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Statute of Limitations in an Action of Malpractice

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COMMENTS

STATUTE OF LIMITATIONS IN AN ACTION OF MALPRACTICE

When a plaintiff-patient is injured by the malpractice of a doctor or dentist, but does not learn that he is injured until a later time, a real question is presented as to when the statute of limitations starts to run. Does the statute commence to run from the time of the wrongful act or omission or is the running of the statute tolled until the plaintiff knows or should know of his right of action?[1] A few cases have held that the statute is tolled until the plaintiff knows or should know of his right of action,[2] but California is the only jurisdiction which consistently states this to be the law.[3]

The prevailing view is that the statute runs from the time of the defendant's negligent act or omission irrespective of the plaintiff's knowledge of the injury.[4] However, even in those jurisdictions adopting this view, an exception is made when a person guilty of malpractice fraudulently conceals that fact and prevents the plaintiff from gaining knowledge of his right of action. In such situations, it has been decided that the statute does not begin to run until the cause of action is, or should have been, discovered.[5] There is also authority to the effect that the statute does not start to run until the treatment ends, when a doctor or dentist leaves a foreign substance in a patient's body and continues to treat the patient without discovering the substance.[6] In such a case, the character of the defendant's negligence is considered to continue until termination of the treatment.

Pennsylvania does not clearly adopt either of the above positions. The pertinent portion of the applicable statute reads:

> Every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death, must be

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[1] *Compare* Pickett v. Aglinsky, 110 F.2d 628 (4th Cir. 1940) *and* Cappuci v. Barone, 266 Mass. 578, 165 N.E. 653 (1919); *with* Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (1942).

[2] *E.g.,* Miami v. Brooks, 70 So. 2d 306 (Fla. 1954); Fraser v. Atlanta Title & Trust Co., 66 Ga. App. 630, 19 S.E. 2d 38 (1942); Kitchner v. Williams, 171 Kan. 540, 236 P. 2d 64 (1951).

[3] *E.g.,* Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936); Pellett v. Sonotone Corp., 55 Cal. App. 2d 196, 130 P.2d 181 (1942); Ehlen v. Burrows, *supra* note 1.

[4] *E.g.,* Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940); Grambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940); Maloney v. Brackett, 275 Mass. 479, 176 N.E. 604 (1931); Weinstein v. Blanchard, 109 N.J.L. 632, 162 Atl. 601 (1932); Conklin v. Draper, 241 N.Y. Supp. 529, *aff'd.* 254 N.Y. 620, 173 N.E. 892 (1930).

[5] *E.g.,* Colvin v. Warren, 44 Ga. App. 825, 163 S.E. 268 (1932); Hudson v. Shoulders, 164 Tenn. 70, 45 S.W. 2d 238 (1932); Thompson v. Barnard, 142 S.W. 2d 238 (Tex. Civ. App. 1940).

[6] *E.g.,* Perrin v. Rodriguez, 153 So. 555 (La. App. 1934); Hotelling v. Walther, 169 Or. 559, 130 P.2d 944 (1942).

> brought within two years from the time when the *injury was done* and not afterwards.[7] (Emphasis added.)

A situation could arise where the negligent act or omission would occur at one time, while the injury would not occur until later. In such situations, the statute runs from the time of the injury and not from the time of the negligent act or omission.[8] Consequently, in deciding when the statute starts to run in an action of malpractice, as in any other case of wrongful injury to the person, the time when the *injury was done* must be determined. This can become a troublesome, if not an impossible task. For example, when a foreign substance is negligently left in a patient's body, it is difficult to ascertain exactly when the *injury was done* and when the statute should start running.

