Tort Law—First Circuit Declares Widespread Publicity Triggers Claim Accrual Under Federal Tort Claims Act—*Donahue v. United States,* 634 F.3d 615 (1st Cir. 2011)

The Federal Tort Claims Act (FTCA) affords private parties the opportunity to bring suit against the United States for certain types of tortious harm caused by government employees.[1] An FTCA claim generally accrues at the time of injury, but in circumstances where either the injury or its cause is not immediately apparent, federal courts employ a discovery rule that delays accrual until the plaintiff knows or reasonably should know the factual basis of his claim.[2] In *Donahue v. United States*,[3] the United States Court of Appeals for the First Circuit considered whether publicity regarding the government's role in causing the plaintiffs' injuries was sufficient to start the running of the FTCA claim-accrual period.[4] The court held that the two-year statute of limitations time barred the plaintiffs' FTCA claims because widespread media coverage should have made them aware of the causal link between the government's actions and the deaths of their loved ones.[5]

In January 1982, Edward "Brian" Halloran, a member of the Winter Hill Gang, offered the FBI information implicating the gang's commander, James "Whitey" Bulger, and one of his top lieutenants, Stephen "the Rifleman" Flemmi, in the murder of businessman Roger Wheeler.[6] Unbeknownst to

1. *See* 28 U.S.C. § 1346(a)–(b)(1) (2006) (allowing private individuals to bring suit against United States in narrow set of circumstances). Congress enacted the FTCA in 1946 as a limited waiver of sovereign immunity. *See* Román-Cancel v. United States, 613 F.3d 37, 41 (1st Cir. 2010). This limited waiver permits suits when the plaintiff has suffered personal injury, death, or property damage, and the plaintiff's harm was caused by the negligent or wrongful act or omission of a government employee acting within the scope of his employment. *See* 28 U.S.C. § 1346(b) (2006). This waiver of sovereign immunity is hedged by statutory conditions explained in other sections of the FTCA. *See* 28 U.S.C. § 2680 (2006) (enumerating exceptions to liability under FTCA).

2. *See* United States v. Kubrick, 444 U.S. 111, 122 (1979). *Kubrick* created the FTCA discovery rule in a medical malpractice context, and held that the two-year FTCA statute of limitations does not begin to run until the plaintiff knows of both the existence and cause of his injury. *Id.* at 119-20; *see also* Díaz v. United States, 165 F.3d 1337, 1339 (11th Cir. 1999) (holding discovery rule protects ignorant plaintiffs when causal link between injury and tortfeasor has not materialized). The Supreme Court has recently displayed disdain for the discovery rule, indicating that it has strayed from its intended goal of providing relief to medical malpractice victims. *See* TRW Inc. v. Andrews, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) (pointing to Congress to balance remediation and repose, not courts).

3. 634 F.3d 615 (1st Cir. 2011).

4. *See id.* at 621-22.

5. *See id.* at 625 (claiming FBI complicity in murders came to forefront in April 1998); *see also* 28 U.S.C. § 2675(a) (2006) (requiring potential plaintiffs file claim with federal agency before taking legal action); *infra* note 23 (explaining FTCA statute of limitations).

6. *See* 634 F.3d at 616, 617-18. Bulger and Flemmi directed Winter Hill Gang member John Martorano

Halloran, FBI agent John Connolly and his supervisor John Morris had recruited Bulger and Flemmi as informants to infiltrate Boston's Italian Mafia, and the agents soon learned of Halloran's allegations.[7] On May 11, 1982, Halloran caught a ride from his neighbor, Michael Donahue, when a car pulled alongside them and bombarded their vehicle with gunfire, killing Donahue instantly and mortally wounding Halloran, who died in the ambulance.[8] The FBI was interested in Bulger and Flemmi as potential suspects; consequently, Connolly and Morris prevented the emergence of information implicating the pair in the murders.[9] In 1985, the Suffolk County District Attorney tried Winter Hill Gang associate James "Jimmy" Flynn for the murders, but the jury acquitted Flynn, and the murders remained unsolved until the mid-1990s.[10]

In 1995, the United States Attorney for the District of Massachusetts obtained a lengthy indictment of Bulger, Flemmi, and other Winter Hill Gang associates.[11] Morris testified under a grant of immunity on April 22, 1998, and admitted that he notified Connolly about Halloran's offer to implicate Bulger in Wheeler's murder, and further testified that after the Donahue and Halloran murders, he told Connolly that he "did not want another Halloran" the next time they passed information to Bulger and Flemmi.[12] Morris's testimony

to kill Wheeler to prevent him from discovering their profit-skimming scheme. *See* Callahan v. United States, 426 F.3d 444, 447 (1st Cir. 2005).

