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Statutes of Limitations and Undiscovered Malpractice

Stanley Sacks*

NOWHERE IS OPERATION of the law more harsh than in those instances of absolute denial of any redress to innocent victims of undiscovered malpractice. In spite of the salutary legal axiom boasting "a remedy for every wrong," statutes are yet being judicially construed to limit legal action for damages to the ordinary limitations period without regard to those circumstances where the injured party, in the exercise of even the highest degree of care, could not have discovered the commission of the wrong until the limitation period has expired. Thus, in many cases, injustice prevails where rights are denied to persons before they are even aware that they have such rights.¹

A number of general legal problems have arisen out of malpractice actions and applicable statutes of limitations. Thus, the fact that there is a choice as to which event starts limitations running against the malpractice actions, either the physician's wrongful act or omission, or when such act or omission resulted in injury, is as naturally susceptible of varying judicial interpretation as the myriad of other legal situations.

It is not surprising that there is a division of opinion in whether the limitation period begins to run at the time of the wrongful act or at the time the injury is sustained, where the two events do not coincide. There is authority for the proposition that limitation statutes run, not from the date of the physician's wrongful act or omission, but from the date of the resulting damage.² There are other cases supporting the rule that the limitation period for malpractice actions commences at the time of the defendant's wrongful act, rather than from the date of the subsequent injury.³ On the other hand, a substantial number of jurisdictions hold that there is no difference between

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¹ "All too often in the past, in cases of inherently unknowable malpractice, of which the foreign-object cases are a classic example, where the victim is generally unlikely to learn of the harm before the remedy expires, justice has been buried under an avalanche of cases applying the harsh general rule that blameless ignorance of the injury does not prevent the bar from operating." 28 *NACCA L. J.* 158 (1962).

² *United States v. Reid*, 251 F. 2d 691 (5th Cir. 1958); *Agnew v. Larson*, 82 Cal. App. 2d 176, 185 P. 2d 851 (1947); *Miami v. Brooks*, 70 S. 2d 306 (Fla. 1954).

³ *Giambozi v. Peters*, 127 Conn. 380, 16 A. 2d 833, 835, 144 A. L. R. 211 (1940) overruled by *Foran v. Carangelo*, 153 Conn. 356, 216 A. 2d 638 (1966); *Cappuci v. Barone*, 266 Mass. 578, 165 N. E. 653 (1929); *Bernath v. LeFever*, 325 Penn. 43, 189 A. 342 (1937); *Albert v. Sherman*, 167 Tenn. 133, 67 S. W. 2d 140 (1934).

the physician's wrongful act and the subsequent injury, as far as time is concerned, and that the applicable statute of limitations runs from the time of the physician's act.⁴ It appears that statutes in medical malpractice cases appear to commence at almost any stage of the case, depending on the jurisdiction.⁵

However, the situation that too often fosters injustice and thereby demands immediate and appropriate action, whether legislative or judicial, is that predicament where the wrongful act of a medical practitioner results in injury, but the injured party is unable to discover in the exercise of reasonable diligence that he has been injured until the applicable limitation period has expired.

Described as "statutes of repose, the object of which is to prevent fraudulent and stale actions from springing up after a great lapse of time,"⁶ statutes of limitations are in many instances being utilized as a means of actually defeating a meritorious claim by an innocent sufferer. Originally, such restrictive statutes were based on a policy of protection of a litigant against the dangers of missing witnesses, errors in memory, and recollecting pertinent facts. In that regard there can be little contention that they do not serve a proper and worthwhile function in the law. They have become firmly embedded in our law in the course of centuries.⁷

Construction of modern day statutes of limitations in any manner that deprives the innocent victim of malpractice of the remedy he otherwise would have before he knows he has such a right is a far cry from the basic ends that the statutes seek to effect. Some jurisdictions have recognized the acrimony of applying the regular statutory limitation period in such cases and

