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Torts—Malpractice—Cause Of Action Accrues Only At End Of Treatment Which Includes Wrongful Acts Or Omissions

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to the majority, the duty imposed, namely the requisite degree of care necessary to relieve the instant defendant from liability, would be fulfilled if the jury found that the house had been secured upon its becoming vacant, that frequent inspections had been made of the premises, and resecurement had been effected when items amiss were ascertained. The fact that the house was actually in violation of the statute at the time of the accident would, under such circumstances, have no bearing upon liability.[14]

A careful reading of the *Runkel* decision, expressly stated in terms of mandatory duty regardless of negligence, does not easily admit of the concepts of reasonableness and degree of care. In the instant case, the Court has, in effect, substantially modified if not overruled the *Runkel* decision. The statutory provisions involved here, admittedly designed for individual and public safety, are of the tenor which historically have imposed strict liability.[15] Even assuming *Runkel* to admit of varying degrees of care, the previously noted policy of the Court to exact a high degree of care where trespassing children are involved, especially where the landowner is on notice that children are or will likely be in close proximity to the dangerous instrumentality,[16] would seem to warrant a recovery on the instant facts since the ten-year-old infant plaintiff had been playing at a playground adjacent to the abandoned house. Further, the distinction drawn by the majority between a building in imminent danger of collapse and a building in a state of disrepair seems at best unrealistic both in light of the statutory mandate and the facts. It stretches the imagination to find substantial difference between a collapsing building and a collapsing ceiling as injury-precipitating agents: one seems as inherently dangerous as the other. In view of the availability of insurance protection to landowners, the nature of the risks involved in maintaining dilapidated structures on one's property, and the manifest intent of such socially desirable statutory enactments as are herein involved, the position of the dissent seems highly preferable.

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MALPRACTICE—CAUSE OF ACTION ACCRUES ONLY AT END OF TREATMENT WHICH INCLUDES WRONGFUL ACTS OR OMISSIONS

Infant plaintiff on October 10, 1956, was taken to defendant city's hospital for treatment of severe burns. Following initial treatment and dressing of wounds the infant, by reason of the hospital personnel's negligence, suffered permanent brain damage at the hosptital on the night he was admitted. In addition to the first act of negligence, the child was the victim of neglect amounting to malpractice on three later occasions, the last of which occurred

14. Instant case at 408, 190 N.E.2d at 417, 240 N.Y.S.2d at 22.
15. See Weiner v. Leroco Realty Corp., 279 N.Y. 127, 17 N.E.2d 796 (1938).
16. See DiBiase v. Ewart & Lake, 228 App. Div. 407, 240 N.Y. Supp. 132 (4th Dep't 1930) *aff'd*, 255 N.Y. 620, 175 N.E. 339 (1931); Collentine v. City of New York, 279 N.Y. 119, 17 N.E.2d 792 (1938); Mayer v. Temple Properties, 307 N.Y. 559, 122 N.E.2d 909 (1954).

on November 25, 1957. He remained in the hospital for physiotherapy and rehabilitation until February 14, 1958, eighty-one days after the last act of malpractice, and filed notice of claim with the city sixty-three days after his release. The Supreme Court-Trial Term rendered judgment against the city, and the Appellate Division[1] reversed solely on the ground that the notice of claim against the city, a prerequisite to recovery, was not given within ninety days after the claim accrued.[2] On appeal, *held*, reversed with two judges dissenting. When the course of treatment which includes the wrongful acts or omissions runs continuously, and is related to the same original condition or complaint, the accrual comes only at the end of treatment. *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

By definition, a statute of limitations prescribes limits to the right of action on certain described causes of action, declaring that suits cannot be maintained on such claims unless brought within a specified time period after the right accrues.[3] Malpractice statutes of limitation "refers to actions to recover damages for personal injuries resulting from the misconduct of physicians, surgeons and others practicing a profession similar to those enumerated."[4] The legislative intent in enacting such statutes was to protect prospective defendants from untimely suits which would have deprived them of adequate investigatory opportunities, rather than to defeat the rights of plaintiffs with legitimate claims.[5] Prior to September 1, 1963, the statute of limitations for malpractice against physicians in New York was two years;[6] at that time it was extended to three years.[7] However, the malpractice limitation applicable to suits against municipalities is only ninety days.[8] None of these provisions indicate whether the limitation begins to run from the time the claimant learns of the injury, from the time the malpractice occurs or from the time treatment ends. Whether the court is passing on a true statute of limitations problem or a section 50-e dispute, the issue which must be decided is the same; when did the claim or cause of action accrue?[9] New York courts have held that the cause of action accrues at the date the malpractice is perpetrated.[10] Yet, as early as 1923, it was decided that where a physician performing surgery fails to remove an implement from claimant's body and does not remove it thereafter, though he continues to

