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Limitations of Actions--Physicians and Surgeons--Malpractice [,i>Johnson v. Saint Patmck's Hosp., 417 P.2d 469 (Mont. 1966)]

Lawrence S. Allen

LIMITATIONS OF ACTIONS — PHYSICIANS AND SURGEONS — MALPRACTICE

Johnson v. Saint Patrick's Hosp., 417 P.2d 469 (Mont. 1966).

The general purpose of a statute of limitations in medical malpractice actions is to bar stale claims and therefore ultimately promote justice. Yet, under certain circumstances, these limitations can produce harsh results. Many courts have sought to prevent these inequities by adopting various doctrines that circumvent the literal meaning of their respective statutes.

In *Johnson v. Saint Patrick's Hosp.*,[1] an operation was performed on the plaintiff's right hip by the defendant's employees on March 28, 1955. In 1962, the plaintiff became aware of surgical gauze coming out from his draining pelvic sinus. Another doctor subsequently removed some gauze from the area. Finally, in July of 1965, after more gauze had appeared, the plaintiff underwent another operation, resulting in the discovery of a surgical sponge in the right hip. The plaintiff alleged that the defendant, through his servants, had negligently failed to remove the sponge from his body at the conclusion of the operation.[2]

The plaintiff brought his suit more than ten years after the operation was performed; however, it was instituted less than a year after he discovered that a surgical sponge had been left in his body. Thus, the issue was whether the three-year statute of limitations in Montana[3] would bar the plaintiff's cause of action. Stated more precisely, did the cause of action asserting liability accrue at the time of the negligent act on March 28, 1955, or did it accrue at the time the plaintiff discovered the negligence.[4]

Before reaching its ultimate decision that the statute of limitations was no bar in this case, the court considered the several views which have been adopted in other jurisdictions.

The first of these is the traditional strict approach "that a cause of action for malpractice accrues when the statute begins to run at the time of the injury . . . or, as otherwise stated, on the date of the wrongful act or omission constituting the malpractice."[5]

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1 417 P.2d 469 (Mont. 1966).

2 *Id.* at 469-70.

3 MONT. REV. CODES ANN. § 93-2605 (1947).

4 417 P.2d at 470.

5 70 C.J.S. *Physicians and Surgeons* § 60, at 984 (1951).

When a remedy becomes available, a cause of action has accrued, though at that time the injury and damages may be nominal.[6]

This doctrine is susceptible to criticism on the grounds that it is unjust and unreasonable.[7] It is submitted that courts should construe statutes of limitations in a manner which will avoid protecting the negligent physician in a *Johnson* factual situation.[8] This is not an instance of a negligent plaintiff, "sleeping on his rights," since under these circumstances, the plaintiff was unaware of his right of action until the sponge was discovered.

With these considerations in mind, the Supreme Court of Montana rejected the traditional view but noted a second approach, the "contract theory," according to which the plaintiff frames his pleading in contract in order to circumvent the effect of the shorter tort statute of limitations.[9] The idea here is that the physician-patient relationship gives rise to an express or implied contract of employment so that an aggrieved party can allege the defendant's breach of contract and sue for damages naturally and directly flowing therefrom.[10]

Most courts, including the Supreme Court of Montana, have rejected the differentiations between contract and tort theories recognizing that the action arises from the injury, regardless of the particular action employed.[11]

A third approach also rejected in *Johnson* is that the physician's fraudulent concealment of the damage tolls the running of the statute until the plaintiff discovers or reasonably should have dis-

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[6] See, *e.g.*, Pickett v. Aglinsky, 110 F.2d 628 (4th Cir. 1940); Capucci v. Barone, 226 Mass. 578, 165 N.E. 653 (1929); Weinstein v. Blanchard, 109 N.J.L. 332, 162 Atl. 601 (Ct. Err. & App. 1932); Conklin v. Draper, 229 App. Div. 227, 241 N.Y. Supp. 529, *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930).

[7] See Wilder v. St. Joseph Hosp., 225 Miss. 42, 82 So. 2d 651 (1955), wherein the court barred the plaintiff's claim although she had suffered for over six years, having been unaware of the source of her pain.

