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JUSTICE CARDOZO'S THE NATURE OF THE JUDICIAL PROCESS: A CASE STUDY

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Presented at the Cardozo Symposium at Touro Law Center
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INTRODUCTION

In almost thirty-two years as a judge, state and federal, trial and appellate, I have written more than 1300 opinions. Although I do not have the gift of some of my colleagues who remember every opinion that they have written, I have written some opinions that I can never forget. I want to focus on one of those opinions -- a dissent that I wrote in 1995 as a member of the Maine Supreme Judicial Court.

I have chosen this case because the majority opinion and dissent illustrate many of Justice Cardozo's insights about judicial decision-making from his four lectures in 1921 on "The Nature of the Judicial Process."¹ Reflecting on his experience on the New York Court of Appeals, Cardozo wrote that most of the cases that come before his court "could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain."² Then there are the cases that inspired Cardozo's lectures, where "[t]here are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided."³ For me, *Dasha v. Maine Medical Center*⁴ was one of those cases.

*I wish to thank my talented law clerk, Nicholas Meyers, for his valuable help in preparing this essay.

¹ BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) [hereinafter CARDOZO, JUDICIAL PROCESS]. [Note: page numbers in brackets indicate page numbers in the 2010 paperback edition].

² CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 164 [105].

³ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 14 [4].

⁴ *Dasha v. Maine Med. Ctr.*, 665 A.2d 993, 995 (Me. 1995).

I.

Joseph Dasha was an Army veteran who earned his living by writing complex technical manuals, largely for the Navy. After experiencing seizures for a number of years, he had an MRI performed in Maine in 1988 that disclosed a brain tumor. Dasha was then 56 years old.⁵

In June 1988, Dasha underwent surgery at the Maine Medical Center in Portland to remove the tumor. The surgeon's findings -- that the tumor was round, smooth and came out easily⁶ -- suggested a benign tumor. To the surgeon's surprise, however, a pathologist at Maine Medical Center diagnosed the tumor as an aggressive and fatal form of cancer.⁷ Dasha was advised to undergo a series of radiation treatments of his brain to prolong his life.⁸ Without treatment he might survive six months. With treatment he could survive eighteen months to two years.⁹ During July and August of that year, Dasha had approximately thirty high-dosage radiation treatments.¹⁰ On August 1, while he was receiving the radiation treatments in Portland, a neuropathologist at the New England Medical Center in Boston confirmed the diagnosis of Dasha's fatal tumor.¹¹

In September, in need of care, Dasha moved from his home in Scarborough, Maine to Needham, Massachusetts to live with his sister Margaret.¹² There, he experienced a steady decline in his capacities because of severe brain damage from the radiation treatments.¹³ He could not walk or sit and he became incontinent. He developed poor memory and had difficulty speaking.¹⁴ On March 2, 1989, Dasha executed a power of attorney in favor of his sister.¹⁵ The parties agreed

⁵ E-mail from Terry Garmey, counsel for Joseph Dasha, to author (Feb. 22, 2017) (on file with author).

⁶ E-mail from Terry Garmey, counsel for Joseph Dasha, to author (Feb. 22, 2017) (on file with author).

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⁸ *Dasha*, 665 A.2d at 994.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Dasha v. Adelman*, 699 N.E.2d 20, 21 (Mass. App. 1998).

¹³ *Id.*

¹⁴ *Dasha vs. Maine Med. Ctr.*, D. Me., No. CIV. 93-343-P-C, 1994 WL 371464 (July 8, 1994).

