I.C. § 5-219(4)

From plain language to applied discovery rule

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Pre-1971 version “within two years”

1964: Discovery rule on foreign object left in patient’s body and, to some extent, fraudulent concealment.

Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224 (1964)

1969: Extended discovery rule to failure to diagnose.

Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1969)

1971 amendment to § 5-219(4)

- 2-year SOL on professional malpractice;
- Accrues “as of the time of the occurrence, act or omission complained of”
- Limitation period not extended by continuing consequences or damages or continuing professional relationship
- Exceptions
  - Foreign object left in body
  - Fraudulent concealment

“In all other professional malpractice actions, ‘the cause of action shall be deemed to have accrued **as of the time of the occurrence, act or omission complained of**….’ The action must be brought within two years of that time.”

Holmes v. Iwasa, 104 Idaho 179, 657 P.2d 476 (1983)

Stephens introduces "some damage" rule

"It is axiomatic that in order to recover under a theory of negligence, the plaintiff must prove actual damage. As a general rule the statute of limitations does not begin to run against a negligence action until **some damage** has occurred."

Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984)

Justice Bakes dissents:

The majority **effectively reads out of the statute and repeals the language** "shall be deemed to have accrued **as of the time of the occurrence, act or omission**" and that limitation period is **not to be extended** by reason of any "damages resulting therefrom"

Streib adopts completed tort theory

- Majority acknowledges that the 1971 amendment **abrogated the discovery rule**
- Nevertheless, creates modified discovery rule upon **completed tort theory**

Streib v. Veigel, 109 Idaho 174, 706 P.2d 63 (1985)

Justice Bakes again dissents:

- Majority **ignores plain language** of statute
- Majority's cited cases are "**totally irrelevant**" because none of the jurisdictions cited has statute similar to Section 5-219(4)

