St. John's Law Review

Volume 37
Number 2 *Volume 37, May 1963, Number 2*

Article 11

Malpractice--Statute of Limitations--Plaintiff's Cause of Action Held Not to Have Accrued Until End of Continuous Treatment (Borgia v. City of New York, 12 N.Y.2d 151 (1963))

St. John's Law Review

Whereas full faith and credit is not applicable to questions of jurisdiction, the doctrine of res judicata is. Hence, if a judgment is rendered in one state where the application of the res judicata principle precludes the parties from subsequently raising the question of jurisdiction collaterally within that forum, then a court in another state should be bound by full faith and credit to give the prior judgment the same conclusiveness it enjoys in the rendering state. Thus, the second forum will be bound to hold the matter of jurisdiction, whether it be over the person or the subject matter, as res judicata between parties to the previous suit. Of course the application of the res judicata doctrine will vary accordingly as that doctrine was evolved in the first forum, but in all cases the rule of the first forum, if it is to receive full faith and credit, must afford the contesting party due process.[27] It must also be noted that under extreme circumstances policy considerations of the second forum have been allowed to defeat the operation of full faith and credit.[28] Consequently, it appears that in an exceptional case a court in another state may permit a collateral attack though the courts of the rendering state would not.

With the above in mind, it will be noted that the Court in the principal case makes no mention of the status of the Nebraska law as to res judicata and collateral attack of subject-matter jurisdiction. Hence, the result arrived at in the instant case would appear to be justified provided that the Nebraska judgment was subject to collateral attack in that state; and unjustified if the law of Nebraska is otherwise, unless the present case is deemed one of those extremely rare cases in which the dictate of full faith and credit is inoperative. In addition, if there were no controlling decision in Nebraska, it seems that the Court in the principal case was by that fact justified in applying its own rule as to collateral attack of subject-matter jurisdiction.[29]

MALPRACTICE — STATUTE OF LIMITATIONS — PLAINTIFF'S CAUSE OF ACTION HELD NOT TO HAVE ACCRUED UNTIL END OF CONTINUOUS TREATMENT. — Plaintiff, an infant, brought a mal-

---

[27] American Sur. Co. v. Baldwin, 287 U.S. 156 (1932).

[28] See State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154 (1945); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939).

[29] Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Boskey & Braucher, *supra* note 26, at 1011-12.

practice action through his guardian *ad litem* against the City of New York to recover damages for traumatic injuries he had sustained while a patient at a city hospital. Plaintiff's notice of claim was filed within ninety days of his discharge from the hospital, but not within ninety days of the last act of malpractice. The last ninety days of plaintiff's stay in the hospital were devoted solely to an effort by the defendant to alleviate the effects of its malpractice through remedial therapy. The Supreme Court judgment in plaintiff's favor was reversed by the Appellate Division on the ground that the notice of claim was not filed within the ninety-day period prescribed by the General Municipal Law.[1] The Court of Appeals, reversing the Appellate Division, *held* that so long as the defendant continued to treat the plaintiff for the same or related illness out of which the malpractice arose, the plaintiff's cause of action is not deemed to have accrued. Therefore, the plaintiff's notice, filed within ninety days of his discharge from the hospital, was timely. *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1963).

The notice of claim provision under which this case arose is analogous to the malpractice statute of limitations contained in the Civil Practice Act.[2] In both situations, the statutory period of limitations usually begins to run from the time the injury was sustained.[3] Therefore, the two statutes will be treated as involving the same problems for the purposes of analysis in this article.

The courts have given a uniform interpretation to the two statutes. In *Conklin v. Draper*,[4] a statute of limitations case, the court held that plaintiff's cause of action accrued when the defendant doctor negligently failed to remove arterial forceps from the plaintiff's abdominal cavity, and not when the plaintiff subsequently discovered the foreign matter in her body.[5] The court

---

[1] N.Y. MUNIC. LAW § 50-e provides that a notice of claim against a public corporation must be filed within ninety days after the claim arises. The purpose of this short notice requirement is to enable the municipality to make a prompt investigation of claims against it. Winbush v. City of Mount Vernon, 306 N.Y. 327, 118 N.E.2d 459 (1954); Teresta v. City of New York, 304 N.Y. 440, 108 N.E.2d 397 (1952); 1944 N.Y. LEG. DOC. No. 15, N.Y. JUDICIAL COUNCIL TENTH ANNUAL REPORT AND STUDIES 265.

