they feel that their doctors are forthcoming about medical errors. *See supra* note 2.

gate what medical providers said and did not say to patients about unfavorable outcomes. Judge advocates should urge hospitals and medical providers to inform patients of the true causes of injuries as early as possible.

Before claims judge advocates and attorneys decide when a medical malpractice claim accrued, they should carefully screen the medical file to determine when the patient received accurate information about the causes of the injury. If it appears that the claim is beyond the statute of limitations, the claims attorney or judge advocate must consider whether a provider misled or misinformed the patient, and whether the blameless ignorance exception or another equitable tolling provision operates to delay the accrual of the claim in that jurisdiction. Judge advocates and claims attorneys should retain potential claim files (including complete copies of the medical records) until two years after the patient is advised of the true nature of the injury.²³ This additional analysis will allow for efficient and just adjudication if an injured patient files a claim.

Finally, judge advocates should talk with their medical providers and review the importance of giving patients timely and accurate outcome information. In the summer of 2001, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) established new patient protection standards designed to encourage frank, honest, and timely discussions between health care professionals and patients when a health care outcome differs significantly from that which was expected.²⁴ As health care professionals implement the new standards, the industry will gradually develop standards of care for patient protection.²⁵ Plaintiffs may push this process and continue to test how far courts are willing to stretch *Kubrick*.²⁶ One excellent source of materials to add to any such discussion is the JCAHO Patient Safety Standards and other JCAHO materials. Those standards require practitioners and hospitals to explain the outcome of any treatment or procedure to patients clearly whenever the actual outcome differs significantly from the anticipated outcome.²⁷ While the standards certainly do not require medical providers to admit negligence, providers must know that honesty is the best policy—from both the ethical and legal points of view. Captain Julie Long.

23. See U.S. DEP'T OF ARMY, REG. 25-400-2, THE MODERN ARMY RECORDKEEPING SYSTEM 1 (18 Mar. 2003).

24. In July 2001, the JCAHO applied new patient safety standards in response to growing concern in this area. The new standards are designed primarily to help health care providers and institutions reduce medical errors. For the first time, the JCAHO's accreditation standards incorporate long-standing medical ethics requirements regarding the responsibility of medical providers and hospitals to tell patients if they have been harmed by care. The JCAHO standards do not require medical professionals or hospitals to admit legal negligence or liability, nor do they set a standard that places a legal duty on medical providers. The JCAHO recognizes, however, that the fear of litigation often makes health care providers and hospitals unwilling to be forthcoming with patients. The JCAHO attempts to address this problem by requiring practitioners to explain to their patients clearly whenever the outcome of any treatment or procedure differs significantly from the anticipated outcome. It is important to note that the JCAHO standards do not create a legal duty. See the JCAHO's Web site at <http://www.jcaho.org> for the text of the standards and more information about patient safety issues.

25. Significantly, the Third Circuit remanded *Hughes* to the District Court to determine when Hughes had accurate knowledge of his injury; the Solicitor General's Office is considering whether to request a writ of certiorari to the Supreme Court. Uygur Interview, *supra* note 5.

26. In *McGraw v. United States*, No. 00-35514, 2002 U.S. App. LEXIS 15774 (9th Cir. Feb. 25, 2002), for example, the U.S. Court of Appeals for the Ninth Circuit relied in part on the Third Circuit's holding in *Hughes* to expand its holding in *Augustine v. United States*, 704 F.2d 1074, 1078 (9th Cir. 1983), a case in which the Ninth Circuit held that the claim of a plaintiff alleging failure to diagnose did not accrue until the patient learned that a preexisting condition had transmuted into a more serious ailment. *Id.* In *McGraw*, the Ninth Circuit held that under the FTCA, a failure-to-diagnose plaintiff does not "discover" the claim until he is aware of both the pre-existing condition and the fact that the condition has transformed into a more serious ailment. Although McGraw's widow knew of the more serious condition, she did not discover that her husband had a pre-existing condition until more than two years after his death. *McGraw*, 2002 U.S. App. LEXIS 15774, at *6. The court held that because doctors failed to inform the decedent of the pre-existing condition, the claim did not accrue until Mrs. McGraw, the plaintiff, discovered it. *Id.* at *3. *Hughes* has also influenced state court holdings. In *Walk v. Ring*, 44 P.3d 990 (Ariz. 2002), the Arizona Supreme Court relied on *Hughes*, in part, to adopt a blameless ignorance rule for state medical malpractice cases. *Id.*

27. See *supra* note 24.