7. *See* 634 F.3d at 617-18 (detailing interactions between Halloran and FBI in early 1982). Connolly and Morris offered protection to the Winter Hill Gang in exchange for bribes and information regarding the FBI's investigation of the Boston Mafia. *See, e.g.*, United States v. Connolly, 504 F.3d 206, 210 (1st Cir. 2007) (asserting Connolly "sold protection" to Winter Hill Gang in exchange for favors); Rakes v. United States, 442 F.3d 7, 12 (1st Cir. 2006) (noting Connolly "crossed a critical line" to permit Winter Hill Gang activities); United States v. Salemme, 91 F. Supp. 2d 141, 210 (D. Mass. 1999) (detailing Bulger giving Morris's secretary $1000 to meet Morris for romantic purposes), *rev'd in part sub nom.* United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000). In order to protect this partnership, Connolly and Morris deemed Halloran untrustworthy, and as a result, the FBI rejected his offer and denied his request for witness protection. *See* 634 F.3d at 618.

8. 634 F.3d at 618. In the ambulance, Halloran identified James Flynn, a Winter Hill Gang associate, as the shooter. *Id.*

9. *See id.* at 618-19 (summarizing Connolly and Morris's protection of Bulger and Flemmi in subsequent investigation); *see also* United States v. Salemme, 91 F. Supp. 2d 141, 154 (D. Mass. 1999) ("Morris believed that Bulger and Flemmi were responsible for Halloran's death, but did not disclose to the agents investigating it that they had been told that Halloran was cooperating with the Bureau."), *rev'd in part sub nom.* United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000). Connolly and Morris made Halloran's incriminating information inaccessible to others involved in the investigation by failing to properly index Halloran's statements with reference to Bulger and Flemmi's names, effectively disconnecting them from the investigation. *See* 634 F.3d at 619.

10. *See* 634 F.3d at 619.

11. *See id.* (declaring indictment catalyst for revealing impropriety of FBI-Winter Hill Gang relationship). Bulger fled before his indictment was announced and was a fugitive for sixteen years before his 2011 capture in California. *See* 634 F.3d at 619 (describing Bulger's disappearance); Shelley Murphy, *Whitey Bulger Arrested: Boston Gangster Surrenders Quietly in Calif. After 16 Years on Run*, BOS. GLOBE, June 23, 2011, at A1.

12. *See* 634 F.3d at 619. Connolly invoked his Fifth Amendment right against self-incrimination at the hearings. *See* United States v. Salemme, 91 F. Supp. 2d 141, 313 (D. Mass. 1999), *rev'd in part sub nom.*

spurred months of local and national media coverage detailing the FBI's connection to Bulger that led to the Donahue and Halloran murders.[13] The hearings concluded in October of 1998, resulting in District Court Judge Mark Wolf's exhaustive September 15, 1999 opinion, which detailed the depth of the FBI's improper relationship with Bulger and Flemmi.[14]

The Halloran and Donahue families filed administrative claims with the FBI on September 25, 2000 and March 29, 2001, respectively, and after the government failed to satisfy each claim, the plaintiffs sued separately.[15] The United States brought motions to dismiss both cases based on the expiration of the FTCA statute of limitations, but the court found that the Donahues and Hallorans were unaware of the media reports and held that it was reasonable for them to be unaware of the factual basis of their claims due to their belief that Flynn was the murderer, the sixteen year gap between his trial, and the reports of the FBI's involvement.[16] In a consolidated bench trial of the Halloran and Donahue suits, the court awarded the Halloran family $2,061,000 and the Donahue family $6,335,100, which the Government appealed by challenging the denial of its motions to dismiss.[17] The United States Court of Appeals for the First Circuit reversed the denial of the Government's motions to dismiss in a two to one decision, holding that the claims were time barred because they accrued no later than September 2, 1998 based on the months of testimony and

United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000). A federal jury eventually convicted Connolly on charges of racketeering, obstruction of justice, and making false statements. *See* United States v. Connolly, 341 F.3d 16, 19 (1st Cir. 2003) (upholding Connolly's district court convictions).

13. 634 F.3d at 620. The hearings revealed that an incarcerated drug dealer told the FBI that Bulger was responsible for Halloran's killing, but the FBI never recorded this account. *See id.* Flemmi's testimony also corroborated Morris's testimony, stating that the FBI tipped him off about the information Halloran gave them. *Id.* Many newspaper articles detailed Morris's testimony about the FBI–Winter Hill Gang relationship and its consequences for Donahue and Halloran. *See, e.g.*, Peter Gelzinis, *'Good' Guys Weren't Good to Halloran*, BOS. HERALD, Apr. 23, 1998, at 6; Patricia Nealon, *Ex-Agent Says He Told of Informer: Fringe Gangster Turned up Dead*, BOS. GLOBE, Apr. 23, 1998, at B1; Ralph Ranalli, *FBI Was Allegedly Told of Bulger Role in Murder*, BOS. HERALD, June 4, 1998, at 4. An episode of *60 Minutes* also discussed the FBI's complicity in the murders, alleging that the case was not solved because the FBI protected Bulger. 634 F.3d at 621.