In the recent case of *Ayers v. Morgan,*[9] the Supreme Court of Pennsylvania considered this problem, and decided that the plaintiff's claim against the defendant-surgeon was not barred by the statute of limitations even though the action had not been brought within two years from the time the defendant had negligently left a surgical sponge in the plaintiff's abdomen. The defendant had operated on the plaintiff for an ulcer on April 20, 1948. For nine years after his discharge from the hospital, the plaintiff continued to be bothered by abdominal pains. On January 3, 1957, the surgical sponge was discovered, and it was determined that it had been the cause of the plaintiff's discomfort. In reversing a decision for the defendant and granting the plaintiff a new trial, Justice Musmanno, speaking for the majority, stated:

> The plaintiff in the case at bar could hardly have launched his lawsuit on the day Dr. Morgan performed the operation because, at that time, no injury was yet inflicted. The injury became a reality when the sponge began to break down healthful tissue within the body of the plaintiff.[10]

When did the sponge begin "to break down healthful tissue" and thereby inflict injury upon the plaintiff? Justice Musmanno did not say, and it is virtually impossible to estimate when the injury occurred. Therefore, some other means must be used to ascertain the time of injury. Justice Musmanno later stated: "The injury is done when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable." [11] Since the damage did not become "physically objective and ascertainable" until 1957 when the sponge was discovered, the decision is in reality a declaration that the injury

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[7] PA. STAT. ANN. tit. 12, § 34 (1895).
[8] DiGironimo v. American Seed Co., 96 F.Supp. 795 (E. D. Pa. 1951); Foley v. Pittsburgh Des Moines Co., 363 Pa. 1, 68 A.2d. 517 (1949).
[9] 397 Pa. 282, 154 A.2d 788 (1959).
[10] *Id.* at 287, 154 A.2d at 790.
[11] *Id.* at 290, 154 A.2d at 792.

is not done until the plaintiff knows, or should know, of it. Consequently, the court is saying, in effect, that the statute of limitations does not start to run until the plaintiff knows, or should know, that he is injured.

The court further indicates approval of the view that the statute is tolled until the plaintiff is, or should be, aware of his injury by citing *Byers v. Bacon.*[12] In that case, the defendant failed to remove a tube from the plaintiff's body after an operation. The tube was not discovered until 1913, three years after the operation. The Supreme Court of Pennsylvania reversed a lower court decision for the defendant, granted the plaintiff a new trial, and stated:

> [I]t should have been a question for careful consideration, as to whether the statute should properly have been regarded as running against plaintiff, until such time as he could reasonably be charged with knowledge of the fact that the tube had been overlooked and left in the wound.[13]

This suggests that the statute should not start to run until the plaintiff has, or should have, knowledge of his injury.

A case which the court in its latest decision did not mention, however, was *Bernath v. LeFever.*[14] In that case, the defendant operated on the plaintiff's eye on January 9, 1930, and again on May 9, 1931. An inflammation developed which made necessary the removal of the eye. Plaintiff instituted suit on August 8, 1932. The defendant contended that the *injury was done* at the time of the first operation, and that the statute of limitations started running from that time, even though the plaintiff did not become aware of the injury until she learned that a second operation had to be performed. The court agreed, and stated in affirming a judgment for the defendant:

> It is too well established to require extensive discussion that the statute runs from the time when the injury was done even though the damage may not have been known, or may not in fact have occurred until afterwards.[15]

The court further stated: "It is true that the running of the statute is postponed where, by some independent act of fraud or concealment, a wrongdoer prevents or diverts discovery." [16] As to this point Pennsylvania is directly in line with the majority of jurisdictions in the United States. However, it is evident that there is a conflict in Pennsylvania case law as to when the statute begins to run when malpractice is involved.

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[12] 250 Pa. 564, 95 Atl. 711 (1915).
[13] *Id.* at 567, 95 Atl. at 711.
[14] 325 Pa. 43, 189 Atl. 342 (1937).
[15] *Id.* at 46, 189 Atl. at 343.
[16] *Id.* at 47, 189 Atl. at 344.