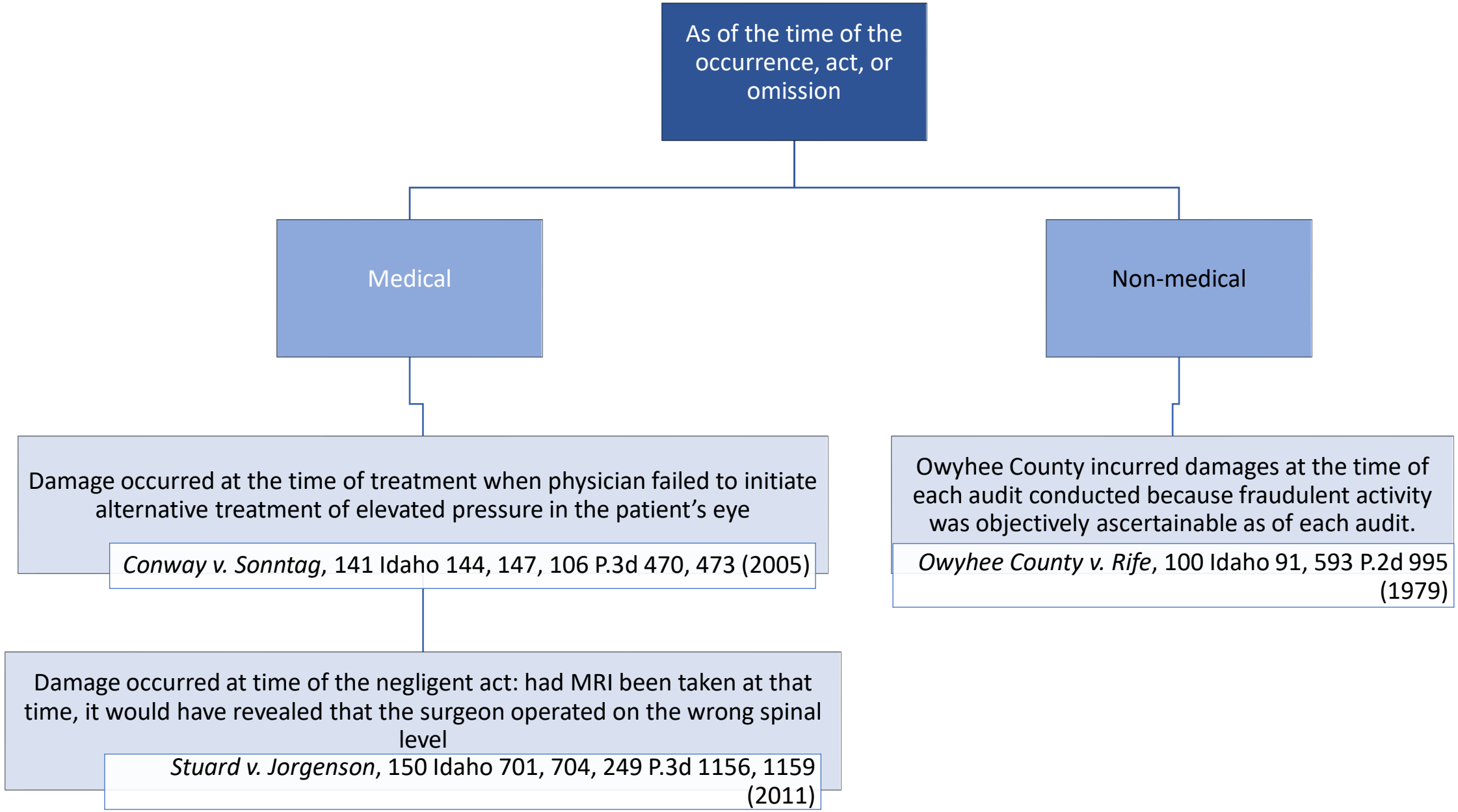
Objectively ascertainable damage

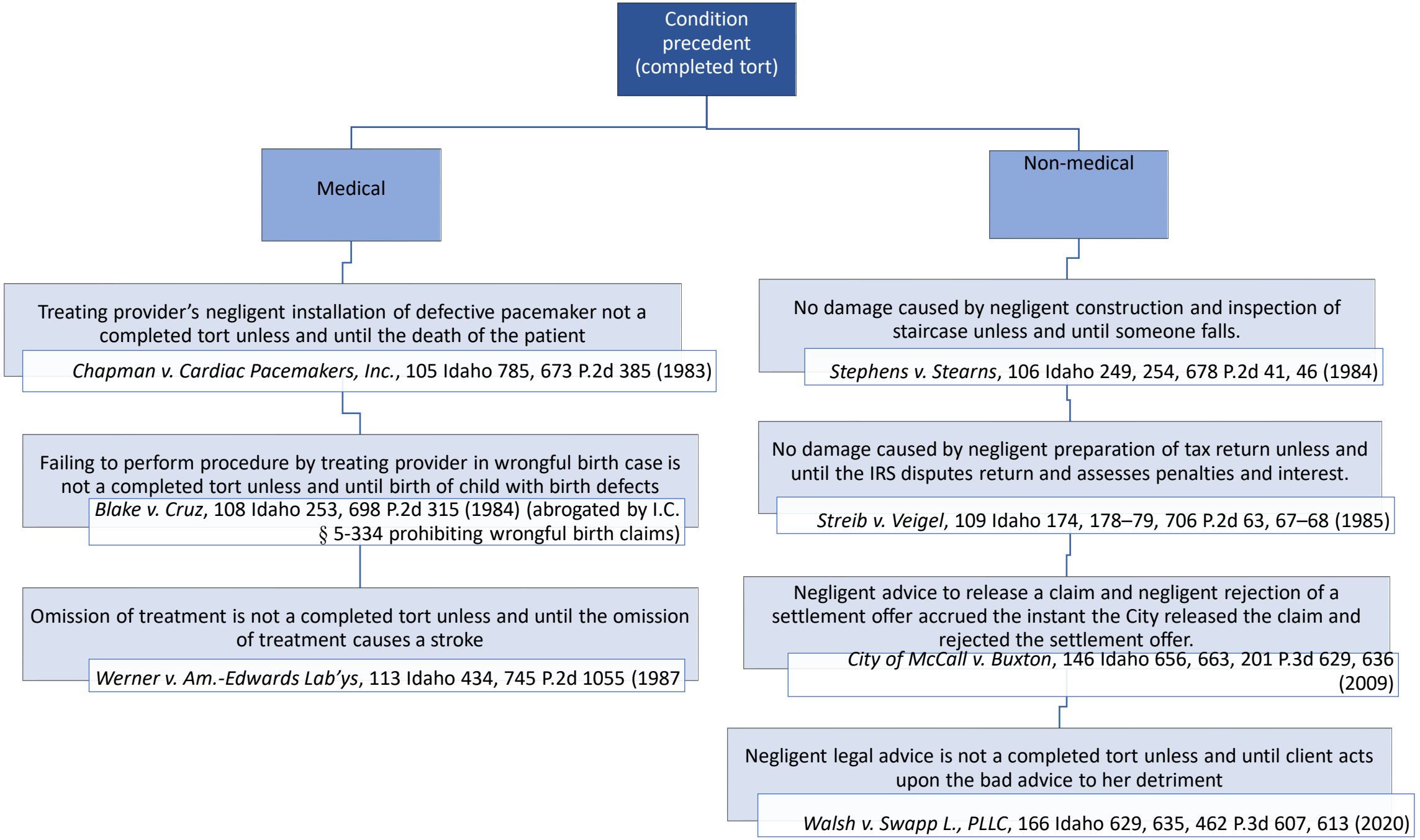
"In most cases, **the act or omission complained of and the injury to the plaintiff occur at the same time, particularly in the medical context**. However, where the functional defect (and its symptomology) does not occur at all until a later time, **the very nature of a tort action requires us to read this language in I.C. § 5–219(4) flexibly to avoid absurd results**."

