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Theory of a Medical Malpractice Action--Time Limitations and Damages

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When a patient institutes an action against a physician or surgeon for improper treatment, the legal theory under which he proceeds may determine whether a statute of limitations will act as a bar, and further, the damages, if any, to which he is entitled.[1] All such actions against physicians are not, in the true sense of the word, malpractice actions although they are frequently referred to as such. Malpractice is predicated upon the failure to use the required medical care and skill and is tortious in nature, whereas an action in contract arises from the physician's failure to perform a special agreement.[2] However, both a malpractice action and an action based on breach of an express contract may arise from the same transaction.[3] But there are, between the two actions, dissimilarities as to theory, proof and damages recoverable;[4] and, of course, the time limitations would vary.[5] As might be expected, the distinctions between the two actions are not always clear.[6] Aside from the situation where the action is based upon the physician's breach of a special contract there is some variance as to the theory of the action resulting in a problem regarding the applicable statute of limitations. As an aid to the understanding of the bases of these distinctions it would be well to examine the nature of the physician-patient relationship.

Disregarding the situation where there is a special contract to effect a cure,[7] the duty of a physician to exercise ordinary skill and care in the treatment of his patient's ailment arises not only from an implied contract, but also from the status which is created by this singular relationship.[8] The physician-patient relationship

[1] No attempt will be made to discuss the substantive law relating to medical malpractice actions. For an able discussion of the law in West Virginia on this subject see Posten, The Law of Medical Malpractice in West Virginia, 41 W. VA. L.Q. 35 (1934).

[2] Lakeman v. La France, 102 N.H. 300, 156 A.2d 123 (1959); Colvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949).

[3] Colvin v. Smith, *supra* note 2.

[4] Lakeman v. La France, 102 N.H. 300, 156 A.2d 123 (1959); Colvin v. Smith, *supra* note 2.

[5] It should be noted that the time from which the statute begins to run may vary depending upon the circumstances. See generally Annot., 80 A.L.R.2d 368 (1961); Comment, 64 W. VA. L. REV. 103 (1961).

[6] See Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955).

[7] Contracts of this nature are unusual because the practice of medicine is not an exact science. *Id.* at 546, 127 N.E.2d at 331.

[8] Norton v. Hamilton, 92 Ga. App. 727, 89 S.E.2d 809 (1955); Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956).

is usually considered to be more consensual in nature than contractual. However, in the usual situation, the two ideas of the relationship are inextricably bound together.[9] But, because of the "status which results from the circumstance of physician treating patient, the former is under a duty, imposed by law, to the latter to apply his skill and ability in a reasonably careful manner.[10] Thus, superimposed upon the duty arising from the implied contract is the obligation imposed by law. Generally the duty imposed by law is over and above the duty arising out of the contractual relationship.[11] In support of the view that the legal duty takes precedence, it might be said that this duty is always present whereas the contractual duty may not exist.[12] However, in the usual case where physician treats patient undoubtedly the implied contract concept is present. Thus, where the medical practitioner breaches his duty the problem may arise with respect to what statute of limitations is applicable. Can the plaintiff elect to bring his malpractice action either under the implied contract or under the duty imposed by law? And, will the theory under which the plaintiff proceeds provide the solution?

Under the prevailing view it will make little difference whether the plaintiff pleads a breach of implied contract, or simply negligent treatment. The majority view is probably represented by those jurisdictions which hold that an action against a physician for unskillful treatment resulting in injury is tortious in nature, and therefore subject to the limitation period for tort actions,[13] or the period provided in specific statutes relating to medical malpractice.[14] The courts adhering to this view state that the gravamen of the action is the negligent act which causes the injury.[15] The court will look behind the form of the complaint and determine the applicable statute of limitations by the substance of the allegations.[16] Thus, in *Trimming v. Howard*,[17] where the two year statute of limitations for torts was applied, the court stated that "the basic

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[9] *Ibid.*

[10] Kozan v. Comstock, 270 F.2d 839, 845 (5th Cir. 1959).

[11] *Ibid.*

[12] For example, there is no implied contractual relationship where the patient is incapable of contracting, or where a third person has contracted with the physician for the treatment of the patient. *Ibid.*

[13] *Ibid.*; Annot., 80 A.L.R.2d 320 (1961).

[14] Barnhoff v. Aldridge, 327 Mo. 767, 38 S.W.2d 1029 (1931).

[15] *Id.* at 771, 38 S.W.2d at 1030.

[16] Trimming v. Howard, 52 Idaho 412, 16 P.2d 661 (1932); Lakeman v. La France, 102 N.H. 300, 156 A.2d 123 (1959).

