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Prescriptions As An Extension of the Doctor-Patient Relationship

A WOMAN HAS BEEN TAKING "THE PILL" for three years under her doctor's prescription although she has not seen her doctor in ten months. A professor has a renewable prescription for his heart condition, but has not seen that physician for more than a year. A stroke victim has been taking a prescription pain killer for seven months beyond the time when he was last examined by his physician. Does the doctor-patient relationship exist in situations such as these?

Whether or not a doctor-patient relationship exists can be significant in applying the statute of limitations to medical malpractice cases. The significance is apparent when one realizes that Ohio follows what is known as the termination rule[1] as to when a cause of action for medical malpractice accrues. The termination rule says, in effect, that the statute of limitations for medical malpractice actions[2] does not begin to run until the doctor-patient relationship is terminated.[3]

The issue of whether or not the doctor-patient relationship exists is normally an issue of fact.[4] However, in *Millbaugh v. Gilmore*,[5] the Ohio Supreme Court recently held that the taking of pills prescribed by a patient after the patient failed to show up for an appointment was not a continuation of the relationship, and that the minds of reasonable men could not differ as to that conclusion of fact. In effect, the Ohio Supreme Court overturned a jury conclusion that the taking of pills prescribed by a doctor did continue the doctor-patient relationship.[6]

The decision in *Millbaugh v. Gilmore*[7] raises a number of interesting questions. To what extent does the taking of a prescription by a person evidence a doctor-patient relationship? Should the taking of a prescription raise a presumption as to the existence of that relationship? Could it properly be said that the taking of a prescription does, as a matter of law, extend the relationship? In considering

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[1] Wyler v. Tripi, 25 Ohio St.2d 164, 168, 267 N.E.2d 419, 421 (1971).

[2] OHIO REV. CODE §2305.11 (Page 1972) states that an action for malpractice shall be brought within one year after the cause of action accrues.

[3] Wyler v. Tripi, 25 Ohio St.2d 164, 167, 267 N.E.2d 419, 421 (1971).

[4] Hankerson v. Thomas, 148 A.2d 583, 584 (D.C. Mun. Ct. App. 1959).

[5] 30 Ohio St.2d 319, 285 N.E.2d 19 (1972).

[6] *Id.* The Ohio Supreme Court reversed a 2-1 decision of the appellate court which had ruled as error the trial court's granting of defendant's motion for judgment notwithstanding the jury's 9-3 verdict for the plaintiff-patient.

[7] *Id.*

these questions it will be helpful to develop a definition of prescriptions and to consider the nature of the prescribing process, to consider the nature of the doctor-patient relationship, and to consider the development and policy considerations of the termination rule.

Prescription of Drugs by the Medical Profession

It is important to differentiate between "over-the-counter drugs" and "prescription drugs." Although a physician may order the use of either,[8] the latter can only be obtained with a prescription. It should also be noted that prescriptions are not limited to drugs; various devices may also require a prescription in order to be obtained.[9] As used throughout this article the term "prescription" will refer to a prescription drug and not to devices or over-the-counter drugs.

The Federal Food, Drug and Cosmetic Act[10] specifies which drugs shipped in interstate commerce must be dispensed only on prescription.[11] Such drugs include (1) habit forming drugs,[12] (2) drugs that for various reasons are not safe for use except under the supervision of a licensed practitioner,[13] and (3) a new drug[14] which, because its effects are not completely known,[15] must be dispensed only upon the prescription of a licensed practitioner. Such is the definition of a prescription drug according to federal legislation. Since state legislation dealing with food and drugs is generally a mirror image of the federal act,[16] the definition of a prescription drug discussed above would, as a general proposition, not be altered significantly by state laws.[17]

For the most part, a physician or surgeon is free to prescribe a prescription drug of any type and for any duration as is consistent with his professional judgment so long as the prescription is to a

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[8] OHIO REV. CODE §4729.02 (Page 1972).