[2] N.Y. CIV. PRAC. ACT § 50(1) provides that a malpractice action must be commenced within two years after "the cause of action has accrued." It should be noted that if the City of New York is a defendant, as in the present case, the action must be brought within one year after it arose. NEW YORK CITY ADMINISTRATIVE CODE § 394a-1.0(c). This requirement is in addition to the notice of claim provision.

[3] PRASHKER, NEW YORK PRACTICE 57 (4th Ed. 1959); 22 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE § 9 (1956).

[4] 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930).

[5] The malpractice statute was also held to run from the time of injury and not discovery in Golia v. Health Ins. Plan, 6 App. Div. 2d 884, 177

reasoned that it is the injury itself and not its subsequent discovery which gives rise to the cause of action, and hence the statute begins to run at the earlier date.[6] A similar result was reached in *Joseph v. McVeigh*,[7] a notice of claim case, wherein the court held that the period for filing the notice of claim began to run from the time the injury was actually sustained.

This harsh rule, which penalizes plaintiffs with valid causes of action for their failure to discover their injuries within the period of limitations, has long been the subject of criticism.[8] Judicial attempts to ameliorate this situation have resulted in the evolution of a new doctrine. According to this doctrine, known as the "continuous treatment theory," a plaintiff's cause of action does not accrue until the defendant physician completes his treatment, provided there is a continuing breach of duty by the defendant during the course of this subsequent treatment. Therefore, the statute of limitations would not begin to run until the treatment ended, despite the fact that the negligence giving rise to the cause of action may have occurred earlier, and the claim would otherwise have been barred by the statute.[9] The theory was first promulgated in Ohio in *Gillette v. Tucker*.[10] The *Gillette* rationale first appeared in New York case law with the Supreme Court decision in *Sly v. Van Lengen*.[11] In both the *Gillette* and *Sly* cases the courts held that the plaintiff's cause of action accrued not when the defendant physician left a sponge in plaintiff's body during the course of an operation, but when he terminated treatment years later without having removed the sponge. The rationale of both cases was that the failure to remove the sponge amounted to a continuing breach of duty, and hence

---

N.Y.S.2d 550, (2d Dep't 1958), *aff'd mem.*, 7 N.Y.2d 931, 165 N.E.2d 578, 197 N.Y.S.2d 735 (1960); Budoff v. Kessler, 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954) (memorandum decision); Ranalli v. Breed, 251 App. Div. 750, 297 N.Y.Supp. 688 (2d Dep't 1937) (memorandum decision), *aff'd mem.*, 277 N.Y. 630, 14 N.E.2d 195 (1938).

[6] 229 App. Div. 227, 230, 241 N.Y. Supp. 529, 532 (1st Dep't), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930). It is interesting to note that only two states have a statutory provision tolling the malpractice statute of limitations until discovery, *i.e.*, Alabama (ALA. CODE tit. 7, § 25(1) (1958)) and Connecticut (CONN. GEN. STAT. ANN. § 52-584 (1960)). See LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES ¶ 13.07 (1960).

[7] 285 App. Div. 386, 137 N.Y.S.2d 577 (1st Dep't), *aff'd mem.*, 309 N.Y. 877, 131 N.E.2d 289 (1955).

[8] Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 343 (1962). See also PRASHKER, *op. cit. supra* note 3; Note, *The Statute of Limitations Applicable to Malpractice Actions in New York*, 11 N.Y.U. INTRA. L. REV. 190, 198 (1955).

[9] See Lillich, *supra* note 8, at 344.

[10] 67 Ohio St. 106, 65 N.E. 865 (1902).

[11] 120 Misc. 420, 198 N.Y. Supp. 608 (Sup. Ct. 1923).

the cause of action accrued only at the end of treatment.[12] Since the *Sly* decision, the continuous treatment theory has become a generally accepted doctrine in the lower New York courts.[13]

In 1960, the Court of Appeals indicated its probable acceptance of the continuous treatment theory in *Hammer v. Rosen*.[14] The court mentioned the theory with approval though recognizing that its adoption was unnecessary to its holding in plaintiff's favor since the action had been brought within the statutory period from the last act of malpractice.[15]