[17] 52 Idaho 412, 16 P.2d 661 (1932).

allegations of the complaint are directed solely to . . . negligence . . . as the proximate cause of the injury. . . . Respondent is not arraigned for breach of contract, but for delinquencies incidental to its performance . . . these are the very foundation of the action, and if true constituted nothing but malpractice . . . ." Thus the view obtains that a malpractice action is tortious in nature and therefore barred by the tort or malpractice time limitation, whether only mere negligence is alleged[18] or whether the negligence constituting a breach of implied contract is pleaded.[19]

In *Kozan v. Comstock*,[20] the court stated that "It is the nature of the duty breached that should determine whether the action is in tort or contract." Contractual relation or not, the physician is under a duty to use due care in treating his patient, and a breach of this duty constitutes a tort. "On principle then", the court declared, "We consider a malpractice action as tortious in nature . . . ."[21] However, the court recognized that a contractual action may lie against a physician where, for instance, he has expressly agreed to effect a cure.[22]

However, even where the plaintiff-patient pleads the breach of an express contract the action may be subject to the statute of limitations provided for tort or malpractice actions. Thus, in *Barnhoff v. Aldridge*,[23] the court dismissed plaintiff's contention that the action was for breach of an express contract. Even though the plaintiff pleaded language "suitable to the statement of a cause of action on contract" and did not allege negligence, the court stated that the gist of the action was the defendant's wrongful act, and held that the two year statute of limitations barring all actions against physicians for malpractice was applicable.[24] A

[18] Calvin v. Thayer, 150 Cal. App. 2d 610, 310 P.2d 59 (1957).

[19] Trimming v. Howard, 52 Idaho 412, 16 P.2d 661 (1932); Travis v. Bishoff, 143 Kan. 283, 54 P.2d 955 (1936).

[20] 270 F.2d 839 (5th Cir. 1959).

[21] *Id.* at 845.

[22] *Ibid.*

[23] 327 Mo. 767, 38 S.W.2d 1029 (1931).

[24] The court stated that "The limitation is not determined by the form of the action, but by its object. The improper performance by a physician. . . of the duties devolved and incumbent upon him and the services undertaken by him, whether same be said to be under a contractual relationship with the patient arising out of either an express or implied contract or the obligation imposed by law under a consensual relationship, whereby the patient is injured in body and health, is malpractice, and any action for damages, regardless of the form thereof, based upon such improper act comes within the inhibition of the two year statute of limitation." *Id.* at 771, 38 S.W.2d at 1030. See Mo. STAT. ANN. § 516.140 (1952).

similar result was reached in *Lakeman v. La France*,[25] where the plaintiff in his first count alleged that the defendant negligently treated him for a broken hip, and in his second count in assumpsit alleged the existence of a special contract to cure and heal the hip in a proper manner, and that the defendant breached this contract by unskillfully treating the hip. While the court declared that the two year statute of limitations applicable to a tort for malpractice did not apply to an action of assumpsit for breach of contract, they stated that substance, and not form, was controlling. Finding that the gist of the second count was the defendant's wrongful act—unskilled treatment—the court held the two year limitations statute barred the action.

However, a result contrary to that reached in the *Barnhoff*[26] and *Lakeman*[27] cases was announced in *Robins v. Finestone*.[28] Here the plaintiff alleged that the defendant-physician breached an express contract to remove a growth by fulguration—an operation not involving an incision of the abdominal wall. Due to the allegedly unskillful manner in which the physician performed the fulguration a major operation requiring incision became necessary. A majority of the court held that "the gist of the action here is defendant's failure to perform his promise to cure plaintiff within a specified time by a specified method."[29] Also, the damages sought being those suitable to an action on contract helped characterize the action as one based on a contract. The two dissenting judges voted to affirm the determination of the lower courts that the gravamen of the complaint was in malpractice, an action barred by the statute of limitations.

While the *Barnhoff*[30] and *Lakeman*[31] cases indicate that it may be of no avail to sue on an express contract in order to avoid the bar of the statute of limitations, the *Robins*[32] case does afford some comfort to the injured patient seeking to recover on such a contract where his action otherwise would be barred.

Contrasted to those jurisdictions holding that a malpractice action is subject to the time limitations provided for tort or mal-

[25] 102 N.H. 300, 156 A.2d 123 (1959).
[26] 327 Mo. 767, 38 S.W.2d 1029 (1931).
[27] 102 N.H. 300, 156 A.2d 123 (1959).
[28] 308 N.Y. 543, 127 N.E.2d 330 (1955).
[29] *Id.* at 547, 127 N.E.2d at 332.
[30] 327 Mo. 767, 38 S.W.2d 1029 (1931).
[31] 102 N.H. 300, 156 A.2d 123 (1959).
[32] 308 N.Y. 543, 127 N.E.2d 330 (1955).

practice actions are those holding that the contract statute of limitations governs where the action purports to be one for breach of contract.[33] Not only does this appear to be the minority view, but there is apparently a trend away from this position.[34] In an early Alabama decision,[35] representative of this view, the plaintiff sued the defendant for breach of contract in performing an appendectomy. The breach consisted of negligently leaving a needle or portion thereof in the plaintiff's body. In holding that the tort statute of limitations was not applicable, the court said that the reference to negligence in the complaint only described the manner in which the contract was breached.

