Federal Tort Claims Act: Limitations Period for Wrongful Death Begins Running at Date of Death

In *Kington v. United States*[1] the Court of Appeals for the Sixth Circuit has held that a claim for wrongful death under the Federal Tort Claims Act (FTCA)[2] "accrues" at the date of death and the statute of limitations begins to run at that date, rather than at the date the cause of death is discovered. During the years 1946 and 1947, the plaintiff's husband was exposed to beryllium while working in federally-owned atomic energy facilities at Los Alamos, New Mexico. The husband died on July 6, 1964, but the cause of death, allegedly beryllium poisoning resulting from the exposure 17 years earlier, was not determined until an autopsy was completed almost two months later. On August 29, 1966, more than two years after the husband's death but less than two years after discovery of the alleged cause of death, the plaintiff filed suit for wrongful death under the FTCA, alleging negligent operation by the United States, through its Atomic Energy Commission, of a plant using inherently dangerous materials.[3] The district court granted the defendant's motion for dismissal on the grounds that the FTCA's two-year statute of limitations[4] barred the action.[5] The court of appeals, rejecting appellant's argument that the claim did not arise until the cause of death was *discovered*, or by the exercise of ordinary care should have been discovered, held that the cause of action accrued at the date of death and affirmed the district court's order.

The question of when a statute of limitations begins to run for a cause of action against the United States for non-traumatic injury was unsettled for many years.[6] This problem, particularly troublesome in a personal-injury action in which the negligent act occurred many years before the injury became known or before the source of cause of the injury was discovered, was finally considered by the Supreme Court in *Urie v. Thompson*.[7] The Court decided that it

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[1] 396 F.2d 9 (6th Cir. 1968).

[2] Ch. 753, 60 Stat. 812 (1946) (codified in scattered sections of 28 U.S.C.).

[3] Kington v. United States, 265 F. Supp. 699 (E.D. Tenn. 1967).

[4] 28 U.S.C. § 2401(b) (1964).

[5] 265 F. Supp. at 702.

[6] *See Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200-44 (1950).

[7] 337 U.S. 163 (1949).

was not Congress' purpose in establishing the statute of limitations in the Federal Employer's Liability Act (FELA)[8] to cause one afflicted with an "unknown and inherently unknowable" injury to be barred from recovery due to his own "blameless ignorance"; and it therefore held that, for purposes of the statute of limitations, a cause of action for negligent infliction of occupational disease does not accrue until the specific nature of the disease in the particular plaintiff is discoverable.[9] Thus, in *Urie* the claim accrued at diagnosis since a determination that the disease was silicosis immediately provided knowledge of both the cause *and* source of the railroad fireman's disability.[10] Decisions in FELA *wrongful death* actions, however, have established a more definite time for the accrual of the cause of action—the date of death.[11] The principal decision in this area, *Reading Company v. Koons*,[12] held that the cause of action accrues at death rather than when an administrator is appointed because all events which determine the employer's liability have occurred prior to death and because, under the Act, the beneficiaries can bring suit while awaiting appointment of an administrator.[13]

While no FELA or FTCA cases prior to *Kington* have considered statute-of-limitations treatment in the context of an "undiscovered" cause-of-death situation, recent cases involving "undiscovered" non-traumatic personal injury have followed the *Urie* rationale that the limitations period does not begin until the plaintiff has a reasonable opportunity to know those facts which give notice of the invasion of his legal rights.[14] For a personal injury claim to exist, there must have

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[8] 45 U.S.C. § 56 (1964).

[9] 337 U.S. at 168-70.

[10] *Id.* at 170.

[11] *See, e.g.*, Baltimore & O.S.W. R.R. v. Carroll, 280 U.S. 491 (1930); Reading Co. v. Koons, 271 U.S. 58 (1926).

[12] 271 U.S. 58 (1926).

[13] *Id.* at 62.

[14] *See, e.g.*, Seaboard Air Line R.R. v. Ford, 92 So. 2d 160 (Fla. 1955), *modified on rehearing*, 92 So. 2d 164 (1956); Imiola v. Erie-Lackawanna R.R., 45 Misc. 2d 502, 257 N.Y.S.2d 195 (Sup. Ct. 1965). *See also* Estep & Van Dyke, *Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases*, 62 MICH. L. REV. 753, 764-69 (1964); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1203-04 (1950); Note, 45 ORE. L. REV. 73, 76-77 (1965).