¹⁵ *Dasha*, 665 A.2d at 994.

that he was mentally incompetent by that point.¹⁶ In November 1990, a doctor at Newton-Wellesley Hospital, surprised that Dasha was doing better physically than the initial diagnosis of a fatal tumor had predicted, asked the New England Medical Center neuropathologist who had confirmed that diagnosis to review Dasha's tissue samples again.¹⁷ After doing so, the neuropathologist revised his diagnosis and concluded that Dasha's tumor was relatively benign and had a favorable prognosis.¹⁸

In March 1991, approximately two years and nine months after the misdiagnosis by the pathologist at Maine Medical Center, Margaret Dasha was informed of the error. She subsequently notified Maine Medical Center that she intended to file a lawsuit against Maine Medical Center on her brother's behalf in federal court in Portland.¹⁹ At that point, three years and eleven months had passed since the misdiagnosis.²⁰ In response to the lawsuit, Maine Medical Center asserted the statute of limitations as a defense. Maine law requires that actions for professional negligence "be commenced within 3 years after the cause of action accrues."²¹ The statute further specifies that "a cause of action accrues on the date of the act or omission giving rise to the injury."²² In choosing that definition of accrual, the Maine legislature abrogated the more generous discovery rule that the Maine Supreme Court, in the absence of a statutory definition of accrual, had adopted for medical malpractice actions.²³ With a discovery rule, a cause of action does not accrue, that is, the commencement of the statute of limitations is tolled, until a plaintiff reasonably could know of the harm he suffered.

The parties agreed that Dasha's action was not filed within three years of the date of the misdiagnosis, the date of accrual.²⁴ Dasha contended, however, that Maine Medical Center should be equitably

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The filing of this notice tolls the statute of limitations if it has not already expired. *See* ME. REV. STAT. ANN. tit. 24, § 2859 (2018). The actual lawsuit does not need to be filed for this purpose.

²⁰ This narrative has included many dates. To help the reader understand the chronology, I have added an appendix detailing the relevant dates.

²¹ ME. REV. STAT. ANN. tit. 24, § 2902 (2018).

²² ME. REV. STAT. ANN. tit. 24, § 2902 (2018).

²³ *See* Choroszy v. Tso, 647 A.2d 803, 806 (Me. 1994) (discussing legislative history of P.L.1985, ch. 804).

²⁴ *Dasha*, 665 A.2d at 994.

estopped, that is, barred, from raising the statute of limitations as a defense because the unnecessary radiation treatments caused by its misdiagnosis had made him incapable of understanding and asserting his legal rights after March 2, 1989, the agreed upon date of his mental incompetence.²⁵ That date was almost nine months after the misdiagnosis by Maine Medical Center, and approximately two years and three months before the expiration of the statute of limitations. During that two years and three months, given his inability to understand and assert his legal rights, Dasha did not have the capacity to file a malpractice action before the expiration of the statute of limitations. It would be unfair to allow Maine Medical Center to benefit from its own wrongdoing under that circumstance.

On the basis of agreed upon facts, the federal court in Portland reviewed Maine's law of equitable estoppel and concluded that its applicability to Dasha's case was uncertain.²⁶ Traditionally, equitable estoppel applies when a plaintiff can show that he filed a lawsuit beyond the statute of limitations period because he relied on some misrepresentation by the defendant *subsequent* to the negligent act.²⁷ In Dasha's case, there was no subsequent misrepresentation. Maine Medical Center's negligent act itself -- the misdiagnosis which led to his mental incompetence -- deprived Dasha of the ability to protect himself during a substantial portion of the statute of limitations period. Aware of this unusual circumstance, the federal court asked the Maine Supreme Court to decide whether Dasha should be allowed to invoke Maine's doctrine of equitable estoppel.²⁸

In addressing that question, my colleagues cited language from our precedents stating that equitable estoppel "is a doctrine that should be carefully and sparingly applied."²⁹ Then, turning to the record, and taking the traditional view of equitable estoppel, the majority saw the negligent diagnosis of Maine Medical Center as irrelevant to the

²⁵ *Id.*

²⁶ *Dasha v. Maine Med. Ctr.*, CIV. 93-343-P-C, 1994 WL 371464, at *1 (D. Me. July 8, 1994).

²⁷ *See Anderson v. Commissioner of Dept. of Human Servs.*, 489 A.2d 1094, 1099 (Me. 1985); *but see Pino v. Maplewood Packing Co.*, 375 A.2d 534, 539 (Me. 1977) (holding that a claim of equitable estoppel can be supported by an act of negligence that is the equivalent of fraud).