1. Borgia v. City of New York, 16 A.D.2d 927, 229 N.Y.S.2d 318 (2d Dep't 1962).
2. N.Y. Munic. Law § 50-e.
3. Black, Law Dictionary 1077 (4th ed. 1951).
4. Federal Int'l Banking Co. v. Touche, 248 N.Y. 517, 518, 162 N.E. 507, 507 (1928). See Lillich, *The Malpractice Statute of Limitations in N.Y. and Other Jurisdictions*, 47 Cornell L.Q. 339, 339 (1962).
5. In the Matter of Kramer v. Bd. of Educ., 2 Misc.2d 644, 150 N.Y.S.2d 489 (Schenectady County Co. 1956); Robinson v. Bd. of Educ. of Galway, 1 Misc.2d 634, 152 N.Y.S.2d 134 (Sup. Ct. 1956).
6. N.Y. Sess. Laws 1920, ch. 925, § 50(1).
7. N.Y. CPLR § 214(6).
8. N.Y. Munic. Law § 50-e.
9. Instant case at 155, 187 N.E.2d 777, 778, 237 N.Y.S.2d 319, 321 (1962).
10. Barnes v. Gardner, 170 Misc. 604, 9 N.Y.S.2d 785 (Sup. Ct. 1939); see Tulloch v. Hasello, 218 App. Div. 313, 218 N.Y. Supp. 139 (3d Dep't 1926); see Frankel v. Wolper, 181 App. Div. 485, 169 N.Y. Supp. 15 (2d Dep't 1918).

treat her for more than two and one-half years, claimant's cause of action is not barred by the statute although suit was brought more than two years after the operation.[11] The court reasoned that since the tort was a continuing one, the statute did not begin to run until the physician terminated his treatment.[12] This theory dominates in New York[13] and also exists elsewhere.[14] Yet, further refinement had to be made; at what point does treatment end?

Early decisions, although there was no accord upon this question, did not allow the statute to toll while treatment for that injury which caused the plaintiff to consult the physician continued.[15] Courts often could not determine whether malpractice occurred in the initial treatment alone, during the aftercare or both.[16] Therefore, it was held that the time limitation of the statute should not accrue until the malpractice terminated, which could arise at the end of one operation, or after a series of them, and it could even extend to the end of postoperative care.[17] More recently a New York decision completely ignored mentioning that the treatment subsequent to the initial injury must be negligent in order to keep the statute from running, leading to the inference that negligence during the continuous treatment may not even be necessary to hold the statute.[18] From decisions such as these the doctrine of continuous treatment in New York evolved; the statute will not begin to toll in an action for malpractice until the date the postoperative care terminates,[19] or upon the date the doctor last treats the patient,[20] or upon termination of the physician-patient relationship.[21] In the decision now under examination, the court extended this doctrine stating that "at least when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the 'accrual' comes only at the end of the treatment."[22] But the court limits its

11. Sly v. Van Lengen, 120 Misc. 420, 198 N.Y. Supp. 608 (Sup. Ct. 1923).
12. *Id.* at 422, 198 N.Y.Supp. at 610.
13. Hammer v. Rosen, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960); see Budoff v. Kessler, 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954) (memorandum decision); see Figuerca v. City of New York, 106 N.Y.S.2d 430 (Sup. Ct. 1951), *aff'd*, 279 App. Div. 771, 109 N.Y.S.2d 126 (2d Dep't 1951); see Piedmont v. Society of N.Y. Hospital, 25 Misc.2d 41, 204 N.Y.S.2d 592 (Sup. Ct. 1961); see Dorfman v. Schoenfeld, 26 Misc.2d 37, 203 N.Y.S.2d 955 (Sup. Ct. 1960); see Nervick v. Fine, 195 Misc. 464, 87 N.Y.S.2d 534 (Sup. Ct. 1949).
14. Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941); *accord*, DeHaan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932); *accord*, Schmit v. Esser, 183 Minn. 354, 236 N.W. 622 (1931); *accord*, Schanil v. Branton, 181 Minn. 381, 232 N.W. 708 (1930).
15. DeHaan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932); see Sly v. Van Lengen, 120 Misc. 420, 198 N.Y.Supp. 608 (Sup. Ct. 1923); see Conklin v. Draper, 229 App. Div. 227, 241 N.Y.Supp. 529 (1st Dep't 1930); *but see* Wetzel v. Pius, 78 Cal.App. 104, 248 Pac. 288 (3d Dist. Ct. App. 1926); *contra*, Cappucci v. Barone, 266 Mass. 578, 165 N.E. 653 (1929).
16. Nervick v. Fine, 195 Misc. 464, 465, 87 N.Y.S.2d 534, 535 (Sup. Ct. 1949).
17. *Ibid.*
18. See Hammer v. Rosen, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960).
19. Dorfman v. Schoenfeld, 26 Misc. 2d 37, 203 N.Y.S.2d 955 (Sup. Ct. 1960).
20. Piedmont v. Society of N.Y. Hospital, 25 Misc. 2d 41, 204 N.Y.S.2d 592, (Sup. Ct. 1961).
21. Budoff v. Kessler, 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954).
22. Instant case at 155.