[9] *Eg.*, a diaphragm requires a prescription in order to be obtained.

[10] 21 U.S.C. §301 *et. seq.* (1972).

[11] *Id.* §353(b)(1)(1972).

[12] *Id.* §353(b)(1)(A)(1972).

[13] 21 U.S.C. §353(b)(1)(B)(1972) states the drug requires supervision because of its toxicity or other potentiality for harm, method of use, or because of the collateral measures necessary for its use.

[14] *See* 21 U.S.C. §321(p)(1972) for a definition of new drug.

[15] *See* HEW TASK FORCE ON PRESCRIPTION DRUGS: THE DRUG PRESCRIBERS, December 1968, at 3 [hereinafter cited as THE DRUG PRESCRIBERS], which discusses the difficulty in determining from pre-clinical investigation the side effects caused by drug allergy, intolerance, and drug interaction.

[16] MORRIS, DOCTOR AND PATIENT AND THE LAW 86 (5th ed. 1971); *compare, e.g.*, OHIO REV. CODE §3715.01 *et seq.* (Page 1972) *with* the federal act.

[17] Interview with Paul A. Lichtman, practicing community pharmacist, in Cleveland, Ohio, February, 1973.

patient for medical purposes.[18] A physician does, of course, have certain guidelines regarding his prescribing practices. All medical schools offer training in drug therapy, often in the early part of the curriculum.[19] The practicing physician relies primarily upon this training in medical school, upon numerous medical journals, upon the personal exchange of information with his colleagues, and upon his own experience, in determining the types and dosages of drugs to prescribe to his patients.[20] The drug manufacturers also provide certain guidelines in accordance with federal regulations. These regulations require that the drug package include information as to the drug's ingredients, effects, dosages, routes and methods of administration, frequency and duration of administration, and any relevant hazards, side effects, and precautions under which the drug can be safely used.[21]

There are, however, a few restrictions or limitations upon a physician or surgeon's discretion. Federal law, for instance, provides some restriction upon the duration of the use of a prescription for drugs which may be abused, and upon the number of refills that may be obtained before a renewal by the physician is required.[22] Other restrictions deal exclusively with narcotics.[23] The medical profession itself has adopted certain restrictions upon the use of drugs in experimentation.[24] In spite of the relatively liberal attitude toword prescription practices existing today, some practitioners expect (or fear) an increase in the amount of control exercised over the medical profession in the general area of prescribing.[25]

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[18] Interview with Algis Matulionis, M.D., Senior Obstetrician-Gynecologist, Kaiser Community Health Foundation, Cleveland, Ohio, in Cleveland, February, 1973 [hereinafter cited as Dr. Matulionis Interview].

[19] THE DRUG PRESCRIBERS, *supra* note 15, at 6.

[20] Dr. Matulionis Interview, *supra* note 18.

[21] 21 C.F.R. §1.106(b) (1972).

[22] 21 U.S.C. §829 (1972) provides that a prescription for narcotics may not be refilled. Furthermore, prescriptions for amphetamines or barbiturates may not be refilled more than five times unless renewed, nor may they be filled or refilled more than six months after the prescription date. *See* HEW TASK FORCE ON PRESCRIPTION DRUGS: THE DRUG MAKERS AND THE DRUG DISTRIBUTORS 80 (1968) for a brief general discussion of various state and federal regulations on prescriptions.

[23] *See* Bellizzi, *Legal Prescription of Narcotics,* 70 N.Y. J. MEDICINE 1677 (1970).

[24] Interview with R. Crawford Morris, author of the book DOCTOR AND PATIENT AND THE LAW (5th ed. 1971), in Cleveland, Ohio, February 20, 1973 [hereinafter cited as R. Morris Interview]. *See* THE INSTITUTIONAL GUIDE TO THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE POLICY ON PROTECTION OF HUMAN SUBJECTS, DHEW PUB. NO. (NIH) 72-102 (1971).

