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Medical Malpractice Tort Claim Accrual (Toal v. United States)

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MEDICAL MALPRACTICE TORT CLAIM ACCRUAL

Title 28 U.S.C. section 2401(b)[90] provides that any tort claim against the United States shall be barred by the statute of limitations unless the action shall have been brought within two years of the time of accrual of that claim. The only question raised, therefore, in *Toal v. United States*,[91] a malpractice action, was how the Second Circuit Court of Appeals would construe the phrase "within two years after such claim accrues"[92] in the context of a medical malpractice action.

In *Toal*, the claimant was assured by a government physician that the pantopaque dye, used in certain medical tests upon the plaintiff and left in his body thereafter, would, in fact, be gradually absorbed into plaintiff's system and would thereby cause him no injury. The government physician omitted to note the pantopaque retention in plaintiff's discharge report, and therefore, plaintiff's private physician was unable to learn anything at that time concerning that retention. In addition, the plaintiff himself was prevented from acquiring the knowledge of any possible acts of malpractice committed upon his person. It was not until March of 1964, nearly two years after the initiation of the pantopaque into plaintiff's system, that the plaintiff learned that such was the primary cause of his protracted illness. In a suit brought pursuant to the Federal Tort Claims Act[93] more than two years subsequent to the plaintiff's release from the hospital, the defense raised by the government as to the two year statute of limitations was expeditiously overruled by the district court,[94] an opinion later affirmed by the court of appeals.[95] This was indeed a breakthrough. Prior to this decision, the furthest this court had gone with regard to such an action was its holding in *Kossick v. United States*.[96] In *Kossick*, the United States Court of Appeals, for the Second Circuit held that the statute of limitations, in an action such as the one in *Toal*, was to commence at the time the patient ceased to receive continuous treatment from the wrongdoing doctor or hospital.[97]

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90 28 U.S.C. § 2401(b) (Supp. V, 1969) *amending* 28 U.S.C. § 2401(b) (1964). The claim is to be presented in writing to the appropriate federal agency within two years of the accrual of the claim.

91 438 F.2d 222 (2d Cir. 1971), *aff'g* 306 F. Supp. 1063 (S.D. Conn. 1969).

92 28 U.S.C. § 2041(b) (Supp. V, 1969). The question presented in *Toal* is whether the action accrues at the time of the alleged malpractice upon the plaintiff or whether such action accrues from the time claimant discovered, or in exercise of reasonable dilligence should have discovered, the existence of the alleged acts of malpractice upon his person.

93 Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970).

94 Toal v. United States, 306 F. Supp. 1063 (S.D. Conn. 1969).

95 438 F.2d 222 (2d Cir. 1971).

96 330 F.2d 933 (2d Cir.), *cert. denied*, 379 U.S. 837 (1964).

97 330 F.2d at 936. This holding was in line with the law of New York as stated

In deciding *Toal*, the court, for the first time,[98] held the "discovery rule" to be applicable to medical malpractice actions arising under the Federal Tort Claims Act,[99] and thus the statute of limitations does not begin to run until "the claimant has discovered, or in the exercise of reasonable diligence should have discovered, the acts constituted the alleged malpractice."[100] It would appear, however, that the court's continuous mention of the particular circumstances of the case would indeed limit this holding to actions wherein a foreign object has negligently been left in the plaintiff's body,[101] and should not be understood as applying to all medical malpractice actions arising under federal statute.

PENDENT JURISDICTION

The judicial inclination toward the expansion of the concept of pendent jurisdiction[102] was enhanced by *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*[103] In this action for copyright infringement, unfair competition and unfair trade practices, Judge Friendly stated[104] that when an unfair competition claim[105] is asserted against three defendants in one out of four counts of a complaint whose other three counts allege copyright infringement,[106] asserted against only two of the defendants,

in Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969), a case concerning a foreign object negligently left in the plaintiff's body. Prior to the *Flanagan* decision, the law in New York as to all medical malpractice actions was that the statute of limitations commenced to run upon the patient's termination of a continuous relationship with the wrongdoing doctor or hospital. *See* Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962); Conklin v. Draper, 254 N.Y. 620, 173 N.E. 892 (1930).

98 Certain other circuits have been holding this way for some time. *See, e.g.*, Brown v. United States, 353 F.2d 578 (9th Cir. 1965); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962).

99 *See* note 93 *supra*.

100 438 F.2d at 224-25.

101 This decision is indeed harmonious with present New York decisional law. In Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427, 431, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 27, the New York Court of Appeals held that in cases "where a foreign object has negligently been left in the patient's body, the Statute of Limitations will not begin to run until the patient could have reasonably discovered the malpractice." *See also* Murphy v. St. Charles Hosp., 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970).

102 *See* 3A J. MOORE, FEDERAL PRACTICE ¶ 18.07, at 1951 (2d ed. 1971). Pendent jurisdiction is a type of ancillary jurisdiction. It is derived from an expansive reading of Article III, Section 2 of the Constitution of the United States. The Supreme Court began the doctrine of pendent jurisdiction in the case of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). There the Court held that a federal court may decide issues of state law when necessary to decide a federal question because the power to decide a case must include the power to resolve all issues necessary to the decision.

103 441 F.2d 627 (2d Cir. 1971).

104 Although this is not the holding of the case, it nevertheless is strong dictum and in all likelihood will be followed in subsequent cases decided in the Second Circuit.

105 Such a claim is one which arises under state law.

106 Copyright infringement is a claim which arises under federal law. 28 U.S.C. § 1338(a) (1970).