Compare the situation in civil antitrust actions under a similar federal statute of limitations, 15 U.S.C. § 15(b) (1964), where it is settled that fraudulent concealment prevents the running of the limitations period until the existence of the conspiracy is or should have been discovered, Kansas City v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962), *cert. denied*, 373 U.S. 914 (1963), and where it is suggested that the same result will occur if the

occurred both a negligent act and an injury resulting therefrom. For the claim to be maintained, the plaintiff must know of his injury; the nature of the injury; the cause of the injury; the source of the injury's cause; and the negligent act which allowed the cause to operate upon him. Since knowledge of *all* these facts is necessary before one fully realizes that his legal rights have been invaded, the prolonged dispute over when the statute of limitations begins to run in personal injury actions under federal legislation has been resolved in favor of beginning the limitation period on the date by which the plaintiff knew or should have known those facts connecting the injury with the negligent act. Where diagnosis of the nature of the illness provided this connection, the court held that the statute did not begin to run until diagnosis of the plaintiff's condition was possible.[15] Where diagnosis of the disease was not synonymous with knowledge that the injury was afflicted by the defendant, the claim did not accrue until the cause and source of the injury were discoverable.[16] Where knowledge was inadequate concerning the existence of the acts upon which the claim was based, the running of the statute was delayed until such knowledge became available.[17] Thus, past precedent has employed the concept of fair notice in defining the standard of "discovery" which starts the statute running as knowledge of those facts connecting *act* with *injury*. The presumption that the hardships imposed upon a corporate governmental entity by an indeterminate period of liability are not as significant as when the defendant is an individual, is arguably a further justification for this liberal interpretation in FTCA actions.[18]

The *Kington* court, although aware of this recent authority, passed over it as inapplicable because it dealt with personal injury rather than wrongful death actions. The first of the court's three reasons for rejecting the date of "discovery" was that the traditional

conspiracy is merely concealed by its very nature without fraudulent action by the defendant, Gaetzi v. Carling Brewing Co., 205 F. Supp. 615 (E.D. Mich. 1962).

[15] Young v. Clinchfield R.R., 288 F.2d 499 (4th Cir. 1961) (FELA action).

[16] Kuhne v. United States, 267 F. Supp. 649 (E.D. Tenn. 1967) (FTCA action); Anderson v. Southern Pac. Co., 231 Cal. App. 2d 233, 41 Cal. Rptr. 743 (1964) (FELA action).

[17] Brown v. United States, 353 F.2d 578 (9th Cir. 1965); Beech v. United States, 345 F.2d 872 (5th Cir. 1965); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); Johnson v. United States, 271 F. Supp. 205 (W.D. Ark. 1967) (all FTCA actions).

[18] *See, e.g.*, Quinton v. United States, 304 F.2d 234, 241 (5th Cir. 1962) (FTCA statute of limitations viewed as exception to general provision that government is liable as a private individual would be).

date of accrual in "similar" actions is the date of death. However, the cases relied upon by the court for this position involved accrual for purposes other than determining the operation of the limitations period upon claims arising from belatedly discovered injury. One case primarily involved the relation-back of an amended complaint, and in deciding that the cause of action accrued at the time of death, the court sought to point out the distinction between survival and wrongful death actions.[19] Another case involved the choice between time of death and appointment of an administrator as the moment of accrual,[20] and a third case mentioned the date of death only in discussing the measurement of the life expectancy of the decedent's parents.[21] The *Kington* decision was secondly based upon the assumption that the cause and source of death can be ascertained shortly after death by autopsy. No authority for such a proposition was given, and this assumption overlooks recent cases involving radioactivity-induced diseases where the cause or source of the malady was not discovered for as long as five years after the original diagnosis.[22] Medical science, particularly in the field of radiation poisoning, apparently cannot provide immediate answers to the source and cause of all diseases, even after extensive and detailed testing.[23] While the majority noted, as a third point, that the plaintiff in *Kington* still had twenty-two months after the cause of death was discovered in which to file the complaint,[24] the dissenting judge recognized that if the *Kington* rule is inflexibly followed, the party who is unable to discover the cause of the decedent's death within two years from the date of death will be foreclosed from any possibility of compensation.[25]

Since federal law rather than state law apparently determines when an FTCA claim accrues for purposes of commencing the limitations period,[26] there appears to be no compelling reason why the

[19] Baltimore & O.S.W. R.R. v. Carroll, 280 U.S. 491, 495 (1930), *citing* Reading Co. v. Koons, 271 U.S. 58 (1926).

