St. John's Law Review

Volume 16
Number 1 *Volume 16, November 1941, Number 1*

Article 6

# Malpractice and the Statute of Limitations

Rose Gress

*prima facie* evidence of his refusal or neglect to provide for his wife.[25]

It is now well established that the burden of proving abandonment rests upon the party alleging it.[26]

The legislative policy of barring a spouse from an elective share where there was an abandonment or a neglect or refusal to provide was not incorporated in the general revision of the Decedent Estate Law in regard to a share passing to the surviving spouse by intestacy.[27] By subsequent amendment a surviving spouse is barred upon similar grounds from receiving an intestate share.[28] This policy has been further extended to dowager for wrongful death [29] and to the statutory cash and property exemptions granted a husband and wife under the provisions of the Surrogate's Court Act.[30]

JAMES J. THORNTON.

---

## MALPRACTICE AND THE STATUTE OF LIMITATIONS

### I

Ironical as it seems, the New York State Legislature in its efforts clearly to define the rights and remedies of citizens of the state has at times enacted statutes which, in their ambiguity, confound bench and bar alike. Courts, reluctant to go beyond a literal interpretation of these statutes, have often placed upon them harsh and unfair constructions which remain long unchallenged because of a strict adherence to the doctrine of *stare decisis*. The inevitable result is an unending list of unjust decisions. This has been the case

---

[25] Matter of Rechtschaffen, 278 N. Y. 336, 16 N. E. (2d) 357 (1938).

[26] Matter of Maiden, 284 N. Y. 429, 31 N. E. (2d) 889 (1940); Matter of Rechtschaffen, 278 N. Y. 336, 16 N. E. (2d) 357 (1938); Matter of Quick, 262 App. Div. 808, 28 N. Y. S. (2d) 10 (4th Dep't 1941).

[27] Matter of Knuppel, 151 Misc. 773, 273 N. Y. Supp. 867 (1933).

[28] N. Y. DEC. EST. LAW § 87, subd. c and d providing:

"No distributive share of the estate of a decedent shall be allowed under the provisions of this article, either

(c) to a husband who has neglected or refused to provide for his wife, or has abandoned her;

(d) or to a wife who has abandoned her husband."

[29] N. Y. DEC. EST. LAW § 133, subd. 4a and b providing:

"No distributive share of such damages shall be allowed under the provisions of this article either

(a) To a husband who has neglected or refused to provide for his wife, or has abandoned her;

(b) Or to a wife who has abandoned her husband."

[30] N. Y. SURR. CT. ACT § 200, subd. 6, providing: "No property or money shall be set apart under this section to a surviving spouse who cannot inherit as a distributee, any part of the estate of a deceased spouse who died intestate; nor to a surviving spouse who can neither inherit, nor claim any rights against the estate of a deceased spouse who has died testate."

with Section 50 of the Civil Practice Act,[1] which sets forth the limitation period applicable in malpractice actions.

A physician and surgeon or other person practicing a profession similar thereto, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by others of his profession in the locality where he practices.[2] He represents that he has that ability which is regarded by those conversant with the employment as necessary to qualify him to engage in such profession.[3] He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge.[4] The law, therefore, holds him liable for an injury to his patient resulting from a want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment.[5]

Section 50 of the Civil Practice Act states: "An action to recover damages for * * * malpractice must be commenced within two years after the cause of action has accrued." In *Conklin* v. *Draper*[6] defendant physician having operated upon the plaintiff for appendicitis left a pair of arterial forceps, which had been used during the course of the operation, within plaintiff's abdominal cavity. Plaintiff recovered from the appendicitis operation but continued to suffer intestinal attacks. She consulted her regular physician but was assured that the operation performed by defendant was successful and that her ill health was due to some other cause. It was not until several years after the operation that the presence of the forceps was discovered and removed. Plaintiff began her malpractice action within two years after her *discovery* of the fact that the forceps had been left in her body but more than four years after the operation was performed. It is important to note that Section 50 does not say whether the two-year period prescribed therein begins to run from the time plaintiff learns of the injury or from the time of the malpractice. Promptness of action presupposes the knowledge of the existence of conditions which warrant such action and it is unreasonable to expect a person to bring suit for malpractice until he has actual knowledge of the facts which constitute the wrong.[7] It would seem, therefore, that the limitation period should run from the date

[1] 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."