The effect of this conflict on the lower courts is well illustrated by *Simmons v. Saltz*.[17] The plaintiff in that case brought suit against a dentist for negligently extracting certain teeth. The suit was instituted more than two years after the extractions were made, but not more than two years after the plaintiff knew of the condition caused by the defendant's negligence. The court recognized both the *Byers* and *Bernath* cases, but followed the latter in denying the plaintiff a judgment on the grounds that the later decision was the law in Pennsylvania.[18]

Before deciding what effect the latest Pennsylvania decision has on this uncertainty in our law, the purpose of the statute of limitations and the interpretation which the courts have given it must be examined to determine which view is the more desirable. Concerning the general purpose behind statutes of limitations, Justice Maxey of the Pennsylvania Supreme Court once stated:

> It has always been the policy of the law to expediate litigation and not to encourage long delays. From this fact arose the various statutes of limitations, and the reasons why the law is unfavorable to delayed litigation are self-evident. If any person has a right which he wishes enforced, he should enforce it promptly. The person against whom the right is to be enforced might be greatly prejudiced by the plaintiff's delay. Witnesses disappear or remove to distant parts and the entire aspect of the parties on both sides may change with the lapse of time.[19]

Statutes of limitations have also been described as statutes of repose.[20] It has been stated that they:

> find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.[21]

In the case of an action for malpractice, the defendant probably has not preserved his records of the operation for longer than the prescribed period of limitation. To allow a claim after five or ten years have passed may work an undue hardship on the defendant.

Although a statute of limitations must be raised by the defendant as an affirmative defense, and although the purpose is not so much to punish the

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[17] 9 Pa. D. & C. 2d 605 (1957).

[18] *Id.* at 607. The court stated, "We think, however, that the law of the Commonwealth, by reason of the more recent decision in Bernath v. LeFever, *supra,* is established to be that the statute runs from the time of the alleged negligence unless fraud and active concealment is pleaded and proved."

[19] Ulakovic v. Metropolitan Life Ins. Co., 339 Pa. 571, 575, 16 A.2d 41, 42 (1940).

[20] Philadelphia, B. & W. Ry. Co. v. Quaker City Flour Mills Co., 282 Pa. 362, 127 Alt. 845 (1925).

[21] Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1944).

plaintiff as to aid the defendant, such a statute does have a punitive effect. Through the passage of time, the courts have come to look upon statutes of limitation with favor and have been quick to hold a plaintiff's claim barred when the statute is raised as a defense.[22] If an injured party "slumbers on his rights" and does not promptly litigate his case, he finds that his recovery is barred by the statute of limitations. In this way, the statute serves to stimulate the prompt and efficient disposition of litigation.

In a case like *Ayers v. Morgan,* however, where the plaintiff does not and cannot, through ordinary diligence, know of his right of action, it is doubtful whether the statute should be so strictly construed and applied. The situation of a person resting on his rights and not dutifully asserting his claim is not present. Rather, such an individual does not realize that he has any rights. After the statutory period elapses, the injured party may become aware of his right of action only to find it has been cut off. In *Urie v. Thompson,*[23] the court reasoned that to have a statute of limitations run before a plaintiff had reason to know of his injury could not have been intended by any legislature and could not be, "reconciled with the traditional purposes of statutes of limitations." [24]

Courts which have refused to allow the statute of limitations to be tolled in malpractice cases, merely because of the lack of knowledge on the part of the injured party, have apparently felt that the particular statute involved could not be interpreted to permit such a claim. Justice Musmanno, however, said of the Pennsylvania statute:

> This statute, as all statutes, of course, must be read in the light of reason and common sense. . . . [I]t must not be made to produce something which the Legislature, as a reasonably-minded body, could never have intended.[25]

The General Assembly, in enacting the statute, probably did not foresee the possibility of an injured party's remedy being taken away before he realized that he was injured. That body could not have intended such an unreasonable result. Of course, the problem of witnesses being dead and evidence being unavailable is still present. Those possibilities notwithstanding, it is a question of whether a wrongdoer or an innocent injured party, who has done everything possible to assert his claim, should be given the protection of the law. The just rule is that the statute of limitations does not start to run until the injured party knows, or should know, of his injury.

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[22] Schulte v. Westborough Inc., 163 Kan. 111, 180 P.2d 278 (1947); *cf.* Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152 (1868); Regan v. Williams, 185 Mo. 620, 84 S.W. 959 (1905).

[23] 337 U.S. 163 (1949).