[25] *See* Smith, *Drugs and the Physician-Patient Relationship,* 66 J. KENTUCKY MED. ASSOC. 1062 (1968); *Prescription Integrity Endangered,* 66 J. INDIANA STATE MED. ASSOC. 131 (1971).

Although the standard of medical care in the United States is highly praised by many, drug prescribing does have some problem areas which will be mentioned in passing. The drug therapy curriculum in medical schools is to some extent inadequate since much of what is taught is outdated by the time a medical student graduates.[26] The rapid developments in the drug industry make it increasingly difficult for a physician to keep current in pharmacology during his professional career.[27] There are enormous time pressures[28] upon a practitioner which may contribute to his overenthusiastic response to the marketing efforts of the drug industry.[29] Extensive medical insurance coverage for the patient also reduces his personal concern over the cost and extent of medication.[30] As a result it has been said:

> [T]he average doctor tends to overprescribe; he orders unnecessary medicines, the wrong medicines, and too many medicines for the same illness, and he is too easily persuaded to change to the latest product.[31]

Doctor-Patient Relationship

The doctor-patient relationship[32] is founded upon the realization that the physician is skilled and experienced in afflictions of the body while the patient ordinarily knows very little about such matters.[33] Because of this special skill and experience in diagnosis and treatment, the patient will seek out and obtain treatment from the physician.[34] This contemplation of treatment is said to be an essential ingredient of the doctor-patient relationship.[35] Thus, the existence of the relationship and the existence or contemplation of treatment is a near identity.[36] The doctor-patient relationship has been further described as a relationship of trust and confidence,[37] based upon mutual

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[26] THE DRUG PRESCRIBERS, *supra* note 15, at 6.

[27] *Id.* at 5.

[28] Muller, *The Overmedicated Society: Forces in the Marketplace for Medical Care*, 176 SCIENCE 489 (1972).

[29] *Id.* at 490.

[30] *Id.* at 491.

[31] THE DRUG PRESCRIBERS, *supra* note 15, at 5; *see* Maronde, *A Study of Prescribing Patterns*, 9 MEDICAL CARE 383 (1971).

[32] *See* MORRIS, *supra* note 16, ch. 8, for a good general discussion of the doctor-patient relationship.

[33] Adams v. Isom, 249 S.W.2d 791, 793 (Ky. Ct. App. 1952).

[34] Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940).

[35] Traveler's Ins. Co. v. Bergerson, 25 F.2d 680, 683 (8th Cir. 1928); MORRIS, *supra* note 16, at 135.

[36] *See* D. LOUISELL, MEDICAL MALPRACTICE 376 (1969) [hereinafter cited as LOUISELL].

[37] Hummel v. State, 210 Ark. 471, 196 S.W.2d 594 (1946); Macaulay v. Booth, 53 Cal. App.2d 757, 128 P.2d 386 (3d Dist. Ct. App. 1942).

consent,[38] under which the physician has the duty to exercise utmost good faith.[39] The relationship is said to arise out of contract, express or implied.[40]

Once the doctor-patient relationship is initiated, it may be terminated in various ways. Mutual consent of the parties may end the relationship;[41] the patient's recovery from his ailment or from the effects of treatment may end the relationship;[42] the authorized referral of the case to another physician may end the relationship;[43] when the patient is given adequate notice, the withdrawal of the physician may end the relationship;[44] an express or implied dismissal of the physician may revoke the relationship.[45] There is seldom any formality in the severance of the doctor-patient relationship[46] except where there has been an express referral, an express dismissal, or a formal notice of withdrawal.