²⁸ *Dasha v. Maine Med. Ctr.*, CIV. 93-343-P-C, 1994 WL 371464, at *3 (D. Me. July 8, 1994).

²⁹ *Dasha*, 665 A.2d at 995 (quoting *Vacuum Sys., Inc. v. Bridge Const. Co.*, 632 A.2d 442, 444 (Me. 1993)).

applicability of equitable estoppel to Dasha's claim. Instead, the majority focused on the hospital's conduct after the misdiagnosis.³⁰ Did Dasha detrimentally rely on any misrepresentation by Maine Medical Center that induced him to run afoul of the statute of limitations, such as "Don't worry. We will take care of you," or "You have plenty of time to file your lawsuit?"

Answering that question "no," the majority wrote that "Dasha relied on the misdiagnosis to seek radiation treatments, but he did not rely on a misrepresentation of MMC to decide to forego legal redress."³¹ In the absence of this traditional element, the majority concluded that Dasha's claim against Maine Medical Center was barred by the statute of limitations.³²

In my view, however, the detrimental reliance required by equitable estoppel was present in Dasha's case, but it took a different, more lethal form. As I wrote in my dissent: "MMC's conduct effectively prevented Dasha from filing a timely cause of action in a manner far more devastating than fraud. The conduct of MMC made Dasha incompetent and unable even to understand that he had a cause of action."³³ Hence, unlike the majority, I would have advised the

³⁰ *Id.* at 994.

³¹ *Id.* at 995.

³² *Id.*

³³ *Id.* at 997 (Lipez, J., dissenting). I noted in my dissent that Dasha had executed a power of attorney in favor of Margaret in March 1989, prior to the expiration of the three-year statute of limitations. She also learned of the Maine Medical Center diagnosis several months prior to the expiration of the statute of limitations. In my view, those facts did not preclude application of the doctrine of equitable estoppel:

In equitable tolling cases, the existence of a power of attorney conferred by a person before the onset of incapacity does not preclude application of the tolling statute:

The aim of the tolling statute is "to relieve from the strict time restrictions any person who actually lacks the ability and capacity, due to mental affliction, to pursue his lawful rights. . . ." (citations omitted) The statute does not condition tolling on the absence of others who may be legally authorized to act for the insane person.

Kisselbach v. County of Camden, 271 N.J. Super. 558, 638 A.2d 1383, 1387 (1994). That same principle should apply to this equitable estoppel case. The power of attorney conferred on Margaret Dasha the authority to sue when she learned of the misdiagnosis approximately two years and nine months after it occurred, not the obligation to do so. *Id.*

Dasha, 665 A.2d at 997 n.3 (Lipez, J., dissenting). Consistent with this view, the majority did not rely on the existence of the power of attorney in concluding that Dasha could not invoke equitable estoppel as a bar to the statute of limitations.

federal court that Dasha could invoke equitable estoppel as a bar to the statute of limitations.

II.

Looking back on these competing opinions, I now realize that my colleagues and I had engaged, unwittingly, in a decision-making process that reveals the continuing relevance of Cardozo's lectures on the judicial process.³⁴

To begin, Cardozo captured my predicament in *Dasha* when he described the "anxious judge" with a "semi-intuitive apprehension" that a decision against Dasha would be contrary to "the pervading spirit of our law."³⁵ On such egregious facts, how could we close the courthouse door to him? Yet I knew that anxiety and apprehension were no substitute for analysis. My colleagues and I had to begin our analysis of Dasha's claim where we must always begin -- with the precedents.

Cardozo insisted on the importance of *stare decisis*. "Adherence to precedent," he said, "must . . . be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the court."³⁶ These precedents

fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law.³⁷

My colleagues in *Dasha* were faithful to this principle. They found the leading cases in Maine on equitable estoppel, noted the elements of the doctrine, applied them to the undisputed facts in Dasha's case, found the necessary elements missing, and concluded that our precedents were "plain and to the point," with "need of nothing

³⁴ Although I criticize the majority opinion of my colleagues, as I did in my dissent, I have the utmost respect for them. I have the advantage here of an unchallenged elaboration of my position. Given the opportunity, I know that my colleagues could offer a thoughtful elaboration of their position.