The Court of Appeals, in the instant case, recognized that the approval of the continuous treatment theory in *Hammer* was mere dicta for the reasons given above, and that it now had to decide for the first time whether to accept or reject the doctrine.[16] The majority, Chief Judge Desmond writing the opinion, unequivocally approved the doctrine, holding that the "'accrual' [of the cause of action] comes only at the end of treatment."[17] The Court reasoned that the continuous treatment theory is the "fairer one" in that it does not present a plaintiff with the dilemma of either interrupting needed treatment and serving the defendant doctor with a summons, or continuing treatment and having his cause of action barred by the statute of limitations.[18] The Court intimated that its rationale would apply to ordinary malpractice statute of limitations cases as well as notice of claim cases.[19] It did, however, attach one caveat to its apparently broad application of the doctrine: plaintiff's cause of action will only be deemed to arise at the end of treatment if such treatment is "for the same or related illnesses or injuries, continuing after the alleged acts of malpractice, not mere continuity of a general physician-

---

[12] *Id.* at 422, 198 N.Y. Supp. at 610; Gillette v. Tucker, 67 Ohio St. 106, —, 65 N.E. 865, 870 (1902).

[13] See Piedmont v. Society of New York Hosp., 25 Misc. 2d 41, 204 N.Y.S.2d 592 (Sup. Ct. 1960); Steele v. City of New York, 12 Misc. 2d 605, 177 N.Y.S.2d 816 (Sup. Ct. 1958); Nervick v. Fine, 195 Misc. 464, 87 N.Y.S.2d 534 (Sup. Ct.), *aff'd mem.*, 275 App. Div. 1043, 91 N.Y.S.2d 924 (2d Dep't 1949).

[14] 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960).

[15] *Id.* at 379-80, 165 N.E.2d at 757, 198 N.Y.S.2d at 67.

[16] Borgia v. City of New York, 12 N.Y.2d 151, 155-56, 187 N.E.2d 777, 778, 237 N.Y.S.2d 319, 321 (1963).

[17] *Id.* at 155, 187 N.E.2d at 778, 237 N.Y.S.2d at 321.

[18] *Id.* at 156, 187 N.E.2d at 779, 237 N.Y.S.2d at 321. Ironically the continuous treatment theory has also been justified on the ground that it protects the *defendant* by not subjecting him to harassment by plaintiffs suing prematurely before he has had time to correct his original mistake during the course of subsequent treatment. Schmitt v. Esser, 178 Minn. 82, 226 N.W. 196 (1929).

[19] Borgia v. City of New York, 12 N.Y.2d 151, 155, 187 N.E.2d 777, 778, 237 N.Y.S.2d 319, 321 (1963).

patient relationship." [20] Thus, the continuous treatment theory will not be applied if subsequent treatment is not for the same malady as that which was being treated when the malpractice occurred.

The dissent in the present case agreed with the majority that the application of the continuous treatment theory in *Hammer* was only by way of dicta, and hence argued that the case was not controlling. The dissent went further, however, and argued that even the cases cited by the majority in which the continuous treatment theory was the *ratio decidendi* were distinguishable from the present case.[21] In these other cases, the dissent urged, there appeared "some plausible theory for concluding that the injury complained of was the result of a continued course of treatment, and not merely the result of one or more separate and distinct acts. No such theory is available to the plaintiffs in the case at bar." [22]

The distinction drawn by the dissent appears to be a valid one. In these previous cases, the physician could have corrected or alleviated his original negligence. His failure to do so amounted to a *continuing breach of duty*.[23] The statute was rightly held to run from the end of treatment in cases where the defendant: 1) proceeded to treat on the basis of an incorrect diagnosis,[24] 2) left a foreign object in the plaintiff and failed to remove it during subsequent treatment,[25] 3) set a cast improperly at the outset,[26] or 4) continued to beat the patient as a means of psychiatric therapy *throughout the treatment*.[27]

---

[20] *Id.* at 157, 287 N.E.2d at 779, 237 N.Y.S.2d at 322. For a discussion of this judicial criterion for determining when the cause of action accrues see LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES ¶ 13.09 (1960).

[21] Borgia v. City of New York, 12 N.Y.2d 151, 160, 187 N.E.2d 777, 781, 237 N.Y.S.2d 319, 325 (1963) (dissenting opinion).

[22] *Id.* at 160, 187 N.E.2d at 781, 237 N.Y.S.2d at 324 (dissenting opinion).

[23] See Sly v. Van Lengen, 120 Misc. 420, 422, 198 N.Y. Supp. 608, 610, (Sup. Ct. 1923): "[P]laintiff's cause of action accrued as much by reason of the alleged *continuous breach of duty* . . . in failing to remove the sponge . . . as it did because of the alleged negligent act of the defendant on the day of the operation when he sewed up the opening without removing the foreign substance. According to the complaint the tort was a *continuing* one." (Emphasis added.)