14. *See* 634 F.3d at 621. *See generally* United States v. Salemme, 91 F. Supp. 2d 141 (D. Mass. 1999) (Judge Wolf's opinion), *rev'd in part sub nom.* United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000).

15. 634 F.3d at 621.

16. *See* Donahue v. FBI, 204 F. Supp. 2d 169, 177-78 (D. Mass. 2002) (denying Government's motion to dismiss based on expiration of two-year statute of limitations), *rev'd sub nom.* Donahue v. United States, 634 F.3d 615 (1st Cir. 2011); Estate of Halloran v. United States, No. 01-11346-NG (D. Mass. June 25, 2002) (denying Government's motion to dismiss), *rev'd sub nom.* Donahue v. United States, 634 F.3d 615 (1st Cir. 2011). The district court in *Donahue* declared that the sixteen-year period between Donahue's murder and Morris's testimony, as well as the reasonableness of the Donahue family's belief that Flynn was Donahue's murderer, did not constitute a failure of diligence under the discovery rule. *See* Donahue v. FBI, 204 F. Supp. 2d 169, 178 (D. Mass. 2002), *rev'd sub nom.* Donahue v. United States, 634 F.3d 615 (1st Cir. 2011). The district court also noted that the Government was unable to present any evidence to contradict the proposition that the plaintiffs lacked knowledge of the media reports. *See id.* at 177.

17. *See* 634 F.3d at 622.

media scrutiny outlining the link between the FBI and the murders.[18]

Enacted in 1946, the FTCA acts as a limited waiver of sovereign immunity aimed at granting redress to plaintiffs who suffer negligent or wrongful tortious injury at the hands of a government actor.[19] At its genesis in *United States v. Kubrick*, the FTCA discovery rule was influenced by the discovery rule that the Court had previously applied to claims brought against the government under the Federal Employers Liability Act (FELA).[20] While an FTCA claim generally accrues at the time of injury, the discovery rule provides that certain claims do not accrue until a plaintiff knows or, in the exercise of reasonable diligence, should know of both the existence and the cause of his injury.[21] The FTCA discovery rule was originally applied in the medical malpractice context, but federal courts have since expanded its application to other kinds of claims arising under the FTCA.[22] The two-year FTCA statute of limitations begins to run at the moment the plaintiff's claim accrues.[23]

18. *See id.* at 625, 630. *But see id.* at 633-35 (Torruella, J., dissenting) (arguing Donahue and Halloran claims accrued in September 1999, after Judge Wolf published his opinion).

19. *See supra* note 1 and accompanying text (describing FTCA). In *Kubrick*, the Court noted the limited waiver of immunity and cautioned that this waiver should not be construed to extend the statute of limitations beyond what Congress intended. *See* United States v. Kubrick, 444 U.S. 111, 125 (1979). The sovereign can only be sued to the point that the legislature has agreed and the FTCA is the only relief available for tort claims. *See* Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1107 (2009).

20. *See* United States v. Kubrick, 444 U.S. 111, 127 (1979) (Stevens, J., dissenting) (discussing use of discovery rule under analogous laws); Urie v. Thompson, 337 U.S. 163, 169-70 (1949) (holding plaintiff's "blameless ignorance" of facts delayed accrual of his FELA claim until disease manifested). The plaintiff in *Urie* was a fireman on an interstate steam locomotive who contracted silicosis in the line of duty. Urie v. Thompson, 337 U.S. 163, 165-66 (1949). Doctors did not diagnose him until after he was too ill to work. *Id.* at 169. The Court refused to hold the plaintiff responsible for knowing of the "unknown and inherently unknowable" condition. *Id.* The *Urie* Court created the discovery rule of accrual. *See* Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 553 (2004) (stating before *Urie*, tort claims accrued at time of injury without regard for plaintiff's knowledge).

21. United States v. Kubrick, 444 U.S. 111, 125 (1979). The First Circuit has stated that a claim accrues when a plaintiff knows or reasonably should know of both his injury and sufficient facts to allow a reasonable person to believe there is a causal link between the government and his injury. *See* Skwira v. United States, 344 F.3d 64, 78 (1st Cir. 2003). The discovery rule affords leniency to plaintiffs' rights in departing from the "accrual at time of injury" framework. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008) (pointing to discovery rule's aim of striking balance between interests of plaintiffs and defendants); Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1, 24 (1991) (noting courts inevitably balance purpose of statute of limitations with remedial purpose of FTCA).

22. *See, e.g.*, Plaza Speedway Inc. v. United States, 311 F.3d 1262, 1270-71 (10th Cir. 2002) (applying discovery rule when plaintiff's latent injury manifested after long-term exposure to government contaminants); Díaz v. United States, 165 F.3d 1337, 1340 (11th Cir. 1999) (applying discovery rule in wrongful death cause of action); Sinclair & Szypszak, *supra* note 21, at 30 (asserting courts have expanded discovery rule beyond medical malpractice context); *see also supra* note 2 (pointing out original application of FTCA discovery rule occurred in medical malpractice case).

