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A Four Year Statute Of Limitations For Medical Malpractice Cases: Will Plaintiff's Case Be Barred?

During the 1970 session, the California Legislature enacted a specific statute of limitations for medical malpractice actions in California. On its face, the statute appears to be a maximum four year limitation from the time of the actionable conduct. This comment examines the meaning of this statute of limitations and endeavors to identify the "legislative intent" by reviewing the history of the progress of the bill during the session and the significant developments during committee and floor hearings. The writer points out there is significant evidence to suggest the legislature did not intend to protect the medical profession at the expense of the injured plaintiff with a four year maximum limitation in all cases. In addition, some of the possible exceptions established by earlier case law are analyzed from the standpoint of their application under the new law.

As a result of the abundant malpractice litigation in the United States, a number of basic affirmative defenses have evolved and are available to the practicing physician in a suit for malpractice.[1] An often asserted defense is the running of the statute of limitations.

The law requires a person who is injured by another to seasonably pursue legal redress.[2] The reasons for this policy are evident: With the passage of time, it becomes increasingly difficult to prove that the defendant in fact exercised due care; and, if sufficient time elapses, it may become impossible to determine whether plaintiff's injury resulted from

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1. 'Malpractice,' sometimes called 'malapraxis', is a term of broad significance. It is defined as any professional misconduct or any unreasonable lack of skill of fidelity in the performance of professional or fiduciary duties; illegal or immoral conduct; improper or immoral conduct; misbehavior; wrongdoing; evil, bad, objectionable, or wrong practice; evil practices, acts, or doings; illegal or unethical practice; practice contrary to established rules; practice contrary to rules.

54 C.J.S. *Malpractice*, 1111 (1948). For a discussion of available defenses see Note, *Medical Malpratcice: A Survey of Statutes of Limitation*, 3 SUFFOLK U.L. REV. 597, 604-606 (1969).

2. Note, *Medical Malpractice: A Survey of Statutes of Limitation*, 3 SUFFOLK U.L. REV. 597, 606 (1969).

the negligence of the defendant.[3] Thus, the general purpose of a statute of limitations[4] is to bar "stale" claims.[5] This gives the alleged tortfeasor freedom from having the threat of a lawsuit hanging over his head indefinitely[6] and therefore ultimately promotes certainty and fairness. The successfully asserted statute of limitations represents the physician's most effective defense to an action for malpractice as it is a complete bar to recovery.[7]

In 1872, California enacted a code section which set forth the maximum time for commencing certain civil actions. As originally enacted, the pertinent subdivision of the Code of Civil Procedure section 340 read: "Within one year: subdivision 3., an action for libel, slander, assault, battery, or false imprisonment. . . ."[8] This section did not include a civil action for negligence.

In order to include medical malpractice, this section was amended in 1905 to include an action "for injury to or for the death of one caused by the wrongful act or neglect of another. . . ."[9] The section embraced all infringments of personal rights[10] as opposed to transgressions of property rights.

Because the statute did not specifically mention medical malpractice suits per se, it was classed as a general statute of limitations for personal injury claims in tort actions. The California Supreme Court in *Krebenios v. Lindauer*[11] declared that an action by a patient against a physician for injuries sustained by reason of the physician's negligent or unskillful treatment was governed by subdivision 3; this precedent was continuously followed.[12] However, the broad and general wording of

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3. This is particularly significant in personal injury actions because of the perishable nature of the claims. Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528 (1957); Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

4. The major purpose of statutes of limitations is to ensure fairness to defendants. *See* Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349 (1944):

> Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

5. Recent Decisions, 18 WESTERN RES. L. REV. 1002 (1967).

6. Note, *Statute of Limitations—Medical Malpractice*, 6 WAKE FOREST INTR. L. REV. 532, 535 (1970).

7. *See* note 2 *supra* at 606.

8. CAL. CODE CIV. PROC. § 340.

9. CAL. CODE CIV. PROC. § 340, *as amended*, CAL. STATS. 1905, c. 258, p. 232 (S.B. 701 as authored and introduced by Senator Lukens).

