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Jerome D. Schad

NEGLIGENCE—MEDICAL MALPRACTICE—STATUTE OF LIMITATIONS STARTS TO RUN WHEN PATIENT COULD REASONABLY DISCOVER FOREIGN OBJECT

In June, 1958, Josephine Flanagan was under the care of a doctor for a gall bladder ailment. She entered the Mt. Eden General Hospital for an operation on July 14, 1958. During the operation surgical clamps were inserted into her body, but were not removed. In June, 1966, she experienced abdominal pains and consulted another doctor who discovered the clamps and successfully removed them. In separate actions against Mt. Eden General Hospital and the estate of her original doctor, she alleged (1) that the clamps were left in her body due to negligence during and after the operation and (2) that they were not and could not have been discovered by her until June, 1966. The trial court granted defendants' motions to dismiss on the ground that the actions were barred by the statute of limitations.[1] The Appellate Division unanimously affirmed without opinion.[2] The Court of Appeals reversed. *Held*, the statute of limitations does not begin to run in foreign-object medical malpractice actions until the plaintiff could have reasonably discovered the malpractice. *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969).

A person's right of action against one who has wronged him is not perpetual; rather, it is specifically limited by statute.[3] Statutes of limitations are premised upon several factors: (1) the difficulty of proof of old, though meritorious, claims; (2) the presumption that a plaintiff would not ordinarily delay in pursuing a meritorious claim; (3) the possibility of fraudulent claims, and, (4) the defendant's inability to defend against stale claims.[4] At common-law the statute of limitations did not commence until the action had "accrued." This meant, in a negligence action, that all elements—duty, violation of duty,

1. N.Y. CPLR § 214 (McKinney 1963) "Actions to be commenced within three years. . . . (6) An action to recover damages for malpractice." The history of § 214(6) is long. By amendment to the Code of Civil Procedure, § 384(1) (N.Y. Sess. Laws 1900, ch. 117, § 1) created "malpractice" as a separate cause of action. A two year limitation, shorter than the three year limitation on a negligence action generally, applied to the malpractice action. Section 384(1) was the forerunner of the Civil Practice Act § 50(1), which was the predecessor to CPLR § 214(6). Before the 1900 amendment, the action fell under the Code of Civil Procedure § 383(5) (N.Y. Sess. Laws 1877, ch. 416, § 1), which stipulated a three year limitation to bring a negligence action.

CPLR § 203(a) states: "[T]he time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim was interposed."

2. Flanagan v. Mt. Eden Gen. Hosp., 29 A.D.2d 920, 289 N.Y.S.2d 147 (4th Dep't Memo. 1968). Hereinafter the Court of Appeals decision will be referred to as the instant case.

3. In earlier times personal actions were thought to last until the plaintiff's death. *See* Brooklyn Bank v. Barnaby, 197 N.Y. 210, 90 N.E. 834 (1910). Modern procedure rules provide that the statute of limitations may be raised either as an affirmative defense or in a motion to dismiss. In New York consult CPLR § 3018(b) and R 3211(a)(5).

4. Schmidt v. Merchants Despatch Trans. Co., 270 N.Y. 287, 302, 200 N.E. 824, 827-28, (1936); N.Y. LAW REVISION COMM'N REPORT 161 (1947); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177 (1949-50).

proximate causation, and actual damage—had to be present.[5] The action "accrued" when the plaintiff's person was violated, whether or not the injury was known to him.[6] Legislatures, in following this principle, have failed to further define when the cause of action has "accrued."[7] Thus, it has been left to the courts to interpret the statutes. In a malpractice action, as in all tort actions, a "traditional rule" has developed, that is, the statute of limitations begins to run at the time of the negligent commission or omission of the act.[8] The leading New York case, *Conklin v. Draper*,[9] and cases following it, make it clear that neither knowledge, actual damage, nor a presumption of damage is necessary in order that the statute commence.

The courts in a growing number of states have set aside this traditional accrual rule and have substituted a rule that the statute of limitations does not begin to run until the plaintiff discovers, or by the exercise of reasonable diligence, should have discovered that he had suffered an injury.[10] Two states have accepted this "discovery rule" by legislative enactment.[11] The federal rule, adopted in *Urie v. Thompson*,[12] suggests that the principle which focuses upon the plaintiff's discovery of the injury rather than the defendant's commission of the act is the only construction that is constitutionally proper.[13]

Where the courts have refrained from the discovery rule, the "continuous treatment theory," the "contract action," and the "fraud action" have been

5. W. PROSSER, LAW OF TORTS, 146-47 (3d ed. 1964).

6. *Id.*

7. N.Y. CPLR § 203(a) (McKinney 1963): "[T]he time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed." N.Y. LAW REVISION COMM'N REPORT 269, 283 (1962) and Lillich, *The Malpractice Statute of Limitation in New York and other Jurisdictions*, 47 CORNELL L.Q. 339, at 372 (1962), contain appendices of the statutes of limitations of the other jurisdictions.

