St. John's Law Review

Volume 12
Number 2 *Volume 12, April 1938, Number 2*

Article 10

The Statute of Limitations for Malpractice

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to the main relief prayed for the complainant also asks for money damages, a separate trial by jury is not within the realm of constitutional guaranty. One wonders whether this decision does not overrule *Jackson* v. *Strong* and *The City of Syracuse* v. *Hogan, supra.*

In conclusion we may say that while the overwhelming majority of the earlier cases were favorable to the theory of one form of action, the later cases tended towards the revival of the old forms of action. Suits for equitable relief were dismissed,[49] even though the defendant had appeared and interposed an answer, merely because the plaintiff had failed to allege that he had no adequate remedy at law.[50] Even the traditional terminology of "actions at law" and "suits in equity" is still retained, resulting sometimes in the dismissal of actions on purely technical grounds. The question whether the New York judiciary will continue in its practice of bringing about a resurrection of the old systems of law and equity, or will follow the lead of the *Ferguson, Lonsdale, and Jamaica Savings Bank* cases, *supra,*[51] is a matter which belongs to the realm of pure speculation. Judging from its previous vacillations it is unsafe to venture a prediction as to the ultimate fate of the doctrine of the Merger of Law and Equity.

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THE STATUTE OF LIMITATIONS FOR MALPRACTICE

The limitational statutes have always provided a favorite battleground for legal gladiators. The arbitrary estoppel of one's right of action has, to some, always seemed an unnecessary and harsh rule of law; while others have vigorously, and in the main, correctly, maintained that the benefits of these statutes have far outweighed many of their injustices. Like any other group of laws the statutes of limitation have proven to be defective in parts that could be quickly and

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[49] Poth v. Washington Square M. E. Church of New York, 207 App. Div. 219, 201 N. Y. Supp. 776 (1st Dept. 1923); Chadbourne v. Mayers, 207 App. Div. 754, 202 N. Y. Supp. 805 (1st Dept. 1924); Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co., 135 App. Div. 805, 120 N. Y. Supp. 128 (2d Dept. 1909), *aff'd,* 199 N. Y. 536, 92 N. E. 1097 (1910); Black v. Vanderbilt, 70 App. Div. 16, 74 N. Y. Supp. 1095 (1st Dept. 1902); Spring v. Fidelity Mutual Life Ins. Co., 183 App. Div. 134, 170 N. Y. Supp. 253 (3d Dept. 1918).

[50] These cases hold that a complaint is subject to dismissal where equitable relief is prayed for, but only a right to legal relief is stated. Of course this rule is in direct conflict with Civil Practice Act § 111, which provides that the complaint may be amended at any time during trial and may be "remitted to the proper term or court to be disposed of, in order that the relief may be finally granted which is appropriate to the facts, to the same extent as if the application had been in the first instance for the relief granted."

[51] Another liberal decision was the recent case of Wainright & Page v. Burr & McAuley, 272 N. Y. 130, 5 N. E. (2d) 64 (1937), wherein motion to dismiss was denied although the action, cognizable in a court of equity, was brought at law. All judges concurring.

easily remedied, but for unknown or dubious reasons have been allowed to remain unchanged. Probably one of the most flagrant injustices of the statutes is to be found in the limitation on malpractice.[1]

The Civil Practice Act of New York[2] states that "an action to recover damages for * * * malpractice" must be commenced "within two years after the cause of action has accrued." The cause of action is deemed to have accrued at the time of the negligent injury,[3] and it is because of this fact that there is found so much opposition[4] to the statute. Frequently, if not in the majority of cases, we find that a plaintiff becomes aware of the injury to his person because of the negligent conduct of the physician or surgeon only after the two-year period of limitations has run.[5] A striking example of this is to be found in the case of *Conklin* v. *Draper*,[6] where the defendant surgeon after operating upon plaintiff left the arterial forceps in her abdomen. Plaintiff brought action four years after the operation but within two years of *discovery* of the presence of the forceps. It was vigorously contended that since defendant knew that he had left the forceps in her abdomen and had failed to tell her about it, the act was one of continuing malpractice against which the statute did not commence to run until plaintiff learned of her condition. The court nevertheless decided that the limitation period commenced to run from the date that the injury was inflicted, regardless of whether or not defendant knew of his act. The rule enunciated in *Conklin* v. *Draper* and cases analogous to it, has been substantially adhered to, not only in New York, but throughout the various states.[7]

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[1] N. Y. Civ. Prac. Act § 50.