10. Simmons v. Edouarde, 98 Cal. App. 2d 826, 828 (1950).

11. 175 Cal. 431 (1917).

12. Johnson v. Nolan, 105 Cal. App. 293 (1930); Stafford v. Schultz, 42 Cal. 2d 767, 775 (1954).

this section did not provide for a method of determining when the cause of action arose; nor did it provide a method for determining when the statute commenced to run.

Interpretation Prior to 1936

Prior to 1936, the California courts applied a strict interpretation of the statute of limitations in malpractice cases. The original injury was held to be the sole cause of action. Subsequent acts, while they might aggravate the damage done, merely "attached" to the original injury without becoming independent causes of action.[13] Moreover, subsequent aggravation of the injury did not revive the action if the original injury was otherwise barred;[14] or in other words, the statute began to run on the date of the wrongful act or omission constituting the malpractice.[15]

A plaintiff could bring an action for malpractice only if he were fortunate enough to discover the wrong within one year after its commission.[16] Thus, the narrow reading of the statute often denied the plaintiff a satisfactory means of redress.[17]

Interpretation from 1936 to 1970

In 1936, the California Supreme Court in the landmark case of *Huysman v. Kirsch*[18] recognized the injustice of the strict view and redefined the point in time when a cause of action "accrues" in medical malpractice cases. In *Huysman*, a surgeon left a drainage tube in the abdomen of a patient who, despite the pain, continued under the physician's care for some 20 months before the physician opened the incision and removed the tubing. The court held that the action was not barred for the statute of limitations did not start running until the removal of the tubing.[19] This decision overruled the traditional interpretation and made knowledge the basis for the commencement of the statute of limitations.[20]

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13. Wetzel v. Pius, 78 Cal. App. 104, 107 (1926); Johnson v. Nolan, 105 Cal. App. 293, 294 (1930). *See also* Recent Decisions, *Physicians and Surgeons: Malpractice: Statute of Limitations,* 20 CALIF. L. REV. 660 (1932).
14. Recent Decisions, *supra* note 13.
15. 70 C.J.S. *Physicians and Surgeons* § 60 (1951).
16. This rule of law was, however, the object of repeated criticism. It has been shown that promptness of action presupposes knowledge of the existence of conditions which warrant such action, and that it is unreasonable to expect a person to bring suit for malpractice until he has actual knowledge of facts which constitute the wrong. H. OPPENHEIMER, A TREATISE ON MEDICAL JURISPRUDENCE 113 (1935).
17. *See* Recent Decisions, *supra* note 5, at 1006.
18. 6 Cal. 2d 302 (1936).
19. *Id.* at 312.
20. *Id*. *See* Recent Recisions, 24 CALIF. L. REV. 607, 608 (1936).

The cases have uniformly followed the *Huysman* "discovery" rule and have expanded it by establishing new exceptions.[21] Thus, the courts have held that the statute does not commence to run while the physician and patient relationship continues;[22] or, until the plaintiff discovers the injury, or through the use of reasonable diligence should have discovered it,[23] whether such actual or constructive discovery occurs prior to or after termination of the physician-patient relationship;[24] or, if there is an act or omission on the part of the physician which would toll or interrupt the running of the statute or estop the physician from asserting that the action is barred.[25]

In the years subsequent to 1936, the courts have made knowledge the basis for commencing the statutory period and have evolved on a continuing path of liberalization in the interpretation of Code of Civil Procedure section 340. This liberal interpretation apparently has diminished the effectiveness of the statute of limitations. Consequently, considerable pressure has been asserted by various interest groups who desire restriction on potential plaintiffs.

Present Malpractice Crisis

Since the end of World War II, all litigation has expanded. This has been succinctly termed the "law explosion".[26] In such an era, the number of medical malpractice lawsuits would be expected to have risen proportionately; instead, they have risen out of proportion.[27] There

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

22. The rationale is that during such a relationship the patient does not ordinarily have knowledge of negligent treatment by the physician upon whose skill, judgment and advice he continues to rely. Huysman v. Kirsch, 6 Cal. 2d 302, 312 (1936); Myers v. Stevenson, 125 Cal. App. 2d 399, 401 (1954). *See generally* Recent Decisions, 37 ST. JOHN'S L. REV. 385 (1963); Sacks, *Statute of Limitations in Undiscovered Malpractice,* 16 CLEV.-MAR. L. REV. 65, 67-68 (1967).