³⁵ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 43 [23].

³⁶ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 34 [17].

³⁷ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 20 [8].

more.”³⁸ It was clear to them that Dasha could not invoke equitable estoppel to save his claim.

In taking that approach, however, my colleagues ignored Cardozo’s warning that a “process of search [for precedents], comparison and little more”³⁹ was misguided. It was not enough “to match the colors of the case at hand against the colors of many sample cases spread out upon their desk,”⁴⁰ with “the sample nearest in shade suppl[ying] the applicable rule . . . [N]o system of living law can be evolved by such a process . . . It is when the colors do not match . . . that the serious business of the judge begins.”⁴¹ Although the colors of our cases on equitable estoppel did not match Dasha’s case, we were in the realm of equity, where we had some license to depart from precedents that did not fill what Cardozo describes as “gaps” or “interstices” in the law.

Still, as Cardozo reminds us, and Cardozo always reminds us of countervailing principles, there are constraints on that license. In deciding the immediate case, we are fashioning law for the cases that will follow.⁴² We must remember, as Cardozo puts it, that “[t]he sentence of today will make the right and wrong of tomorrow.”⁴³

Also, where statutes are in play, there must be respect for legislative judgment. “The rule that fits the case may be supplied by the constitution or by statute,” Cardozo writes. “If that is so, the judge looks no further. The correspondence ascertained, his duty is to obey.”⁴⁴ But that correspondence is elusive when judges must determine legislative intent from uncertain words, or determine whether the community’s “sense of law and order”⁴⁵ precludes application of a statute of clear meaning to an unforeseen and unsettling circumstance.

Dasha’s case did not require us to determine legislative intent from ambiguous words. There was no ambiguity in the meaning of the statute of limitations, which said clearly that actions for professional negligence had to “be commenced within 3 years after the cause of

³⁸ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 20 [8].

³⁹ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 20 [8].

⁴⁰ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 20 [8].

⁴¹ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 20-21 [8-9].

⁴² CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 21 [9].

⁴³ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 21 [9].

⁴⁴ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 14 [4].

⁴⁵ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 14 [4].

action accrues.”⁴⁶ *Dasha* involved a different kind of gap in the law -- the uncertain relationship between the legislatively determined statute of limitations and the common law doctrine of equitable estoppel, created by judges to bar the application of rules, including statutes, under circumstances that might offend the community’s “sense of law and order,” and, as such, in the case of statutes, be contrary to legislative intent.

That inquiry in *Dasha* was particularly complicated because of the statutory language providing that “a cause of action accrues on the date of the act or omission giving rise to the injury.”⁴⁷ As noted earlier, the Maine legislature, in choosing that accrual language, eliminated the judicially created discovery rule for medical malpractice actions. However, the Legislature left in place the discovery rule for “foreign object surgical cases.” It also did not disturb the tolling provisions for claims brought by plaintiffs who were “minors, . . . mentally ill, imprisoned or without the limits of the United States” when their cause of action accrued.⁴⁸ The parties agreed that *Dasha* was “competent at the time of the misdiagnosis and during the radiation treatment.”⁴⁹ So one could argue that *Dasha* was, in effect, asking the judges, in direct contravention of the legislative judgment, to create a further exception to the abrogation of the discovery rule for those cases in which an individual, after the act of malpractice, became incompetent during the statute of limitations period.

If that was a fair view of *Dasha*’s argument, Cardozo would say that “the correspondence ascertained,” it was the duty of the judges to obey.”⁵⁰ The Legislature had explicitly decided which exceptions would survive its elimination of the discovery rule for medical malpractice cases. But neither I nor the majority felt that it was fair to view *Dasha*’s equitable estoppel argument as, in effect, an equitable tolling argument designed to undermine the Legislature’s judgment on the discovery rule. Equitable tolling focuses on the circumstances of a plaintiff, such as minority status or mental illness. Those circumstances make it unfair to allow the statute of limitations to run

⁴⁶ ME. REV. STAT. ANN. tit. 24, § 2902 (2018).