"[I]n cases involving alleged negligent radiation treatment a cause of action does not accrue until the fact of injury becomes **objectively ascertainable**."

By "objectively ascertainable," "we mean that **objective medical proof would support the existence of an actual injury**."

Davis v. Moran, 112 Idaho 703, 735 P.2d 1014 (1987)


As of the time of the occurrence, act, or omission
Medical
Non-medical
Damage occurred at the time of treatment when physician failed to initiate alternative treatment of elevated pressure in the patient's eye
Conway v. Sonntag, 141 Idaho 144, 147, 106 P.3d 470, 473 (2005)
Damage occurred at time of the negligent act: had MRI been taken at that time, it would have revealed that the surgeon operated on the wrong spinal level
Stuard v. Jorgenson, 150 Idaho 701, 704, 249 P.3d 1156, 1159 (2011)
Owyhee County incurred damages at the time of each audit conducted because fraudulent activity was objectively ascertainable as of each audit.
Owyhee County v. Rife, 100 Idaho 91, 593 P.2d 995 (1979)


Condition precedent (completed tort)
Medical
Non-medical
Treating provider's negligent installation of defective pacemaker not a completed tort unless and until the death of the patient
Chapman v. Cardiac Pacemakers, Inc., 105 Idaho 785, 673 P.2d 385 (1983)
Failing to perform procedure by treating provider in wrongful birth case is not a completed tort unless and until birth of child with birth defects
Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984) (abrogated by I.C. § 5-334 prohibiting wrongful birth claims)
Omission of treatment is not a completed tort unless and until the omission of treatment causes a stroke
Werner v. Am.-Edwards Lab'ys, 113 Idaho 434, 745 P.2d 1055 (1987
No damage caused by negligent construction and inspection of staircase unless and until someone falls.
Stephens v. Stearns, 106 Idaho 249, 254, 678 P.2d 41, 46 (1984)
No damage caused by negligent preparation of tax return unless and until the IRS disputes return and assesses penalties and interest.
Streib v. Veigel, 109 Idaho 174, 178–79, 706 P.2d 63, 67–68 (1985)
Negligent advice to release a claim and negligent rejection of a settlement offer accrued the instant the City released the claim and rejected the settlement offer.
City of McCall v. Buxton, 146 Idaho 656, 663, 201 P.3d 629, 636 (2009)
Negligent legal advice is not a completed tort unless and until client acts upon the bad advice to her detriment
Walsh v. Swapp L., PLLC, 166 Idaho 629, 635, 462 P.3d 607, 613 (2020)