[8] Some courts, in fact, have admitted that their decision was unfortunate. See Murray v. Allen, 103 Vt. 373, 378, 154 Atl. 678, 680 (1931).

[9] 417 P.2d at 471.

[10] In Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923), cited in the *Johnson* case, the doctor's negligence resulted in a breach of the contract to use reasonable care in performing the operation. The court overruled the defendant's attempt to set up the one-year tort statute of limitations.

[11] See, *e.g.*, Weinstein v. Blanchard, 109 N.J.L. 332, 162 Atl. 601 (Ct. Err. & App. 1932); Sales v. Tauber, 27 Ohio N.P. (n.s.) 372 (C.P. 1929). Many states have enacted special malpractice statutes of limitation. In these jurisdictions, it makes no difference whether the action is framed in tort or contract.

covered the true facts. The "vast majority of courts"[12] have accepted this proposition.[13]

In *Johnson*, the plaintiff did not allege the defendant's fraudulent concealment of the damage.[14] Still, the Montana court could have applied a further extention of the fraud approach, a "constructive fraud" theory, to toll the statute. Under this reasoning, the element of a physician's *actual* knowledge has been eliminated.[15] This approach is actually similar to the "discovery doctrine," to be discussed later,[16] since the same result is reached. But as will be shown, the doctrine of discovery is much more logical than a strained interpretation of the concept of fraud.

The fourth approach, the "continuing negligence" theory, was apparently first recognized by Ohio in the case of *Gillette v. Tucker*.[17] There, the Ohio Supreme Court found that a contractual relationship with the surgeon existed not only for the operation but also for subsequent treatment which might be necessary, absent limitation by contract[18] or through the physician's notification. It was held that the cause of action accrued when the contractual relation for the case had terminated, less than a year before the plaintiff brought her action.[19] The court stated:

> [I]t was the ever present duty of the surgeon to remove the sponge from the body of the patient. . . . The injury consisted not so much in leaving the sponge within the cavity, as negligently continuing it there, or allowing it to remain there from day to day for about a year, and until he dismissed her from his atten-

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12 Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 364 (1962).

13 Some courts have incorporated a fraud approach within the statute of limitations for malpractice. Clearly, in these states, the fraudulent acts toll the running of the statute. See, *e.g.*, GA. CODE ANN. § 3-807 (1936); MICH. COMP. LAWS § 27.612 (1948).

14 The plaintiff did not attempt to frame his cause of action in fraud itself, which would entail attaching the fraud statute of limitations. 417 P.2d at 469. This approach has been rejected. See, *e.g.*, Swankowski v. Diethelm, 98 Ohio App. 271, 129 N.E.2d 182 (1953).

15 Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934); Perrin v. Rodriquez, 153 So. 555 (La. Ct. App. 1934).

16 See text accompanying notes 26-27 *infra*.

17 67 Ohio St. 106, 65 N.E. 865 (1902).

18 When a special employment period has been determined and it ends with the operation, proof of subsequent treatment must be given. Thus, in Searer v. Lower, 25 Ohio App. 328, 158 N.E. 199 (1927), the statute of limitations was held to bar the plaintiff's malpractice action.

19 Ohio has a special malpractice statute, which states: "An action for . . . malpractice . . . shall be brought within one year after the cause thereof accrued. . . ." OHIO REV. CODE § 2305.11.

> tions. . . . In what we have said and now say, it is wholly immaterial whether the patient knew of the true source of her trouble or not. We do not, in any degree, place our conclusions on the fact that for more than a year the plaintiff was in ignorance as to the sponge remaining in the wound.[20]

The Ohio approach, as suggested in *Bowers v. Santee*,[21] strengthens the physician-patient relationship,[22] since the patient should have the right to rely on the doctor's ability until the contract has ended.[23] The physician is thus protected from premature litigation and has the opportunity to give full treatment and even to correct his errors.

