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Torts - Statute of Limitations in a Malpractice Action Held to Have Started Running at the Time of the Operation

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does not solve all the problems in this area. If, after a separate determination is made, the confession is found to be involuntary, must the court impanel a new jury to determine the guilt or innocence? If this were not done, the jury might be influenced by the involuntary confession as was pointed out in the *Jackson* case.[16]

It should be noted that the Court in the *Jackson* case for the first time rejected the presumption that juries follow the instructions of the court.[17] The Court made an objective appraisal of the presumption, and found it to be unsound because under certain circumstances a jury cannot consciously obey the court's instructions. The denial of the presumption that juries follow the court's instructions indicates that in the future the Court will be carefully examining the jury's duties during a trial to determine whether they are capable of fulfilling these duties under the circumstances involved. The *Jackson* case may be the start of a revision of American law concerning the jury system.

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TORTS—STATUTE OF LIMITATIONS IN A MALPRACTICE ACTION HELD TO HAVE STARTED RUNNING AT THE TIME OF THE OPERATION—In *Mosby v. Michael Reese Hospital*, 49 Ill. App. 2d 336, 199 N.E.2d 633 (1st Dist. 1964), the Illinois Appellate Court for the First District was confronted with the problem of when the statute of limitations should begin to run in an action for a negligently performed surgical operation.

The plaintiff, Rowena Mosby, was operated on by agents of the defendant hospital on March 25, 1956. On December 30, 1960, the plaintiff underwent a second operation at another hospital. It was then discovered for the first time that a needle had been left in the plaintiff's body during the first operation. The needle had, by the time of the second operation, passed into the area of the plaintiff's right knee and had caused serious permanent damage.

The complaint consisted of two counts. The first count alleged that the defendant's agents had negligently deposited a surgical needle in the plaintiff's body during the operation and had failed to remove it at the conclusion thereof. The second count repeated the allegations of the first count but

16 Another question likely to be presented to the Court will be whether the so-called Massachusetts rule is constitutional. Under the Massachusetts rule the judge hears all the evidence and rules on voluntariness before allowing the confession into evidence. If he finds the confession voluntary, the jury is then instructed that it must also find that the confession was voluntary before it may consider it, Jackson v. Denno, 378 U.S. 368, 417, 84 Sup. Ct. 1774, 1802 (1964). Some courts and commentators have been unable to see any difference between the New York rule and the Massachusetts rule. Whatever the theoretical variance, in practice the rules are likely to show a distinction without a true difference.

17 *Cf.* Krulewitch v. United States, 336 U.S. 440, 453, 69 Sup. Ct. 716, 723 (1949) (concurring opinion); Comment, 24 U. of Chi. L. Rev. 710 (1957).

added that the defendant had fraudulently concealed from the plaintiff the fact that the needle was still in her body.[1]

Upon motion by the defendant to dismiss the complaint in its entirety on the ground that the statute of limitations had expired,[2] the trial court granted the defendant's motion as to the first count, but denied it as to the second. The plaintiff appealed the dismissal of count one, but the defendant waived appeal of the denial of his motion to dismiss the second count. The appellate court, affirming the ruling of the trial court, held that the first count of the complaint was barred by the statute of limitations. Its decision was grounded on the theory that the statute of limitations had begun to run immediately upon the completion of the operation.

Basic to the determination of whether the statute of limitations has expired in any malpractice case is the nature of the action. That is, does the complaint sound in contract or in tort? Originally the gravamen of such an action was breach of contract. As one writer has stated:

> Malpractice in the pertinent legal literature is inextricably bound up with the idea of breach of implied contract. This was especially true of the older cases wherein malpractice was regarded simply as a form of breach of implied contract. The physician or surgeon was spoken of as impliedly holding himself out as possessing the degree of learning, skill, and experience ordinarily possessed by the profession in similar localities.[3]

The courts eventually took cognizance of the tort aspect of malpractice litigation, however, and presently the majority of jurisdictions view such an action as sounding in tort rather than contract.[4] This is not to imply that one can not sue in such an instance on a breach of contract theory. Where it is clear from the wording of the complaint that the action is one in contract, that will be the nature of the suit. The drawback to basing the action on breach of contract, however, is that the measure of damages is generally more limited than would be the case if the suit were predicated on a tort.[5]

In making the determination as to whether the gist of action is tort or contract, the court will consider, *inter alia*, the context of the complaint, as was done in *Keirsey v. McNeemer.*[6] In *Keirsey* the declaration consisted of an intermingling of tort and contract concepts. The court there decided

1 The plaintiff's second count was directed toward having the court toll the statute of limitations on the basis of fraudulent concealment of the cause of action by the defendant. Ill. Rev. Stat. Ch. 83, § 23 (1963). "If a person liable to an action fraudulently conceals the cause of such action from the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action and not afterwards."