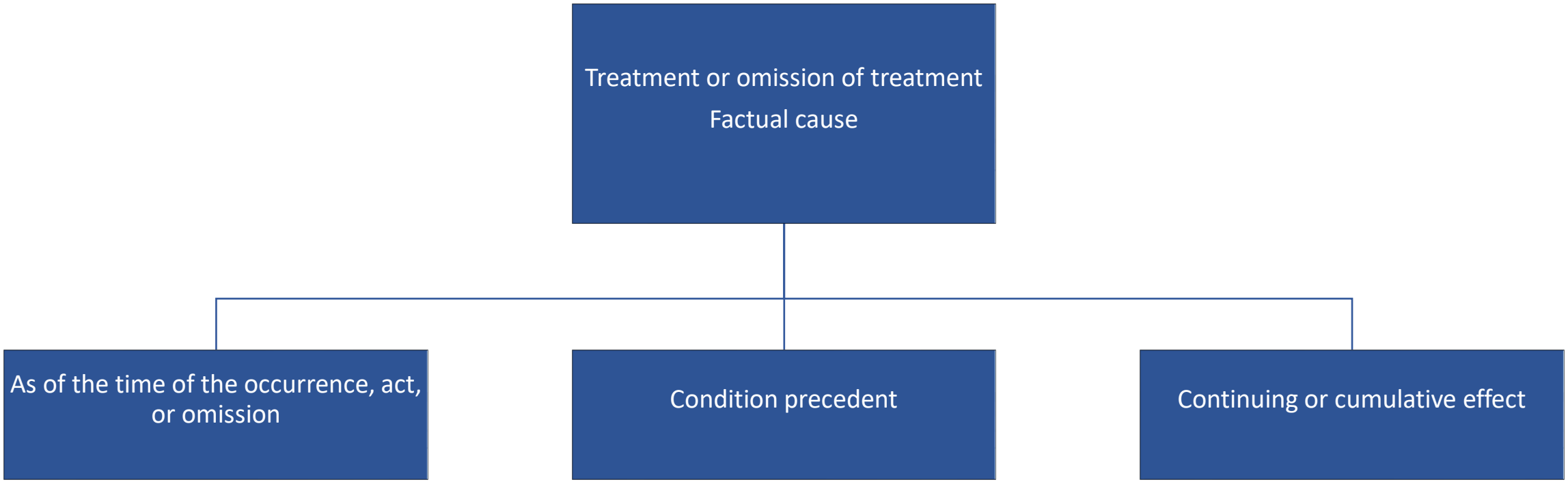
Continuing or cumulative effect

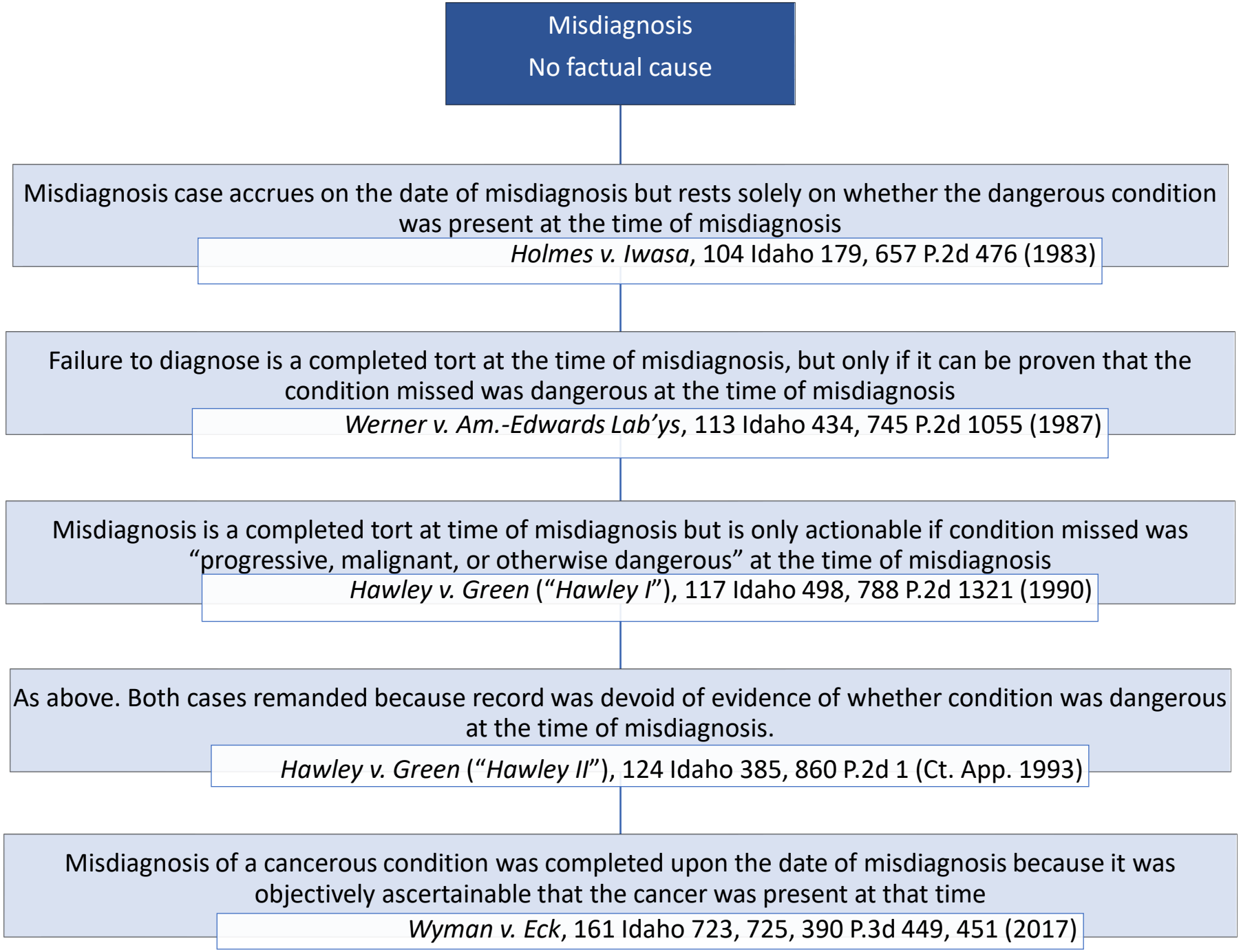
Remanded to determine at what point the treating provider's act of using radiation on patient's body manifested into injury

Davis v. Moran, 112 Idaho 703, 708, 735 P.2d 1014, 1019 (1987)

Applying Idaho law, finding cumulative effect of long-term opioid prescriptions causing addiction does not accrue for SOL purposes until tortious act ceases

Dickson v. Scoville, 210 F.3d 382 (9th Cir. 2000) (Mem.)


Treatment or omission of treatment
Factual cause
As of the time of the occurrence, act, or omission
Condition precedent
Continuing or cumulative effect