⁴ *Tessier v. United States*, 269 F. 2d 305 (1st Cir. 1959); *Hudson v. Moore*, 239 Ala. 130, 194 S. 147 (1940); *Steele v. Gann*, 197 Ark. 480, 123 S. W. 2d 520, 120 A. L. R. 754 (1939); *Stafford v. Shultz*, 42 Cal. Rep. 2d 767, 270 P. 2d 1 (1954); *Gangloff v. Apfelbach*, 319 Ill. App. 596, 49 N. E. 2d 795 (1943); *Guy v. Schuldt*, 236 Ind. 101, 138 N. E. 2d 891 (1956); *Ogg v. Robb*, 181 Iowa 145, 162 N. W. 217 (1917); *Waddell v. Woods*, 160 Kan. 481, 163 P. 2d 348 (1945); *Carter v. Harlan Hospital Assoc.*, 265 Ky. 452, 97 S. W. 2d 9 (1936); *Maloney v. Brackett*, 275 Mass. 479, 176 N. E. 604 (1931); *Tortorello v. Reinfield*, 6 N. J. 58, 77 A. 2d 240 (1950); *Carrell v. Denton*, 138 Tex. 145, 157 S. W. 2d 878 (1942); *McCoy v. Stevens*, 182 Wash. 55, 44 P. 2d 797 (1935).

⁵ For a comprehensive table and collection of statutes of limitations in medical profession liability instances categorizing the statutes in both tort and contract situations and with reference to the time the statutes commence to run in the varying jurisdictions of the United States, see *Stetler & Moritz, Doctor and Patient and The Law*, 390, 391 (4th ed. 1962).

⁶ *Billings v. Sisters of Mercy of Idaho*, 86 Idaho 485, 389 P. 2d 224, 231 (1964), citing 53 C. J. S. 900 (1948).

⁷ England's Limitation Act of 1623 generally is regarded as marking the beginning of the modern law of limitations on personal actions in the common law. It prohibited actions to recover land more than twenty years after the accrual of the right and was the statute upon which our common law of adverse possession was engrafted. See *Developments in The Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950).

have refused to do so. These jurisdictions have relaxed the usual limitation rule and have declared some appropriate exception in order to sustain a recovery in a meritorious case.⁸

In *Morgan v. Grace Hospital, Inc.*,⁹ the Court referred to the use of these qualifications to the rule, in stating:

The application of statutes of limitations has been considered by appellate courts in innumerable medical malpractice cases. This has resulted in various exceptions to our qualifications of the rule that the period of limitation commences to run from the date of the active malpractice rather than from the date of its discovery. Some of these rules may be stated as follows: (1) The statute does not commence to run so long as the physician's treatment of the patient continues; (2) the statute commences to run at the time of the commission of the tort or at the time of the injury, these terms sometimes being used interchangeably; (3) the statute commences to run from the date of the patient's injury rather than from the date of the commission of the tort; (4) the statute does not commence to run until the termination of the physician's treatment of the patient, except where the patient, prior to such termination discovers, or by the exercise of reasonable diligence, could have discovered his injuries; (5) the statute will not run so long as the physician fraudulently conceals the cause of action, unless the patient in the meantime discovers, or by the exercise of reasonable care, should have discovered the injury but the cases differ as to what constitutes a fraudulent concealment; and (6) the period of limitation commences to run only from the time the patient discovers, or in the exercise of reasonable care should have discovered, the wrong committed by the surgeon. . . .

One rationale for delaying the commencement of limitations has sometimes been described as "the continuous treatment" doctrine and has been applied in several cases.¹⁰ Under "the continuous treatment" doctrine while the physician-patient relationship continues, it is recognized that the plaintiff is not ordinarily put on notice of the negligent conduct of the physician upon whose skill, judgment, and advice he continues to rely.

⁸ "The dubious rule, that limitations on a malpractice suit starts (*sic*) to run from the occurrence of the malpractice and not from its discovery, has properly inspired many courts to escape it by benign fictions or adroit doctrinal devices, such as viewing the malpractice as continuing until the end of the physician-patient relationship." 28 NACCA L. J. 159 (1962).