[20] Foote v. Public Housing Comm'r of United States, 107 F. Supp. 270 (W.D. Mich. 1952). See text following note 11 *supra*.

[21] Renaldi v. New York, N.H. & H.R.R., 230 F.2d 841 (2d Cir. 1956).

[22] See cases cited note 16 *supra*.

[23] Young v. Clinchfield R.R., 288 F.2d 499, 504 (4th Cir. 1961); E. STASON, S. ESTEP & W. PIERCE, ATOMS AND THE LAW 421-511 (1959); Estep & Van Dyke, *supra* note 14. See cases cited note 15 *supra*.

[24] Kington v. United States, 396 F.2d 9 (6th Cir. 1968).

[25] *Id.* at 12 (dissenting opinion).

[26] *See, e.g.*, Beech v. United States, 345 F.2d 872 (5th Cir. 1965); Kossick v. United States,

same considerations which led to the development of the "date of discovery" rule in personal injury cases should not be applied to wrongful death actions under the same federal legislation. The much-disputed distinction between a special statute of limitations, compliance with which is a condition precedent to statutory wrongful death actions, and a general statute of limitations which merely bars a common-law claim after a specified time,[27] is afforded no relevance by the language of the FTCA, which provides both the right of action and the limitation thereon, drawing no distinction between an action for injury and one for death.[28] Moreover, the principal dispute in the wrongful death area has previously been whether the claim accrues at the time of the injury or at the time of death and has not involved the unknowable-cause problem.[29] Thus, most courts have had no reason to consider an accrual date later than that of death and implicitly *assumed* that death serves as adequate notice of a possible violation of one's legal rights.[30] The *Kington* decision and the harsh results it will produce in cases where notice of the invasion of legal rights is not provided at death are open to considerable criticism, especially in light of contrary developments in the personal injury field. In favoring administrative efficiency and protection from "stale" claims rather than the preservation of a claim until the potential claimant has a realistic opportunity to discover its existence, *Kington* appears in conflict with the present judicial trend. Thus, the time of death as the inception of the limitations period probably will not be adhered to if a case against the government should arise in which a claim would be barred before its discovery is possible.

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330 F.2d 933 (2d Cir.), *cert. denied*, 379 U.S. 837 (1964); Maryland *ex rel.* Burkhardt v. United States, 165 F.2d 869 (4th Cir. 1947). *Contra* Tessier v. United States, 269 F.2d 305 (1st Cir. 1959); Meyers v. United States, 162 F. Supp. 913 (N.D.N.Y. 1958). A commencement-of-the-limitations-period issue should be distinguished from determination of whether the claim is premature. *See* Bizer v. United States, 124 F. Supp. 949 (N.D. Cal. 1954) (prematurity issue).

[27] *See, e.g.*, Burnett v. New York Cent. R.R., 380 U.S. 424 (1965); 25A C.J.S. *Death* § 53 (1966); *cf.* Simon v. United States, 244 F.2d 703 (5th Cir. 1957).

[28] 28 U.S.C. §§ 1346(b), 2401(b), 2671-80 (1964).

[29] *See* 22 AM. JUR. 2d *Death* § 40 (1965); Annot., 97 A.L.R.2d 1151, 1154-55 (1964).

[30] *See, e.g.*, McGhee v. Cheasapeake & O.R.R., 173 F. Supp. 587 (W.D. Mich. 1959); Imiola v. Erie-Lackawanna R.R., 45 Misc. 2d 502, 257 N.Y.S.2d 195 (1965) (FELA case). *See also Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1203 (1950).