

December 1961

Torts--Statutes of Limitations--Malpractice Actions Involving Objects Left in Surgical Patients

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Recommended Citation

Aaron D. Trub, *Torts--Statutes of Limitations--Malpractice Actions Involving Objects Left in Surgical Patients*, 64 W. Va. L. Rev. (1961).

Available at: <https://researchrepository.wvu.edu/wvlr/vol64/iss1/16>

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the inheritance tax by directing the tax to be paid out of the residue of his estate. The West Virginia court did not seem concerned about this method of escaping the inheritance tax, and said that there were other examples of tax saving which had been written into the act itself.

If the West Virginia Legislature does not amend the inheritance tax, the available savings could be substantial. If the tax rate were, for example, ten per cent, and testator *T* wished to leave 60,000 dollars to *A*, a tax of 6,000 dollars would result. If *T* were to provide that *A* get 54,000 dollars and the inheritance tax be paid out of the estate, the tax would amount to only 5,400 dollars and a tax saving of 600 dollars could be realized. Until such change occurs, the payment of such taxes from the residuary clause offers an attractive technique for tax saving.

Robert Glenn Steele

**Torts—Statutes of Limitations—Malpractice Actions
Involving Objects Left in Surgical Patients**

P underwent an operation on April 26, 1955, and after receiving post-operative attention, was discharged from the hospital on May 5, 1955. Her last visit to *D*, a physician, was on November 14, 1955. After the operation *P* constantly suffered from back trouble and was X-rayed to determine the cause in August, 1958. The X-rays disclosed a wing nut in her abdomen. *P* instituted an action against *D* on August 13, 1959, for his negligence during the operation. The lower court held that *P*'s action was barred by the two-year statute of limitations. *Held*, reversed. The statute of limitations on a cause of action for malpractice based on negligent failure to remove a foreign object from patient's body during the course of an operation began to run when the patient knew or had reason to know about the foreign object and existence of a cause of action based upon its presence. *Fernandi v. Strully*, 173 A.2d 277 (N.J. 1961).

The issue presented to the court in the principal case is one that has arisen many times and one that has been ruled on by many courts throughout the land. By its present decision, the New Jersey

Supreme Court has made its state the third of a growing minority which rules, in effect, that in the present type of malpractice case, the statute of limitations begins to run when the patient knew or had reason to know about the foreign object in his body, and not when this object was negligently left there.

The majority of courts, in interpreting their respective state statutes, have held that the statute of limitations begins to run, not at the time when the patient knew or had reason to know of the doctor's negligent act, but at the time when the negligent act occurred. Only in Arkansas and Missouri is there no opportunity for judicial interpretation of such statutes as the legislatures of both states have explicitly set out the time at which the cause of action accrues in malpractice cases. See ARK. STATS. §§ 37-205 cited in *Crossett Health Center v. Crosswell*, 221 Ark. 874, 256 S.W.2d 548 (1953); MO. REV. STAT. ANN. § 1012 (1939) cited in *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943). In *Hungerford v. United States*, 192 F. Supp. 581 (N.D. Cal. 1961), the court, in applying the law of the state of Washington, held that plaintiff's claim for continuation of a brain injury resulting from negligence of physician "accrued" at the time of such negligence and was barred by limitations. Other decisions supporting the majority view are found in *Wilder v. St. Joseph Hosp.*, 225 Miss. 42, 82 So. 2d 651 (1955), sponges left in plaintiff's body; *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957), failure to remove lap-pack from patient's abdomen before closing appendectomy incision; *DeLong v. Campbell*, 157 Ohio St. 22, 104 N.E.2d 177 (1952), sponges left in plaintiff's body; *Lindquist v. Mullen*, 45 Wash. 2d 675, 277 P.2d 724 (1954), failure to remove a surgical sponge prior to closing a hernia incision.

The West Virginia Supreme Court, in interpreting W. VA. CODE ch. 55, art. 2, § 12 (Michie 1955), also has held that the cause of action against a physician who negligently left a hemostat in plaintiff's body accrued at the time of the operation, and that in the absence of actual knowledge, fraud, or concealment on the part of the defendant, the one-year statute of limitations would not be tolled and the action was therefore barred. *Gray v. Wright*, 142 W. Va. 490, 96 S.E.2d 67 (1957).