⁹ 144 S. E. 2d 156, at 158 (W. Va. 1965).

¹⁰ *Sly v. Van Lengen*, 120 Misc. 420, 198 N. Y. S. 608 (Sup. Ct. 1923); *Hammer v. Rosen*, 7 N. Y. 2d 376, 380, 198 N. Y. S. 2d 65, 67, 165 N. E. 2d 756, 757 (1960); *Borgia v. City of New York*, 12 N. Y. 2d 151, 237 N. Y. S. 2d 319, 187 N. E. 2d 777 (1962); *Waldman v. Rohrbaugh*, 241 Md. 137, 215 A. 2d 825 (1966); *Gillette v. Tucker*, 67 Ohio St. 106, 65 N. E. 865 (1902).

Therefore, under those circumstances some jurisdictions hold that the statute does not start to run until treatment by the physician for the particular disease or condition involved has terminated, unless during the course of treatment the patient learns or should have reasonably learned of the harm, in which case the statute runs from the time of knowledge, actual or constructive. In *Hundley v. Saint Francis Hospital*,¹¹ a surgeon was charged with a battery in removing certain organs of the plaintiff without consent, and was also charged with malpractice in performing the operation in a negligent manner. A one year limitations period was provided by statutes in both causes. After the operation the defendant made untrue statements to the plaintiff to the effect that removal of the organs was required by pathological conditions discovered during the operation. The Court held that the statutory limitations period on the cause of action for battery did not commence until the plaintiff's discovery of the unnecessary removal of the organs, and that the statutory period for the malpractice action based on negligence did not commence before termination of the physician-patient relationship, since the patient is not ordinarily put on notice of the negligent conduct of a physician upon whom he continues to rely.

The Court defined the rule in the following language:

The rule is clear, as to malpractice actions, that "while a physician-patient relationship continues the plaintiff is not ordinarily put on notice of the negligent conduct of the physician upon whose skill, judgment and advice he continues to rely . . ." Thus, in the absence of actual discovery of the negligence, the statute does not commence to run during such a period, and this is true even though the condition itself is known to the plaintiff, so long as its negligent cause and its deleterious effect is not discovered. . . .

Some courts have grounded another exception on the principle that where a practitioner leaves a foreign substance or some other harmful substance in the patient's body and thereafter continues to treat and care for the patient but fails to discover or remove such harmful substance, there well might be negligence on the part of the practitioner both in the original operation and in the subsequent failure to remove the harmful substance. In this situation determination of the commencement of the limitation period against the particular malpractice action may depend upon whether the action is predicated upon negligence by leaving the substance in the body, or by failing to remove the substance, or both such phases of negligence.¹²

Many jurisdictions have indulged in a doctrine of avoidance

¹¹ 161 Cal. App. 2d 800, 327 P. 2d 131, 80 A. L. R. 2d 360 (1958).

¹² Annot., 80 A. L. R. 2d 368, 386.

of the harshness of the limitation rule in such "inherently unknowable" injury cases by holding that fraudulent concealment by the physician tolls any statute of limitations. Thus, where the existence of a cause of action is fraudulently concealed by false representations made by the defendant, commencement of the statutes of limitations is postponed until the plaintiff discovers, or by exercising reasonable diligence could have discovered, that he has a cause of action.¹³

There are other courts which have not indulged in any such exceptions but rather have met the issue more directly. The result is a split of authority. Unfortunately, much of that authority retains the inflexible rule that continues to harbor injustice. Recent cases, while indicating a definite trend toward a fair rule, also vividly demonstrate the continuing divergent treatment of the problem.