2 Ill. Rev. Stat. Ch. 83, § 15 (1963). "Actions for damages for injury to the person . . . shall be commenced within two years next after the cause of action accrued."

3 Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 Wash. U.L.Q. 413; See generally, Prosser, Torts § 32 (3d ed. 1964).

4 *Id.* at 416.

5 Miller, *supra* note 3, at 424.

6 197 Ill. App. 173 (4th Dist. 1915).

that the prayer for relief was directed toward recovering damages arising out of "negligence" and "unskilled treatment" and thus was fundamentally a tort action. This basically has been the reasoning of most courts where the plaintiff has sought damages for bodily injuries.[7]

The rule which was earlier accepted without question by the majority of the jurisdictions is that the statute of limitations on a malpractice action begins to run immediately upon completion of the operation.[8] Proponents of this rule suggest that the wrongful act is complete and the plaintiff's injury inflicted when the operation is performed. Thus, it has been held that there is at that time a complete cause of action and the statute of limitations should begin running.[9] This same line of thought has prevailed in cases dealing with injuries arising from torts other than negligently performed surgical operations. Thus, in *Leroy v. City of Springfield*,[10] the Illinois Supreme Court held that where the plaintiff was allegedly injured by the city's defective sidewalk, his cause of action arose and the statute of limitations began to run when the injury was first sustained despite the fact that its full extent could not be known for some time thereafter.

The fact that a party is totally ignorant of his injury will not serve to toll the statute where the above mentioned rule is followed. This principle is well established in other areas of the law. Illustrative of this point is the Illinois case of *Lancaster v. Springer*,[11] a case cited by the defendant in the instant case. There, an action was brought questioning the validity of two deeds to certain property. The deeds in question had allegedly been transferred thirty-seven years prior to the institution of the suit. The court held that, in the absence of an affirmative act by the defendant to conceal a cause of action, the failure of the plaintiff to learn of the cause of action did not prevent the operation of the statute of limitations.

In an instance such as the *Mosby* case, however, the inequitable result which is obtained by denying an injured party his day in court is readily apparent. A statute of limitations is not intended to prohibit valid causes of action. Its purpose, instead, is to protect a defendant from vexatious delays or fraudulent suits. Thus, arguments have been raised against allow-

7 Norton v. Hamilton, 92 Ga. App. 727, 89 S.E.2d 809 (1955); Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955); Young v. Crescente, 132 N.J. Law 223, 39 A.2d 449 (1944); Mirich v. Balsinger, 53 Cal. App. 2d 103, 127 P.2d 639 (1942); 70 C.J.S., *Physicians and Surgeons* § 57 (1960).

8 "In the case of torts arising quasi e contractu, the statute usually commences to run from the date of the tort, not from the occurrence of actual damage. And ignorance of the facts on the part of the plaintiff will make no exception to the rule, though he discovers his injury too late to have a remedy. This will be the case too, even where the defendant has betrayed the plaintiff into permitting the time to elapse in fruitless inquiries and negotiations." 2 Wood, Limitation of Actions 839, § 177 (4th ed. 1916).

9 Gangloff v. Apfelbach, 319 Ill. App. 596, 49 N.E.2d 793 (1st Dist. 1943); 54 C.J.S., *Personal Injuries* § 174 (1960).

10 81 Ill. 114 (1876).

11 239 Ill. 472, 88 N.E. 272 (1909). See Jackson v. Anderson, 355 Ill. 550, 189 N.E. 924 (1934); 54 C.J.S., *Personal Injuries* § 174(b) (1961).

ing the statute to work against an injured party who could have had no knowledge of the wrong done him. It is contended that to allow such a suit after more than the statutory time limit has elapsed would not be a violation of the spirit of the statute in that the suit is not intended to defraud or harass; its only purpose is an honest recovery of damages. When the injured party is denied his action, he is left remediless for an injury which may have caused permanent disabilities. Finally, in this regard, it must be noted that statutes of limitations for tort actions are relatively short. Illinois, with a two year limitation, is no exception.[12] This period of time may be grossly inadequate where a party is in the same position as was Mrs. Mosby.