decision by clarifying that the continuous treatment which is referred to is "treatment for the same or related illness or injuries, continuing after the alleged acts of malpractice, not mere continuity of a general physician-patient relationship."[23]

In arriving at its conclusion the court cited prior decisions from New York and elsewhere which were decisively in favor of the application of the continuous treatment doctrine.[24] The result reached here was based on an earlier New York decision in which the court referred to "a continuing course of . . . treatment" which would keep the statute from accruing.[25] Therefore, when the court approved the continuous treatment formula the majority was not making a rash or sudden break with precedent. In fact, it was pointed out that such has been the uniform trend in New York except for two decisions. One of these exceptions was the lower court decision of the present case.[26] The other has since been reversed.[27] The court was satisfied with following the majority view since the conclusion reached by applying this reasoning was the more equitable. The decision stated that "it would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent, or by filing a notice of claim in the case of a city hospital." By applying this rule, the infant plaintiff would have been barred from instituting a cause of action while still at the hospital receiving treatment if he had remained there a few days longer. Thus the court was making a practical decision, but it did not remain unaware of the results possible from its holding. Therefore, the majority flatly stated that they were not creating a justification for suits brought years later merely because a patient continues to consult the same physician for any kind of illness. The continuous treatment which would prevent the statute from running was limited to "treatment for the same or related illnesses or injuries, continuing after the alleged acts of malpractice, not mere continuity of a general physician-patient relationship." The dissent also recognized that strict application of the statute could lead to unjust results. But, in its opinion, this was not a proper case to apply the continuous treatment theory as propounded by the majority because there was no plausible reason for concluding the injury was the result of a continuous course of treatment. Furthermore, the dissent said that by giving this plaintiff the relief he demands the majority is disrupting "established distinctions between cases involving a *continuous course of improper treatment* and those presenting merely an isolated act or acts."

The holding here appears to be in the interest of promulgating a policy of fairness and alleviating harsh results in cases of malpractice. New York

23. *Id.* at 157, 187 N.E.2d at 779, 237 N.Y.S.2d at 322.
24. Cases cited *supra* notes 11, 13 & 14.
25. Hammer v. Rosen, 7 N.Y.2d 376, 380, 165 N.E.2d 756, 757, 198 N.Y.S.2d 65, 67 (1960).
26. Borgia v. City of N.Y., 16 A.D.2d 927, 229 N.Y.S.2d 318 (2d Dep't 1962).
27. Gross v. Wise, 16 A.D.2d 682, 227 N.Y.S.2d 523 (2d Dep't 1962), *rev'd*, 18 A.D.2d 1097, 239 N.Y.S.2d 954 (2d Dep't 1963).

