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legislative approach or a more full-reasoned body of case law, sensitive to the rights of both private owners and the public, is necessary.

III. CONCLUSION

The opinion in *Coastal Industrial Water Authority v. York* has created a new standard for riparian boundaries in coastal areas. A change in the riparian boundary, such as that caused by subsidence, which is not the result of an ordinary hazard of riparian ownership, will be ineffective to alter the boundary between the lands of the private owner and the public lands beneath coastal waters. Such a result is consistent with those cases which have dealt with submergence, a related riparian phenomenon, and indicates a sensitivity on the part of the court to the unique problems faced by coastal landowners. Any uncertainty of result which *Coastal* introduces into riparian law may simply reflect the difficulty presented when doctrines based on riparian phenomena peculiar to rivers and lakes are applied to cases involving land riparian to the Gulf coast.

The court's solution, retention of private ownership to subsided lands, may lead to future conflicts between the rights of the private landowner and the rights of the public to the use of coastal resources. The court was careful to note that these conflicts did not exist in this case because the submerged land in question was not actually used for navigation by the public.[60] It is left to future decisions to illuminate whether a different rule will apply in the case of submergence beneath coastal water which is or could be used for public navigation.

Aimee Hess Conlan

Kelley v. Rinkle: Texas Embraces the Discovery Rule in Credit Libel

On March 13, 1973, Dr. Roy Rinkle, defendant, submitted a voluntary report to Credit Bureau Services, a credit reporting agency, which stated that plaintiff, George W. Kelley, owed $277 on an account past due. Plaintiff had previously applied for credit with several business firms, and during April and May of 1973 he began receiving negative responses from those firms based on information supplied by Credit Bureau Services. Plaintiff first learned of defendant's credit report on August 29, 1973, and subsequently filed an action for libel on March 26, 1974. The trial court granted defendant's motion for summary judgment on the ground that plaintiff's suit was barred by the one-year statute of limitations applicable to libel actions.[1] The court of civil

60. 532 S.W.2d at 954; *see* note 57 *supra*.

1. TEX. REV. CIV. STAT. ANN. art. 5524 (1958) provides in part that "[t]here shall be commenced and prosecuted within one year after the cause of action shall have accrued, and not afterward, all actions or suits in courts of the following description: 1. Actions for malicious prosecution or for injuries done to the character or reputation of another by libel or slander."

appeals affirmed,[2] and the Texas Supreme Court granted plaintiff's application for writ of error. *Held, reversed*: The limitations period for a cause of action for libel of one's credit reputation by publication of a defamatory report to a credit agency begins to run when the defamed person learns or by the exercise of reasonable diligence should have learned of the existence of the credit report. *Kelley v. Rinkle*, 532 S.W.2d 947 (Tex. 1976).

I. STATUTES OF LIMITATIONS AND THE DISCOVERY RULE

A limitation of the time during which an action may be brought is created by statutory law.[3] The purpose behind these statutes is the prevention of stale or fraudulent claims. The assumptions underlying the establishment of time limits are (1) that a plaintiff will not delay in bringing a meritorious claim, and (2) that the ability to determine the true facts of a case decreases with time.[4] Another consideration behind the statutes may be the desire to relieve the courts of the burden of adjudicating inconsequential or tenuous claims.[5] The time periods selected by the legislature may vary with the degree of permanence of the evidence ordinarily required in a particular type of case; they may also indicate the relative favor with which the legislature views certain types of claims or particular classes of plaintiffs.[6]

A typical statute of limitations provides that the period within which an action may be brought is to be computed from the time the cause of action "accrues." Legislatures, by employing this phrase, have adopted a substantive law concept describing that combination of facts which will allow plaintiff to sue; thus, the time of the occurrence of the last of these facts becomes the critical point of inquiry.[7] Through a determination of when a cause of action accrues, courts have introduced an element of flexibility into statutes of limitations. A cause of action has generally been said to accrue when it comes into existence as an enforceable claim, when a right of action becomes vested in a plaintiff, or when a plaintiff is entitled to sue on his claim.[8] The statutory period may begin to run when defendant allegedly commits the wrong or when substantial harm occurs. When considerable time intervenes between the two, courts have generally looked to the substantive elements of the cause of action on which the suit is based.[9] Under the long-standing rule in Texas when an act is not itself unlawful as to plaintiff so

2. 524 S.W.2d 806 (Tex. Civ. App.—Waco 1975).

3. *See* Harper, *Texas Adopts the Discovery Rule for Limitations in Medical Malpractice Actions*, 1 ST. MARY'S L.J. 77 (1969).

4. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950). The writers of this comprehensive analysis of statutes of limitations stated that "[t]he primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim" if memories have faded and evidence and witnesses have disappeared. *Id.* at 1185.

5. *Id.* at 1200.

6. *Id.* Since legislative opinion will change with time and with the composition of the legislature, limitations statutes should be periodically subjected to legislative consideration. *See* note 54 *infra* and accompanying text.

7. *Id.*

8. *See, e.g.*, Leahey v. Department of Water & Power, 76 Cal. App. 2d 281, 173 P.2d 69 (1946); Berger v. Jackson, 156 Fla. 251, 23 So. 2d 265 (1945); *In re* North's Estate, 320 S.W.2d 597 (Mo. App. 1959).

9. *Developments in the Law*, *supra* note 4, at 1200.

that harm is an essential element in the cause of action, the occurrence of the harm marks the accrual of the cause of action and the commencement of the statutory period. But when the act itself is a legal injury to plaintiff so that suit can be maintained regardless of damage, plaintiff's right of action accrues and the statute begins to run when the wrongful act is complete, despite plaintiff's ignorance or inability to learn of his cause of action.[10]

In certain limited types of cases Texas courts have adopted the discovery rule which states that the statute of limitations does not begin to run until plaintiff learns or in the exercise of reasonable diligence should have learned of the injury giving rise to his right of action.[11] Although it has been applied with some hestitation, the discovery rule approach to limitations statutes in tort actions has found increasing favor in Texas as well as in most other jurisdictions.[12] The rule has been applied in cases of fraud,[13] in actions for property damage,[14] in suits for reformation of a deed,[15] and, recently, in an action against a drug manufacturer for breach of warranty.[16]

The clearest indication of a growing acceptance in Texas of the discovery rule is found in the area of professional malpractice.[17] In *Atkins v. Crosland*[18] the Texas Supreme Court ruled that a cause of action against an accountant for negligent preparation of an income tax return accrues when the resulting tax deficiency is assessed.[19] The court's reasoning in *Atkins* was consistent with former cases,[20] but the decision's effect was similar to that of the

10. Houston Water Works v. Kennedy, 70 Tex. 233, 8 S.W. 36 (1888). *See also* Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W.2d 336 (1954). *See generally Developments in the Law, supra* note 4.

11. *See* Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967). *See also* Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961).

12. *See, e.g.*, Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971) (action for legal malpractice); Layton v. Allen, 246 A.2d 794 (Del. 1968); Basque v. Yuk Lin Liau, 50 Hawaii 397, 441 P.2d 636 (1968) (action for damage to real property); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969); Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967) (action for defective design); Polzin v. National Co-op. Refinery Ass'n, 175 Kan. 531, 266 P.2d 293 (1954) (action for damages for water pollution); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Flanagan v. Mt. Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); Frohs v. Greene, 88 Ore. 131, 452 P.2d 564 (1969); Janisch v. Mullins, 1 Wash. App. 393, 461 P.2d 895 (1969) (actions for medical malpractice).

13. *See, e.g.*, Wise v. Anderson, 163 Tex. 608, 359 S.W.2d 876 (1962); Quinn v. Press, 135 Tex. 60, 140 S.W.2d 438 (1940); Glenn v. Steele, 141 Tex. 565, 61 S.W.2d 810 (1933); Blondeau v. Sommer, 139 S.W.2d 223 (Tex. Civ. App.—Galveston 1940, writ ref'd); American Indem. Co. v. Ernst & Ernst, 106 S.W.2d 763 (Tex. Civ. App.—Waco 1937, writ ref'd).

14. *See, e.g.*, Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309 (Tex. Civ. App.—Texarkana 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975); Crawford v. Yeatts, 395 S.W.2d 413 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.); Geochemical Surveys v. Dietz, 340 S.W.2d 114 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.); Gulf Oil Corp. v. Alexander, 291 S.W.2d 792 (Tex. Civ. App.—Amarillo), *aff'd per curiam*, 295 S.W.2d 901 (Tex. 1956); Beck v. American Rio Grande Land & Irrigation Co., 39 S.W.2d 640 (Tex. Civ. App.—San Antonio 1931, writ ref'd).