23. Huysman v. Kirsch, 6 Cal. 2d 302, 312 (1936); Stafford v. Shultz, 42 Cal. 2d 767, 778 (1954); Hundley v. St. Francis Hospital, 161 Cal. App. 2d 800, 806 (1958); Howe v. Pioneer Mfg. Co., 262 Cal. App. 2d 330, 342 (1968). *See* note 2 *supra,* at 614. Whether the appellant should have reasonably discovered his condition and its cause at an earlier time, and whether he should have sought further advice as to that condition is a question of fact. Zelver v. Sequoia Hospital District, 7 Cal. App. 3d 934, 943 (1970).

24. Petrucci v. Heidenreich, 43 Cal. App. 2d 561, 562 (1941).

25. Calvin v. Thayer, 150 Cal. App. 2d 610, 615 (1957). The tolling factors include fraudulent concealment of the facts with implicit or express representation, continuing tort, continuing duty, or a progressive and accumulated injury. *See* Stafford v. Schultz, 42 Cal. 2d 767, 779 (1954); Warrington v. Charles Pfizer & Co., 274 Cal. App. 2d 564, 568 (1969). *See generally* Note, *Malpractice and the Statute of Limitations,* 32 IND. L.J. 528, 535-540 (1957).

26. Morris, *Response to Ribicoff: Malpractice Suits v. Patient Care,* 2 INS. COUNSEL J. 206, 213 (1970). There is a graphic portrayal of the development of malpractice litigation in an article by Sandor, *The History of Professional Liability Suits In The United States,* 163 J.A.M.A. 459, 461-463 (1957).

27. *Morris, supra* note 26. Medical professional liability claims were relatively insignificant until 1930. However, they arose tenfold in the decade 1930 to 1940 and

are several reasons for the increase in medical malpractice lawsuits which contribute to the present malpractice crisis.

Most suits are the result of injuries suffered by patients during medical treatment or surgery and are justifiable from the standpoint that the patient, as a result of the alleged negligence or incompetence of the physician, did suffer extra pain and suffering.[28] Some malpractice suits are the indirect result of a deterioration in physician-patient rapport.[29] The breakdown in the physician-patient relationship is often created by the defendant physician himself who has told his patient so little about his progress that the patient worries and seeks quasi-medical advice from others; or, told him too much; or, neglected him or his emotional needs.[30] In such a situation a malpractice suit is likely to follow.[31] Another factor is that doctors are few in supply and so great in demand.[32] The result is "a pressure cooker of overworked physicians, high caseloads, short-cut precautions and substandard treatment."[33]

Therefore, the present malpractice crisis arises out of complex and dynamic relationships between law, medicine, economics and government, all superimposed on a matrix of an inflated economy and rapidly changing social values.[34]

Malpractice Crisis and California

The medical malpractice crisis has stimulated several interest groups to suggest solutions to the problem. The spectrum of controversy has

another tenfold from 1940 to 1950. Since 1950, judgments in the six figures have become uncomfortably commonplace. An AMA survey in 1957 found that one out of every seven physicians was a defendant in a professional liability action. Committee on Medicolegal Problems, *Professional Liability & The Physician*, 183 J.A.M.A. 695 (1963).

28. Ribicoff, *Medical Malpractice: The Patient v. the Physician*, 6 TRIAL 10 (1970). Poor results of surgery (other than results from directly isolable acts such as a slip of the knife or leaving a foreign body in an operative wound) fall into four main classifications: (1) failure to cure the condition for which surgery was performed, (2) undue prolongation of healing or recovery even though the final result is satisfactory, (3) appearance of early complications such as infection in the wound during healing, and (4) developments of late complications. *See* D. LOUISELL AND H. WILLIAMS, 1 MEDICAL MALPRACTICE 112 (1970).