*Billings v. Sisters of Mercy of Idaho*¹⁴ held that the patient's cause of action for malpractice arising out of the fact that a surgeon left a gauze sponge in the patient when performing an operation in 1948 was not barred by the statute of limitations although the suit was not brought until 1962. The presence of the sponge was not discovered until an exploratory operation was performed in 1961. In scrapping the old doctrine and adopting the "discovery rule," the Idaho Court said:

In one context or another, it has been stated that statutes of limitations are statutes of repose, the object of which is to prevent fraudulent and stale action from springing up after a great lapse of time. 53 C. J. S. Limitations of actions, S. 1, (1948). These considerations are not present in a foreign object case. First of all, the existence of a sponge, or gauze, or pin in the body of a plaintiff negatives fraud. Secondly, we do not often encounter a plaintiff who is guilty of "sitting on his rights." If one is unaware that he has any rights, it cannot be said that he is "sitting" on them. . . .

In *Morgan v. Grace Hospital Inc.*,¹⁵ the plaintiff and her husband brought an action for malpractice against the hospital and others for injuries caused by a sponge left in the plaintiff's abdomen during an operation but not learned of by the plaintiff until ten years later. The trial court sustained a plea of the statute of limitations, but the Supreme Court of Appeals of West Virginia, expressly overruling its previous decisions to the contrary, reversed and remanded, holding:

It would be unwarranted to assert that the plaintiff in this case has slept on her rights; that she is asserting a stale or fraudulent demand; or that she has needlessly delayed the

¹³ 34 Am. Jur. 187; Annot. *supra* note 12 at 401.

¹⁴ *Supra*, n. 6.

¹⁵ *Supra*, n. 9.

institution of this action or displayed lack of diligence in asserting her claim with reasonable promptness after it was practicable for her to do so. Can it be said that any attorney would or could have advised her to sue within a year after the hysterectomy was performed? Can anybody reasonably assert that she was guilty of lack of diligence when the evidence of the alleged wrong or tort committed by the surgeon was effectively sealed and hidden from view by the sutures which he applied? Must she be penalized and denied a day in court and must the defendants and their employees be rendered immune from any redress of the wrong inflicted upon the plaintiff merely because apparently the wrong or tort could be discovered only by means of an x-ray or by a second incision in her abdomen? Doubtless, it is fair and accurate to say that neither the operating surgeon or anybody else knew of the presence of the sponge in the plaintiff's abdomen until another physician discovered it years later by means of an x-ray examination. It simply places an undue strain upon common sense, reality, logic and simple justice to say that a cause of action had "accrued" to the plaintiff until the x-ray examination disclosed a foreign object within her abdomen until she had reasonable basis for believing or reasonable means of ascertaining that the foreign object was within her abdomen as a consequence of a negligent performance of the hysterectomy.

We believe that the "discovery rule" as stated and applied in cases cited above represents a distinct and marked trend in recent decisions of appellate courts throughout the nation and that it is in harmony with the rule announced by this court in the decisions involving subterranean coal mining operations. We are of the opinion that this rule should be applied in this case. . . .

The West Virginia Court has joined the ranks of those enlightened jurisdictions which have moved forward towards suppressing this inequitable doctrine. Having the opportunity to do so without damage to the time honored doctrine of *stare decisis*, it boldly rose to the occasion like the Idaho Court. Obviously, the Court felt, as did the venerable Dean Roscoe Pound, who once wrote regarding such a situation, "Law must be stable, and yet it cannot stand still."¹⁶

The Court of Appeals of Maryland has also recognized and joined the trend of those forward-looking tribunals which have accepted and applied the equitable "discovery" principle. In *Waldman v. Rohrbaugh*,¹⁷ the Court was confronted with a medi-

¹⁶ Pound, *Interpretations of Legal History* 1 (1923).