15. *See, e.g.*, Barker v. Levy, 507 S.W.2d 613 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

16. Thrift v. Tenneco Chems., Inc., 381 F. Supp. 543 (N.D. Tex. 1974).

17. The early rule was that a cause of action in professional negligence accrues when defendant breaches his duty to maintain a professional standard of care. *See, e.g.*, Stewart v. Janes, 393 S.W.2d 428 (Tex. Civ. App.—Amarillo 1965, writ ref'd), *cert. denied*, 383 U.S. 962 (1966); Crawford v. Davis, 148 S.W.2d 905 (Tex. Civ. App.—Eastland 1941, no writ).

18. 417 S.W.2d 150 (Tex. 1967).

19. *Id.* The court based its holding on the fact that until the tax deficiency was assessed the tort was incomplete because legal injury was not the inevitable result of the accountant's negligent act, and until a "legal injury," rather than a technical breach of duty, or an economic injury is sustained, there is no cause of action. *See* note 10 *supra* and accompanying text; Note, *Limitations of Actions*, 46 TEXAS L. REV. 119 (1967).

20. *See* note 10 *supra* and accompanying text.

discovery rule: the tax assessment served to inform plaintiff of his right of action and thereby enabled him to bring suit within the limitations period.

In recent years Texas courts have frequently applied the discovery rule in the area of medical malpractice. In *Gaddis v. Smith*[21] the decision was explicitly limited to foreign objects cases,[22] but the court's opinion did not completely foreclose the possibility of applying the discovery rule in other instances.[23] Five years later Texas expanded its application of the discovery rule in *Hays v. Hall*[24] to include malpractice cases arising from vasectomy operations. Discussing the *Gaddis* ruling, the *Hays* court explained that *Gaddis* involved not an extension of the limitations period, but a recognition "that *in certain situations it is difficult if not altogether impossible to discover the existence of a legal injury.* . . . [T]he Statute of Limitations commences to run from discovery of the injury, or the time discovery should reasonably have been made."[25] Texas courts have subsequently applied the discovery rule to other types of medical malpractice claims.[26] In a recent case the court of appeals based its extension of the rule on the language of the *Hays* opinion[27] which it interpreted as broadening the permissible application of the discovery rule in Texas.[28]

Texas case law in the area of credit libel is both sparse and ambiguous. The opinion in *Bratcher v. Pecos Motors, Inc.*[29] implied but did not specifically

21. 417 S.W.2d 577 (Tex. 1967). The Texas Supreme Court had refused to apply the rule to medical malpractice cases since Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942), in which it had held that a cause of action for medical malpractice involving the negligent leaving of a foreign object in the body of the patient accrued when the physician closed the incision at the conclusion of the surgery.

22. 417 S.W.2d at 581. The court's majority reasoned that the discovery rule could be applied in foreign objects cases, those in which a foreign object is left in the body of the patient by the physician, without endangering the policy behind the statute of limitations. While the court recognized the possibility that physicians might encounter difficulty in preserving evidence with which to defend discovery rule actions, it found the rule justified on the basis of fairness and because of the minimal possibility of fraud in foreign objects cases.

23. Quoting from the opinion in Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277, 286 (1961), the court said: "*For present purposes* we need not question these instances for we are satisfied that the case at hand falls within a special grouping or 'class of cases' . . . where the period of limitations may . . . justly be said to begin to run when the plaintiff knows or has any reason to know about the foreign object and the existence of a cause of action based upon its presence . . . ." 417 S.W.2d at 581 (emphasis added).

24. 488 S.W.2d 412 (Tex. 1972).

25. *Id.* at 413-14 (emphasis added). Applying the reasoning in *Gaddis* to the facts in *Hays*, the court stated that "[i]f the limitation period is measured from the date of the operation, and if the discovery of fertility, and therefore the injury, is not made until after the period of limitation has run, the result is that legal remedy is unavailable to the injured party before he can know that he is injured. A result so absurd and so unjust ought not to be possible." 488 S.W.2d at 414.

26. *See, e.g.*, Nichols v. Smith, 507 S.W.2d 518 (Tex. 1974) (negligent severing of vagus nerve); Sanchez v. Wade, 514 S.W.2d 812 (Tex. Civ. App.—El Paso 1974, no writ) (improper diagnosis).

27. *See* note 25 *supra* and accompanying text.