[2] 2 CARMODY, N. Y. PRACTICE (Perm. ed. 1930) 702.

[3] Pike v. Honsinger, 155 N. Y. 201, 209, 49 N. E. 760, 762 (1898).

[4] *Ibid.*

[5] 2 CARMODY, N. Y. PRACTICE (Perm. ed. 1930) 702.

[6] 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dep't 1930), *aff'd*, 254 N. Y. 620, 173 N. E. 892 (1930).

[7] BROTHERS, MEDICAL JURISPRUDENCE (2d ed. 1925) 254, 255; OPPENHEIMER, MEDICAL JURISPRUDENCE (1935) 113.

of discovery of the injury.[8] Our courts, however, failing to find an *explicit* provision to this effect within the statute thought themselves constrained to hold that the cause of action accrued at the date of perpetration of the malpractice.[9] *Conklin* v. *Draper* was decided accordingly and the suit was barred. We have then a situation where plaintiff can bring an action for malpractice only if he has been fortunate enough to discover the wrong within two years after its commission. Even though a failure to become aware of the injury to his person within this period of time is not due to any lack of diligence on his part, the action is nevertheless barred and plaintiff left without a satisfactory means of redress.

If the broad statements to the effect that under Section 50, the period of limitation begins to run at the time of the negligent act are given their full effect, it would appear that there is nothing to be considered except the particular time when the specific treatment or operation was performed. Yet it was decided in *Sly v. Van Lengen*[10] that the statute does not start to run until the relation of physician and patient terminates. This novel theory was disapproved in later cases, then reaffirmed by the same court, divided each time.[11] The doctrine has been rejected elsewhere[12] and is indeed, difficult to support.[13] In all these malpractice actions, the cause of action upon which the statute starts to run is founded upon a breach of duty, and not upon the fact that some damage has occurred as a consequence of a prior breach.[14]

---

[8] Note (1938) 12 ST. JOHN'S L. REV. 330.

[9] Wetzel v. Pius, 28 Cal. App. 104, 248 Pac. 288 (1926); Ogg v. Robb, 181 Iowa 145, 162 N. W. 217 (1917); Capucci v. Barone, 266 Mass. 578, 165 N. E. 653 (1929); Ranalli v. Breed, 277 N. Y. 630, 14 N. E. (2d) 195 (1938); Tulloch v. Haselo, 218 App. Div. 313, 218 N. Y. Supp. 139 (3d Dep't 1926); Frankel v. Wolper, 181 App. Div. 485, 169 N. Y. Supp. 15 (2d Dep't 1918); Barnes v. Gardner, 170 Misc. 604, 9 N. Y. S. (2d) 785 (1939); Bodne v. Austin, 156 Tenn. 366, 2 S. W. (2d) 104 (1928).

[10] 120 Misc. 420, 198 N. Y. Supp. 608 (1923) (The decision was based on Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865 (1902), where the court, in holding that the period of limitation for an action based upon defendant's leaving a sponge in the abdominal incision would not commence with the date of the closing of the incision, made the following statement: "The facts in the case at bar show a continuous obligation upon the plaintiff in error so long as the relation or employment continued, and each day's failure to remove the sponge was a fresh breach of contract implied. The removal of the sponge was part of the operation, and in this respect the surgeon left the operation incompleted.").

[11] Bowers v. Santee, 99 Ohio St. 361, 124 N. E. 238 (1919); McArthur v. Bowers, 72 Ohio St. 656, 76 N. E. 1128 (1905).

[12] Duff v. U. S. Gypsum Co., 189 Fed. 234 (C. C. A. Ohio 1911).

[13] (1923) 37 HARV. L. REV. 272.

[14] Wilcox v. Plummer, 4 Pet. 172 (U. S. 1830); Fronce v. Nichols, 12 O. C. D. 472; see 2 WOOD, LIMITATIONS (4th ed.) §§ 177, 178.