¹⁷ *Supra*, n. 10.

cal malpractice action filed more than the statutory limitation period of three years after the alleged negligence. The Court's opinion expressly refers to the trend of other jurisdictions:

An increasing number of states are following the discovery rule in various factual situations. California took this position in 1936 where a foreign substance was negligently left in a patient's body by a physician, in *Huysman v. Kirsch*, 6 Cal. (2d) 302, 57 P. (2d) 908, and the patient was ignorant of the fact; in more recent cases this holding has been extended to other kinds of malpractice. *Agnew v. Larson*, 82 Cal. App. 176, 185 P. (2d) 851. The Supreme Court in a silicosis case under the Federal Employers' Liability Act began the running of the statute with the discovery of the injury in *Urie v. Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and the Court of Appeals of the Fifth Circuit reached a similar result in a case of tuberculosis in *Reid v. United States*, 224 F. (2d) 102, where there had been a negligent failure to advise that the x-rays showed the disease. See also *Thomas v. Lobrano* (La. Ct. App.), 76 So. (2d) 599; *Kozan v. Comstock* (5th Cir., applying Louisiana law), 270 F. (2d) 839; *Ayers v. Morgan* (Pa.), 397 Pa. 282, 154 A. (2d) 788; *City of Miami v. Brooks* (Fla.), 70 So. (2d) 306. New Jersey and West Virginia have recently, in soul-searching opinions, reversed their prior adherence to the general rule and applied the time of discovery date. New Jersey did it in *Fernandi v. Strully*, 35 N. J. 434, 173 A. (2d) 277. . . .

The concluding language of the opinion was an adoption of the "discovery" principle henceforth to be applied in Maryland in malpractice-limitation situations.

On the other hand, the Virginia Court, in the more recent case of *Hawks v. DeHart*,¹⁸ rejected the opportunity directly presented and chose to remain with the ever decreasing minority of jurisdictions clinging to the old rule. *Hawks* was an action for medical malpractice allegedly caused by a doctor's negligence in leaving a surgical needle in the plaintiff's neck in the course of a goiter operation performed approximately seventeen years before the action was commenced. The Supreme Court of Appeals of Virginia held that the statute of limitations commenced to run when the wrong was assertedly done and not when the plaintiff discovered the alleged damage "where there was no trick or artifice on the part of the doctor to conceal facts that gave rise to the action."

The Virginia Court was aware of and, in fact, referred to *Morgan v. Grace Hospital, Inc.*, but elected to reject the reasoning of the West Virginia Court and what would appear to be the

¹⁸ 206 Va. 810, 146 S. E. 2d 187, 189 (1966).

more just view.¹⁹ The Virginia Court concluded its opinion with a declaration that in absence of establishment of trick or artifice on the part of the physician, the regular statutory limitation period would apply, without being tolled. Consequently plaintiff was denied a right of action even though she had not discovered the malpractice until after the expiration of the statutory period, and nothing in the record suggested that in the exercise of reasonable care she would have been able to so discover it.

Fraudulent concealment by the physician of the injury or of his negligence will toll, or interrupt, the period of limitation in most states. The Virginia Court's holding, therefore, represented no novel treatment of the problem in that respect. In fact, fifteen states expressly provide by statute for such tolling in the case of such concealment,²⁰ and many others by established case law. The Virginia Court's holding was a clear rejection of the view of the West Virginia, Idaho and Maryland Courts which have solved their problems of injustice presented by undiscoverable malpractice.

The Illinois Court has apparently taken yet another position in upholding the inflexible limitation rule but with reservations, indicating with appropriate language the reluctance with which it did so:

We are not pleased with this result. The statute barred the plaintiff's claim before she knew she had been wronged. The defendant's admitted negligence was not ascertainable to her. She presumably was under anesthetic when it took place and she certainly has not slept on her rights. It would be more equitable if the commencement of the limitation period were delayed until she discovered the reasons for her illness, but the statute does not permit the construction necessary to obtain this equitable result. Relief must come from the legislature and not from the Courts.²¹

¹⁹ There are cases to the contrary, fixing the discovery of damage or other events as the time when the limitation begins, e.g., *Morgan v. Grace Hospital, Inc.*, *supra*, n. 9; but as said by *Louisell & Williams Medical Malpractice*, Sec. 13.06, at p. 369 (1960):

"By far the majority of the courts have held that in the absence of special circumstances that are common to various types of cases, particularly the disability of the plaintiff or fraudulent concealment by the defendant, the cause of action accrues and the statute commences to run from the time of the wrongful act. Among the common situations involving this issue are the foreign body cases, i.e., those where the gauze, sponge or surgical instrument is left in the patient at the time of the surgery. Most cases place the accrual of the cause of action at the closing of the incision, not at the discovery of the facts sometime afterward. The statute usually is held to run from the wrongful act, not the date the damage occurs. . . ." See, *Hawks v. DeHart*, *supra* n. 18, at 814.