8. *See, e.g.*, Pasquale v. Chandler, 250 Mass. 450, 215 N.E.2d 319 (1966); Schmidt v. Merchants Despatch Trans. Co., 270 N.Y. 287, 200 N.E. 824 (1936); Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1930), *aff'd*, 254 N.Y. 620, 173 N.E. 892 (1930). Some statutes have specifically stated that the statutory time begins running from the moment of the negligent act or omission, but even then courts have postponed the time of its running. Lillich, *supra* note 7 at 358-60.

9. 229 App. Div. 227, 241 N.Y.S. 529 (1930), *aff'd*, 254 N.Y. 620, 173 N.E. 892 (1930); *See* Lillich, *supra* note 7 at 339-43 for a list of cases. Six years before the instant case, the court re-affirmed the accrual rule of *Conklin* in a malpractice suit involving medication in Schwartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

10. *See* cases listed in the instant case at 431-32 nn. 1 & 2, 248 N.E.2d 871 at 873 nn. 1 & 2, 301 N.Y.S.2d 23 at 27 nn. 1 & 2.

11. 7 ALA. CODE § 25(1) (1958); 52 CONN. GEN. STAT. REV. § 584 (1968). Each has an outside limit within which the action must be brought. These are six and three years, respectively. The brevity of the latter virtually negates the equity of the discovery rule principle.

12. 337 U.S. 163, at 170 (1949). The Supreme Court pointed out that it was against the policies underlying the statute of limitations to bar the plaintiff's action before he could know he had an injury. By the court's interpretation an assumption lay behind statutes of limitations "which conventionally require assertion of claims within a specified period of time after notice of the invasion of legal rights."

13. Judge Desmond's dissenting opinion in Schwartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963), raised the question of whether a right to an action could be taken away before one could know of its existence.

used to avoid the traditional rule. The "continuous treatment theory" accepts the maxim that the statute runs from the act or omission, but finds that the negligent act "continues" until the end of the treatment of the patient.[14] This interpretation has similarly been applied to malpractice by attorneys.[15] Its drawback is that the theory is not available to those viable claims where no post-operative or continued services were provided by the defendant. Under the "contract action" theory, the plaintiff's complaint is based on the contractual obligation between the doctor and patient instead of a theory of negligence, thus accounting for a longer statute of limitations.[16] Even though a plaintiff may be successful in a contract action, he may be inadequately compensated since contract damages do not include amounts for pain and suffering.[17] A further problem is that although an action based on an express contract may survive challenge, one based on an implied contract may be held to be essentially a complaint in negligence and thereby limited by the statute of limitations for malpractice.[18] A plaintiff may take advantage of a "discovery rule" if the action is based on a theory of fraud, since where fraud is involved the statute of limitations does not begin to run until the injury is discovered.[19] This theory has had little acceptance in New York since *Tulloch v. Haselo*,[20] where the court held that a doctor's concealment of his malpractice was simply part of his overall negligence and not a separate cause of action in fraud. It has become almost impossible to successfully argue a fraud action where the facts necessary to prove it would also establish an action in malpractice.[21]

In the instant case, the court overruled *Conklin v. Draper* to the extent that it applied to foreign-object medical malpractice. The court cautiously removed the barrier against suits by plaintiffs suffering injuries due to foreign-object medical malpractice. In allowing such actions the court thought that the increased number of defendants subject to liability would be "in compatible

14. The theory was first established in New York in Sly v. Van Lengen, 120 Misc. 420, 198 N.Y.S. 608 (Sup. Ct. 1923); Note, 37 HARV. L. REV. 272 (1923). In that case the court adopted its principle from an Ohio precedent. Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902). The theory was streched to include independent and severable negligent acts or omissions within a period of treatment in Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962). *See* Hammer v. Rosen, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960).

15. Marine Midland Trust Co. v. Penberthy, 301 N.Y.S.2d 221 (Sup. Ct. 1969). *See also, Statutes of Limitations in Legal Malpractice*, 18 CLEV.-MAR. L. REV. 82 (1969).

16. N.Y. CPLR § 213(2) (McKinney 1963) applies the six year statute of limitations in actions based on a "contractual obligation or liability express or implied."

