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Statute of Limitations in Malpractice Actions

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THE ILL-TREATED patient has sought redress for medical malpractice by actions that sound in tort,[1] in contract,[2] or in fraud.[3] As with other actions, the underlying policy of "peace and repose" of all statutes of limitations dictates that these actions be timely.[4] In Ohio, for example, the time limit for an action for malpractice is one year.[5]

From the physician's viewpoint, such imposed time limit is justified as a means of assuring reliable evidence.[6] Thus fairness to the physician demands that the plaintiff should commence his action within a reasonable time.

On the other hand, the wronged patient certainly should have ample time to assert his claim. Indeed, possibly this would be a better basis for malpractice limitations statutes.[7] Superficially, a one year period of limitations does not seem to be extremely rigorous on the patient. However, *Schwartz v. Heyden Newport Chemical Corporation*[8] illustrates the potential harsh-

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1 41 Am. Jur., Physicians & Surgeons, Par. 123.

2 74 A. L. R. 1317 (1931); Slaughter v. Tyler, 126 Fla. 515, 171 So. 320 (1936); Menefee v. Alexander, 107 Ky. 279, 538 S. W. 653 (1899); Burke v. Maryland, 149 Minn. 491, 184 N. W. 32 (1921); Yeager v. Dunnavan, 26 Wash. 2d 559, 124 P. 2d 755 (1946).

3 Swankowski v. Diethelm, 98 Ohio App. 271, 129 N. E. 2d 182 (1953), where the court held that the complaint set up a cause of action in malpractice, and that the allegation of fraudulent misrepresentation and intentional concealment did not change the action to one of deceit; and see Acton v. Morrison, 62 Ariz. 139, 155 P. 2d 782 (1945); Crossett Health Center v. Croswell, 221 Ark. 874, 256 S. W. 2d 548 (1953); Procter v. Schomberg, 63 So. 2d 68 (Fla. 1953); Scaffold v. Scarborough, 91 Ga. App. 688, 86 S. E. 2d 649 (1955); Shearin v. Lloyd, 246 N. C. 363, 98 S. E. 2d 508 (1957); Hinkle v. Hargens, 81 N. W. 2d 888 (S. D. 1957).

4 Note, 27 Albany L. R. 312, 315 (1963).

5 Ohio Rev. Code § 2305.11, which provides, "an action for . . . or malpractice . . . shall be brought within one year after the cause thereof accrued.

6 *Supra,* n. 4.

7 The general rule that knowledge of the harm is immaterial in determining when the limitation begins to run is based upon the assumption that in most cases a delinquent plaintiff will be aware of the injury within the statutory period. Note, Developments in Law—Statutes of Limitations, 63 Harv. L. R. 1177 (1950).

8 12 N. Y. 2d 1073; 190 N. E. 2d 253 (1963) (memo. op.); 12 N. Y. 2d 212, 188 N. E. 2d 142 (1963); noted, 30 Bklyn. L. R. 158 (1963).

ness of such a time limitation. In that case the injury was a slow and hidden reaction to an internal injection. Three years elapsed before the patient discovered the resultant injury. No prudent observer could have discovered the injury sooner. However, it was held that the statute of limitations had run, barring an action for malpractice and leaving the innocent plaintiff remediless. Since such injured patient has no way of protecting himself, arguments favoring leniency appear in court opinions as well as in legal writings.[9]

Ameliorating Movements

Many jurisdictions have avoided such a harsh result by advancing the date when the period of limitation begins to run. Thus, one can find holdings, theories and doctrines extending the starting day from the time of the act of malpractice,[10] to one of the following: the time of injury; [11] the last day of successive contributing injury; [12] the end of continuous treatment; [13] the

[9] See Truxel v. Goodman, 49 N. E. 2d 569 (Ohio App. 1942), in which the majority opinion stated, "We sympathize with the earnestness with which council for plaintiff argues the justness of his client's case. He says that he has no quarrel with the legislation in its enactments, but rather with the construction given to the section by the courts. Certainly council would not expect us to reverse the Supreme Court. . . . We volunteer the suggestion that we think some changes should very properly be made." See also Gress, Malpractice and the Statute of Limitations, 16 St. John's L. R. 101, 103 (1941), wherein it was stated "A plaintiff can bring an action for malpractice only if he had become fortunate enough to discover the wrong within two years after its commission."