29. *Ribicoff, supra* note 28. For many years sociologists have pointed to the increasingly impersonal nature of medical care and have warned of the negative consequences of a greater likelihood of a malpractice claim. Bernzweig, *Lawsuits: A Symptom Not a Cause*, 6 TRIAL 14, 15 (1970).

30. *Morris, supra* note 26, at 215.

31. However, if there is a high level of competence and trust, most patients will not resort to a malpractice suit but will "ride out" the pain and suffering accompanying a "bad" result. *Id.* at 222.

32. There are less than 300,000 active doctors caring for over 200 million Americans—about one doctor for every 700 citizens. Kelner, *The Conspiracy of Silence*, 6 TRIAL 18 (1970).

33. *Id.*

34. *Bernzweig, supra* note 29, at 14.

been concentrated within two opposing interest groups, the California Medical Association (CMA) and the California Trial Lawyers Association (CTLA).

The CMA agrues that a major contributing factor to the increase in malpractice litigation is that, in effect, there is no statute of limitations for medical malpractice.[35] The California courts have followed the "discovery doctrine" which seems to place the physician in a position where he is never free from the threat of a malpractice suit, regardless of the number of years that have elapsed since the patient was treated.[36]

Adverting to the premise that there is no statute of limitations in malpractice lawsuits, the insurance industry involved in writing malpractice insurance must maintain huge reserves, paid for by physicians, to protect themselves against the possibility of a potentially disastrous malpractice suit which is commenced several years from the date of injury.[37] Consequently, there has been a significant increase in the amount of premiums imposed on physicians.[38] Physicians, as do other businessmen, pass on their operating costs, including insurance, to their customers-the patients.[39]

The CMA proposed a solution to the problem by sponsoring new legislation designed to reduce the premiums of malpractice insurance for the medical profession.[40] The insurance companies will not be required to establish and maintain the large reserves year-after-year, but rather they will be able to restrict their reserves in accordance with the four-year limitation period.[41] The reduction of reserves will effect

35. Interview with J. Michael Allen, Director of Governmental Relations of the California Medical Association, in Sacramento, California, December 17, 1970.

36. *Id.*

37. *Id.*

38. *Id.*

39. Uhthoff, *Medical Malpractice—The Insurance Scene,* 43 ST. JOHN'S L. REV. 578, 579 (1969).

40. The bill was authored and introduced by Senator Gordon Cologne, R-Indio. S.B. 362, CAL. STATS. 1970, c. 360, § 1, p. 771:

> An act to add Section 340.5 to the Code of Civil Procedure, relating to limitation of actions. The people of the State of California do enact as follows:
> Section 1. Section 340.5 is added to the Code of Civil Procedure, to read:
> 340.5 In an action for injury or death against a physician or surgeon, dentist, registered nurse, dispending optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bio-analyst, clinical laboratory technologist, veterinarian, or a licensed hospital as the employer of any such person, based upon such person's alleged negligence, or for rendering professional services without consent, or for error or omission in such person's practice, four years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever first occurs. This time limitation shall be tolled for any period during which such person has failed to disclose any act, error, or omission upon which such action is based and which is known or through the use of reasonable diligence should have been known to him.

41. Letter from Senator Gordon Cologne to Governor Ronald Reagan, June 29, 1970, on file in California State Capitol Building, Room 3070.

economies in the cost of malpractice insurance which may be carried over to patients and the general public.[42]

The California Trial Lawyers Association (CTLA) was the most formidable opposition. The comprehensive scope of the legislation was criticized as favoring a specific profession in that it establishes preferential treatment for a specific profession by reducing responsibilities for error, and unfairly deprives the injured plaintiff of his legal redress.[43]

Evolution of the New Statute

New legislation was introduced each year from 1968 through 1970; however, until 1970 no legislation was passed into law.[44] Each bill introduced during this three-year period was designed to implement a statute of limitations for medical malpractice suits.[45]

The 1970 bill was amended twice before it was signed into law.[46] As introduced, the legislation provided for a statute of limitations of

> four years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever first occurs.[47]

Thus, there would have been an absolute four year period from the date of injury during which to commence the action. This four year period would not have considered the physician's failure to disclose any act or error which was known or through the use of reasonable diligence should have been known to him.

