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Civil Procedure And Evidence—Statute of Limitations—Malpractice

Raymond Ettliger

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THE COURT OF APPEALS, 1954 TERM

from defendant to plaintiff's lawyer; this was allowed as "some corroboration." Another question was whether the trial court had made a finding of fact or of law with regard to the telephone conversation. This was held to be unimportant; in non-jury cases (including those in which trial by jury was waived)⁸³ a reversal and entry of judgment is possible,⁸⁴ upon the making of new findings,⁸⁵ including findings of fact.⁸⁶

Statute of Limitations—Malpractice

In an action upon an alleged contract for medical treatment claimed to have been improperly performed, a motion to dismiss on the grounds that the statute of limitations for malpractice governed and had expired was denied.⁸⁷

Plaintiff alleged a contract between himself and defendant surgeon for a particular surgical operation. It was claimed that defendant had agreed to perform the operation in a workmanlike manner, and had promised that the plaintiff would be cured within two days. The operation was in fact performed in such a way as to cause considerable internal injury to the plaintiff, requiring hospitalization for a month and considerable medical care. This action was brought over two years later.

The statute of limitations for contract actions is six years;⁸⁸ for malpractice it is two years.⁸⁹ In order to permit recovery, it was therefore necessary to find a cause of action founded upon breach of contract. Since the case arose upon appeal from a motion to dismiss, the court was required to accept as true all allegations of the plaintiff. The court emphasized the fact that New York State will recognize contracts between a physician and his patient,⁹⁰ though it admitted that such contracts are a rarity. The court also placed great weight on the nature of the damages alleged, pointing out that only contract damages were sought in the action.

The dissent claimed that the "gravamen" or foundation of the action was

83. *Lamport v. Smedley*, 213 N. Y. 82, 106 N. E. 922 (1914); *Caldwell v. Nicolson*, note 40 *supra*.

84. Note 43, *supra*.

85. *York Mortgage Corp. v. Clotar Const. Corp.*, 254 N. Y. 128, 172, N. E. 265 (1930); see note 44, *supra*.

86. *Sagorsky v. Malyon*, *supra* note 45.

87. *Robins v. Finestone*, 308 N. Y. 543, 127 N. E. 2d 330 (1955).

88. C. P. A. §48 (1).

89. C. P. A. §50 (1).

90. *Colvin v. Smith*, 276 App. Div. 9, 92 N. Y. S. 2d 794 (3rd Dep't 1949); *accord*, *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 24 N. Y. S. 2d 92 (1st Dep't 1940), *aff'd*, 286 N. Y. 649, 36 N. E. 2d 692 (1941).

in malpractice, and should therefore be governed by the statute of limitations applying to that cause of action. The gravamen test, widely used in cases involving a breach of warranty in sales, was discussed by the Court of Appeals in the leading case of *Blessington v. McCrory Stores Corp.*,⁹¹ where the court stated that in cases where the contract duty is essentially identical with common law duty, the action sounds in negligence. Where the contract imposes a greater duty, which duty was breached by the defendant, the action sounds in contract and the longer statute of limitations applies.

The dissent seems to have misapplied the gravamen test of the *Blessington* case. The issues in the instant case are the existence and terms of a contract. While it is possible that the two day cure promised by the defendant was nothing more than "puffing", this must be submitted to a jury for their decision, and so a motion to dismiss should be denied. Furthermore, in view of the recognized injustices inherent in our present malpractice limitation,⁹² the court may justifiably have been swayed to giving all possible benefits to the plaintiff, even though in fact the statute worked no particular injustice in the instant case.

91. 305 N. Y. 140, 111 N. E. 2d 421 (1953).

92. See *Conklin v. Draper*, 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dep't) *aff'd*, 254 N. Y. 620, 173 N. E. 892 (1930). See also the recommended changes of the Law Revision Commission, 1942 N. Y. Law Revision Comm. 135, 167.