[10] *Supra,* note 1 at 233, stating that the statute of limitation on acts of malpractice ordinarily runs in favor of the physician or surgeon from the time of the negligent act, rather than the time of the consequential injury.

Fronce v. Nicholes, 12 Circ. Dec. 472, 22 C. C. R. 539 (1901), in a clear and concise opinion, sustains the rule that the statute commences to run when the injurious act complained of is perpetrated or accomplished.

Also, Cappuci v. Barone, 266 Mass. 578, 581, 165 N. E. 653, 654-655 (1919); Wilder v. Haworth, 187 Ore. 688, 213 P. 2d 797 (1949), 74 A. L. R. 1317 (1931) supplemented 144 A. L. R. 209 (1943); Conklin v. Draper, 229 App. Div. 227, 241 N. Y. Supp. 529 (1930), affd. 254 N. Y. 620, 173 N. E. 892 (1930); Tortorello v. Reinfeld, 6 N. J. 58, 77 A. 2d 240 (1950); Shearin v. Lloyd, *supra,* note 3.

[11] Golia v. Health Ins. Plan of Greater N. Y., 7 N. Y. 2d 931, 165 N. E. 2d 578 (1960). Bernath v. LeFeuer, 325 Pa. 43, 189 A. 342 (1937), in which it was said that it is too well established to require extensive discussion that the statute of limitations runs from the time of injury even though the damage may not have been known.

[12] Gross v. Wise, 16 App. Div. 2d 682, 227 N. Y. S. 2d 523, 80 A. L. R. 368 (Supp. 1962). Wherein the court held that the last alleged act of malpractice accrued beyond the two years statute of limitations, and although subsequent treatment was applied thirty nine times, since no claim was

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termination of continuous surgeon-patient relationship;[14] and the day of discovery or when a diligent person would have discovered the malpractice.[15]

In general, compassion for the innocent patient has produced a tendency toward allowing sufficient time to bring an action. In some states the progress is slow.[16] Other jurisdictions have maximized patient protection by tolling the statute until the injury is discovered.[17]

The Continuous Treatment Theory

Ohio has been cited as the leader of the movement to broaden the construction of malpractice statutes by tolling the statute until continuous treatment terminates.[18] The leading case is *Gillette v. Tucker*,[19] in which the syllabus reads:

> Where the physician operates upon the patient, for what he pronounces to be appendicitis and neglects or carelessly forgets to remove from the abdominal cavity, a sponge which he had placed therein, and closes the incision, with the sponge remaining therein, and this condition continues during his entire professional relationship to the case and

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made that such treatment was improper, the action was barred. Also, Hotelling v. Walther, 169 Ore. 559, 130 P. 2d 944 (1942), 144 A. L. R. 205 (1943).

[13] See Bowers v. Santee, 99 Ohio Op. 361, 363, 124 N. E. 238, 240 (1919), which held that "termination of treatment does not necessarily mean formal discharge. The physician need only have ceased to treat as to the particular injury or malady in question."

DeLong v. Campbell, 157 Ohio St. 22, 104 N. E. 2d 177 (1952); Guy v. Schuldt, 138 N. E. 2d 891 (Ind. 1956); Buchanan v. Kull, 323 Mich. 381, 35 N. W. 2d 351 (1949); Nervick v. Fine, 195 Misc. 464, 87 N. Y. S. 2d 534 (1949), affd. 275 App. Div. 1043, 91 N. Y. S. 2d 924 (1950); Sly v. Van Lengen, 120 Misc. 420, 198 N. Y. Supp. 608 (1923); Williams v. Elias, 140 Neb. 656, 1 N. W. 2d 121 (1941).

[14] Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639 (1902); Garlock v. Cole, 199 Cal. App. 2d 11, 18 Cal. Rptr. 393 (1962); Hammer v. Rosen, 7 N. Y. 2d 376, 165 N. E. 2d 756, 198 N. Y. S. 2d 65 (1960); Schmitt v. Esser, 183 Minn. 354, 236 N. W. 622 (1931); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N. W. 2d 96 (1948).