Because the relation often ends without formality, it can be difficult to determine exactly when the relationship has ended, as is evidenced by numerous cases. In *Meyers v. Clarkin*,[47] after setting a fractured leg the doctor often called on the patient at home, but he only observed the patient walk on crutches. The jury found that the contractual relationship was extended by these calls and the appellate court held that the issue was properly submitted to a jury.[48] In *Pump v. Fox*,[49] after an operation on the patient and after retirement from active practice as a physician, a doctor continued to advise the patient of other doctors she should visit. On one occasion the doctor even agreed to pay a surgical fee for the patient. The appellate court held that a jury should decide whether or not the relationship had terminated.[50] *Netzel v. Todd*[51] deals with prescriptions in particular. In that case a patient continued taking pills under the prescription of a surgeon. The appellate court held that it was error

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[38] Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940).

[39] Batty v. Arizona State Dental Board, 57 Ariz. 239, 112 P.2d 870 (1941); Foster v. Brady, 198 Wash. 13, 86 P.2d 760 (1939).

[40] McNamera v. Emmons, 36 Cal. App.2d 199, 97 P.2d 503 (4th Dist. Ct. App. 1939).

[41] Capps v. Volk, 189 Kan. 287, 369 P.2d 238 (1962).

[42] LOUISELL, *supra* note 36, at 377.

[43] *Id.*

[44] MORRIS, *supra* note 16, at 135.

[45] Capps v. Volk, 189 Kan. 287, 369 P.2d 238 (1962).

[46] Schmit v. Esser, 183 Minn. 354, 236 N.W. 622 (1931).

[47] 33 Ohio App. 165, 168 N.E. 771 (1929).

[48] *Id.* at 170, 168 N.E. at 772.

[49] 113 Ohio App. 150, 177 N.E.2d 520 (1961).

[50] *Id.* at 156, 177 N.E.2d at 525.

[51] 24 Ohio App. 219, 157 N.E. 405 (1926).

for the trial court to rule as a matter of law that the cause of action was barred by the statute of limitations.[52] In very explicit language the appellate court stated:

> [I]t is certain . . . that the relation of surgeon and patient existed from the time the defendant sent the pills in January, 1923, until the last one was taken under the defendant's instructions on August 8th of that year . . . .[53]

In contrast to the *Netzel* decision is the recent Ohio Supreme Court decision in *Millbaugh v. Gilmore*[54] which has been already discussed.

Statute of Limitations — Termination Rule

It is generally said that under the termination rule, the statute of limitations for medical malpractice begins to run when the treatment for a particular injury or malady is ended.[55] Because of the near identity of a "course of treatment" and the "doctor-patient relationship" discussed above, the termination rule can also be phrased in terms of the cessation of the doctor-patient relationship as to a particular injury or malady. Ohio courts have used the express language of "doctor-patient relationship" in applying the termination rule,[56] although it has been suggested that Ohio, in fact, uses the termination of treatment concept.[57]

The termination rule was first set forth in *Gillette v. Tucker*[58] where the patient underwent an operation for appendicitis in November, 1897. Although pus was discharging from the incision, the patient was released from the hospital one month later upon the surgeon's explanation that the discharge was from a kangaroo tendon[59] that would soon be absorbed. The discharge continued during the following months while the patient was still under the care of the doctor. Finally, approximately one year after the operation, the patient visited the surgeon and suggested that he had not performed the surgical procedure correctly. The surgeon responded by ordering the patient out of his office, saying that he would do no more for the patient. A few months later a different surgeon reopened the old

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[52] *Id.* at 224, 157 N.E. at 406.

[53] *Id.* at 223, 157 N.E. at 406.

[54] 30 Ohio St.2d 319, 285 N.E.2d 19 (1972).

[55] Schmit v. Esser, 183 Minn. 354, 236 N.W. 622 (1931); 61 AM. JUR.2d *Physicians and Surgeons* §185 (1972).

[56] Millbaugh v. Gilmore, 30 Ohio St.2d 319, 285 N.E.2d 19 (1972); Wyler v. Tripi, 25 Ohio St.2d 164, 267 N.E.2d 419 (1971); Delong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952); Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919); Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902).