[24] Williams v. Elias, 141 Neb. 656, 1 N.W.2d 121 (1941); Hotelling v. Walther, 169 Or. 559, 130 P.2d 944 (1942); Peteler v. Robinson, 81 Utah 535, 17 P.2d 244 (1932).

[25] Sly v. Van Lengen, *supra* note 23; Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 867 (1902).

[26] De Haan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932); Schanil v. Branton, 181 Minn. 381, 232 N.W. 708 (1930).

[27] Hammer v. Rosen, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960) (dicta). See Anderson, *The Application of Statutes of Limitations*

In the present case, however, the last act of malpractice had occurred three months before the plaintiff's discharge from the hospital. The defendant spent these last three months attempting to alleviate the effects of its original negligence. There is no allegation that the defendant breached any duty toward the plaintiff during this time.[28] It would appear, therefore, that the cases relied upon by the majority are inapposite.

The reasons advanced by the majority in support of its adoption of the continuing treatment theory are also open to question. The Court wanted to avoid placing plaintiffs in the predicament of either having to interrupt treatment or having their causes of action barred by the statute of limitations.[29] But, logically, it would appear that not many patients would wish to continue in the care of a physician against whom they intended to commence a malpractice action.

Despite these criticisms, it cannot be denied that the present case has definitely established the continuous treatment theory as a judicial guideline in New York, in the construction of both the notice of claim statute and the malpractice statute of limitations. This interpretation will undoubtedly also apply in the construction of the new Civil Practice Law and Rules which becomes effective September 1, 1963.[30] Under this statute, as under the Civil Practice Act, the period of limitations begins to run when the cause of action accrues, and not upon subsequent discovery of the malpractice.[31]

By retaining the "cause of action" theory, and refusing to adopt a discovery theory, the Legislature has made it necessary for the courts to adopt such doctrines as the continuous treatment theory, and expand them as far as they were expanded in the present case in order to avoid unjust results. The Civil Practice Law and Rules alleviates the problem somewhat by providing for an extension from two to three years in the malpractice statute of limitations.[32] But it appears that the cleavage between legislative

---

to Actions Against Physicians and Surgeons, 25 INSUR. COUNSEL J. 237, 239-40 (1958); Note, 16 ST. JOHN'S L. REV. 101, 103 (1941).

[28] Borgia v. City of New York, 12 N.Y.2d 151, 160, 187 N.E.2d 777, 781, 237 N.Y.S.2d 319, 325 (1963) (dissenting opinion).

[29] *Id.* at 156, 187 N.E.2d 779, 237 N.Y.S.2d at 321.

[30] N.Y. CIV. PRAC. LAW & RULES § 214.

[31] N.Y. CIV. PRAC. LAW & RULES § 203(a). The revisers indicate that this section basically brings forward the equivalent section under the Civil Practice Act. 1961 N.Y. LEG. DOC. No. 15, FIFTH PRELIMINARY REPORT OF THE SENATE FINANCE COMMITTEE ON THE REVISION OF THE CIVIL PRACTICE ACT 30-31.

[32] This extension will also alleviate the problem of deciding whether or not the malpractice statute of limitations is to be applied to a particular cause of action. It was held under the Civil Practice Act that a nurse

enactment and judicial interpretation will continue until a statute such as was recommended by the Law Revision Commission in 1942 is passed.[33] This statute would toll the running of the period of limitations until the plaintiff discovered his cause of action. There would, however, be a six year maximum period of limitations computed from the time the act of malpractice occurred. Such a statute would not be without precedent in New York. The present fraud statute of limitations does not begin to run until discovery.[34] The recommended statute would relieve the courts of the burden of devising means to circumvent the present harsh statutory standards.[35]

---

is not engaged in the practice of medicine, and therefore the three-year personal injury statute of limitations, rather than the two-year malpractice statute applied to her. Isenstein v. Malcamson, 227 App. Div. 66, 236 N.Y. Supp. 641 (1st Dep't 1929). Under the Civil Practice Law and Rules, whether the nurse's tort is malpractice or not, the statutory period is three years. N.Y. CIV. PRAC. LAW & RULES § 214(5),(6).

[33] 1942 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (A) 14.

[34] N.Y. CIV. PRAC. ACT § 48(5). Attempts to take advantage of this more liberal statute by framing what is essentially a malpractice cause of action in terms of fraud, have generally been unsuccessful. Hammer v. Rosen, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960); Tulloch v. Haselo, 218 App. Div. 313, 218 N.Y. Supp. 139 (3rd Dep't 1926). Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 352 (1962).

[35] Lillich, *supra* note 34, at 343-44.