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Contracts--Physicians and Surgeons--Complaint Alleging Breach of Contract to Cure Held Sufficient (Robins v. Finestone, 308 N.Y. 543 (1955))

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separate obligation.”²⁵ Such an interpretation is placing an obvious strain upon the exception to the parol evidence rule permitting the admission of evidence to prove the existence of a collateral agreement.

The holding of the Court that this advertisement was an offer is open to serious question. Defendant testified he would have offered a much lower trade-in value for plaintiff's car had he known a 1954-55 deal was contemplated. Such accompanying circumstances as this uncertainty as to price and the unusual nature of the announcement, indicate the advertisement was merely an invitation to enter into negotiation for an agreement.

The tenor of the majority opinion indicates an effort to discourage extravagant and misleading advertising. The Court says: “There is entirely too much disregard of law and truth in the business, social, and political world of to-day. . . . It is time to hold men to their primary engagements to tell the truth and observe the law of common honesty and fair dealing.”²⁶



CONTRACTS—PHYSICIANS AND SURGEONS.—COMPLAINT ALLEGING BREACH OF CONTRACT TO CURE HELD SUFFICIENT.—Plaintiff-patient sought damages for breach of contract to cure. The complaint alleged defendant-physician agreed to perform a minor operation on plaintiff and to cure him in one or two days, but that defendant breached this agreement by puncturing an abdominal organ which necessitated further medical treatment and a consequent period of convalescence. The trial court dismissed the action as being barred by the malpractice statute of limitation. On appeal the Court of Appeals held that a cause of action in contract was sufficiently stated. *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955).

Although the legal liability of physicians to their patients has generally been restricted to the area of torts,¹ the number and variety of claims against physicians involving a breach of contract are by no means insignificant.² The majority of jurisdictions in this country hold that a physician and his patient are free to contract for a particular result and if that result be not attained, the patient may bring

²⁵ *Id.* at 81.

²⁶ *Id.* at 82, where the court quotes *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio St. 328, 140 N.E. 118, 121 (1922).

¹ See, e.g., *Pike v. Honsinger*, 155 N.Y. 201, 49 N.E. 760 (1898); *Patten v. Wiggin*, 51 Me. 594 (1862); *Craig v. Chambers*, 17 Ohio St. 253 (1867); *Graham v. Gautier*, 21 Tex. 111 (1858).

² See Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 WASH. U.L.Q. 413, 416. See, e.g., *Gill v. Schneider*, 48 Colo. 382, 110 Pac. 62 (1910); *Staley v. Jameson*, 46 Ind. 159 (1874); *Kolb v. Bergelin*, 209 Wis. 547, 245 N.W. 583 (1932).

a cause of action for breach of contract.³ This has been stated to be true even where the physician has employed the highest degree of care in treating his patient.⁴

The New York courts have recognized the contractual liability of a physician to be separate and distinct from that which arises from malpractice,⁵ and have held that a dismissal of a cause of action for malpractice as being barred by the statute of limitations is not a bar to a subsequent breach of contract action based upon the same transaction.⁶ This distinction, however, is not as clear-cut as would appear and this is evident in cases where the breach of contract involves a negligent act on the part of the physician. In the past, some courts have dismissed complaints alleging a contract due to the use of language peculiar to a tort action.⁷ The presence of allegations of unskilled performance and pain and suffering have identified the action as malpractice,⁸ subject to the two-year statute of limitations.⁹

Since the statute of limitations in malpractice actions runs from the date of the negligent act rather than the discovery of the injury,¹⁰ it proves difficult in many cases for the plaintiff to bring his action

³ See, e.g., *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930); *Vanhoover v. Berghoff*, 90 Mo. 487, 3 S.W. 72 (1887); *Brooks v. Herd*, 144 Wash. 173, 257 Pac. 238 (1927).

⁴ "If a doctor makes a contract to effect a cure and fails to do so, he is liable for breach of contract even though he use the highest possible professional skill." *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 768, 24 N.Y.S.2d 92, 95 (1st Dep't 1940), *aff'd mem.*, 286 N.Y. 649, 36 N.E.2d 692 (1941).

⁵ "The two causes of action are dissimilar as to theory, proof and damages recoverable. Malpractice is predicated upon the failure to exercise requisite medical skill and is tortious in nature. The action on contract is based upon a failure to perform a special agreement. Negligence, the basis of one, is foreign to the other." *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794, 795 (3d Dep't 1949); see also *Safian v. Aetna Life Ins. Co.*, *supra* note 4.