⁴⁷ ME. REV. STAT. ANN. tit. 24, § 2902 (2018).

⁴⁸ *Dasha*, 665 A.2d at 996 (discussing legislative history of statute of limitations in medical malpractice actions); see also ME. REV. STAT. ANN. tit. 14, § 853 (2018); ME. REV. STAT. ANN. tit. 24, § 2902 (2018).

⁴⁹ *Dasha*, 665 A.2d at 994-95.

⁵⁰ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 14 [4].

when a plaintiff cannot reasonably discover what has happened to him. In equitable estoppel cases, on the other hand, the focus is on the conduct of the defendant. Did the defendant behave in a way towards the plaintiff that would make it unfair to allow the defendant to raise an expired statute of limitations as a defense? In my view, and the majority's, Maine's statute of limitations for malpractice cases did not preclude consideration of Dasha's equitable estoppel argument. Rather, the question we had to answer was how that common law doctrine should evolve in the face of a difficult case like Dasha's. That is the "serious business of judging"⁵¹ to which Cardozo devotes his lectures.

III.

Cardozo famously writes that judges may use four methods to evaluate "the directive force of a principle"⁵² such as equitable estoppel. They are:

First, the line of logical progression, which he called the rule of analogy or the method of philosophy;⁵³

Second, the line of historical development, which he called the method of evolution;⁵⁴

Third, the line of the customs of the community, which he called the method of tradition;⁵⁵ and

Fourth, the lines of justice, morals and social welfare, which he called the method of sociology.⁵⁶

Cardozo is not suggesting that these four methods are relevant to every case requiring judges to fill a gap in the law. Their relevance will depend on the nature of the case. For example, when he writes of custom, Cardozo refers to the application of old rules of commerce to the new realms "of steam and electricity, the railroad and the

⁵¹ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 20-21 [8-9].

⁵² CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 30-31 [15].

⁵³ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 30 [15].

⁵⁴ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 30-31 [15].

⁵⁵ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 30-31 [15].

⁵⁶ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 30-31 [15].

steamship, the telegraph and the telephone.”⁵⁷ These realms of commerce are far removed from the world of medical care. There, the methods of philosophy, history and sociology are relevant to the directive force of the principle of equitable estoppel in a malpractice case.

Cardozo places “the rule of analogy or the method of philosophy” first among his principles of selection because it has, he says, “a certain presumption in its favor It has the primacy that comes from natural and orderly and logical succession.”⁵⁸ In *Dasha*, I used the rule of analogy. The majority had emphasized the traditional requirement of equitable estoppel that a plaintiff must detrimentally rely on a fraudulent or negligent representation by the defendant, subsequent to the negligent conduct, in foregoing a legal action that he had intended to pursue.⁵⁹ *Dasha* had shown no such reliance. In my dissent, I said there was a fair analogy between that traditional detrimental reliance requirement and *Dasha*’s reliance on the negligent misdiagnosis of Maine Medical Center to submit to the massive radiation treatments that made him incompetent and unable to seek timely redress during a substantial portion of the statute of limitations period.⁶⁰ I saw in that analogy the “natural and orderly and logical succession” of equitable estoppel.⁶¹

The method of history also supported the application of equitable estoppel to *Dasha*’s case. True, Cardozo relates the method of history to such heavily rule-based areas of the law as real estate or contracts. There, he says, the conceptions

embody the thought, not so much of the present as of the past, that separated from the past their form and meaning are unintelligible and arbitrary, and hence that their development, in order to be truly logical, must be mindful of their origins.⁶²

But Cardozo’s point -- that mindfulness of the origins of a doctrine may support its logical development -- has broad applicability. In its original formulation in Maine, equitable estoppel was notable for its

⁵⁷ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 62 [36].

⁵⁸ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 31 [15-16].

⁵⁹ *Dasha*, 665 A.2d at 995.