[24] *Id.* at 170.

[25] 397 Pa. at 284, 154 A.2d at 789.

It should be noted that a number of states have statutes of limitations which apply specifically to actions for malpractice.[26] The Pennsylvania statute, however, applies to actions for personal injuries generally, including those brought for malpractice. The latest decision construing the Pennsylvania statute dealt with an action of malpractice, and held that the statute was tolled until the plaintiff knew or should have known of his injury. Whether the court means that the statute is to be tolled in all personal injury actions until the plaintiff becomes aware of his injury is not clear. Perhaps the decision should be interpreted as applying to actions of malpractice only. For a clear answer, it will be necessary to wait until a case involving something other than malpractice reaches the supreme court. It would seem, however, that the same reasons for holding that the statute is tolled in an action for malpractice would also be applicable to other actions for personal injury.

Although the supreme court in its latest decision on the question took the more desirable position that the statute of limitations is tolled in an action for malpractice until the plaintiff is, or should be, aware of his injury, there is still doubt as to the law in Pennsylvania. The court did not overrule or even mention its earlier decision which stated the law to be directly to the contrary.[27] Therefore, that decision appears to be in force and might be relied upon for authority. The court should have taken a more affirmative stand on the matter and overruled the *Bernath* case; instead, it left the controversy unsettled.

The ultimate decision in *Ayers v. Morgan* is just, but there are certain unfortunate aspects to the case. In addition to the fact that the court did not overrule the *Bernath* case and forthrightly state when the statute of limitations should start running, it reasoned its holding on other cases. For example, it cites the cases of *Foley v. Pittsburgh Des Moines Co.* and *DiGironimo v. American Seed Co.*[28] in support of its position that the statute should not run until the injured party learns of his injury. In neither of those cases, however, was there a person who did not realize he had been injured. Instead, the defendants contended that the statute ran from the time of the alleged negligence, *i.e.*, before any injury had occurred. The statute should never be interpreted to sustain such a position. In fact, the court in the *Foley* case recognized *Bernath v. LeFever* as the law in Pennsylvania.[29]

In at least one state, the problem of when the statute of limitations should start to run has been settled by legislation, to wit:

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[26] See, *e.g.*, OHIO GEN. CODE § 11225; N.Y. CIV. PRAC. ACT § 50 (1947); CALIF. CODE CIV. PROC. § 340 Subd. 3 (1949); MASS. GEN. LAW ch. 260 § 4 (1943).

[27] Bernath v. LeFever, *supra* note 14.

[28] *Supra* note 8.

[29] 363 Pa. 1, 38, 68 A.2d 517, 535.

> Hereafter all actions of contract or tort *for malpractice,* error, . . . mistake or failure to treat or cure, against physicians, surgeons, . . . and sanataria shall be commenced within two years after the cause of action accrues. The date of the accrual of the cause of action shall be date of the wrongful act complained of, and no other time.[30] (Emphasis added).

This leaves no doubt as to when the statute starts running. The statute restates the majority view, and although it is submitted that the opposite view is preferable, this enactment at least settles the point. The results are predictable and the statute eliminates confusion like that existing in Pennsylvania.

As previously noted, the Pennsylvania statute applies to all types of personal injuries. Since most litigation involving a plaintiff who does not realize he is injured concerns malpractice, the Pennsylvania law makers could perform a real service to the legal profession by enacting a statute applicable solely to malpractice actions.[31] The act should provide that, in an action for malpractice, the statute of limitations does not start to run until the injured party is, or should be, aware of his injury.[32] The enactment of such a statute would settle, once and for all, the question of when the period of limitation should begin.

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[30] ARK. STATS. (1947), § 37-205.

[31] See, for example, the statutes cited in note 26 *supra.*

[32] See, for example, a statute recommended for enactment in New York providing: "(a) a one year limitation on malpractice, which however, (b) will not accrue until the malpractice is discovered, but limited (c) to no more than six years." The recommended act has not been adopted, however. See, Note 31 ST. JOHN'S L. REV. 77, 80, (1946).