courts have long been cognizant of the injustices possible by strict adherence to its rigid statute of limitations. Even in its earliest application, the continuous treatment doctrine was inherently a circumvention of the rigid statute. However, here the dissent could not understand how the court could grant this plaintiff's relief without overturning the distinction between cases involving a continuous course of improper treatment and those presenting merely an isolated improper act or acts. It is submitted that such a distinction has not been made in recent decisions. Therefore, if the majority is disregarding such a distinction it was disregarded prior to the instant case. In one recent decision the court made no mention that treatment subsequent to the wrongful act need itself be negligent.[28] In addition, the trial court in the present case held that the statute of limitations in malpractice cases accrues when the course of treatment ends without regard to whether there have been negligent acts throughout the course of treatment.[29] Also, within the instant case, one recent decision was cited as contrary to this holding which has since been reversed.[30] In reversing the decision it was held that a cause for malpractice is not barred by the statute where the defendant rendered treatment to the plaintiff with respect to the particular condition complained of, even though there was no claim that treatment subsequent to the malpractice was improper in any way. This is significant in that by citing the instant case, it indicates immediate acceptance of that holding. Although the extent of circumventing the statute has been somewhat limited by requiring the treatment to be for the "same or related illness," there is now a new area for disagreement in applying the continuous doctrine to the statute. In the future, courts will be confronted with problems of defining related treatment. This can be forecast by the minority which based its dissent on the theory that "the infant's subsequent stay for the purpose of physiotherapy and rehabilitation can in no sense be deemed continuous treatment for burns, or a continuation of the original wrong." But what could be more related to an irrepairable brain injury, leaving the injured party near total incapacitation, than such treatment? Since no known medication or surgery could recover the use of the infant's mental capacities prior to the injury, the only treatment available to him for the wrong committed was that which was afforded him. The dissent by concluding otherwise on this point, illustrates this new problem in applying the continuous treatment doctrine. Therefore, the decision does not eliminate all areas of doubt in this field. It is submitted, as it has been done previously, that an amendment to the statute of limitations as to malpractice is the only solution to the problem.

> As long as . . . continues to remain on the books in its present form, our courts will be saddled with an unnecessarily ambiguous statute.

28. Hammer v. Rosen, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960).

29. Borgia v. City of N.Y., 216 N.Y.S.2d 897, 903 (Sup. Ct. 1961).

30. Gross v. Wise, 16 A.D.2d 682, 227 N.Y.S.2d 523 (2d Dep't 1962), *rev'd*, 18 A.D.2d 1097, 239 N.Y.S.2d 954 (2d Dep't 1963).

An amended statute, explicit in terms and leaving no room for doubt on any point, would prevent further injustice.[31]

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CONSTRUCTIVE RELEASE OF CO-TORTFEASORS FALLS

Following the granting of a general release in an auto negligence claim, the plaintiff sustained aggravation of her injuries through maltreatment. In an action to recover against the alleged malpractitioner, the bar of a general release granted a fellow tortfeasor was raised. Upon appeal the Court of Appeals *held*, where a general release is granted to one who has not acted *jointly*, in concert, with his co-tortfeasors, the release will not by operation of law discharge the liabilities of such co-tortfeasors. Instead, availability of the release in their defense presents questions of fact concerning the adequacy of the compensation had by the grantor or the intention of the grantor to surrender all claims for less than full compensation. Both issues are to be borne by the plaintiff. *Derby v. Prewitt*, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962) (three judges dissenting).

English common law courts fashioned the rule of constructive release based upon the concept of joint tort liability. Concerted action served the common law courts as a link by which the individual joint tortfeasor could be held vicariously liable for the entire damage produced by such conduct.[1] This liability was neither predicated upon causation in fact,[2] nor upon foreseeability of the damage that flowed from the act.[3] The gist of the concept was the mutual agency by which the act of one became the act of all.[4] Since any one joint tortfeasor was liable for the total damage by imputation of the fault of all, his release was the release of all.[5] Of course this conclusion assumes that full compensation has been had for the release. At common law there was some excuse for such an assumption. Releases were then sealed instruments, recitals in which were conclusive.[6] Confusion over the meaning of a joint tortfeasor, the terms as used in various contexts, led to the extension of the rule of release by operation of law to mere co-tortfeasors.[7] The corresponding rule in the law of judgments did not share this development. Unsatisfied judgments against one co-tortfeasor did not bar recovery against other co-tortfeasors.[8] Harsh rules permit of harsh exceptions, so that the courts in order to mitigate the rigorous result began by construction to view releases containing a reservation of claims

31. 16 St. John's L. Rev. 108 (1941).

1. Duck v. Mayeu, [1892] 2 Q.B. 511; Prosser, Torts 234 (2d ed. 1955).
2. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413 (1932).
3. Thompson v. Johnson, 180 F.2d 431 (5th Cir. 1950).
4. Prosser, Torts 225, 234 (2d ed. 1955).
5. Southern Pacific Co. v. Raish, 205 F.2d 389 (9th Cir. 1953); Lucio v. Curran, 2 N.Y.2d 157, 139 N.E.2d 133, 157 N.Y.S.2d 948 (1956).
6. Williston, Contracts 3140 (1920).
7. Prosser, Torts 233, 242-43 (2d ed. 1955).
8. *Id.* at 241, 243.