[57] R. Morris Interview, *supra* note 24; LOUISELL, *supra* note 36, at 378.

[58] 67 Ohio St. 106, 65 N.E. 865 (1902).

[59] A suture obtained from a tendon in the tail of a kangaroo.

incision and removed a two inch by three inch cheesecloth sponge. The action for malpractice was commenced over nineteen months after the operation, but only seven months after the last visit with the defendant surgeon.[60] After a directed verdict for the surgeon on the ground that the action was barred by the one year statute of limitations, the circuit court of appeals reversed.[61] Relying in part upon the authority of a case dealing with the unskilled gelding of a colt by a veterinary surgeon[62] and in the face of a vigorous dissent,[63] an equally divided Ohio Supreme Court affirmed the decision of the circuit court, saying:

> [T]he facts in the case at bar show a continuous obligation upon the [surgeon], so long as the relationship . . . continued, and each day's failure to remove the sponge was a fresh breach of the contract implied by the law.[64]

Subsequent Ohio cases affirmed the application of the termination rule,[65] and other jurisdictions have adopted or commented favorably on the rule.[66]

The termination rule is based in part upon the theory that the physician or surgeon is liable for continuing negligence in not discovering and repairing the damage he had done; such negligence is a continuing breach of the physician's warranty to properly care for the patient during the contractual relationship.[67] Furthermore, since the statute of limitations does not run during the continuance of the relationship, a patient may rely upon the skill and judgment of his physician without penalty. Consequently, the termination rule is also said to strengthen the doctor-patient relationship by encourag-

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[60] *Id.* at 125, 65 N.E. at 869.

[61] Gillette v. Tucker, 22 Ohio C.C.R. 664 (1901).

[62] Williams v. Gilman, 71 Me. 21 (1880).

[63] Gillette v. Tucker, 67 Ohio St. 106, 144, 65 N.E. 865, 875 (1902), where the dissenting opinion of Justice Davis reads in part "[t]he theory involved in the misleading phrases 'a continuing negligence', 'a continuing wrong' . . . 'a continuous contract' is not only contrary to all authority, but from my point of view it is utterly absurd when tested in the light of established principles."

[64] *Id.* at 133, 65 N.E. at 872.

[65] Millbaugh v. Gilmore, 30 Ohio St.2d 319, 285 N.E.2d 19 (1972); Wyler v. Tripi, 25 Ohio St.2d 164, 267 N.E.2d 419 (1972); DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952); Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919); *see* Lundberg v. Bay View Hospital, 175 Ohio St. 133, 191 N.E.2d 821 (1963), where the termination rule was extended to encompass the hospital-patient relationship; *but see*, Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972), where the discovery rule was used when a foreign body was left in the patient during surgery; Cook v. Yaker, 13 Ohio App.2d 1, 233 N.E.2d 326 (1968), where the discovery rule was used in a malpractice action against a dentist; Stewart v. Sacks, 27 Ohio Misc. 29, 266 N.E.2d 262 (Cuyahoga County C.P. 1971), where the discovery rule was used in a negligence action against a hospital (not a malpractice action, since a hospital cannot practice medicine).

[66] *See, e.g.*, Schmit v. Esser, 178 Minn. 72, 266 N.W. 196 (1929).

[67] DeLong v. Campbell, 157 Ohio St. 22, 25, 104 N.E.2d 177, 178 (1952).

ing the patient to have confidence in his physician.[68] Other policy considerations become apparent upon a further examination of the termination rule and other rules regarding the statute of limitations.