⁶⁰ *Id.* at 997 (Lipez, J., dissenting).

⁶¹ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 31 [15-16].

⁶² CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 56 [32].

flexibility. As the Maine Supreme Court wrote in 1893, equitable estoppel developed in the Chancery Courts of England to ameliorate the inflexible rules of the common law courts.⁶³ Hence, the court said, it should not “be confined within the limits of any technical definition or formula which excludes all cases not within its terms, but . . . it is entitled to a fair and liberal application for the promotion of honesty and fair dealing.”⁶⁴

Somehow, that capacious doctrine had been narrowed by the Maine Supreme Court in the ways noted by the majority in *Dasha*. Instead of a fair and liberal application, the doctrine “should [now] be ‘carefully and sparingly’ applied.”⁶⁵ Instead of being free of any formula, the doctrine now required a misrepresentation by a defendant, subsequent to the negligent act causing injury, that induced a plaintiff to forego his intended legal action. The analogy that I advanced in my dissent, comparing Maine Medical Center’s misdiagnosis to a misrepresentation by the hospital, was consistent with the original formulation of the doctrine in Maine. We were free, as a later incarnation of the Supreme Court, to return to that more flexible and just version of equitable estoppel.

To be sure, as Cardozo warned, such a return would have consequences for future cases involving equitable estoppel. My approach would have conflated, for the first time in Maine law, the misrepresentation about an available legal remedy and the negligent act itself. On the other hand, how often would the negligence of a party justify that conflation by destroying the competence of the injured party? Not often. If my position had prevailed, the breach in the wall of finality for medical malpractice cases would have been slight.

Then, finally, there is the method of sociology, described by Cardozo as “the force which in our day and generation is becoming the greatest of them all.”⁶⁶ Cardozo explicitly links the method of sociology to constitutional cases with their great generalities, such as liberty and due process. In those cases, “[t]he method of sociology in filling the gaps, puts its emphasis on the social order.”⁶⁷ He adds that “[t]he old forms remain, but they are filled with a new content . . .

⁶³ *Hallowell Nat. Bank v. Marston*, 85 Me. 488, 27 A. 529, 531 (1893).

⁶⁴ *Id.*

⁶⁵ *Dasha*, 665 A.2d at 995 (quoting *Vacuum Sys., Inc. v. Bridge Const. Co.*, 632 A.2d 442, 444 (Me. 1993)).

⁶⁶ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 65-66 [38].

⁶⁷ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 71 [42].

We are thinking of the end which the law serves, and fitting its rules to the task of service.”⁶⁸

Yet Cardozo insists that the method of sociology should also be applied to private law, even though “considerations of social utility are not so aggressive and insistent.”⁶⁹ There, too, judges must be prepared to alter the formal application of a rule to serve the ends of justice. To demonstrate that point, Cardozo cites the famous case of *Riggs v. Palmer*,⁷⁰ which required the New York Court of Appeals to decide in 1889 if a sixteen-year-old boy who murdered his grandfather to prevent his disinheritance could still claim property under the will. Although the probate statutes, literally applied, did not permit the court to alter the terms of the will, the court refused to apply the statutes as written. Instead, the court posed this question: “If the lawmakers could, as to this case, be consulted, would they say that they intended by their general language that the property of . . . an ancestor should pass on to one who had taken his life for the express purpose of getting his property?”⁷¹ In answering that question “no,” Cardozo says the court chose a principle “that was thought to be most fundamental, to represent the larger and deeper social interests.”⁷² It was the principle that “no man should profit from his . . . own wrong.”⁷³

I invoked this same “deeply rooted maxim”⁷⁴ in my dissent in *Dasha*. It is the principle at the heart of the doctrine of equitable estoppel, and it is the principle that captures the unsettling injustice of the *Dasha* case. It is also the principle that prompted me to ask in my dissent in *Dasha* the same question that the New York Court of Appeals asked in *Riggs v. Palmer*.⁷⁵ Could the Maine legislature have intended such an unjust result? I did not think so.