[15] Stafford v. Schultz, 42 Cal. 2d 761, 270 P. 2d 1 (1954).

[16] See Eschenbacher v. Hier, 363 Mich. 676, 110 N. W. 2d 731 (1961), where the court concluded by saying "we feel compelled to limit our application here of the last treatment rule to the facts of this case. By so saying, we reserve for further consideration applicability of the discovery rule urged upon us by plaintiff for a case which presents a factual situation more appealing than that presented here."

[17] Stafford v. Schultz, *supra* note 15; Urie v. Thompson, 337 U. S. 163, 69 Sup. Ct. 1018, 93 L. Ed. 1282 (1949).

[18] Note, Malpractice—Statute of limitations—Plaintiff's cause of action held not to have accrued until end of continuous treatment, 37 St. John's L. R. 385 (1963).

[19] See *supra*, note 14.

> is present when he abandons or otherwise retires therefrom, the statute of limitations does not commence to run against a right to sue and recover on account of such want of skill, care and attention, until the case has been so abandoned, or the professional relation otherwise terminated.

McArthur v. Bowers[20] reversed the *Gillette* decision. However, in 1919 in *Bowers v. Santee,*[21] the court again held that the relationship arises out of contract and the statute of limitations begins to run when the contract relationship is terminated. The surgeon-patient relationship arose out of a contract in which the doctor expressly or impliedly agreed to exercise the average degree of skill of members of the same profession. Consequently, the statute of limitation did not begin to run until after termination of such agreement by an ending of treatment. It should be noted, however, that the relevant time is termination of treatment for the particular malady.[22] A surgeon-patient relationship continued for other reasons will not be considered as part of the same contract.

DeLong v. Campbell[23] expanded this theory somewhat by stating that the surgeon also owed the duty of subsequent treatment necessary to a reasonable and substantial recovery. This duty to follow up for a reasonable time means that there is no clear-cut rule to determine the date of the last act related to a specific contracted treatment. Since reasonable minds may differ as to when the statute should thus begin to run, it should be decided by a jury.[24]

The recent case of *Lundberg v. Bay View Hospital*[25] further expands the Continuous Treatment Theory. A woman entered the hospital. A pathologist who had been represented as employed by the hospital improperly diagnosed the patient's condition. Two other doctors working at the same hospital actually performed a needless hysterectomy due to this mistaken diagnosis. The Supreme Court held that the statute of limitations in an action against the hospital was tolled until the patient

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[20] 72 Ohio St. 656, 76 N. E. 1128 (1905).

[21] 99 Ohio St. 361, 124 N. E. 238 (1919).

[22] *Id.* at 363, where it was stated that "termination of treatment does not necessarily mean formal discharge. The physician need only have ceased to treat as to the particular injury or malady in question."

[23] See *supra,* note 13.

[24] Pump v. Fox, 113 Ohio App. 150, 17 Ohio Ops. 2d 129, 177 N. E. 2d 520 (1961).

[25] 175 Ohio St. 133 (1963).

severed her hospital relationship. Thus the doctrine of continuous treatment was extended to cover hospital malpractice.

Discovery Doctrine

However far the continuous treatment doctrine is expanded, it clearly cannot help many victims of medical malpractice. For example, in *DeLong v. Campbell*[26] an operation in 1942 was performed negligently in that a portion of a surgical sponge was left inside the patient's body. The sponge was found in 1948 by another surgeon. As mentioned earlier, the continuous treatment doctrine barred recovery.

More is needed to prevent injustice. Possibly the best cure is the discovery doctrine. Basically, this doctrine will toll the statute until the plaintiff discovers or should have discovered his injury.[27] Several states have written it into their statutes.[28] Others have adopted it by judicial construction. California, for example, holds that the one year period of limitation for malpractice does not start to run until the date of discovery of the wrongful act or the date when by the exercise of reasonable diligence the act should have been discovered.[29] The words "exercise of reasonable diligence" do not require the patient to doubt and challenge his physician, in whom he should have complete confidence during treatment.[30]

Other jurisdictions have adopted the discovery doctrine.[31] Michigan, which follows the last treatment approach, may soon swing over to the discovery approach as well. The majority court opinion stated, in the case of *Eschenbacher v. Hier*,[32] that they

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[26] See *supra*, note 13.