[2] *Ibid.*

[3] Burdick, Law of Torts (3d ed. 1913) § 373, p. 274, it is the general rule that the statute of limitations, in malpractice action, runs from the time of the breach of duty, and not from the time of the occurrence of the consequential damages or of the discovery of the injury. Cappuci v. Barone, 266 Mass. 578, 165 N. E. 653 (1929); see also cases digested in Prashker, Cases and Materials on New York Pleading and Practice (2d ed. 1937) 32 to 51.

[4] Brothers, Medical Jurisprudence (2d ed. 1925) 254, 255; Oppenheimer, Medical Jurisprudence (1935) 113, where the author says: "This rule of Law (that the action accrues from the time of the doing of the injurious act although plaintiff has no knowledge of that act) has, however, been the subject of reported criticism. It is pointed out that 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 facts which constitute the wrong."

[5] Conklin v. Draper, 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dept. 1930), *aff'd*, 254 N. Y. 620, 173 N. E. 892 (1930); Frankel v. Wolper, 181 App. Div. 485, 169 N. Y. Supp. 15 (2d Dept. 1918).

[6] 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dept. 1930), *aff'd*, 254 N. Y. 620, 173 N. E. 892 (1930).

[7] See cases cited note 5, *supra;* Wetzel v. Pius, 78 Cal. App. 104, 248 Pac. 288 (1926); Ogg v. Robb, 181 Iowa 145, 162 N. W. 217 (1917); Bodne v. Austin, 156 Tenn. 366, 2 S. W. (2d) 104 (1928); Cappuci v. Barone, 266 Mass. 578, 165 N. E. 653 (1929).

Attempts to Avoid the Statute

1. *Action Based on Contract*

Since attorneys realized the hardship of this section of the Civil Practice Act [8] and those statutes in other states similar to it, it is naturally not surprising to discover the numerous attempts [9] made by counsel for plaintiff to sidestep the statute in an effort to come within some branch of the law other than malpractice. Early efforts to bring the case within the field of contracts proved to be futile.[10] The limitation period prescribed for actions against physicians, surgeons and dentists for malpractice or negligence causing personal injuries was applied to an action for any of such causes even though the complaint therein was in form an action on contract.[11] Notwithstanding the fact that the petition stated a contractual relation between plaintiff and defendant physician, if the gravamen of the complaint was found to be the unskillful and negligent performance of defendant's medical services, it was held that the two-year limitation for malpractice was applicable; [12] even though the complaint, after stating a contract between physician and patient for the performance of a surgical opera-

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It is interesting to note that, where the statutes of limitations has barred a claim of malpractice during claimant's lifetime, the cause of action is not revived in favor of his estate by his subsequent death from the original wrong. The right of action created by Section 130 of the Decedent Estate Law does not confer upon a decedent's estate the right to enforce an action which was outlawed in his lifetime.

In Schmidt v. Merchants Despatch Transportation Co., 270 N. Y. 287, 200 N. E. 824 (1936), the court held that a cause of action for breach of statutory duty may be preserved to the decedent's estate if there was pending undetermined at the time of his death a similar suit brought by him against the defendant within six years of the alleged wrong, and in which a cause of action is alleged of the same character, namely, breach of statutory duty. However, in Johnson v. Stromberg-Carlson Telephone Mfg. Co., 250 App. Div. 362, 294 N. Y. Supp. 793 (4th Dept. 1937), an action to recover damages for death of plaintiff's intestate from silicosis, it was decided that the death action was barred since the original action brought by the intestate had been outlawed. The original complaint, though containing numerous allegations of failure by defendant to provide safeguards required by the Labor Law to promote ventilation of work rooms where the decedent was employed, was held not to allege a cause of action for breach of statutory duty, but rather one for negligence. The court expressly refused to follow the *Schmidt* case. That the decision in the *Johnson* case is at least questionable cannot be controverted.

[8] N. Y. CIV. PRAC. ACT § 50.

[9] Tulloch v. Haselo, 218 App. Div. 313, 218 N. Y. Supp. 139 (3d Dept. 1926); Burrell v. Preston, 54 Hun 70, 7 N. Y. Supp. 177 (1889); Harding v. Liberty Hospital, 177 Cal. 520, 171 Pac. 98 (1918).

[10] Hurlburt v. Gillett, 96 Misc. 585, 161 N. Y. Supp. 994, *aff'd*, 176 App. Div. 893, 162 N. Y. Supp. 1124 (2d Dept. 1916); Horowitz v. Bogart, 218 App. Div. 158, 217 N. Y. Supp. 881 (1st Dept. 1926); Kuhn v. Brownfield, 34 W. Va. 252, 12 S. E. 519 (1917).