28. Grady v. Faykus, 530 S.W.2d 151 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

29. 408 S.W.2d 722 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.). *Bratcher* held that when a seller wrongfully reported the cancellation of a sales transaction by mutual agreement between seller and buyer as a "repossession," buyer's suit for injury to his credit reputation filed two years after seller's report was barred by the one-year statute of limitations applicable to defamation suits. Another approach offered for the *Kelley* court's consideration was suggested by Wilson v. Retail Credit Co., 438 F.2d 1043 (5th Cir. 1971), in which a federal court, applying Mississippi law, held that a cause of action in credit libel arose and the statute began to run on the date that the credit report was received by the agency's customers. A third approach urged upon the Texas court in *Kelley* was that of Weaver v. Beneficial Fin. Co., 199 Va. 196, 98 S.E.2d 687 (1957), where the court held that if the republication of a libelous credit report was a natural and

hold that a false report to a credit agency was a publication of libel sufficient to start the running of the limitations period. The transition from the Texas courts' use of the discovery rule in medical malpractice cases to their application of the rule to other fact situations was a smooth and logical one notwithstanding the aberration of the *Bratcher* decision. The Texas Supreme Court's opinions in *Gaddis* and *Hays* indicate that the court may have been willing to consider applying the rule in credit libel several years before *Kelley* was filed.

II. KELLEY V. RINKLE

A. *Application of the Discovery Rule*

While *Kelley* represents a new application of the discovery rule and a new direction for credit libel in Texas, the case can also be viewed as simply a reflection of a nationwide mood. There exists today an intensifying national awareness of the role that credit plays in personal and business affairs and a corresponding national pressure for protection of the consumer.[30] This national mood has found prompt recognition and support in some of the nation's courts.[31] By adopting the discovery rule approach to the statute of limitations for credit libel, the Texas Supreme Court has added its weight to the forces of consumerism currently at work in the United States.[32]

Kelley also raises the issues of the relationship between the discovery rule and the accrual of a cause of action and the problems which inevitably accompany the application of the rule. Texas courts have said that a cause of action accrues when facts exist which authorize one asserting a claim "to seek relief in a court of competent jurisdiction."[33] As *Gaddis, Hays,* and *Kelley* illustrate, however, the considerations which determine the factual components that plaintiff must plead and prove do not themselves necessarily fix the appropriate time limits for the filing of a suit. It is not surprising, therefore, that courts have often failed to carry out the legislative directive that the limitation period begin to run when the cause of action "accrues" and

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probable consequence of the original publication, the statute began to run at the time of the republication. Brief for Petitioner at 9-10, Kelley v. Rinkle, 532 S.W.2d 947 (Tex. 1976).

30. Recent legislation reflecting this mood includes the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (Supp. V, 1975), the Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970), and the Truth in Lending Act, 15 U.S.C. §§ 1601-66j (1970), *as amended,* (Supp. V, 1975). *See generally* Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973); Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 334 N.E.2d 160 (1975); P. CROWN, LEGAL PROTECTION FOR THE CONSUMER (1963).

31. *See, e.g.,* Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973) (action by building contractor for libel predicated upon an allegedly false and defamatory credit report provided by defendant); Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 334 N.E.2d 160 (1975) (action by clothing retailer for defamation by national credit agency). The *Kelley* court noted that *Exciting World of Fashion* signaled Illinois' adoption of the discovery rule for libel actions under circumstances similar to those present in *Kelley.* 532 S.W.2d at 949 n.2.

32. The Texas Supreme Court noted in *Kelley* that "[w]hile the pervasive use of credit reporting agencies makes acquisition of credit much easier and more efficient, it also creates a potential for great abuse by those who would use the system wrongfully to injure the credit reputation of another. . . . [A] rule by which the limitations would commence from the date of the wrongdoer's report to the credit agency would merely enhance that potential." 532 S.W.2d at 949.

33. Williams v. Pure Oil Co., 124 Tex. 341, 345, 78 S.W.2d 929, 931 (1935). *See also* Hartman v. Hartman, 135 Tex. 596, 138 S.W.2d 802 (1940).

have devised numerous exceptions to their original interpretations of that term in order to avoid injustice.[34]

Rather than redefining the point at which a particular cause of action accrues, the discovery rule offers an equitable exception to the traditional rule that the statute of limitations begins to run at the time a cause of action accrues.[35] The Texas Supreme Court failed to make this distinction in *Gaddis*, but the language of the *Kelley* opinion seems to indicate the court's recognition of it.[36] To interpret the discovery rule as changing the time at which a cause of action accrues would be to say either that the courts have redefined the term "accrue" or that they have expanded the elements of the causes of action to which they have applied the rule so as to include the element of knowledge, or the reasonable possibility of it, by a plaintiff. While it is obvious that one cannot maintain an action until he knows of his right to do so, no court has yet held that such knowledge is an element of any cause of action.