Implicit in any statute of limitations [I wrote] . . . is the notion that an individual subject to the statute has the capacity for self-protection. Even in cases of medical misdiagnosis, the misdiagnosed patient at least has the

⁶⁸ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 101-02 [63].

⁶⁹ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 150-51 [96].

⁷⁰ 22 N.E. 188 (N.Y. 1889).

⁷¹ *Id.* at 189.

⁷² CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 40-42 [21-22].

⁷³ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 41-42 [22].

⁷⁴ *Dasha*, 665 A.2d at 998 (Lipez, J., dissenting) (quoting *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959)).

⁷⁵ 22 N.E. 188 (N.Y. 1889).

capacity to seek a second opinion or to act upon symptoms that remain troublesome. That capacity for self-protection arguably moderates the harshness of the rule that begins the limitations period with the act of misdiagnosis.⁷⁶

In *Dasha*'s case, however, that "capacity for any degree of self-protection within the statute of limitations period was destroyed by the very party from whom he [sought] redress."⁷⁷ As noted, equitable estoppel, unlike equitable tolling, focuses on the conduct of the party who has committed the wrongful act. Although the legislature may have spoken unequivocally on the availability of equitable tolling to bar the application of the statute of limitations, it had never spoken on the availability of equitable estoppel. Under that circumstance, to use Cardozo's language, we could have reasonably concluded that the Maine legislature would not want the statute of limitations to bar *Dasha*'s claim when that outcome would offend the community's "sense of law and order."⁷⁸

I must acknowledge, however, that this application of the method of sociology in *Dasha* was relatively easy because of the congruence between my "anxiety" about the case and the equitable maxim that "no man should profit from his . . . own wrong."⁷⁹ My dissent had some grounding in familiar law. I did not feel that I was imposing my personal sense of justice. But there will be cases where the judge's anxiety does not match a familiar equitable maxim. How useful will the method of sociology be then?

Cardozo's answer is vague, perhaps inescapably so. He acknowledges that judges "cannot escape" the "empire" of "subconscious loyalties" "any more than other mortals."⁸⁰ Yet he believes that the wise judge, and Cardozo bets heavily on the wise

⁷⁶ *Dasha*, 665 A.2d at 998 (Lipez, J., dissenting).

⁷⁷ *Id.* (Lipez, J., dissenting). I acknowledge that I overstated this point somewhat in my dissent. Maine Medical Center did not destroy *Dasha*'s capacity for self-protection for the entirety of the statute of limitations period. As noted, he was competent at the time of the misdiagnosis and at the time he received the radiation treatments. Those treatments triggered a process of mental deterioration that destroyed his competence by March 1989, two years and nine months before the expiration of the three-year statute of limitations. It would be more accurate to say that Maine Medical Center destroyed his capacity for self-protection for a substantial portion of the statute of limitations period.

⁷⁸ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 16 [5].

⁷⁹ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 41-42 [22].

⁸⁰ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 16 [5].

judge, will engage in a process of creation that harmonizes the personal with deeply rooted principles and traditions. Observing that “[w]e are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees,”⁸¹ Cardozo describes the wise judge at work:

[T]he duty of a judge becomes itself a question of degree, and he is a useful judge or a poor one as he estimates the measure accurately or loosely. He must balance all those ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales.⁸²

Although Cardozo acknowledges that this description of the wise judge may seem “a weak and inconclusive summary,”⁸³ he argues that “the like criticism may be made of most attempts to formulate the principles which regulate the practice of an art.”⁸⁴ Ultimately, every judge must find his or her own way in the art of judging. As he puts it:

After the wearisome process of analysis has been finished, there must be for every judge a new synthesis which he will have to make for himself. The most that he can hope for is that with long thought and study, with years of practice at the bar or on the bench, and with the aid of that inward grace which comes now and again to the elect of any calling, the analysis may help a little to make the synthesis a true one.⁸⁵

Cardozo knows that he is too modest about his achievement. Using his methods of reasoning in those difficult cases requiring “the creative or dynamic element”⁸⁶ of judging, even those judges who are not among the elect of their calling can reach the true synthesis that permits the law to evolve sensibly and humanely. Far from a wearisome analysis, Cardozo’s brilliant lectures on the judicial process

⁸¹ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 161 [103].