The termination rule is designed to avoid the harsh results of the general rule that a cause of action accrues at the time the negligent act was committed.[69] Under the general rule, where no injury is apparent at the time of the negligent act, the injured party's right to recovery can be barred by the statute of limitations before he is aware of any injury.[70] It was just such a harsh result that was avoided in *Gillette v. Tucker*.[71] However, where the injury is one of long development and has not become apparent when the doctor-patient relationship is finally terminated, the termination rule offers no more relief than the general rule. Consequently, the termination rule is criticized for bearing no relationship to the injury incurred.[72]

Many jurisdictions[73] have gone much further than the termination rule by adopting the discovery rule which says that the statute of limitations for medical malpractice begins to run when the resulting damage is discovered or should have been discovered.[74] Both the termination rule and the discovery rule represent attempts of various jurisdictions to resolve conflicting public policies: the policy of discouraging stale claims and discouraging "sitting on rights," *versus* the policy of allowing meritorious claimants their day in court.[75]

Prescriptions as a Presumption of the Doctor-Patient Relationship

There is at least one theoretical argument for not extending the doctor-patient relationship through the period when the prescription drug is being used. However, a synthesis of the above discussions on prescriptions, the doctor-patient relationship, and the termination rule, provides numerous arguments supporting the following proposition: the taking of a prescription drug should create a presumption that the doctor-patient relationship is continued.

The argument against such a continuance is that such an extension is inconsistent with the continuing negligence theory upon which the termination rule is based. It has been shown that under

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[68] Wyler v. Tripi, 25 Ohio St.2d 164, 167, 267 N.E.2d 419, 421 (1972).

[69] *Id.* at 168, 267 N.E.2d at 421.

[70] *Id.*

[71] 67 Ohio St. 106, 65 N.E. 865 (1902).

[72] *See* Loeb, *Medical Malpractice — Statute of Limitation Begins to Run When the Patient Discovers He Has Been Injured*, 30 OHIO ST.L.J. 425, 430 (1969).

[73] *See* Wyler v. Tripi, 25 Ohio St.2d 164, 176, 267 N.E.2d 419, 422 (1971), for a recent listing of jurisdictions adopting the discovery rule.

[74] Yoshizaki v. Hilo Hospital, 50 Hawaii 150, 154, 433 P.2d 220, 223 (1967); *see* 61 AM. JUR.2d *Physicians and Surgeons* §183 (1972).

[75] Yoshizaki v. Hilo Hospital, 50 Hawaii 150, 154, 433 P.2d 220, 223 (1967); Wyler v. Tripi, 25 Ohio St.2d 164, 166, 267 N.E.2d 419, 420 (1971); Annot., 80 A.L.R.2d 371 (1961).

the continuing negligence theory, the physician is said to be continuously negligent for not discovering and correcting his original act of malpractice.[76] However, a physician has no opportunity to discover or correct his original act when the patient takes a prescription drug in isolation from the physician. There is an inconsistency in stating that failure to discover and correct is negligence when, in fact, there was no opportunity to discover and correct. Although this argument appears sound, it should be noted that the theory used as general support for the termination rule already has no application in many specific cases because the continuing negligence is not an element of malpractice action.[77] Even without prescriptions as an extension of the relationship, it appears that the termination rule could apply where continuing negligence was impossible because there was absolutely no manifestitation of the malpractice act during the doctor-patient relationship.

In contrast, one argument supporting the proposition that a presumption should exist relates to the very definition of a prescription drug. Implicit in that definition is the existence of some continuing moral or legal responsibility of a physician to the user of a prescription drug. Regarding habit forming drugs, there seems an implicit responsibility to monitor the user and to guard against addiction; regarding the second category of prescription drugs (unsafe without supervision), there seems an implicit responsibility to *provide* that continuing supervision; regarding new drugs, there seems the implicit responsibility to monitor the use and to be on guard for unknown effects. There is evidence of the need for such a continuing responsibility,[78] and there is dicta supporting the existence of such a continuing responsibility.[79] This continuing responsibility, be it legal or moral, is indicative of a continuing doctor-patient relationship.