⁶ *Colvin v. Smith*, *supra* note 5; *Conklin v. Draper*, *supra* note 3; *Monahan v. Deviny*, 223 App. Div. 547, 229 N.Y. Supp. 60 (3d Dep't 1928).

⁷ See, e.g., *Frankel v. Wolper*, 181 App. Div. 485, 169 N.Y. Supp. 15 (2d Dep't 1918), *aff'd mem.*, 228 N.Y. 582, 127 N.E. 913 (1920); *Hurlburt v. Gillett*, 96 Misc. 585, 161 N.Y. Supp. 994 (Sup. Ct.), *aff'd mem.*, 176 App. Div. 893, 162 N.Y. Supp. 1124 (2d Dep't 1916).

⁸ See *Horowitz v. Bogart*, 218 App. Div. 158, 217 N.Y. Supp. 881 (1st Dep't 1926). This case presents an excellent example of an instance where the presence of allegations of tort damages (plaintiff sought damages for physical pain and mental anguish) in the complaint has convinced the court that despite allegations sufficiently stating a cause of action in contract, the complaint was one for malpractice and negligence.

⁹ N.Y. CIV. PRAC. ACT § 50. "Actions to be commenced within two years. The following actions must be commenced within two years after the cause of action has accrued: 1. An action to recover damages for . . . malpractice." *Ibid.*

¹⁰ See *Derlicka v. Leo*, 259 App. Div. 607, 19 N.Y.S.2d 949 (1st Dep't), *aff'd mem.*, 284 N.Y. 711, 31 N.E.2d 47 (1940); *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y. Supp. 529 (1st Dep't), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930).

within the statutory period.¹¹ This has led to various attempts to circumvent this time barrier by alleging the malpractice to be a continuing act, ending only at the termination of the physician-patient relationship,¹² or that the physician perpetrated a fraud upon the patient by concealing his negligent act.¹³ These various attempts have met with only limited success.

In the instant case, the plaintiff brought his action after the statute of limitations on malpractice had run, seeking compensation for his damages in a contract action.¹⁴ The complaint contained allegations of unskilled performance, physical disfigurement and loss of earning capacity, all of which are characteristic of a tort action. It did not, however, contain any request for tort damages such as pain and suffering. The Court, seizing upon this, held that the tort allegations were insufficient to overcome the gist of the complaint which stated a cause of action for breach of special contract to cure. This characterization of the complaint would seem to indicate the Court's awareness of the questionable justice of the time limitation on malpractice actions and its willingness to avoid the harsh result of the application of such a bar to plaintiff's action.¹⁵

The special contract action, however, is at best an inadequate remedy. The courts have thus far limited recovery in such actions to "out of the pocket" damages which include advances made to the physician and immediate costs for nurses and medicines.¹⁶ This does not compensate the plaintiff for any pain and suffering resulting from defendant's failure to perform as agreed. It would appear, therefore, that even in cases where the plaintiff succeeds in circumventing the two-year statute of limitations, the result is still unjust. The fault does not lie so much with our courts as with the legislature. The obstacle is Section 50 of the Civil Practice Act, and the only feasible solution would be a revision of this section insofar as it affects malpractice actions. The concealed nature of malpractice warrants its being treated much in the manner of actions for fraud.¹⁷

¹¹ See Note, 12 ST. JOHN'S L. REV. 330 (1938).

¹² See *Sly v. Van Lengen*, 120 Misc. 420, 198 N.Y. Supp. 608 (Sup. Ct. 1923).

¹³ See *Tulloch v. Haselo*, 218 App. Div. 313, 218 N.Y. Supp. 139 (3d Dep't 1926). The complaint alleged the defendant concealed the fact that a tooth which he pulled had fallen down plaintiff's throat but not that he knew it had lodged in plaintiff's lung. The court held the gravamen of the complaint to be malpractice, that there were no allegations present from which any intentional fraudulent misrepresentation could be inferred.

¹⁴ The plaintiff thereby received the benefit of the six-year statute of limitations which governs contract actions. N.Y. CIV. PRAC. ACT § 48.

¹⁵ The fact that the Court stressed the absence of allegations of pain and suffering would seem to indicate that it would be unwilling, at this time, to break with *Horowitz v. Bogart* and related cases. See note 8 *supra*.

¹⁶ See, e.g., *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (3d Dep't 1949); *Hirsch v. Safian*, 257 App. Div. 212, 12 N.Y.S.2d 568 (1st Dep't 1939).

¹⁷ For an excellent analysis of this problem, see 1942 LEG. DOC. NO. 65 (E) REP., N.Y. LAW REVISION COMMISSION 13, 39 (1942). See also Note, 16 ST. JOHN'S L. REV. 101 (1941).