23. 28 U.S.C. § 2401(b) (2006) ("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 claim accrues."). In an effort to protect defendants from having to answer stale claims, statutes of limitations begin to run at the moment a

Under the discovery rule, a plaintiff has a duty to undertake reasonable diligence to investigate potential claims; the determination of the reasonableness of a plaintiff's diligence is fact-specific.[24] The framework for considering what a reasonable plaintiff should have known or discovered in the course of a diligent investigation is an objective one.[25] In light of these general guidelines, courts have had difficulty ascertaining what degree of knowledge provides a sufficient factual basis to trigger accrual under the discovery rule.[26] Courts have established that something less than definitive knowledge is required, but the threshold amount of knowledge has not been consistently stated.[27]

In assessing the amount of knowledge necessary for claim accrual under the FTCA, courts have differed as to whether reports in the media can supply a

claim accrues. *See* R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349 (1944) (noting legislative judgment indicating right to avoid stale claims eventually overtakes right to pursue them); Bain & Colella, *supra* note 20, at 571-74 (delineating policies underlying statutes of limitations); Robert D. Laurie, Note, *When Does Time Begin: A Clarification of the Federal Courts' Inconsistent Application of the Federal "Catch All" Statute of Limitations*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 57, 60 (2000) (noting statutes of limitations protect parties from perpetual liability).

24. *See* United States v. Kubrick, 444 U.S. 111, 128 (1979) (Stevens, J., dissenting) ("A plaintiff who remains ignorant through lack of diligence cannot be characterized as 'blameless.'"); *see also* Rakes v. United States, 442 F.3d 7, 20 (1st Cir. 2006) (detailing factual inquiry involved in assessing what generally available facts plaintiff should know); Sinclair & Szypszak, *supra* note 21, at 19 ("[D]etermining at what point the plaintiff failed to exercise due diligence is often a difficult task."). Assessing the reasonableness of the plaintiff's diligence is a fact-specific determination that is guided by the inferences drawn from the facts of each case. *See* David L. Abney, *For Whom the Statute Tolls: Medical Malpractice Under the Federal Tort Claims Act*, 61 NOTRE DAME L. REV. 696, 707 (1986).

25. *See* Skwira v. United States, 344 F.3d 64, 78 (1st Cir. 2003) (recognizing varying degree of knowledge of injury and cause prompting one to undertake reasonable diligence); Gonzalez v. United States, 284 F.3d 281, 288-89 (1st Cir. 2002) (holding test for when plaintiff should know basis of claim objective one); Abney, *supra* note 24, at 707 (confirming standard for evaluating reasonable diligence objective, not subjective); *cf.* Cascone v. United States, 370 F.3d 95, 104 (1st Cir. 2004) (holding plaintiff's particular circumstances relevant in accrual assessment).

26. *See* Skwira v. United States, 344 F.3d 64, 76 (1st Cir. 2003) (discussing lack of definitive standard regarding level of knowledge required to trigger accrual). In *Skwira*, the First Circuit observed that the Supreme Court in *Kubrick* left unanswered the important question of when plaintiffs could be charged with sufficient knowledge for their claims to have accrued. *Id.*; *see also* Cutting v. United States, 204 F. Supp. 2d 216, 224 (D. Mass. 2002) ("The issue of precisely how much knowledge is needed to trigger accrual bedevils discovery rule analysis."); Sinclair & Szypszak, *supra* note 21, at 17-18 (observing *Kubrick* did not adequately address applicability of discovery rule to more complex fact patterns); Cory Zajdel, Note, *Discovery Rule in Medical Malpractice Under the Federal Tort Claims Act: The Supreme Court's Decision in* United States v. Kubrick *Was Not Meant to Be Secondary Authority*, 20 J. CONTEMP. HEALTH L. & POL'Y 443, 450-51 (2004) (pointing out split among circuits as to amount of knowledge necessary to trigger accrual).

27. *See, e.g.*, Skwira v. United States, 344 F.3d 64, 78 (1st Cir. 2003) (holding something less than definitive knowledge required); Garza v. U.S. Bureau of Prisons, 284 F.3d 930, 934-35 (8th Cir. 2002) (holding claim accrues when plaintiff on notice of injury and potential cause); Kronisch v. United States, 150 F.3d 112, 121 (2d Cir. 1998) (holding "a mere hunch, hint, suspicion or rumor of a claim" does not trigger accrual); *see also* Abney, *supra* note 24, at 704-05 (noting courts prefer actual knowledge but hold plaintiffs accountable for ignorance of generally available knowledge).

sufficient level of knowledge.[28] Over the last decade, the First Circuit has consistently held that plaintiffs should be charged with constructive knowledge of widely reported events.[29] In particular, the First Circuit has held that when certain facts and data achieve a level of notoriety, that notoriety can be reasonably imputed to prospective plaintiffs, satisfying constructive knowledge and triggering claim accrual.[30] In cases arising out of the same circumstances, however, the First Circuit has drawn a line distinguishing plaintiffs who have reason to suspect the government caused their injury from those who do not.[31]