[27] Bowman v. McPheeters, 77 Cal. App. 2d 795, 176 P. 2d 745 (1954).

[28] See *e.g.*, Mo. Ann. Stat. § 516, 100 (1952). See also Lillich, The Malpractice Statute of Limitations in New York and Other Jurisdictions, 47 Cornell L. Q. 344, 359 (1962).

[29] Huysman v. Kirch, 6 Cal. 2d 302, 57 P. 2d 908 (1936); see also 80 A. L. R. 2d 368 (1961).

[30] Stafford v. Schultz, *supra* note 15; Garlock v. Cole, 199 Cal. App. 2d 11, 18 Cal. Rptr. 393 (1962).

[31] See, *e.g.* Perrin v. Rodriquez, 153 So. 555 (La. App. 1934); Thatcher v. Detar, 351 Mo. 603, 173 S. W. 2d 160 (1943); McFarland v. Connally, 252 S. W. 2d 486 (Tex. Civ. App. 1962); City of Miami v. Brooks, 170 So. 2d 306 (Fla. 1954); Davies v. Bonebrake, 135 Colo. 506, 313 P. 2d 982 (1957); Ayers v. Morgan, 397 Pa. 382, 154 A. 2d 788 (1959); Nowell v. Hamilton, 249 N. C. 523, 107 S. E. 2d 112 (1959); Spath v. Morrow, 174 Neb. 38, 115 N. W. 2d 581 (1962); Fernandi v. Strully, 35 N. J. 434, 173 A. 2d 277 (1961); Seitz v. Jones, 370 P. 2d 300 (Okla. 1962).

[32] See *supra*, note 16.

are holding such a change in abeyance, waiting for a good set of circumstances in which to test the discovery doctrine.

DeLong v. Campbell, in no uncertain terms, rejected the use of the discovery doctrine in Ohio.[33] The court felt its function to be to declare what legislative enactments say and not to determine what they ought to say; any injustice to be cured by the General Assembly.

Directly contrary reasoning is set forth in *Ayers v. Morgan,*[34] wherein the discovery doctrine was supported in Pennsylvania notwithstanding the absence of a legislative enactment. While courts will not inquire into the wisdom of a statute, nevertheless they will interpret the statutes so as to include essential constitutional requirements. The discovery doctrine must be adopted for without it the statute of limitations would be unconstitutional. The patient, unable to learn of his injury until after the period of limitation had expired, would be left without a remedy and without due process of law.

This doctrine is still a minority view, although its adherents seem to be growing. Even where not adopted by the majority, it appears in the dissenting opinion of some cases.[35] In addition, favorable dissertations can be found in many law reviews.[36]

While Ohio has not yet applied the discovery doctrine in malpractice cases, the date of discovery is important in other limitation cases. For example, it is used in cases of fraud,[37] as well as in cases of trespass.[38] Furthermore, a recent Ohio personal injury case held that the statute of limitations was tolled until diagnosis of the injury was established.[39]

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[33] *Supra,* note 13.

[34] 397 Pa. 382, 154 A. 2d 788 (1959).

[35] See Lindquist v. Mullen, 45 Wash. 2d 675, 682-683, 277 P. 2d 724, 728 (1954), wherein it was stated, "to say that the patient had a cause of action all the while, although no one knew about it or suspected it, may meet some tests of legal logic or theory; but the result would hardly meet the tests of abstract, generally applicable, or lay standard of justice"; DeLong v. Campbell, *supra,* note 13.

[36] See, e.g., Lillich, *supra* note 28; Notes, 37 St. John's L. Rev. 385 (1963); Gress, *supra* note 9; 21 St. John's L. Rev. 77, 79 (1946); 11 W. Res. L. Rev. 299, 301 (1960).

[37] Ohio Rev. Code § 2505.09.

[38] Squire v. Guardian Trust Co., 79 Ohio App. 371, 47 Ohio L. Abs. 203, 73 N. E. 2d 137 (1947).

[39] Brush Beryllium Co. v. Meckley, 284 F. 2d 797 (6th Cir. 1960).