Probably the leading West Virginia case in this area is *Kuhn v. Brownfield*,[36] wherein it is stated that either assumpsit or trespass on the case will lie against a physician where he has failed to exercise proper skill in the treatment of a patient. However, the court stated that the gist of the action is the negligence of the defendant, and the implied contract "is only explanatory of how he came to be engaged, and as raising a duty on his part, and is to be treated as if it were inducement."[37] The court also stated that the same is true where the defendant-physician is engaged under a special contract to effect a cure and he breaches the contract by rendering unskillful or negligent treatment.[38]

Regardless of the form of the action however, the court stated that it was subject to the one year statute of limitations.[39] Although under present West Virginia practice forms of action are abolished,[40] this change in procedure would have no effect upon the time limitation to be applied in a malpractice action. It is readily seen that West Virginia is in accord with the majority view, at least insofar as the application of the statute of limitations is concerned. More recent malpractice actions barred by the one year

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[33] Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923); Burke v. Mayland, 149 Minn. 481, 184 N.W. 32 (1921).

[34] Annot., 80 A.L.R.2d 320, 339 n. 15 (1961).

[35] Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923).

[36] 34 W. Va. 252, 12 S.E. 519 (1890).

[37] *Id.* at 257, 12 S.E. at 521.

[38] *Ibid.*

[39] "The action, though connected with an implied contract is for a tort or wrong resulting in bodily suffering and injury, and would not survive the death of the party injured either under our statute or the common-law, and is thus limited to one year." Kuhn v. Brownfield, 34 W. Va. 252, 260, 12 S.E. 519, 522 (1890).

[40] W. VA. R.C.P. 2.

statute of limitations[41] are *Pickett v. Aglinsky*[42] and *Gray v. Wright.*[43]

Damages recoverable in an action against a physician based on breach of contract are quite different from those recoverable in an action for malpractice.[44] In a malpractice action the plaintiff-patient may recover damages for personal injuries, including pain and suffering, which proximately result from the tortious act of the defendant-physician.[45] Thus in a malpractice suit the plaintiff is entitled to compensation for loss of time, impaired earning capacity and other consequential damages.[46]

Where the action is in contract, based upon the physician's failure to perform a special agreement, the plaintiff is entitled to "only the difference between the value of the condition promised and the actual condition, including incidental consequences fairly subject to contemplation by the parties when the contract is made."[47] Thus the patient in a contract action is restricted in his recovery to payments made to the defendant-physician, expenditures necessitated for medicine and nursing and "those other damages which naturally flow from the breach of the contract."[48] It is generally held that in an action based on contract damages are not recoverable for loss of earnings[49] or for pain and suffering.[50]

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[41] W. VA. CODE ch. 55, art. 2, § 12 (Michie 1961). The pertinent language of this statute provides: "Every personal action for which no limitation is otherwise prescribed shall be brought: . . . (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative." Prior to the extensive amendment of this statute in 1959 it provided a two year limitation on personal actions which survived the death of a party, and if it did not survive, the limitation period was one year. It would seem that a malpractice action, being an action for damages for personal injuries, would be governed by subsection (b) of the present statute and thus not be barred if brought within two years.

[42] 110 F.2d 628 (4th Cir. 1940).

[43] 142 W. Va. 490, 96 S.E.2d 671 (1957).

[44] Lakeman v. La France, 102 N.H. 300, 156 A.2d 123 (1959); Colvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949); Miller, *The Contractual Liability of Physicians and Surgeons,* 1953 WASH. U.L.Q. 413, 423-24.

[45] Lakeman v. La France, 102 N.H. 300, 156 A.2d 123 (1959); Colvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949).

[46] Miller, *supra* note 44, at 424.

[47] McQuaid v. Michou, 85 N.H. 299, 303, 157 Atl. 881, 883 (1932).

[48] Hertgen v. Weintraub, 29 Misc. 2d 396, 215 N.Y.S.2d 379 (Sup. Ct. 1961).

[49] McQuaid v. Michou, 85 N.H. 299, 157 Atl. 881 (1932).

[50] Hawkins v. McGee, 84 N.H. 114, 146 Atl. 641 (1929); Miller, *supra* note 44, at 424.

However, damages for pain and suffering have been allowed in a contract action, the court stating that under the circumstances pain and suffering might fairly be said to have been within the contemplation of the parties when the contract was made.[51] One writer, agreeing with the holding in the above case, favors the allowance of damages for pain and suffering and other damages allowable in tort actions, in an action based on breach of contract where the factual situation is appropriate.[52]

In summation, it is apparent that for a plaintiff-patient a malpractice action has an advantage over an action for breach of contract with respect to the measure of damages, but as concerns the statute of limitations the reverse is true, for normally there is a longer period in which to commence a contract action. Of course, for the defendant-physician the situation is reversed. The caveat is patent: it is incumbent on the patient not to sit on his cause of action otherwise it may be barred. The numerous malpractice cases wherein the statute of limitations has been applied not only indicate that it is an oft-used defense, but that the plaintiff has frequently waited too long. Possibly the circumstances may be such as to toll the running of the statute. But, if not, the paucity of decisions permitting an action to be based on a contractual obligation give notice of the inexpediency of such course.

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[51] Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957).
[52] Miller, *supra* note 44, at 428.