*Attempts to Circumvent Section 50*

(a) The second count in the complaint in the *Conklin* case contained nothing but contractual allegations without reference to pain and suffering and was held to be subject to the six-year period of limitations prescribed for contract actions.[15] This was an important break from the majority rule, namely, that the limitation period prescribed for actions against physicians, surgeons and dentists for malpractice or negligence causing personal injuries applied to an action for any of such causes notwithstanding the fact that the complaint therein was in form an action on contract.[16] Some jurisdictions had attempted to get away from this rule.[17] In accord with the *Conklin* case, it was held by a New York court in *Keating v. Perkins*[18] that where the action purports to be for breach of contract, the limitation period applicable to contract actions should govern. If plaintiff now wishes to avoid a short period of limitations he may base his claim on contract instead of malpractice. In a contract action, however, no recovery can be had for the wrong involving unskillful treatment and for the pain and suffering occasioned thereby but only for sums expended for medical attention, or other damages that flow naturally from the breach of whatever contract was made between the parties.[19] Obviously, this would be an entirely unsatisfactory remedy affording plaintiff only partial relief.

(b) Another means of evading the two-year period prescribed in Section 50 was attempted in *Tulloch* v. *Haselo*.[20] The complaint alleged that by reason of the negligence of defendant, a duly licensed dentist, one of plaintiff's extracted teeth went down her throat and lodged in her lung; that defendant fraudulently concealed this fact from plaintiff, and that she did not know of it until the tooth was removed from her lung three years later. Plaintiff contended that the action was for *fraud* and that under Section 48 of the Civil Practice Act,[21] the cause of action was deemed to accrue at the date of

---

[15] N. Y. CIV. PRAC. ACT § 48. "Actions to be commenced within six years after the cause of action has accrued:

"1. An action to recover upon a liability created by statute, except a judgment or sealed instrument."

[16] Coady v. Reins, 1 Mont. 424 (1872); Burrell v. Preston, 54 Hun 70 (N. Y. 1889); Horowitz v. Bogart, 218 App. Div. 158, 217 N. Y. Supp. 881 (1st Dep't 1926); Frankel v. Wolper, 181 App. Div. 485, 169 N. Y. Supp. 15 (2d Dep't 1918); Hurlburt v. Gillett, 96 Misc. 585, 161 N. Y. Supp. 994 (1916); Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865 (1902); Bodne v. Austin, 156 Tenn. 366, 2 S. W. (2d) 100 (1928).

[17] Palmer v. Jackson, 62 Fla. 249, 57 So. 240 (1911); Burns v. Barenfield, 84 Ind. 43 (1882); Staley v. Jameson, 46 Ind. 159, 15 Am. Rep. 285 (1874).

[18] 250 App. Div. 9, 293 N. Y. Supp. 197 (1st Dep't 1937).

[19] 2 CARMODY, N. Y. PRACTICE (Perm. ed. 1930) 704.

[20] 218 App. Div. 313, 218 N. Y. Supp. 139 (3d Dep't 1926).

[21] N. Y. CIV. PRAC. ACT § 48. "An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have

discovery of the fraud. The court nevertheless held that the action was one for malpractice and that the two-year statute, running from the date of perpetration of the injury, applied. The opinion states that the proximate cause of the damage was defendant's negligence in permitting the tooth to fall down plaintiff's throat, and that the concealment of the act merely aggravated the original wrong and was not the gravamen of an action to procure a judgment on the ground of fraud within Section 48.[22] Malpractice was the proximate cause of the injury; the relation of dentist and patient made it malpractice.[23]

It is submitted that at least in a case where the person guilty of malpractice fraudulently conceals the fact so as to prevent the injured party from obtaining knowledge thereof, the statute should not commence to run until the injury is discovered or could have been discovered through the exercise of diligence on the part of the injured party.[24] Some jurisdictions have so held.[25] But in New York, the bare fact that plaintiff was not advised of the extent of his injuries or his right to a cause of action has been generally held to be immaterial.[26]

The decisions in the cases of *Monahan* v. *Devinney*[27] and *Rudman* v. *Bancheri*[28] bring to light another failing of our malpractice statute. The defendants in the former case were unlicensed chiropractors who had undertaken to treat plaintiff for certain ailments. As a result of unskilled acts on their part, plaintiff became paralyzed. Defendants claimed Section 50 was a bar to the suit instituted against them as action had not been commenced within the two-year period. Plaintiff contended that the statute does not apply to unlicensed practitioners. The court held that defendants were practicing medicine as defined in Section 1250, subdivision 7, of the Education Law[29]

---

accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

[22] See case digested in PRASHKER, CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE (2d ed. 1937) 42.