17. Katz, *Medical Malpractice: A Survey of Statutes of Limitations*, 3 SUFFOLK U. L. REV. 587, 603 (1969).

18. *See e.g.*, Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955); Calhoun v. Gale, 29 A.D.2d 766, 287 N.Y.S.2d 710 (2d Dep't Memo. 1968), *aff'd*, 23 N.Y.2d 756, 244 N.E.2d 468, 296 N.Y.S.2d 953 (1968); Colvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949); Safian v. Aetna Life Ins. Co., 260 App. Div. 765, 24 N.Y.S.2d 92 (1942), *aff'd*, 286 N.Y. 649, 36 N.E.2d 692 (1941); Horowitz v. Bogart, 218 App. Div. 158, 217 N.Y.S. 881 (1926); Hertgen v. Weintraub, 29 Misc. 396, 215 N.Y.S.2d 379 (Sup. Ct. 1961).

19. N.Y. LAW REVISION COMM'N REPORT 237, 250 (1962).

20. 218 App. Div. 313, 218 N.Y.S. 139 (1926).

21. N.Y. LAW REVISION COMM'N REPORT 237, 251-52 (1962); Katz, *supra* note 17; Lillich, *supra* note 7 at 365.

harmony with the purpose for which the Statutes of Limitation were enacted."[22] Judge Keating, speaking for the majority, noted that these statutes of limitations were never intended to protect the defendant from all old, but valid, claims; rather, they were intended to avoid stale, unprovable, and frivolous claims. The reasoning of the instant decision is that the danger of false claims is eliminated in this kind of malpractice because the claim "rests solely on the presence of a foreign object."[23] The policy of insulating defendants from the burden of defending stale claims is neither circumvented, nor unduly altered where an action is allowed when the damaging item "retains its identity."[24] The defendant's burden, in these situations does not outweigh the plaintiff's right to a remedy.

By its emphasis on the nature of the injury, the majority creates a distinction, for the purpose of the statute of limitations, between one type of medical malpractice and another. The emphasis upon the tangible object within the plaintiff's body focuses on the plaintiff's ability to prove the injury's origin, rather than the problem of knowing when the injury occurred. Only in the class of foreign-object medical malpractice will the discovery rule principle be permitted by the court. Medication malpractice, treatment malpractice and other professional types of malpractice, which do not originate from a "foreign-object" injury, may not, for purposes of applying the statute of limitations, take advantage of the discovery rule principle. Based on this distinction the court was able to uphold its recent decision in *Schwartz v. Heyden Newport Chemical Corp.*[25] involving medication malpractice, which followed the traditional rule of accrual enunciated in *Conklin v. Draper.*

Having narrowly limited the class of cases in which the discovery rule principle would be allowed, it was not necessary for the court to establish an outside time limit for bringing a claim so as to avoid a flood of suits. The time to bring the action is postponed indefinitely, conditioned only on the discoverability of the injury. In contrast to the majority rationale, the previous recommendations of the New York Law Revision Commission have not distinguished types of malpractice, but have established an outside limit within which to bring an action.[26] Although the majority explicitly limited itself to foreign-object medical malpractice, Judge Breitel's dissenting opinion accurately noted that the majority's rule is equally applicable to other types of malpractice.[27] He acknowledged that:

> [T]he same conclusions, for different reasons would probably apply where a medical practioner fails to disclose the fact of treatment

22. Instant case at 430, 248 N.E.2d 871, at 872, 301 N.Y.S.2d 23, at 26 (1969).
23. *Id.*
24. Instant case at 431, 248 N.E.2d 871, at 873, 301 N.Y.S.2d 23, at 27.
25. 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).
26. *See* N.Y. LAW REVISION COMM'N REPORT 139, 142 (1942); N.Y. LAW REVISION COMM'N REPORT 227, 233 (1962).
27. Instant case at 436, 248 N.E.2d 871, at 876, 301 N.Y.S.2d 23, at 31.

> malpractice either known to him or inferable to him from the consequences of a treatment of surgical procedure.[28]

Speaking for three dissenting judges, Breitel's objection was that the court had invaded an area which he considered wholly controlled by the legislature.[29]

One justification for applying the discovery rule, touched upon by both the majority and dissent, is that the "lack of knowledge" of the plaintiff's injury ought to be a reason for delaying the running of the statute of limitations against him. The majority, quoting a West Virginia case, acknowledged that

> 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 and until she had reasonable basis for believing or reasonable means of ascertaining that the foreign object was within her abdomen. . . .[30]

Perhaps, only this element of knowledge can realistically justify the discovery principle.