⁸² CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 161-62 [103-04].

⁸³ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 162 [104].

⁸⁴ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 162 [104].

⁸⁵ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 162-63 [104].

⁸⁶ CARDOZO, JUDICIAL PROCESS, *supra* note 1, at 164 [106].

are a timeless gift for judges who must inescapably fill the gaps in the law.

EPILOGUE

I must finish the story of Joseph Dasha. Prior to filing the action in Maine against Maine Medical Center, Margaret Dasha had filed on Joseph's behalf a malpractice action in the Superior Court of Massachusetts against the New England Medical Center pathologist who, like the Maine Medical Center pathologist, had misdiagnosed Joseph's tumor.⁸⁷ After several twists and turns in the courts of Massachusetts,⁸⁸ that lawsuit led to a modest settlement. Joseph was already well into his radiation treatments as a result of the Maine misdiagnosis when the New England pathologist also misread his slides.⁸⁹ At that point, even a correct diagnosis might not have prevented much of the damage to Joseph's brain.

Still, there was enough money in the settlement to fund a trust for Joseph's care. Margaret placed him in a good nursing home in Needham, where she hired a nurse to supplement his care four hours a day.⁹⁰ She bought a van with a hydraulic lift so that she and the nurse could lift Joseph's wheelchair into the van and take him to dentist appointments, to visit his old neighborhood in Needham, and to see the Christmas lights of Boston. He always seemed to enjoy those outings.⁹¹

Joseph died on April 2, 2004 at the age of 72, almost 16 years after the misdiagnosis of his brain tumor in 1988. At that time, with the "benefit" of radiation treatment, he was told that he might live two years. He deserved better.

⁸⁷ See *Dasha v. Maine Med. Ctr.*, 93-3856-G, 1996 WL 365995, at *1 (Mass. Super. June 25, 1996).

⁸⁸ See *id.*; *Dasha v. Adelman*, 699 N.E.2d 20 (Mass. App. 1998).

⁸⁹ E-mail from Terry Garmey, counsel for Joseph Dasha, to author (Feb. 22, 2017) (on file with author).

⁹⁰ E-mail from Terry Garmey, counsel for Joseph Dasha, to author (Feb. 22, 2017) (on file with author).

⁹¹ E-mail from Terry Garmey, counsel for Joseph Dasha, to author (Feb. 22, 2017) (on file with author).

APPENDIX

- **June 13, 1988:** A pathologist at Maine Medical Center diagnoses Joseph Dasha with a fatal brain tumor.
- **July 5, 1988:** Joseph Dasha begins radiation treatments.
- **August 1, 1988:** A neuropathologist at the New England Medical Center confirms Maine Medical Center's diagnosis.
- **August 16, 1988:** Joseph Dasha receives final radiation treatment.
- **March 2, 1989:** Joseph Dasha executes a power of attorney in favor of his sister, Margaret Dasha. The parties agree that Dasha was mentally incompetent at this point, which is nine months after the misdiagnosis by Maine Medical Center, and two years and three months before the expiration of the statute of limitations.
- **November 1990:** A doctor at the Newton-Wellesley Hospital asks the New England Medical Center neuropathologist to review again tissue samples from Dasha's brain tumor.
- **March 1, 1991:** Margaret Dasha is informed that the neuropathologist has revised his earlier diagnosis, now identifying the tumor as relatively benign. She received this information two years and nine months after the misdiagnosis.
- **May 9, 1992:** Margaret Dasha notifies Maine Medical Center of her intent to file a lawsuit on behalf of her brother, three years and eleven months after the misdiagnosis.
- **July 22, 1992:** Josepha Dasha is declared legally incompetent and Margaret Dasha is appointed as his legal guardian.
- **December 8, 1993:** Margaret Dasha files suit against Maine Medical Center in federal district court in Portland.