28. *Compare* Heinrich v. Sweet, 44 F. Supp. 2d 408, 417 (D. Mass. 1999) (holding evidence connecting injury to government in scientific journals and newspapers did not provide notice), *and* Orlikow v. United States, 682 F. Supp. 77, 85 (D.D.C. 1988) (stating mere publications of media sources do not necessarily put plaintiffs on notice), *with* Rakes v. United States, 442 F.3d 7, 23 (1st Cir. 2006) (holding plaintiffs should be aware of general theme of widely circulated news reports), *and* United Klans of Am. v. McGovern, 621 F.2d 152, 154 (5th Cir. 1980) (holding widely publicized events charge plaintiffs with knowledge for discovery rule purposes).

29. *See* Rakes v. United States, 442 F.3d 7, 20 (1st Cir. 2006) ("At some point, facts achieve a local notoriety great enough that the only practicable course is to attribute knowledge of them to people in a position to become familiar with them."); McIntyre v. United States, 367 F.3d 38, 60 (1st Cir. 2004) (charging plaintiffs with knowledge of events when they receive widespread publicity); Carl M. Wagner, United States v. Kubrick*: Scope and Application*, 120 MIL. L. REV. 139, 158 (1988) (suggesting constructive knowledge satisfied when facts establishing cause of action reasonably available). *But see* Cascone v. United States, 370 F.3d 95, 108 (1st Cir. 2004) (holding local media reports insufficient to charge plaintiffs with knowledge). *Rakes* and *McIntyre* arose out of the Bulger–FBI saga, and in both cases the plaintiffs had constructive knowledge of the Bulger–FBI relationship from the media crush that documented the federal hearings. *See* Rakes v. United States, 442 F.3d 7, 22 (1st Cir. 2006); McIntyre v. United States, 367 F.3d 38, 60 (1st Cir. 2004). Both plaintiffs' claims were time barred because the plaintiffs filed them more than two years after their claims accrued in the midst of the media storm surrounding the 1998 federal hearings. *See* Rakes v. United States, 442 F.3d 7, 22-23 (1st Cir. 2006); McIntyre v. United States, 367 F.3d 38, 60-61 (1st Cir. 2004).

30. *See* Patterson v. United States, 451 F.3d 268, 271 (1st Cir. 2006) (denying plaintiffs' claim because it accrued at time of breaking media reports); Rakes v. United States, 442 F.3d 7, 23 (1st Cir. 2006) (holding plaintiff's claims time barred because certain facts traveled through communication channels and triggered accrual); *see also* Abney, *supra* note 24, at 704-05 (observing courts prefer actual knowledge but rely on constructive knowledge when information generally available). Some circuits have declined to charge plaintiffs with constructive knowledge ascertained through "community awareness" from media reports. *See In re* Swine Flu Prods. Liab. Litig., 764 F.2d 637, 640-41 (9th Cir. 1985) (holding plaintiff could not be charged with knowledge of press reports as matter of law).

31. *Compare* Cascone v. United States, 370 F.3d 95, 107-08 (1st Cir. 2004) (refusing to charge plaintiff with knowledge of media reports and government inquiry into suspicious deaths), *with* Skwira v. United States, 344 F.3d 64, 81-82 (1st Cir. 2003) (charging plaintiff with knowledge of decedent's suspicious death based on media reports and government investigation). In *Cascone*, the decedent was a patient of a Veteran Affairs hospital and had a history of heart problems; thus, his estate suspected no wrongdoing when he died of a heart attack. *See* Cascone v. United States, 370 F.3d 95, 97-98 (1st Cir. 2004). When media reports and government inquiries discussed the possibility that a government employee killed other members of the decedents' ward by inducing heart attacks, the reports did not mention the decedents' name, and no one contacted the decedent's family during the investigation; thus, the court held that the estate had a sufficient preexisting explanation for the death, and did not have enough information to lead a reasonable person in its position to suspect a governmental cause of injury. *Id.* at 104-05, 107-08. In *Skwira*, the decedent was a patient in the same ward, but the court held that the media reports, government investigation, and change in the cause of death on the decedent's death certificate provided sufficient information for the estate to inquire further about a claim against the government. Skwira v. United States, 344 F.3d 64, 80 (1st Cir. 2003). In its assessment, the court