The major failing of the instant case is that it distinguished one type of medical malpractice from another. In distinguishing *Schwartz v. Heyden Newport Chemical Corp.*[31] the court denied that the discovery principle is applicable to medication malpractice, treatment malpractice, or any other professional malpractice. *Schwartz* should have been overruled explicitly. In fact, two weeks before the *Flanagan* case was decided, the Oregon Supreme Court ruled in a medical-treatment malpractice case that:

> On a theoretical basis it is impossible to justify the applicability of the discovery rule to one kind of malpractice and not another. The reason for the application of the discovery rule is the same in each instance. . . . This is true whether it consists of leaving a foreign object in the body or whether it consists of faulty diagnosis or treatment.[32]

Had the New York Court of Appeals faced the *Schwartz* case squarely, it would have reached a similar conclusion. Nevertheless, the *Flanagan* decision

28. *Id.*

29. *Id.* Breitel asserted that the failure of the legislature to act affirmatively on proposals for a discovery rule since 1942 is a clear indication of legislative intent against it. While he was correct in stating that this is an area where the legislature could act, *e.g.*, as it has in establishing the discovery rule in fraud actions, his reasoning presented a fallacious picture of the legislative process, *See* Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEXAS L. REV. 1254, 1262 (1966). The majority approached the realities of the situation by pointing out that the discovery rule applies to *when* the statute of limitations begins to run. When it runs is only stated generally in the Civil Practice Law and Rules, since the "traditional rule" is a judicial creature. The majority also correctly noted that the failure of the legislature to act cannot be taken as absolute proof of intent to keep the *Conklin* decision frozen. Instant case at 433, 248 N.E.2d 871, at 874, 301 N.Y.S.2d 23, at 28.

30. Morgan v. Grace Hosp., 149 W. Va. 783, 144 S.E.2d 156 (1967) *quoted* in instant case at 431, 248 N.E.2d 871, at 873, 301 N.Y.S.2d 23, at 27.

31. 12 N.Y.S.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

32. Frohs v. Greene, 452 P.2d 564, 565 (Ore. 1969).

has probably undermined the policy reasons for remaining with *Schwartz* in the future.

Whether the decision will be applied to other malpractice is not clear. Certainly the equities are no less demanding when the plaintiff is injured by an injection,[33] by a surveyor's careless measurements,[34] or by an attorney's failure to act before a statute of limitations barred his client's claim.[35] Significantly, these various types of malpractice have been covered by the New York statute of limitations for malpractice.[36] A lower court decision after *Flanagan* suggests that the discovery principle may not be applied to other professional malpractice. In May, 1969, a trial court in *Marine Midland Trust Co. v. Penberthy*[37] applied the "continuous treatment theory"[38] to a legal malpractice situation. Thus, the traditional rule for the running of the statute still exists in one type of relationship but not another even though the same equitable issues arise. Until a similar malpractice case comes before the Court of Appeals again, New York will have to be content with a very limited discovery rule. In light of the twenty years of Law Revision Commission recommendations and decisions in other jurisdictions, the Court of Appeals should certainly uphold the majority rationale and, upon reconsideration of the issues, expand the scope of the rule to include all undiscovered malpractice.

JEROME D. SCHAD

NEGLIGENCE-PERSONAL INJURY—GENERAL RELEASE SUBJECT TO RESCISSION WHERE PARTIES ARE MISTAKEN ABOUT THE EXTENT AND EXISTENCE OF PLAINTIFF'S INJURIES

Infant plaintiff, injured in an automobile accident, was examined by three doctors and then assured that the only injury that resulted was to her lower spine. Since the date of injury she had complained of pain radiating down the back of her posterior left thigh and a "clicking" sound in the region of her left hip. Her counsel settled her claim for $1,000 and prepared general releases relinquishing "all claims for personal injuries, medical expenses, loss of wages (claims for expenses and loss of service) as a result of an automobile accident on February 26, 1963." Six months later she was again examined by a doctor who stated that the accident had caused an additional injury, an avascular

33. Schwartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

34. Seger v. Cornwell, 44 Misc.2d 994, 255 N.Y.S.2d 744 (Sup. Ct. 1964). The court viewed Schwartz v. Heyden Newport Chemical Corp. as controlling.

35. Siegel v. Kranis, 52 Misc.2d 78, 274 N.Y.S.2d 968 (Sup. Ct. 1966). The court applied the traditional rule and held that "New York takes the view that fraudulent concealment does not toll the statute of limitations." *Id.* at 80, 274 N.Y.S.2d at 970.

36. *See supra* note 1 for statutory history.

37. 301 N.Y.S.2d 221 (Sup. Ct. 1969).

38. *See supra* note 14.