The bill, as introduced, drew harsh criticism from its opponents, in particular, the California Trial Lawyers Association (CTLA). Their arguments were not without sympathetic support from the staff and members of the Judiciary Committee.[48]

On April 17, 1970, during an open hearing of the Senate Judiciary Committee, the CTLA asserted, among other arguments, that the original form of the bill would severely limit the right of recovery for the injured plaintiff who is not responsible for the delay in filing a claim because fraudulent concealment may be present.[49] Though some mem-

42. *Id.*
43. Interview with William H. Lally, Legislative Director of the California Trial Lawyers Association, in Sacramento, California, January 11, 1971. [Hereinafter cited as *Lally*].
44. A.B. 1071, 1968 Regular Session; S.B. 678, 1968 Regular Session. A.B. 135, 1969 Regular Session. S.B. 362, 1970 Regular Session.
45. *Id.*
46. S.B. 362, 1970 Regular Session, *as amended*, April 17, 1970 and April 27, 1970.
47. S.B. 362, 1970 Regular Session, *as introduced*, February 12, 1970.
48. Interview with Herbert Nobriga, Chief Counsel, Assembly Judiciary Committee in Sacramento, California, April 12, 1971 [hereinafter cited as *Nobriga*].
49. *Lally*.

bers of the Committee strongly asserted their belief that a statute of limitations was justified and necessary to prevent indefinite exposure to claims, a compromise was reached and the bill passed out of committee with the resulting amendment.[50] The amended version provided for a tolling factor which stated that the "time limitation shall be tolled for any period during which such person [medical practitioner] has intentionally concealed any act, error, or omission upon which such action is based."[51] The first amended version, therefore, provided for a tolling of the statute of limitations only when there was an *intentional* concealment of an error by the medical practitioner. This version would not have tolled the statute of limitations for any unintentional concealment of an error.

The harshness of the bill was partially removed by the tolling amendment; however, the CTLA remained unsatisfied and contended that the burden of proof was insurmountable due to the plaintiff's difficulty in proving that the physician had actual knowledge of his negligence.[52] Further, the CTLA argued that the public should not be subjected to any solution that requires innocent victims to bear the cost of unintentional but careless human error.[53] The continued effort of the CTLA to muster support for the injured party who might be deprived of his just recovery culminated in a second compromising amendment on the floor of the senate on April 27, 1970. The second amended version provided that the statute shall be tolled whenever the practitioner has "failed to disclose any act, error, or omission upon which such action is based and which is known or through the use of reasonable diligence should have been known to him."[54] Thus it is apparent that the bill, as enacted into law, still provides for intentional non-disclosure as it used the phrase "known . . . to him."[55] However, it also provides for tolling when there is an unintentional failure to disclose which seems to impose a burden on the physician to discover his error. This can be determined from the portion of the bill which provides for tolling when failure to disclose is the result of lack of reasonable diligence by the practitioner in discovering his error.[56]

It is apparent that the bill became more liberal in its application as it progressed through the amendment process. This liberalization would appear to be the result of the legislature's overriding concern for the

50. *Nobriga.*
51. S.B. 362, 1970 Regular Session, *as amended,* April 17, 1970.
52. *Lally.*
53. *Id.*
54. S.B. 362, 1970 Regular Session, *as amended,* April 27, 1970.
55. *Id.*
56. *Id.*

meritorious claim which would have been barred by the original absolute limitation period.[57] It would seem that the legislature intended to allow the courts some latitude in applying the statute of limitations.[58] In fact, the California Trial Lawyers Association believes that the amendments have considerably reduced the harshness of the bill by allowing the courts considerable leeway in applying the tolling factor.[59]

Another inference that the legislature was concerned about meritorious claims can be drawn from the legislation introduced in 1969. This bill would have provided that

> the applicable limit of time specified in this code for the commencement of action shall be calculated from the date of the alleged wrongful act, and not from any other date, except only upon proof of fraud or intentional concealment.[60]

This in effect would have provided for a *one* year statute of limitations which could only be tolled in the event of intentional non-disclosure. It is, therefore, reasonable to assume that the rationale behind the resultant liberal statute was the concern for the bona fide claim which would be barred by an absolute limitation.