[11] See note 10, *supra*.

[12] Hurlburt v. Gillett, 96 Misc. 585, 161 N. Y. Supp. 994, *aff'd*, 176 App. Div. 893, 162 N. Y. Supp. 1124 (2d Dept. 1916).

tion, made no reference to negligence on the part of the physician in specific language, but charged "improper performance of the work to the personal injury of the plaintiff."[13] The court in *Horowitz* v. *Bogart*[14] stated: "The nature of the charge of malpractice is not changed by failing to sufficiently state it in necessary detail, or by putting it in language suitable to the statement of a cause of action on contract, omitting the usual allegations as to the absence of skill and negligence."

The latest decision of the New York courts, however, indicates, apparently, a definite change of policy. The Appellate Division of the First Department in *Keating* v. *Perkins*[15] held that proof by the plaintiff that part of one tooth, a gold inlay, remained within her body with disastrous results required the conclusion that the defendant, a surgeon dentist, failed to perform the special contract to extract four teeth, including one tooth with a gold inlay, and each and every part thereof from within the plaintiff's body, as alleged in the complaint and admitted by defendant's answer; and this, notwithstanding the degree of care exercised by defendant. The court, in this case, based its decision on *Conklin* v. *Draper*,[16] where it was decided that the second count, which contained nothing but strictly contractual allegations, without reference to pain and suffering, would be subject to the statutory period prescribed for contract actions. It is to be noted, however, that although the court does allow recovery on the theory of contract in some instances,[17] the plaintiff can only secure partial relief since the measure of damages is limited to the cost of original operation, the second operation (to remedy the injury) and such other additional medical expenses, as fees for nurses. He may not recover for all the pain and suffering he has suffered as a result of the doctor's negligence.

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[13] Horowitz v. Bogart, 218 App. Div. 158, 217 N. Y. Supp. 881 (1st Dept. 1926).

[14] See note 13, *supra.*

[15] 250 App. Div. 9, 293 N. Y. Supp. 197 (1st Dept. 1937).

[16] 229 App. Div. 227, 241 N. Y. 529 (1st Dept. 1930).

[17] Some jurisdictions in malpractice cases give the patient a choice of actions, tort or contract. Carpenter v. Walker, 170 Ala. 659, 54 So. 60 (1910); Knowles v. Dark & Boswell, 211 Ala. 59, 99 So. 60 (1924); Staley v. Jameson, 46 Ind. 159 (1874); Burns, Ex'r v. Barenfield, 84 Ind. 43 (1882); Reinhardt v. Frederick, 58 Ind. App. 421, 108 N. E. 258 (1915); Kuhn v. Brownfield, 34 W. Va. 252, 12 S. E. 519 (1890). The Indiana decisions are based entirely upon the form of the complaint, the essential element being the promise on the part of the physician and not the undertaking under the employment. Staley v. Jameson, and Burns, Ex'r v. Barenfield are particularly interesting, as there the contract action was upheld after the tort action was barred by the statute of limitations.

2. *Actions Based on Fraud*

Another favorite method of approach to avoid the ban of statutes similar to Section 50,[18] was to base the action on fraud.[19] But here, too, we find the court was loath to entertain the suit where more than two years had run from the date of the breach of duty. The failure of the physician to speak and to disclose his negligent act was held to be the breach of duty which constituted malpractice.[20] It has, however, been decided in other jurisdictions that where the person guilty of malpractice fraudulently conceals the fact so as to prevent the injured from obtaining knowledge thereof, the statute is tolled until the cause of action is discovered or could have been discovered through the exercise of diligence on the part of the injured party.[21]

3. *The Treatment Theory*

Many states, including New York, have adopted the rule that the limitation period does not begin to run until the treatment ceases.[22]

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[18] N. Y. CIV. PRAC. ACT § 50.

[19] Tulloch v. Haselo, 218 App. Div. 313, 218 N. Y. Supp. 139 (3d Dept. 1926).