In *Donahue v. United States*, the First Circuit once again considered whether widespread publicity of the government's role in causing the plaintiffs' injuries provided plaintiffs with sufficient factual information to start the FTCA claim-accrual period.[32] Stating that the plaintiffs' actual knowledge was not at issue, the court focused its assessment on the information available to the plaintiffs following Morris's testimony.[33] Noting that Morris's testimony and the subsequent media coverage painted a clear picture of the government's involvement in the murders, the court proclaimed that such widely available information provided more than a hunch of the government's involvement and triggered a duty on behalf of the plaintiffs to pursue a diligent investigation.[34] The court rejected the plaintiffs' argument that the sixteen-year gap between the murders and the coverage of Morris's testimony justified delaying accrual because it had ignored similar gaps in previous cases.[35] The court also rejected the plaintiffs' argument that they were reasonable in not investigating the connection between the government and their injury because they believed Flynn was the true killer despite his acquittal.[36] Citing the importance of Morris's testimony, the court asserted that the belief about Flynn was no longer reasonable once the FBI's impropriety became public knowledge.[37]

The court was unconvinced that the plaintiffs lacked sufficient knowledge to establish their claims until Judge Wolf published his opinion in late 1999, reasoning that the opinion was merely a more cogent presentation of the

noted the suspicious nature of the heart attack based on the decedent entering the facility for alcoholism treatment, and the pivotal fact that investigators exhumed the decedent's body for an autopsy that reported a different cause of death than the natural heart attack stated on the death certificate. *Id.*

32. *See* 634 F.3d at 622-23. The court focused its analysis on the accrual issue, but briefly addressed plaintiffs' argument that the statute of limitations should be equitably tolled. *See id.* at 629 (rejecting equitable tolling argument). Courts typically deny requests to equitably toll the FTCA statute of limitations. *See* Abney, *supra* note 24, at 720 (observing strict interpretation of limitation period precludes equitable tolling); Figley, *supra* note 19, at 1120 (commenting on lack of equitable tolling in FTCA context).

33. *See* 634 F.3d at 626.

34. *See id.* at 626-27 (insinuating testimony and publicity provided requisite knowledge for plaintiffs' claims to accrue).

35. *See id.* at 627 (stating widespread publicity overcomes sixteen-year gap); *see also* Patterson v. United States, 451 F.3d 268, 271 (1st. Cir. 2006) (holding thirty-five-year gap did not delay accrual due to "widespread publicity"). In *Patterson*, the media reports that Flemmi killed the decedent while a complicit FBI failed to prevent the murder surfaced thirty-five years after the murder occurred. Patterson v. United States, 451 F.3d 268, 271 (1st. Cir. 2006). In determining when the claim accrued, the court charged the decedent's estate with knowledge of these reports despite the thirty-five-year gap separating the reports and the murder. *See id.* at 269.

36. *See* 634 F.3d at 628 (declaring plaintiffs "cannot rely on the specter of Flynn to justify their delay"). In addressing the plaintiffs' claims that the statute of limitations should be equitably tolled due to the government's concealment of facts regarding their claims, the court indicated that equitable tolling did not apply in these circumstances due to the plaintiffs' lack of diligence. *See id.* at 629 (refusing to equitably toll statute of limitations).

37. *See id.*

already well-publicized information available after Morris's testimony.[38] Despite expressing sympathy for the plaintiffs' troubles, the court recognized that the mechanical nature of the statute of limitations sometimes has harsh consequences.[39] The court charged the plaintiffs with knowledge of widespread media coverage, and held that this knowledge triggered accrual more than two years before the plaintiffs filed their claims, thereby rendering their claims time barred by the FTCA statute of limitations.[40]

In holding that the plaintiffs should have been aware of the publicity surrounding Morris's testimony, the First Circuit construed the discovery rule too narrowly and punished the plaintiffs for their blameless ignorance.[41] Relying heavily on cases that arose out of the relationship between the FBI and the Winter Hill Gang, the court skewed the reasonable person standard by comparing the Donahues and Hallorans to other plaintiffs who previously sued the government because of the FBI's relationship with Bulger.[42] However, unlike their predecessors, for sixteen years the Donahue and Halloran families reasonably believed that Jimmy Flynn—not the government—caused their injuries.[43] The *Donahue* plaintiffs were reasonable in not investigating the publicity surrounding Morris's testimony because the perceived cause of their family members' deaths was in hand; furthermore, there was no proof presented that they were aware of the reports concerning Morris's testimony.[44]

38. *See id.*

39. *See id.* The court also suggested that Congress's statutes are binding, and only Congress can mitigate the occasional harsh consequences of the statute of limitations. *See id.*

40. *See* 634 F.3d at 630. The court reversed the district court's denial of the Government's motion to dismiss for lack of subject matter jurisdiction and remanded with instructions to enter favorable judgments for the Government in both cases. *Id.* In his dissent, Judge Torruella argues that recent First Circuit jurisprudence gives the impression that plaintiffs need to bring claims based on speculation or rumors. *See id.* at 638 (Torruella, J., dissenting).

41. *See id.* at 633-34 (arguing majority's interpretation of discovery rule misguided); *see also* Abney, *supra* note 24, at 711 (declaring government must bear some blame for victim's ignorance). The dissent also argues that the majority abandons the premise that the plaintiffs' factual circumstances must be included in the court's claim accrual analysis by pointing to the decision in *Cascone*, which stressed, "The issue is whether a reasonable person *similarly situated* to the plaintiff would have known the necessary facts." *See* 634 F.3d at 634 (Torruella, J., dissenting) (quoting Cascone v. United States, 370 F.3d 95, 104 (1st Cir. 2004)).