²⁰ *Stetler and Moritz*, *op. cit. supra* n. 5, at 389.

²¹ *Mosby v. Michael Reese Hospital*, 49 Ill. App. 2d 336, 199 N. E. 2d 633 (1964).

At least the Illinois tribunal recognized the undesirability of such continued rigid application of the rule, and its call for legislative action appears to have reached the ears of at least some lawmakers. In the 1966 Session of the Virginia General Assembly such a bill was introduced, designed to attain by statutory mandate what the Virginia Supreme Court of Appeals had just previously rejected judicially.²² In New York state a bill, introduced in the Senate, and pending at the time of this writing, would also solve such a situation by providing for commencement of an action within six years after discovery of malpractice for injuries resulting from surgery or treatment to plaintiff's person.²³ A similar bill has been introduced in the latest session of the legislature of the State of Michigan which would provide that the "claim accrues at the time the wrong upon which the claim is based is discovered or reasonably should be discovered."²⁴ In Oregon, such legislation was introduced in both the 1963 and 1965 sessions. While the bill passed the Oregon House in both years, it was put to rest on each occasion in a committee of the Oregon State Senate. It is anticipated that the bill will again be introduced at the 1967 session.²⁵ And in Illinois, a code section was added by the 1965 legislature especially providing that in such cases the period of limitation does not commence until the victim knows or should have known of the injury.²⁶

²² H. B. No. 706, introduced February 18, 1966. The bill, which died in Committee, provided:

"Section 8-30.1 In any cause or right arising from professional negligence or malpractice, the period of time during which the person having such right or cause has not discovered such negligence or malpractice shall be excluded from the computation of time within which, by the operation of any statute or rule of law, it may be necessary to commence any proceeding to preserve or prevent the loss of any right or remedy in connection therewith; provided such person has exercised due care to discover such negligence or malpractice."

²³ Introduced January 18, 1966. New York law provides a three year statute of limitations in an action to annul a marriage for fraud, but the running of the statute of limitations is postponed until discovery of the wrong. CPLR 214 (7). The malpractice situation would appear to be entitled to a similar legislative treatment.

²⁴ S. B. 447 Introduced April 12, 1965. At this writing the bill has passed the Senate but is yet in the House Judiciary Committee and not expected to be reported out this year.

²⁵ H. B. 1506 Introduced February 11, 1965, which provided:

"Section 1—An action to recover damages for injury to the person caused by malpractice of a physician, dentist, podiatrist, or operator of a hospital or sanitarium, shall be commenced within two years from the date when the injury is first discovered or in the exercise of reasonable care should have discovered; provided that such action shall be commenced within four years from the date of the act or omission upon which the action is based."

²⁶ Ill. Rev. Stat. (1965) c. 83 Sec. 22.1 as added by H. B. 1096 (1965).

The recent flurry of legislative activity on this point would appear to be a clear indication that a much needed change is imminent in the United States. As indicated above, many jurisdictions have accomplished by judicial fiat what other states now are striving to attain through legislative changes. The sum total of such movements on both fronts is an obvious awareness of the inequity of the present law, the demand for improvement, and the beginning of a universal solution.

Thus, "undiscoverable medical malpractice" situations which have too long and too often been the legal backdrop for court-approved injustice and deprivation for innocent victims, would now appear to be on the wane. While some jurisdictions have tended to blindly cling to the harshness of intransigent application of limitations, fortunately many more courts are effecting the needed change. Legislative action apparently has stepped in to aid the judicial forces, and one would seem to be able to predict a total victory in the foreseeable future for the heretofore remediless plaintiff.