Courts have generally held that since harm is an essential element in negligence actions, the statute should not begin to run until the incidence of the harm.[37] The Texas Supreme Court adopted the discovery rule in *Gaddis* and *Hays* in order to achieve results consistent with this policy. In *Kelley*, however, the court confronted an even more inflexible situation. The law of defamation is less malleable than the law of medical malpractice.[38] General damages are presumed from the very fact of publication in libel,[39] and so the negligent or malicious act and the harm coincide to trigger the running of the statute. " 'Publication,' " said the *Kelley* court, "is a word of art . . . defined in the Restatement, Torts § 577 (1938) as 'communication intentionally or by a negligent act to one other than the person defamed.' Thus, there was a publication of the report when respondent gave it to Credit Bureau Services . . . ."[40] Applying the general rule regarding statutes of limitations in tort actions to *Kelley*, then, the tort was complete and the statute began to

34. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971). Referring specifically to the exceptions developed in medical malpractice cases, the author states: "Thus the negligent treatment . . . is held to continue until the relation of physician and patient has ended; or the court finds fraudulent concealment of the damage, which tolls the running of the statute; or it finds 'constructive' fraud in silence with probable knowledge; or the failure to discover and remove the . . . foreign object left in the plaintiff's body is held to be 'continuing' negligence." *Id.* at 144; *see, e.g.*, Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948); Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1942); Samuelson v. Freeman, 75 Wash. 2d 894, 454 P.2d 406 (1969).

35. *See* note 10 *supra* and accompanying text. This is not to say that courts are not free to review their interpretations of the term "accrue," but only that they have not seriously done so. *See* Berry v. Branner, 245 Ore. 307, 421 P.2d 996, 998-99 (1966), in which the court insisted that it is distinctly the province of the courts to determine the time at which a cause of action accrues, but in which the court also subscribed to the traditional view that "accrue" means the time at which a suit can be maintained upon a cause of action.

36. 532 S.W.2d at 948.

37. *See, e.g.*, Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967).

38. Injury in medical malpractice cases is generally thought to occur at the time of the negligent act. While medical malpractice is not a new area of the law, it was not a heavily litigated field until the 1960s. Thus, it is conceivable that the concept of the time of injury was open to redefinition by the Texas court in *Gaddis*, or at least to determination by the court on an ad hoc basis. *See generally* Sandor, *The History of Professional Liability Suits in the United States*, 163 J.A.M.A. 459 (1957); Stetler, *The History of Reported Medical Professional Liability Cases*, 30 TEMP. L.Q. 366 (1957).

39. *See* W. PROSSER, *supra* note 34, § 112.

40. 532 S.W.2d at 948.

run when defendant submitted his credit report to the agency. An exception was again necessary if the court was to effect a just and consistent result.

The eventual adoption of the discovery rule was probably inevitable, even if the Texas court had approached *Kelley* in the manner suggested by *Wilson v. Retail Credit Co.*[41] which held that a cause of action in credit libel arose and the statute began to run on the date that the credit report was received by the credit agency's customers. If general damages must be presumed in credit libel,[42] the *Wilson* approach to the time of actual injury appears to be a more realistic one even though it represents a substantial change in the law of libel since it completely redefines the term "publication." In any event, there will undoubtedly be cases in which plaintiff is unaware of the publication and of his resultant injury until after the statute has run. *Wilson*, therefore, seems to offer only an intermediate but disruptive approach to the problem.

The discovery rule, itself, is not without problems. As a judicial innovation and an exception, rather than a rule, it is subject to broad judicial discretion and engenders uncertainty in those areas of the law to which it is often applied.[43] Each case may require a determination of reasonableness; the inquiry then becomes under what set of facts will it be concluded that plaintiff discovered or in the exercise of reasonable diligence should have discovered the injury giving rise to his cause of action.[44] As the areas of the law in which the rule is applied multiply, its desirable characteristics of fairness and flexibility must be objectively balanced against the equally compelling need for certainty in the law and against the increased burden on the courts which inevitably results from their application of the rule.[45]

One must also examine the discovery rule, as courts have generally done, against the background of the purposes underlying limitations statutes.[46] The Texas Supreme Court in *Kelley* stated that the public policy of forcing the prompt assertion of claims is a particularly compelling one in defamation actions because the nature of the evidence and of the injury itself in such cases is often intangible.[47] The court determined, however, that this policy was outweighed by the need to avoid an application of the limitations statute which would deprive a conscientious plaintiff of his legal remedy.[48]

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41. 438 F.2d 1043 (5th Cir. 1971); *see* note 29 *supra*.