42. *See* 634 F.3d at 633-34 (Torruella, J., dissenting) (opining majority acknowledged premise but did not follow it). By treating the present plaintiffs as if their circumstances were identical to previous plaintiffs, the majority ignored the fact that the Donahue and Halloran families were not similarly situated to the families of other Bulger victims. *See id.* at 632-33.

43. *See id.* at 634-36 (detailing importance of Flynn as perceived cause of harm). The dissent notes that because Flynn was brought to trial, the Government was confident beyond a reasonable doubt of his guilt, and the Donahues and Hallorans had no reason to believe that the government played a role in their loss. *See id.* at 634-35. Addressing the majority's contention that Flynn's acquittal undercuts the reasonableness of the plaintiffs' belief that Flynn was the cause of their injury, the dissent asserts that factually guilty individuals frequently escape conviction. *See id.* at 634.

44. *See id.* at 633 (contending plaintiffs acted reasonably in giving little credence to media reports). Pointing to *Cascone*, the dissent notes that it makes a significant difference in the FTCA accrual analysis if the plaintiff has a credible explanation for his injury that does not bespeak government wrongdoing. *See id.* at 636.

Previous First Circuit decisions had distinguished the nuances of different claims arising out of a common set of facts, but the *Donahue* court failed to recognize the factual nuances associated with the plaintiffs' claims.[45]

In nearly ten years of civil suits arising out of the illicit relationship between FBI agents and the Winter Hill Gang, the First Circuit has only used the discovery rule in favor of a plaintiff on one occasion.[46] The court's application of the discovery rule distorts the concept of when a plaintiff can be charged with sufficient knowledge for his claim to accrue and is indicative of a growing hostility towards the rule.[47] The FTCA discovery rule purports to balance the interests of plaintiffs and the sovereign, but this pattern of lowering the bar for accrual tips this balance towards the government.[48] The inconsistent application of the discovery rule by the First Circuit, and across the other circuits, can be traced to the statute of limitations' inability to define the word "accrue."[49] The courts have extended the FTCA discovery rule to an array of

The dissent also rejects the majority's attempt to correlate the plaintiff in *Wheeler* to the present plaintiffs, as the Wheeler family spent the intervening years searching for the culprit, whereas the government led the Donahues and Hallorans to believe Flynn was the cause of their injury. *See id.* at 635-36.

45. *See id.* at 633-34 (comparing Donahue and Halloran families to plaintiff in *Cascone*); *see also supra* note 31 (elucidating factual nuances resulting in different holdings in cases arising out of common tortious conduct).

46. *See* McIntyre v. United States, 367 F.3d 38, 57 (1st Cir. 2004) (reversing dismissal of plaintiff's claims). *But see* Rakes v. United States, 442 F.3d 7, 24, 27 (1st Cir. 2006) (charging plaintiff with knowledge of news reports and holding claims time barred); Patterson v. United States, 451 F.3d 268, 273 (1st Cir. 2006) (holding plaintiff's claim time barred as claim accrued at time of breaking media reports); Callahan v. United States, 426 F.3d 444, 455 (1st Cir. 2005) (holding claims time barred as plaintiff should have reasonably known of publicity). The decedent in *McIntyre* was killed by the Winter Hill Gang during the time of the illicit FBI relationship with the gang, but the court held that there were insufficient facts to determine accrual and to justify holding the estate's claims time barred. *See* McIntyre v. United States, 367 F.3d 38, 56-57 (1st Cir. 2004). The *Donahue* dissent also notes an arguably open animosity towards FTCA plaintiffs in these decisions. *See* 634 F.3d at 638 (Torruella, J., dissenting).

47. *See* TRW Inc. v. Andrews, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) ("[I]njury-discovery rule applied by the Court of Appeals is a bad wine of recent vintage."). The dissent in *Donahue* suspects that recent First Circuit jurisprudence has rewarded paranoia while claiming to do the opposite. *See* 634 F.3d at 638 (Torruella, J., dissenting).

48. *See* 634 F.3d at 638 (Torruella, J., dissenting) (announcing majority opinion and other First Circuit precedent augmented accrual analysis). In holding that claims accrue at the time of media speculation and rumors, the dissent believes that the majority encourages preemptive filing, in conflict with the current heightened pleading requirements. *See id.* The dissent notes that the majority's suggestion that plaintiffs should file administrative claims without sufficient evidence imposes a "sue now, ask questions later" mentality and puts plaintiffs at risk of receiving motions to dismiss for failure to state a claim. *See id.* The dissent also scorns the majority's reasoning by insinuating that First Circuit holdings in the civil cases arising out of the FBI-Bulger relationship reward wicked behavior and reinstate sovereign immunity. *See id.*