Practical Effect of the New Statute

The new section's impact on existing law appears to be of some significance. The actual effect of the statute has not been determined as no points of controversy have been litigated under it.

Since the statute is an attempt to limit the period within which a suit for malpractice might be brought to a maximum of four years after the "date of injury, or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first,"[61] the effect is not to alter existing law for injuries discovered within three years from the date of injury. Any injury discovered within the first three years must of necessity be consumated in a legal action within four years, or it is barred by the one year from discovery limitation; thus, since the previous law was limited to one year from discovery, there is no change in existing law for an injury discovered within the first three years. However, for injuries discovered between the third and fourth year after the injury, the injured patient must assert a cause of action within that one year period or be barred by the running of the statute, providing the tolling factor

57. *Nobriga.*
58. *Id.*
59. *Lally.*
60. A.B. 135, 1969 Regular Session.
61. *See* note 40 *supra.*

does not apply. Of course, any claim discovered after four years would now be barred.

The potential impact on the number of claims which will be barred may be brought into proper perspective through analysis of the number of claims reported against [Allopathic] physicians in Southern California.[62] A reasonable approximation may be made by computing the percentage of claims discovered during the first three years, between the third and fourth years, and after four years from the date of injury. There is little reason to assume the time required for discovery will fluctuate much during the next few years.

The number of claims reported during the policy years from 1951 through 1965 was 4,934.[63] The number of claims reported within three years from the date of injury was 4,032 or 81.82 percent.[64] The claimants within this group will not be affected. These plaintiffs still have to file within one year from discovery, which of necessity will be within four years.

The 448 claims, 9.08 percent, reported during the period of three to four years from the date of injury will not be adversely affected if these claimants are diligent and file their claims within the diminishing period of the fourth year.[65] An undetermined number of these will undoubtedly be barred, due to the lack of diligence of the plaintiff in reporting the injury.

The number of claims reported after four years from the date of injury was 454.[66] This group of 9.20 percent will be barred by the statute.

The vast majority of claims being reported within the four year period suggests that the new section will have minimal impact on the medical malpractice problem and equally slight impact on medical malpractice insurance. However, it seems reasonable that at least some of the claims arising after the 4 year period will be barred unjustly. That is, they will not be "stale" regarding the right, only regarding the discovery of the wrong. 9.20 percent of all claims may be barred. Is this desirable social policy?

Arguably, the social policy of limiting claims will not be served in such cases—especially where evidence indicates the patient was at a substantial disadvantage in making discovery of the malpractice. The

62. From figures submitted by the Nettleship Company to Senator Gordon Cologne, on file in the California State Capitol Building, Room 3070.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

counterbalancing strong social policy to permit an injured plaintiff to recover for his losses should outweigh the 4 year maximum time limitation in some cases.

Tolling the Statute

The phraseology of the tolling factor suggests that the legislature may have intended to allow the California courts latitude in applying the new statute. To invoke the tolling section, the use of reasonable diligence by the medical practitioner in discovering the harm is crucial. If the harm could have been discovered by the use of reasonable diligence within four years from the date of injury, the limitation period is tolled, no circumvention is necessary, and claims arising after the period may be asserted. If the harm could not have been discovered by the use of reasonable diligence within four years, the statute will bar the claim. The pressing issue then becomes: under what physician-patient relationships might it be possible for the physician, by the use of reasonable diligence, to discover the injury within four years?

There are three theories an injured person conceivably may utilize to invoke the tolling section for a claim which is discovered after the four year limitation period. Under prior law, California courts used the "continuing physician-patient relationship" to circumvent the former statute of limitations.[67] The physician-patient relationship may continue for an indefinite period beyond a course of treatment for an actionable injury merely by treatment that is entirely unrelated to the actionable injury or its after cause.[68] This exception evolved from the *Huysman* case and stands for the premise that, in any case, the continuing relationship of the doctor and patient, with the patient's accompanying reliance on the doctor for information, postpones the running of the statute against the ignorant plaintiff until the relationship terminates.[69]

A patient may be unable to rely upon the acts of his physician during the continuing relationship to toll the statute under certain circumstances.