The argument which has been raised in rebuttal to the attacks on the rule which requires the statute to commence with completion of the operation is that it is only necessary that the plaintiff have knowledge of the cause of action and not the full extent of the injuries. That is, once the cause of action is established, all damages which may reasonably be expected to flow therefrom may be recovered.[13] This position fails to recognize, however, that when there is no knowledge of a cause of action until the statute has expired, the plaintiff is unjustly precluded from any recovery.

Many jurisdictions, being cognizant of unjust decisions in cases where the cause of action is not known, have taken steps toward rectifying the situation. Efforts have been made by the legislative as well as the judicial bodies. Thus, most states have long had clauses in their limitations statutes to provide for a tolling of the statute where, for example, the defendant has defrauded the plaintiff into believing that no cause of action existed, where the defendant has left the jurisdiction before the statute of limitations has expired, where the plaintiff is a minor or mentally incompetent, or in various other instances. Illinois has made such provisions in its statutes.[14]

Many courts have recognized that such savings clauses are insufficient to completely protect a wronged party and have turned to reinterpreting the statute of limitations itself. This has led to at least two new rules as to when the statute of limitations should commence.

The first of these two rules, the "end of treatment" rule, is based on the continuous tort concept. It provides that the statute shall not begin to run until the doctor-patient relationship has terminated. This frequently affords the plaintiff a greater opportunity to discover an injury arising out of negligent treatment. The rule as it is generally stated is that:

12 Ill. Rev. Stat. ch. 83, § 15 (1963).

13 "The plaintiff could recover for *all* loss or damage resulting from the breach of contract or wrongful invasion, constituting the cause of action sued on, regardless of whether the loss resulted before suit or between the commencement of suit and the trial, or even if it were merely expected (with reasonable certainty) at the time of the trial that the loss would ensue in the future." McCormick, Damages 48, § 13 (1st ed. 1935).

14 Ill. Rev. Stat. Ch. 83, § 19 (absence of party from state), § 20 (death of party entitled to bring action), § 22 (infants, lunatics, and prisoners), § 23 (fraudulent concealment), § 24 (action stayed by injunction) (1963).

> . . . . [W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious overt acts cease.[15]

While it is applicable to tort actions, the rule has as its foundation contract principles. Thus, where it is employed, it is held that there exists between the doctor and patient an implied agreement that the doctor will treat the patient with the skill and knowledge that is ordinary for the average doctor in a similar locality. There is, therefore, a duty placed on the doctor to treat the patient in such a manner. His failure to do so is considered a tort which continues as long as the substandard treatment continues. The agreement involved need not be express as it is implied by the law.

The reasoning used to construe the post-operative treatment as being tortious, where the actual overt negligent act which led to the injury was committed during the operation, is illustrated by the following excerpts from *Illinois Law and Practice.*

> As a comprehensive definition, it has been stated that a tort is an act or omission, not merely a breach of duty arising out of a personal relation or undertaken by contract, which is related to harm suffered by a determinate person in one of the following ways. It may be . . . an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence, have foreseen and prevented; it may, in special cases, consist merely in not avoiding or preventing harm which the person was bound absolutely or within limits to avoid or prevent.[16]

> . . . . Causes of action, however, need not be completely disconnected from contracts in order to constitute torts, and the existence of a contract may be one of the circumstances required to give a particular conduct the character of a breach of duty in order to make it tortious.[17]

Thus, there is an intermingling of contract and tort with the result that the action which is grounded on contract principles sounds in tort. The rule has found its greatest application in cases involving fact situations similar to that of the *Mosby* case.[18]

15 54 C.J.S., *Continuing or Repeated Injury* § 169(a) (1960).

16 34 I.L.P., *Torts* § 2, 355 (1958).

17 *Id.* at 354.

18 This rule prevails in the State of Ohio. In *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865, 872 (1902), the court said, ". . . . The facts in the case show a continuing obligation upon the plaintiff in error so long as the relation or employment continued, and each day's failure to remove the sponge was a fresh breach of the contract implied by the law. The removal of the sponge was a part of the operation, and in this respect the surgeon left the operation uncompleted."