A second argument for the existence of a presumption relates to the public policy of giving an injured party his day in court. Allowing the presumption is, in effect, a moderate liberalization of the termination rule. Under such a liberalization, the statute of limitations would be less likely to bar a meritorious cause of action in some instances. Such an extension would not, however, allow an injured party additional time to "sit on his rights" because the termination rule includes an exception — where the patient learns of

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[76] DeLong v. Campbell, 157 Ohio St. 22, 25, 104 N.E.2d 177, 178 (1952).

[77] *See* 42 OHIO JUR.2d *Physicians and Surgeons* §147 (1960).

[78] *See* THE DRUG PRESCRIBERS, *supra* note 15, at 5.

[79] Fleishman v. Richardson-Merrell Inc., 94 N.J. Super. 90, 226 A.2d 843 (1967) (dictum).

malpractice prior to termination of treatment. In such a case the statute of limitations begins to run when the patient becomes aware of the negligence[80]

The need to clearly identify the physician with the whole area of drug prescribing also supports this presumption. Some problem areas in drug prescribing, such as the medical school curriculum, the inherent danger existing in any drug, difficulties in keeping abreast of changes in the pharmaceutical industry, and overprescribing, have already been mentioned. In light of these problems and in light of the physician's freedom to prescribe with few restrictions, an increased identification of the physician with drug prescribing could conceivably bring an increased awareness of these problems to the medical profession and facilitate improvements.[81] A presumption that the doctor-patient relationship exists during the period when a prescription drug is being used would more closely identify the physician with this problem area.

A final argument in support of the presumption is related to judicial convenience. Some of the cases discussed above demonstrate the difficulty that courts have experienced in answering the question of whether or not the doctor-patient relationship has been terminated. A presumption that the relationship exists during the period when prescription drugs are used would conceivably ease the burden of answering this question.

In spite of the arguments discussed above, it would be unwise to suggest that the taking of a prescription drug by a person would extend the doctor-patient relationship as a matter of law. Such a rule would fly in the face of the normal methods of termination such as recovery, referral, withdrawal, and discharge; such a rule could lead to the absurd result that a relationship exists even where a physician died while his patient continued to take the prescription drug; such a rule would disregard the consensual nature of the relationship, which some experts consider to be the critical factor.[82] A presumption of the relationship, on the other hand, would allow the physician to rebut by introducing other evidence that the relationship was terminated, and would also be consistent with the view of the medical profession as to when a doctor-patient relationship exists.[83]

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[80] Bauer v. Bowen, 63 N.J. Super. 225, 164 A.2d 357 (1960); *see* Annot., 80 A.L.R.2d 320, 383 (1961).

[81] *See* Smith, *supra* note 25, at 1063.

[82] R. Morris Interview, *supra* note 24, where he stated that the mental state of the parties is the critical determining facor because of the consensual nature of the relationship. Morris considered the existence of a prescription relevant as an indicator of their mental state.

[83] Dr. Matulionis Interview, *supra* note 18, where he stated that while a person is taking a drug prescribed by a physician, so long as that person continues to follow the instructions of the physician as to the drug and as to other matters, that person continues to be the patient of the physician unless some other obvious interruption in the doctor-patient relationship takes place.

Conclusion

The taking of a prescription drug should create a presumption that the doctor-patient relationship is extended. The inherent dangers in the use of prescription drugs give rise to an implicit moral or legal responsibility on the part of the physician. Presumption of a continuing relationship is consistent with this continuing responsiblity. The presumption is also consistent with the public policy of allowing an injured party his day in court, but it does not encourage laches. The presumption would more closely identify the whole area of drug prescribing and use, with the medical profession, which is in the best position to make or encourage improvements in the problem areas. A presumption could still be rebutted by evidence that the relationship had terminated in the typical manner of recovery, referral, withdrawal, or discharge. However, where the evidence of termination was weak, the existence of a presumption would assist the triers of fact in determining whether the relationship had ended. Finally, a presumption appears to be consistent with the view of medical-legal experts and the medical profession as to when a doctor-patient relationship exists.

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