42. While most jurisdictions subscribe to the view that damages are presumed in libel, a minority of states statutorily provide that general damages will not be presumed, at least in cases of libel *per quod*. *See, e.g.*, CAL. CIV. CODE § 45a (West 1954); GA. CODE ANN. § 105-2006 (1968).

43. *See, e.g.*, Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277, 285-86 (1961).

44. Harper, *supra* note 3, at 86. *See* Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961), for an excellent discussion of the way in which courts approach the question of reasonableness under the discovery rule.

45. *See generally* Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961).

46. *See* notes 3-6 *supra* and accompanying text.

47. 532 S.W.2d at 949.

48. The court noted that the reasons stated in *Gaddis* and *Hays* for adopting the discovery rule also applied to *Kelley*:

> A person will not ordinarily have any reason to suspect that he has been defamed by the publication of a false credit report to a credit agency until he makes application for credit to a concern which avails itself of the information furnished by the credit agency. . . . Considering the relatively short period of limitation for libel actions, the occasion may often arise when the injured party cannot learn of the existence of his cause of action before the statutory period has expired.

Id. See also note 32 *supra*.

B. *The Broader Implications*

When the legislature prescribes a time limit on the assertion of a right, it deprives a party of the opportunity, after that time, of invoking the public power in support of an otherwise valid claim.[49] The discovery rule adopted by the Texas Supreme Court in *Kelley* has been successfully applied in many cases and is often a valid exception to a rigid limitations statute. When a court uses the discovery rule, however, it should be explicit in the fact that it is adopting an exception to the statute of limitations and not redefining the term "accrue" or adding a new element to the cause of action on which the suit is based.[50]

Because the discovery rule involves broad judicial discretion and because it circumvents the public policy considerations underlying limitations statutes, courts should avoid employing it indiscriminately. The adoption of the discovery rule was appropriate in *Kelley*, but it was not essential. A more progressive court might have chosen *Kelley* as the case in which to reconsider the questionable presumption of general damages in libel, or at least in credit libel.[51] By requiring plaintiff to show actual damages, the court could have achieved the effect of the discovery rule in *Kelley* without adding to the lengthening list of exceptions to the general rule regarding the running of limitations statutes in tort actions. The point of actual injury would mark the beginning of the limitations period.[52] Such a change in the substantive law of credit libel would reduce the uncertainty involved in the ad hoc determinations of reasonableness which accompany the discovery rule and would reduce the burden on the courts both by rendering judicial determinations of reasonableness unnecessary and by eliminating tenuous claims from the large number of credit libel suits that can be expected to follow in the wake of *Kelley*.

III. CONCLUSION

All claims must be held to be barred at some point. The inability of a defendant to present a meritorious defense due to the passage of time is certainly a valid concern. Statutes of limitations are so firmly established in all jurisdictions that they are seldom the subject of legislative discussion. Consequently, most changes have been realized through judicial application and interpretation of the statutes. Judicial action, however, is necessarily piecemeal, incomplete, and, therefore, unsatisfactory.[53] The courts lack the

49. *Developments in the Law*, *supra* note 4, at 1185.

50. *See* note 35 *supra* and accompanying text. Since courts are actually changing the statute of limitations, or legislating, when they apply the discovery rule, their reluctance to call attention to that fact is understandable.

51. *See* note 42 *supra*.

52. Since the passage of the Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970), that point should be more easily discovered and proved by plaintiff. In most cases it would undoubtedly be the time at which he was denied credit or a job because of a defamatory credit report.

53. *See Developments in the Law*, *supra* note 4, at 1185. The courts could generally avoid unjust results by holding, as the writers suggest, that a cause of action which begins the period of limitations refers not to the technical breach of duty which determines whether plaintiff has a legal right, but to the existence of a practical remedy. This would be equivalent to the court's redefining the term "accrues" or adding the element of knowledge to causes of action in torts. *See also Student Symposium—A Study of Medical Malpractice in Texas*, 7 ST. MARY'S L.J. 733 (1976).

authority to establish limits beyond which a claim is absolutely and finally barred. That is a legislative task which has been taken up by a few state legislatures in conjunction with an evaluation of the merits of providing for the discovery rule within select limitations statutes.[54] It is a task which could be profitably undertaken by the legislature in Texas.

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54. *See, e.g.*, CAL. CIV. PRO. CODE § 340.5 (West Supp. 1976); MO. REV. STAT. § 516.100 (1952); ORE. REV. STAT. § 12.110 (1975).