A California court stated in *Hirschman v. Saxon* that the fiduciary physician-patient relationship terminates when the patient failed to keep scheduled appointments and never thereafter returned for further treatment. Thus, he may not assert the continuing relationship as an ex-

67. *See* note 22 *supra*.
68. LOUISELL AND WILLIAMS, 1 MEDICAL MALPRACTICE 389 (1970). [hereinafter cited as LOUISELL].
69. Huysman v. Kirsch, 6 Cal. 2d 302, 312 (1936). *See also*, WITKIN, CALIFORNIA PROCEDURE, *Actions*, § 133 (1954).

ception.[70] The court further stated that where the patient wrote the physician alleging misconduct but failed to take legal action in respect to the alleged malpractice until a year and one half later, the one year period of limitations was applicable and the patient's claim was barred.[71]

A second possible exception is the "end of treatment theory." Under this theory, the statute may be tolled until the end of treatment, even though the wrongful act causing the injury is clearly determinable, if it has been followed by subsequent treatment of the injury or by continuation of the treatment out of which the injury arose.[72]

A final possible exception is another form of the "end of treatment" doctrine and is known as the "continuing negligence" theory. This theory is based on a continuous and daily breach of the physician's duty by his failure to discover or correct the wrongful injury. The statute of limitations does not begin to run until the commission of the last negligent act.[73] *Huysman* seems to utilize the continuing negligence reasoning; but appears to develop a new twist to the rationale—namely that the former statute began to run at the time a foreign body was removed by a physician who left it in the patient during a prior operation.[74] This reasoning was not necessary in view of the "discovery doctrine" and the theory was criticized as tending to confine its application to situations in which a surgeon left a foreign object inside his patient.[75] However, this reasoning may be useful in circumventing the new statute.

For optimum results in application, the exceptions should be brought within the language of the tolling factor. The pivotal issue in utilizing any of the three exceptions is whether the injury is "known or through the use of reasonable diligence should have been known" to the medical practitioner. The physician-patient relationship should come within the purview of the statute since the relationship is continuing and the physician should be able to discover the harm through the use of reasonable diligence. A patient would seldom not inform the medical practioner of an injury or of continuing pain and suffering from an injury. The physician would be placed on notice that the patient has not properly responded; this would be true even though the physician is no

70. Hirschman v. Saxon, 246 Cal. App. 2d 589, 592 (1966).
71. *Id.*
72. LOUISELL at 374. *See also* DeHaan v. Winter, 247 N.W. 151 (1933); Schmit v. Esser, 236 N.W. 622, 74 A.L.R. 1312 (1931); Dowell v. Mossberg, 355 P.2d 624 (1960); Gross v. Wise, 239 N.Y. Supp. 2d 954 (1963); McQuinn v. St. Lawrence County Laboratory, 283 N.Y. Supp. 2d 747 (1967).
73. *See* Note, *supra* note 2, at 612.
74. Huysman v. Kirsch, 6 Cal. 2d 302, 308 (1936).
75. WITKIN, CALIFORNIA PROCEDURE, *Actions*, § 133 (1954). This has been the approach of some of the later cases. *See* Trombley v. Kolts, 29 Cal. App. 2d 699, 708 (1938); Ehlen v. Burrows, 51 Cal. App. 2d 141, 145 (1942).

longer treating the patient for this injury, but rather for some totally unrelated ailment. The continuing relationship seems to require and afford the physician an opportunity to discover the harm even where there are no overt manifestations of complications.