While the majority rule generally prevails, many courts have recognized the harshness found in it and have used several different approaches to alleviate the inequities created. In *Gillette v. Tucker*,

67 Ohio St. 106, 65 N.E. 865 (1902), the court theoretically postponed the commission of the tort to the time of severance of the professional relationship between doctor and patient. This, the court noted, would serve to "postpone the running of the statute until it is reasonably possible for the victim of the continuous tortious conduct to discover the wrong." This idea of tolling the statute until the end of treatment by the physician has found recent support in *Summers v. Wallace Hosp.*, 276 F.2d 831 (9th Cir. 1960), interpreting the law of the state of Idaho; *Borgia v. City of New York*, 216 N.Y.S.2d 897 (Sup. Ct. 1961); and *Dowell v. Mossberg*, 355 P.2d 624 (Ore. 1960). Although this rule somewhat relieves the burden placed upon plaintiff when the factual situation permits its application, it is, at best, only a compromise measure. In those jurisdictions adhering to this rule, if the patient is released from the hospital without undergoing any post-operative treatment, or at most undergoes such treatment for a very short period of time, but yet discovers the surgeon's negligence at a time beyond that provided by the statute of limitations, no protection is afforded him in bringing his action. Although some attempt has been made under this rule to afford the plaintiff an opportunity to bring an action, it does not appear to readily solve the present problem.

In *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959), the plaintiff underwent an operation for an ulcer. Several years later, a sponge was discovered in her abdomen, having negligently been left there by the defendant-surgeon. When plaintiff instituted legal action, defendant contended that the action was barred by the two-year statute of limitations. This contention was rejected by the Pennsylvania Supreme Court which stressed that the statute of limitations must be read in the light of reason and common sense. In its opinion, several "fictions" were created by the court to support its decision, these being: (1) that the operation was "not completed" until the sponge was removed; (2) that the injury to the plaintiff did not become a reality until "the sponge began to break down the healthful tissue within the body"; and (3) that the defendant's failure to remove the sponge constituted "blameworthiness which continued" until the plaintiff "learned, or by the exercise of reasonable diligence, could have learned of the presence of the foreign substance within his body."

In *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944), although there was no suggestion that the defendants knew of the

failure to remove a gauze pad negligently left during plaintiff's operation, the court expressed the view that the matter could be treated in the same fashion as the fraudulent concealment cases where the statute is widely deemed to be tolled. The court, in *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934), rejected a contention that plaintiff's legal action was barred by limitations, describing the doctor's failure to discover and disclose the presence of a ball of gauze in plaintiff's abdominal cavity as "constructive fraud."

The first telling blow against strict construction of limitations statutes in malpractice cases came in *Huysman v. Kirsh*, 6 Cal. 2d 302, 57 P.2d 908 (1936). In this case the defendant-surgeon closed the plaintiff's wound without removing a drainage tube which had been carelessly left in her abdomen. Although she did not institute her action until after the lapse of a year from the date of the operation, the court unanimously held that she was not barred by the one-year statute. A supporting theory for this decision was that the statutory period of limitations may be viewed as not beginning to run until the plaintiff knew or reasonably should have known of her condition. This approach has repeatedly been adopted in California. See *Tell v. Taylor*, 12 Cal. Rep. 648 (Dist. Ct. App. 1961), and cases cited therein. This view has also been adopted in Florida. *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954).

The New Jersey Supreme Court has recognized the merit of the view propounded by the courts of California and Florida. Although New York has not yet accepted this view, it has been recognized in that jurisdiction that it is within the competence of courts to change the law with respect to the time when a cause of action for medical malpractice arises, as between the time the negligent act is committed and the time the injury or damage is discovered. *Dorfman v. Schoenfeld*, 203 N.Y.S.2d 955 (Sup. Ct. 1960). This principle is one that should not merely be accepted by the highest courts in the United States, but is one which should be put into practice. The time is definitely ripe for a proper determination as to when the cause of action does accrue and, consequently, as to that time when the statute of limitations begins to run in this "class of malpractice cases." This determination should be in accord with the rulings in California, Florida, and now, New Jersey.

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