Misdiagnosis
No factual cause
Misdiagnosis case accrues on the date of misdiagnosis but rests solely on whether the dangerous condition was present at the time of misdiagnosis
Holmes v. Iwasa, 104 Idaho 179, 657 P.2d 476 (1983)
Failure to diagnose is a completed tort at the time of misdiagnosis, but only if it can be proven that the condition missed was dangerous at the time of misdiagnosis
Werner v. Am.-Edwards Lab'ys, 113 Idaho 434, 745 P.2d 1055 (1987)
Misdiagnosis is a completed tort at time of misdiagnosis but is only actionable if condition missed was "progressive, malignant, or otherwise dangerous" at the time of misdiagnosis
Hawley v. Green ("*Hawley I*"), 117 Idaho 498, 788 P.2d 1321 (1990)
As above. Both cases remanded because record was devoid of evidence of whether condition was dangerous at the time of misdiagnosis.
Hawley v. Green ("*Hawley II*"), 124 Idaho 385, 860 P.2d 1 (Ct. App. 1993)
Misdiagnosis of a cancerous condition was completed upon the date of misdiagnosis because it was objectively ascertainable that the cancer was present at that time
Wyman v. Eck, 161 Idaho 723, 725, 390 P.3d 449, 451 (2017)

"…the cause of action shall be deemed to have accrued **as of the time of the occurrence, act or omission complained** of, and the limitation period shall **not be extended by reason of any continuing consequences** or damages resulting therefrom…"

Codified exceptions to discovery rule for foreign objects and fraudulent concealment.

I.C. § 5-219(4) (1971)

Treatment or omission of treatment

FACTUAL CAUSE

As of the time of the occurrence, act, or omission

Damage occurred at the time of treatment when physician failed to initiate alternative treatment of elevated pressure in the patient's eye

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Condition precedent

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"Idaho Code section 5-219(4)'s accrual standard operates under a completed tort theory in that the **cause of action accrues when the tort is completed, an event that corresponds with the first objectively ascertainable occurrence of some damage**."

"Of course, it must be damage that the client could recover from the professional in an action for malpractice. However, **potential harm or an increase in the risk of damage is not sufficient to constitute some damage**."

Walsh v. Swapp L., PLLC, 166 Idaho 629, 462 P.3d 607 (2020)

Exceptions and outliers

Minors (and the "insane") have up to 8 years to initiate action depending on the child's age at the time of injury.

Gomersall v. St. Luke's Reg'l Med. Ctr., Ltd., 168 Idaho 308, 483 P.3d 365 (2021) (citing I.C. §§ 5-219(4), 5-230)

Injury is not objectively ascertainable if the suggested medical methods for objectively ascertaining the injury is **invasive, painful, risky, costly, and had no medical justification at the time of the incident**.

Connor v. Hodges, 157 Idaho 19, 333 P.3d 130 (2014)

Although DNA testing would render objectively ascertainable that the husband was not the biological father of the baby born through artificial insemination, **cause of action did not accrue until the doctor** who performed the procedure and had contributed his own sperm **posted his own DNA results on Ancestry.com**.

Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1032-33 (D. Idaho 2018)

"A defendant will be estopped from raising the statute of limitations as a bar to plaintiff's action where defendant's **representations or conduct dissuaded the plaintiff from prosecuting** his or her cause of action during the statutory period."

Gomersall v. St. Luke's Reg'l Med. Ctr., Ltd., 168 Idaho 308, 483 P.3d 365 (2021)