The "continuing negligence" concept does relieve the injured plaintiff from the harshness of a strict reading of the typical statute of limitations, where the action is brought within the time provided by the statute after "the case has been . . . abandoned, or the professional relation otherwise terminated."[24] Nevertheless, the general rule is not circumvented when the plaintiff first learns of the defendant's negligence many years after the patient-physician relationship has ended.[25]

The Supreme Court of Montana rejected the "continuing negligence" theory, just as it had refused to apply the other approaches, and ultimately joined the modern growing trend by accepting the

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[20] 67 Ohio St. at 126-27, 65 N.E. at 870.

[21] 99 Ohio St. 361, 124 N.E. 238 (1919). This case reinstated the *Gillette* decision which had been overruled by McArthur v. Bowers, 72 Ohio St. 656, 76 N.E. 1128 (1905), where the court relied fully on the dissent in the *Gillette* case. See also Lundberg v. Bay View Hosp., 175 Ohio St. 133, 191 N.E.2d 821 (1963); Amstutz v. King, 103 Ohio St. 674, 135 N.E. 973 (1921).

[22] In Netzel v. Todd, 24 Ohio App. 219, 157 N.E. 405 (1926), the Ohio court considered the following evidence, showing the necessary relationship of physician-patient: the plaintiff had been taking pills sent by the defendant and under his direction over a period of time; the defendant had made a functional kidney test during the alleged relation; and there was no showing of a termination of the relation.

[23] Whether the patient-physician relationship has ended within a year from the time the action is brought is a question for the jury. Pump v. Fox, 113 Ohio App. 150, 177 N.E.2d 520 (1961); Meyers v. Clarkin, 33 Ohio App. 165, 168 N.E. 771 (1929).

[24] 42 OHIO JUR. 2D *Physicians and Surgeons* § 133 (1960).

[25] This is precisely what occurred in DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952), where the plaintiff insisted that it was gross injustice to bar her cause of action since she could not have known that she had a cause of action until the sponge was discovered. The court conceded that the plaintiff's argument was persuasive but said it would not assume legislative powers to change state policy. While the concept might work a hardship on an unsuspecting injured party, the court also recognized that the so-called "discovery doctrine," which the plaintiff recommended, might cause severe injustice to the physician. *Id.* at 28, 104 N.E.2d at 180. See Truxel v. Goodman, 49 N.E.2d 569 (Ohio Ct. App. 1942), where the court suggested that a change in the statute of limitations might properly be made.

"discovery doctrine."[26] According to this approach, the statute of limitations does not begin to run until the plaintiff actually discovers the negligence, or with due diligence reasonably should have discovered it.[27] This approach seems to be the most reasonable and just, for not until the plaintiff discovers an injury does he have the opportunity to assert his cause of action.

Courts have often found it necessary to circumvent the so-called traditional rule in order to allow an injured party, in the case of "hidden negligence," to bring his cause of action.[28] An abstract and narrow reading of the statute of limitations so as to bar the aggrieved party, defeats the very purpose of the rule, especially when the aggreived party was not aware, and with due diligence could not have ascertained that a right of action existed.

While a statute of limitations is a legislative creature, the judiciary must determine when a cause of action accrues and when the statute commences to run. This decision must be tempered by reason and justice to both parties.[29] Where courts refuse to interpret the statute liberally, legislative action should provide for the more logical "discovery approach." By one means or another, the harsh results of a narrow interpretation must be obviated, for "justice cries out that . . . [the plaintiff] be afforded a day in court."[30]

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[26] See, *e.g.*, 417 P.2d at 473; Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809 (2d Cir. 1960); Brush Beryllium Co. v. Meckley, 284 F.2d 797 (6th Cir. 1960); Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960); Coots v. Southern Pac. Co., 49 Cal. 2d 805, 322 P.2d 460 (1958); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962).

[27] 417 P.2d at 473.

[28] See generally Annot., 74 A.L.R. 1317 (1931); Annot., 144 A.L.R. 209 (1943); Annot., 80 A.L.R.2d 368 (1961).

[29] In Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959), the court, applying the "discovery doctrine," stated that the statute of limitations "must be read in the light of reason and common sense." *Id.* at 284, 154 A.2d at 789.

[30] Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961).