[20] In Tulloch v. Haselo, note 19, *supra*, plaintiff alleged that defendant, a dentist, negligently permitted a tooth to go down her throat while plaintiff was under ether and fraudulently concealed the fact from her, the tooth being removed from her lung three years later. The court expressed a willingness to infer from this allegation that defendant knew it had gone into her lung, but said "it would be a dangerous precedent to establish to hold that equity should interpose against the statute of limitations in a malpractice case, especially where no intentional injury is shown or to be inferred." The only apparent case applying the fraud exception to negligent injuries by a physician is Bryson v. Aver, 32 Ga. App. 721, 124 S. E. 553 (1924), which describes the relation of physician and patient as "confidential", so that a duty existed to inform plaintiff of a pessary inserted during an operation and failure to disclose its presence was a "fraud" suspending the statute.

[21] Graendal v. Westrate, 171 Mich. 92, 137 N. W. 87 (1912); 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 cannot 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. But it was expressly held in Trimming v. Howard, 52 Idaho 412, 16 P. (2d) 661 (1932), that negligence in breaking off a surgical needle and leaving a piece in plaintiff's spine was not "fraud" for limitation purposes. See to the same effect Peter v. Robinson, 81 Utah 535, 17 P. (2d) 244 (1932).

[22] Sly v. Van Lengen, 120 Misc. 420, 198 N. Y. Supp. 608 (1923); Schmit v. Esser, 183 Minn. 354, 236 N. W. 622 (1931). In Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865 (1902), the court, in holding that the period of limitation for an action based upon defendant's leaving a sponge in an 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 con-

This is in effect an attempt by the court itself to avoid the injustice of the two-year bar. The treatment and employment are considered as a whole and thus if malpractice occurred therein the statute of limitations is held not to have started until the treatment was completed.[23]

Conclusion

A reading of the various cases on the particular subject will convince one that throughout most of them, especially those of recent origin, there is an undercurrent of dissatisfaction with the present limitational period in malpractice actions. Nevertheless, because of the wording of the statute, and the steadfastness with which the court clings to the doctrine of *stare decisis,* little headway can be made to remedy this problem. The patient relies almost wholly upon the judgment of the surgeon, and under the usual circumstances of each case is bound so to do; and if the injury is not reduced, and a normal condition restored as fully or as speedily as expected, the patient is still obliged to rely upon the professional skill, care and treatment of the physician.[24] How can the patient, with little or probably no knowledge of medicine whatsoever, be held responsible for failing to discover within the statutory time allotted, that a sponge or tubing, for example, was left within his system, where at times, those versed in medicine fail to do so? Malpractice is often unascertainable for considerable periods, and attributed to various other causes, even where due diligence has been used. Furthermore, while it may be maintained that the cause of action has accrued either at the time the treatment is terminated or at the time of the operation, it is difficult to understand what benefit this is to a patient who until the discovery of the hidden infecting element could not prove negligence. To maintain the action on the theory of contract, on the other hand, results in but partial relief, as has been previously pointed out.[25] The inevitable conclusion is that Section 50 of the New York Civil Practice Act and those statutes in other states which are analogous to it, have proved to be unsound. Inasmuch as the courts have expressed their unwillingness to circumvent the statute by judicial interpretation, resort must be made to legislation.

It is submitted that perhaps the most logical remedy suggested by the opponents of this present rule of law, is the proposal to base

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tinued, and each day's failure to remove the sponge was a fresh breach of contract implied by law. The removal of the sponge was part of the operation, and in this respect the surgeon left the operation incompleted."

[23] Huysman v. Kirsch, 91 Cal. Dec. 758, 57 P. (2d) 908 (1936); Bowers v. Santee, 99 Ohio St. 361, 124 N. E. 238 (1919) claimed that the doctrine announced therein was conducive to that mutual confidence that is highly essential in the relation between surgeon and patient.

[24] Bowers v. Santee, note 23, *supra.*

[25] See subdivision entitled *"Actions Based on Contract."*

the malpractice statute on the same ground as that of *fraud.* We find that in actions based on fraud the statutory period is deemed to begin to operate from the time that the fraud is *discovered;* for it is at that moment that, by statute, the cause of action is said to accrue.[26] In other words we might very well have the same two-year limitational period for malpractice actions, but the statute should be tolled until the *discovery* of the malpractice. Thus there would still be a limitation against the stale claims, the only difference being that the statutory period would commence at a somewhat later date. Undoubtedly the physician, surgeon or dentist would not be as fully protected as he is under the section as it stands today, but in the current trend of opinion much of this protection is unwarranted and unjust.

To allow the statute [27] to remain as it presently stands, will only result in a continuation of this needless muddle of affairs. *Amendment* of Section 50,[28] as suggested above, would bring about a much needed and desired reform.

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

[27] N. Y. CIV. PRAC. ACT § 50.

[28] *Ibid.*