A possible problem with this exception is that the statute requires both the patient and physician to use reasonable diligence to discover the injury;[76] however, it would appear that this would not normally defeat the claimant's cause of action. Reasonable diligence requires a medical practitioner to possess and apply that degree of skill and learning that is customarily applied in treating those similarly afflicted in the same or similar circumstances.[77]

The patient is held to that degree of care expected from a reasonable man of ordinary prudence in the same or similar circumstances.[78] Since the medical practitioner is more highly skilled and learned than the ordinary man the law demands conduct consistent with this knowledge.[79] This knowledge would appear to require the medical practitioner while the relationship is continuing, to reasonably discover the "actionable" injury before the patient, with his lesser knowledge would discover the injury, even if the doctor is treating the patient for a totally unrelated ailment.

Also, in *Hundley v. St. Francis Hospital*[80] the court stated that while the physician-patient relationship continues, the patient, who is relying upon the skill and advice of the medical practitioner is not ordinarily placed on notice of the negligent conduct of the medical practitioner, and unless he actually discovers the negligence, the statute does not commence to run during the relationship. This is true even if the patient knows of the condition, so long as its negligent cause is not known.[81] Since the patient ordinarily is not placed on notice of the cause it would appear that even through the use of reasonable diligence he would not be able to discover the injury. This strengthens the conclusion that the medical practitioner should be able to discover the injury through his reasonable diligence before the patient would discover the injury by reasonable diligence. Thus, it appears that the physician-patient relationship will come within the purview of the new statute, in that it probably affords the physician sufficient opportunity to discover the injury within four years through the use of reasonable diligence.

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76. *See* note 40 *supra*.
77. Valentin v. La Societe Franchise, 76 Cal. App. 2d 1, 5 (1946); Agnew v. Larson, 82 Cal. App. 2d 176, 182 (1947); CAL. JUR. 2d, *Physicians and Surgeons*, § 69.
78. PROSSER, LAW OF TORTS 153 (3rd ed. 1964).
79. *Id.* at 164.
80. 161 Cal. App. 2d 800, 806 (1958).
81. *Id.*

The second exception, the end of treatment theory, also appears to be a valid exception. This theory is basically the same as the physician-patient relationship, except that the statute of limitations begins to run at the end of treatment for the particular injury rather than at the end of the total relationship. The exception's application could depend upon the length of treatment for the actionable injury.

If the treatment is of short duration, it is possible that the physician would not discover the injury through the use of reasonable diligence. The longer the claimant is treated for the injury, the more probable discovery through the use of reasonable diligence is.

In fact, this exception may be more practical than the physician-patient relationship. The physician is treating the actionable injury, rather than some unrelated ailment. If the treatment continues for any substantial period, it would certainly seem that the physician should be placed on notice that the claimant is not properly responding to treatment. Thus, through the use of reasonable diligence he should be able to discover his error.

Some cases require that there be "continuing negligence", but defendant's failure to discover the wrongful injury is usually held to constitute continuing negligence.[82] This broad definition will ordinarily bring about the same result as the rule which allows the period to begin at the end of treatment.[83] The cases commonly fail to state whether some form of negligence in the subsequent treatment is required and it is difficult to segregate the cases on this basis.[84]

CONCLUSION

Justice demands that the injured party be afforded a remedy; it also demands that the defendant not be subjected to the threat of a lawsuit for an unreasonable length of time. The legislature has apparently taken the position that a statute which implements a more definite limitation period will achieve a "just" result.

The high cost of medical care includes the cost of medical malpractice insurance which may be somewhat higher by reason of the prior statute of limitations. The argument can be made that the new statute will reduce medical costs and therefore benefit the general public. However, the increasing cost of medical malpractice insurance may be attributed to increasingly negligent physicians. Also, the cost may be inflated by profit motives of the insurance industry. The new statute

82. LOUISELL at 375.
83. *Id.*
84. *Id.*

apparently is a defense tool developed by the medical field to prevent suits against physicians and protect and benefit the insurance carriers rather than the injured party or the general public. However, the final version of the statute is clearly distinguishable from the original version and has progressed through the amendment process to the point where a liberal interpretation may be appropriate. Previous case interpretation and social policy indicates that the four-year maximum limitation may be applied less rigidly than the literal terms of the statute suggest. The California courts are left with the means to balance the injured party's rights with the public's interest in lower medical costs and achieve "justice for all."

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