Idaho has rejected a discovery rule

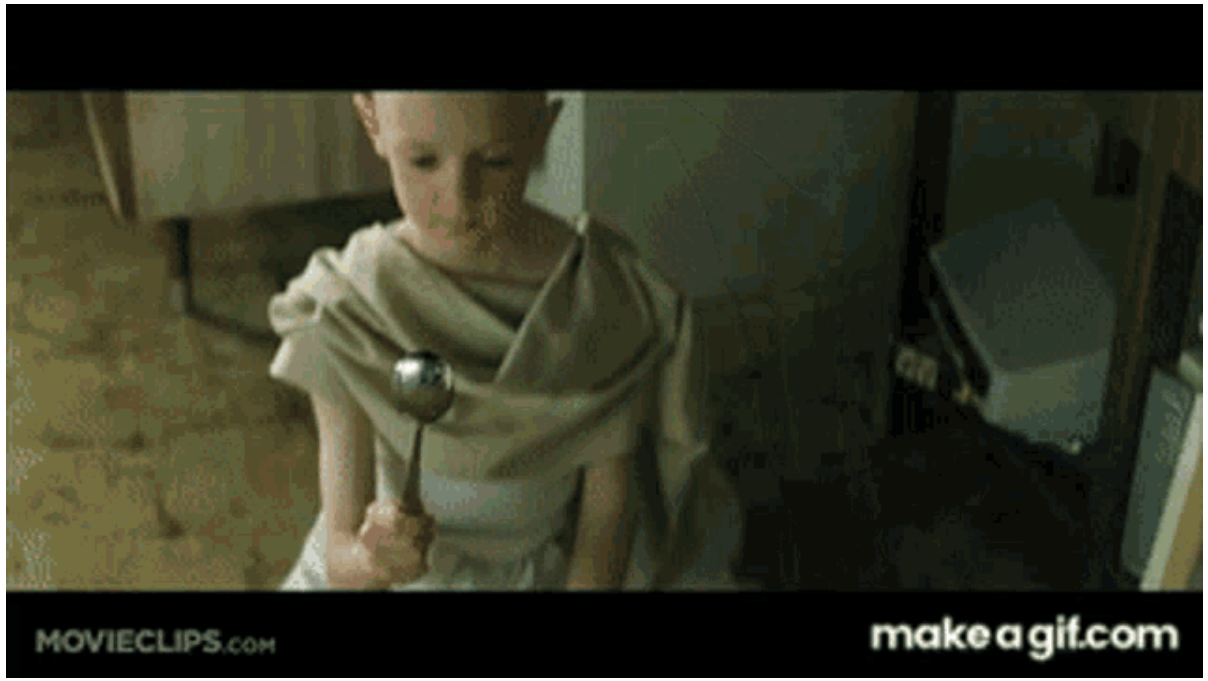
"Our prior cases clearly hold that **we do not apply a subjective test, based upon when the claimant knew or in the exercise of reasonable diligence should have known of the damage**, because that would amount to a **discovery rule which our prior cases have expressly rejected** in light of the legislature's explicit rejection of the discovery rule, I.C. § 5–219(4)."

Davis v. Moran, 112 Idaho 703, 735 P.2d 1014 (1987)

"Although Idaho Code section 5-219(4) is interpreted flexibly to avoid absurd results, **a discovery rule—which begins to run once the plaintiff knows or should know of the injury—has been consistently rejected**."

Wyman v. Eck, 161 Idaho 723, 726, 390 P.3d 449, 452 (2017)

“There is no spoon”



- Completed tort theory **is a discovery rule**
  - Cause of action accrues upon the first point at which “some damage” **is capable of being objectively ascertained**

In practice

- To win a dispositive motion on SOL, *defendants*:
  - Must concede duty and breach (I.C. § 6-1012), causation, and damages; and
  - Carry evidentiary burden of proving the first point at which plaintiff suffered damages.

- Incredibly difficult to dispose of time-barred claims until:
  - Discovery is close to complete;
  - Experts have weighed in; and
  - Significant time and resources have been spent by both parties and courts.

Rules of statutory construction

"The most fundamental premise underlying judicial review of the legislature's enactments is that, unless the result is palpably absurd, the courts must assume that the legislature meant what it said."

State v. One 1955 Willys Jeep, 100 Idaho 150, 595 P.2d 299 (1979)

"We must follow the law as written. If it is socially or economically unsound, the power to correct it is legislative, not judicial."

"In the *Willys Jeep* case, the Court simply made a misstatement. **If this Court were to conclude that an unambiguous statute was palpably absurd, how could we construe it to mean something that it did not say?** Doing so would simply constitute revising the statute, but we do not have the authority to do that." (Emphasis added).

Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011)

In most cases, the act or omission complained of and the injury to the plaintiff occur at the same time, particularly in the medical context. However, where the functional defect (and its symptomology) does not occur at all until a later time, **the very nature of a tort action requires us to read this language in I.C. § 5–219(4) flexibly to avoid absurd results**.

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