[23] Benson v. Dean, 232 N. Y. 52, 133 N. E. 125 (1921).

[24] See Notes (1931) 74 A. L. R. 1320.

[25] Burton v. Tribble, 189 Ark. 58, 70 S. W. (2d) 503 (1934), where it was held that defendant physician had a duty to exercise due care and, therefore, he could not be said as a matter of law not to have known of the negligent treatment; the physician had a duty to disclose to the patient any injuries inflicted by his carelessness, and failure to disclose was fraudulent concealment which would toll the statute until the physician removed the foreign substance from the patient's body, or, until the patient knew or should have learned of its presence; Bryson v. Aven, 32 Ga. App. 721, 124 S. E. 553 (1924); Graendal v. Westrate, 171 Mich. 92, 137 N. W. 87 (1912).

[26] Capucci v. Barone, 266 Mass. 578, 165 N. E. 653 (1929); Conklin v. Draper, 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dep't 1930); Tulloch v. Haselo, 218 App. Div. 313, 218 N. Y. Supp. 139 (3d Dep't 1926).

[27] 131 Misc. 248, 225 N. Y. Supp. 601 (1927).

[28] 260 App. Div. 957, 23 N. Y. S. (2d) 584 (2d Dep't 1940).

[29] EDUCATION LAW § 1250, subd. 7. "The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose,

and that the allegation of unskilful treatment with injurious results indicated that the action was based on malpractice and therefore subject to the two-year limitation. In *Rudman* v. *Bancheri* it was decided that the allegation in the complaint that defendant, a pharmacist although not qualified or licensed as a physician "failed to exercise due care, caution, and prudence in the premises" with injurious results, classified the action as one in malpractice, against which the Statute of Limitations had run. It seems unreasonable that the statute should grant to irregular practitioners the same indulgence granted to duly licensed physicians and surgeons. In answer to this criticism, Judge Staley in the *Monahan* case said: "I think any consideration of this kind is based upon a wrong assumption. I do not think that the two year statute of limitations as to malpractice was adopted for the purpose of granting an indulgence to duly licensed physicians and surgeons simply because they are regular and legal practitioners, but that the statute was passed because of the uncertainty of the results attending the treatment of the disease in the first place and the increasing difficulty of tracing such results as time goes on. Age, inherited traits, latent diseases, debilitated conditions, sometimes render the most skilful treatment unavailing." [30]

This line of reasoning, however, was apparently abandoned in the case of *Isenstein* v. *Malcomson*.[31] Plaintiff prosecuted an action to recover for personal injuries resulting from negligence on the part of a registered nurse. The question raised was whether the negligence of the nurse in her professional employment might be considered as malpractice governable by the two-year period of limitation.[32] It was held that the statute was not applicable to a nurse. If the court had accepted the reasons for the enactment of Section 50 as stated in the *Monahan* opinion a different conclusion would have been reached.[33] Does not a nurse deserve the protection of a statute passed "because of the uncertainty of the results attending the treatment of the disease in the first place, and the increasing difficulty of tracing such results as time goes on"? Judge Staley states in his opinion: "in relation to the medical profession it (the term malpractice) has been applied not only to duly licensed physicians and surgeons, but to irregular practitioners as well, and also to nurses, midwives, and apothecaries." [34] The only explanation for the *Isenstein* decision is

---

treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

[30] Monahan v. Devinney, 131 Misc. 248, 250, 225 N. Y. Supp. 601, 605 (1927).

[31] 227 App. Div. 66, 236 N. Y. Supp. 641 (1st Dep't 1929).

[32] See case digested in PRASHKER, CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE (2d ed. 1937) 43.

[33] See Isenstein v. Malcomson, 133 Misc. 691, 234 N. Y. Supp. 52 (1929).