49. *See* Sinclair & Szypszak, *supra* note 21, at 9 (explaining broad connotations of "accrual" at time 28 U.S.C. § 2401 passed). Sinclair and Szypszak stress: "[S]ection 2401(b)'s imprecise language necessitates construction by the courts in all but the most straightforward cases." *Id.* at 25; *see also* Abney, *supra* note 24, at 721 (observing federal courts need to grapple with slippery definition of accrual); Zajdel, *supra* note 26, at 446-47 (observing important procedural matter of defining accrual nonexistent in statute of limitations). Zajdel also notes that the statute of limitations is shared with other federal statutes, and suffers from extensive interpretation of its general terms. *See* Zajdel, *supra* note 26, at 462.

tort claims, but they have failed to develop a cohesive approach to deciding when a claim begins to accrue under the FTCA.[50]

Both the Supreme Court and Congress are capable of remedying the accrual confusion in the FTCA statute of limitations.[51] The Supreme Court recently cast doubt on the discovery rule outside of the FTCA context, and should therefore grant certiorari to an FTCA discovery rule case to alleviate circuit confusion and clarify the contemporary understanding of *Kubrick*.[52] If the Court does not address this issue, then Congress should step in to produce a comprehensive explanation of the FTCA accrual standard by amending the statute of limitations.[53] Until the Court or Congress addresses the accrual issue, the interpretation of the discovery rule will continue to upset the balance between FTCA plaintiffs and the government that the Supreme Court set out to achieve in *Kubrick*.[54]

Donahue v. United States illustrates the difficulty in determining when a plaintiff's claim accrues under the FTCA's discovery rule. The First Circuit adhered to its holdings in previous suits arising out of the Bulger–FBI relationship by beginning the accrual timeline based on widespread publicity of the government actions, but the court failed to adequately address the Donahue

50. *See* Abney, *supra* note 24, at 697 (observing Congress's lack of discussion of claim accrual against government); Zajdel, *supra* note 26, at 450 (proffering circuits continue to divisively interpret accrual under FTCA). The ad hoc fashion in which courts have held plaintiffs responsible for knowledge of media reports exemplifies the inconsistency regarding claim accrual under the FTCA. *See supra* note 28 and accompanying text (comparing interpretations of amount of knowledge ascribed to plaintiffs because of media reports).

51. *See* Sinclair & Szypszak, *supra* note 21, at 47-52 (proposing three amendments to 28 U.S.C. § 2401(b)); Zajdel, *supra* note 26, at 460-64 (proposing administrative, judicial, and legislative reforms to settle accrual issue).

52. *See* Zajdel, *supra* note 26, at 461 (suggesting Supreme Court grant certiorari to FTCA discovery rule case). In *TRW*, the Supreme Court spoke at length about its concern with the discovery rule, but also pointed out that the Fair Credit Reporting Act (FCRA) discovery rule is legislatively granted in the FCRA statute of limitations, whereas the FTCA statute of limitations includes no such built-in provision. *See* TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001); *see also* 28 U.S.C. § 2401(b) (2006) (defining FTCA statute of limitations). The Supreme Court shirked the burden of determining the extension of the discovery rule, and suggested that it was a congressional matter. *See* TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001).

53. *See* Sinclair & Szypszak, *supra* note 21, at 44-45 (urging Congress to amend 28 U.S.C. § 2401(b) to authorize discovery rule under certain circumstances). Several states have statutes of limitations that attempt to define the scope of the discovery rule, and an amendment based on these models could promote uniformity and fairness. *Id.* at 46-47. Defining accrual as it applies in certain circumstances is an option that, although difficult, could help reduce confusion among the courts. *See* Zajdel, *supra* note 26, at 462.

54. *See supra* note 2 and accompanying text (explaining origin of FTCA discovery rule in *Kubrick*); *supra* note 21 and accompanying text (describing expansion of FTCA discovery rule beyond medical malpractice context); *supra* notes 26-31 and accompanying text (providing examples of inconsistent application of discovery rule across federal courts). Commentators have noted the inability of lower courts to consistently apply *Kubrick*; however, they posit that, at its core, *Kubrick* provides a framework for accrual analysis which can be coherently applied to all contexts. *See* Sinclair & Szypszak, *supra* note 21, at 4. Supreme Court Justice Antonin Scalia has suggested that a congressional solution would be more appropriate, noting that determining the manner in which a balance is to be struck between repose and remediation is a matter for Congress, not the courts. *See* TRW Inc. v. Andrews, 534 U.S. 19, 38 (2001) (Scalia, J., concurring).

and Halloran families' circumstances in its assessment of whether or not they acted as reasonable persons in their positions would. The holding is symptomatic of an inability to consistently define when claims accrue under *Kubrick* thanks, in part, to the imprecise language of the statute of limitations. Without further guidance from the Supreme Court or Congress, courts will continue to inconsistently apply the FTCA discovery rule to the detriment of plaintiffs who have been injured by the negligence of the federal government.

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