[34] Monahan v. Devinney, 131 Misc. 248, 249, 225 N. Y. Supp. 601, 604 (1927).

that the court must have believed Section 50 *was* passed as an indulgence to a favored class, *i.e.*, physicians and surgeons, and that this class was not to be enlarged. In other words, only physicians and surgeons and, if we accept the *Monahan* decision, those acting in that capacity may be guilty of malpractice. This, however, is not the case. The following are some of the recognized definitions of malpractice:

(1) Negligent acts on the part of a physician or surgeon in treating a patient, by means of which such patient suffers death or (unnecessary) injury.[35]

(2) Mistreatment of a disease or injury through ignorance, carelessness or criminal intent.[36]

(3) Improper treatment through carelessness, or ignorance, or intentionally.[37]

It is noticeable that the two latter definitions do *not* confine the acts to physicians and surgeons.

The *Monahan* and *Isenstein* cases are irreconcilable. The latter case, which seems to emphasize the "favored class" theory, is in direct conflict with Justice Staley's opinion. The law which they represent is, however, clear. Section 50 applies to illegal practitioners; it is not applicable to a registered nurse.

### *Conclusion*

A review of the cases discloses the fact that a literal application of the Statute of Limitations for malpractice has led to many unjust results. The fault does not lie so much with our courts as with the legislature which enacted Section 50. It is for the legislature to provide the remedy. In the first place, the two-year limitation period should not run from the date of perpetration of the malpractice but from the date of discovery. The amended statute might well be modeled upon Section 48 which deals with fraud.[38] Section 48 provides that an action must be brought within six years from the time the cause of action accrues. There follows, however, a clear statement that the cause of action is deemed to accrue at the date of discovery of the fraud. The reason for incorporating such a provision in the case of fraud is equally applicable to actions for malpractice. The courts in holding that the period of limitation runs from the date of perpetration of the injury have often barred valid causes of action rather than stale claims. It is unreasonable to expect that plaintiff will in every case discover the presence of sponges, forceps or tubing in his body within two years. It must be further recognized

[35] WITTHAUS AND BECKER, MEDICAL JURISPRUDENCE (1894) 73, 76.
[36] STEDMAN'S MEDICAL DICTIONARY (8th ed. 1924) 589.
[37] GOULD'S MEDICAL DICTIONARY (2d ed. 1928) 757.
[38] See note 9, *supra*.

as a fact that the confidence necessarily reposed in a physician would tend to lull the patient into a feeling of security and thereby to allow what might have been a valid cause of action to become barred by the passage of time.[39] We have seen that a contract action provides only a small measure of relief. The treatment theory as enunciated in *Gillette* v. *Tucker* [40] and *Sly* v. *Van Lengen* is not founded so much in sound reasoning as in an indirect attempt to get around Section 50. Although it is reassuring to know that the courts realize the injustices caused by the statute, the proper remedy, nevertheless, is not with them but with the legislature that produced it.

The *Monahan, Rudman* and *Isenstein* cases introduced another source of criticism concerning the Statute of Limitations for malpractice. In justice to the *Monahan* opinion, it must be admitted that the statute was undoubtedly passed because of the uncertainty attending the treatment of any disease in the beginning and the difficulty of tracing the results of such treatment as time goes on. But this does not necessarily exclude a realization of the fact that Section 50 was adopted as an indulgence to a favored class. Generally speaking, those who have shown their respect for our laws have always constituted a "favored class" in the eyes of the legislature. In this instance, that class consists of licensed practitioners. It has been the avowed purpose of both the legislature and our courts to *discourage* those who disobey the law. Extending the benefit of a short period of limitation to illegal practitioners is hardly a means to this end. On the other hand, a registered nurse should be granted this indulgence. In such case, the statute would still be serving its purpose as expressed by Justice Staley, but it would be a source of protection only to those who deserve the "blessing" of the law.

It is submitted that amendment of the Statute of Limitations as to malpractice is the only solution to the problem. As long as Section 50 continues to remain on the books in its present form, our courts will be saddled with an unnecessarily ambiguous statute. An amended statute, explicit in terms and leaving no room for doubt on any point, would prevent further injustice. This section, perhaps more than any other, merits the attention of the revisers of our Civil Practice Act.

ROSE GRESS.

---

## A CURRENT PROBLEM IN FREEDOM OF SPEECH AND OF RELIGION

Labor cases excepted, there is, perhaps, no more fruitful source of the law governing inter-group relations than the litigation which has resulted from attacks upon minority groups. Typical are the

---

[39] (1923) 37 HARV. L. REV. 272.

[40] See note 14, *supra*.