The rule was discarded in Ohio in *McArthur v. Bowers*, 72 Ohio St. 656, 76 N.E. 1128 (1905), but readopted in *Bowers v. Santee*, 99 Ohio St. 361, 367, 124 N.E. 238, 240 (1919), wherein it was said: "The law should not require impossible or unreasonable things. It should not impose upon the patient a duty that he can only know through expert knowledge which he does not possess, but as to which he is compelled to accept the judgment of his physician or surgeon."

For other cases on this point see Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936);

The "end of the treatment" rule, however, has not been accepted in all instances and especially where the plaintiff has had reason to know of his injury before the doctor-patient relationship has ended. Thus, it is stated that: "The cases which have considered this question hold that even though the treatment has not yet terminated, the limitation period commences to run from the time the patient discovers the pertinent facts."[19]

Where the "end of the treatment" rule has been rejected, it has been rejected on the theory that the entire wrong was committed at the time of the operation and that the subsequent treatment was in itself free of any tortious conduct. This line of reasoning divorces the initial wrongful act of the doctor from his subsequent treatment of the patient. Therefore, the argument runs that the post-operative treatment is not a continuing tort that originated with the operation, but rather that it is a separate and unrelated act that cannot be considered wrongful for mere failure of the doctor to correct the earlier malpractice.

The better view, in this observer's opinion, is the one which was expressed in *Gillette v. Tucker*[20] that the relationship of doctor and patient imposes a duty on the doctor to treat his patient in a skillful manner and to apprise him of his ailments. As long as the patient remains within the doctor's care, the doctor has the duty to use his skill to correct the malady for which the patient underwent the operation. This duty, of course, arises from the implied contract existing between the doctor and patient.

If it can be said that there is a continuing tort where the doctor fails to correct the malpractice during post-operative treatment, it is clear that the statute of limitations should not begin to run until the treatment ceases. The general rule as to when the statute of limitations shall begin to run in the case of a continuing tort is well expressed in the following quotation.

> In general, where a tort involves a continued or repeated injury, the statute of limitations does not begin to run until the date of the last injury or when the tortious overt acts cease. Thus where the gravamen of the action is the continuance of a nuisance, an action may be brought within the statutory period after the date of the last injury, notwithstanding more than the statutory period has elapsed since the creation of the nuisance.[21]

The second rule which has been used to avoid the harshness of the rule that the statute shall begin to run immediately upon completion of the operation, is that the statute shall commence only when the injured party discovers or has reason to know of the cause of action. This is the rule which Mrs. Mosby requested the court to apply in the principal case.

Bowers v. Olch, 120 Cal. App. 2d 108, 260 P.2d 997 (1953); Thatcher v. DeTar, 351 Mo. 603, 173 S.W.2d 760 (1943).

19 Annot., 80 A.L.R.2d 383 (1961).

20 Gillette v. Tucker, *supra* note 18.

21 25 I.L.P., *Limitations* § 53, 221 (1958).

The "discovery" rule was employed in *Ayers v. Morgan*, a Pennsylvania case, wherein the court said:

> Laches becomes a barrier to the institution of a law suit because the injured person has slept on his rights, but if somnolence has not corroded away his claim to recover, the law welcomes his action to recover what has wrongfully been taken away from him. And in such a situation one may not be charged with dreaming away his rights to recover if even the most watchful vigilance would not apprise him of the damage being done.[22]

In *Fernandi v. Strully*, a New Jersey case, in which a wing nut was left in the plaintiff's body during an operation and not discovered until the period allowed by the statute of limitations had run from the time of the operation, it was stated that:

> Departing from the ordinary rule in this special type of situation so as to allow the patient to maintain his legal action after he knows or has reason to know of the existence of his claim would avoid flagrant injustice to him without unduly impairing repose or prompting litigation . . . too uncertain and too speculative to be encouraged.[23]

In *Spath v. Morrow*, a Nebraska case very similar to the *Mosby* case in that the defendant negligently left a needle in the plaintiff's body following a surgical operation, the court stated:

> The statute of limitations is a statute of repose; it prevents recovery on stale demands . . . . The statute is enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the right to procede. The basis of the presumption is gone whenever the ability to resort to the courts is taken away.[24]

The theory which is used to support the "discovery" rule is that no cause of action arises until the plaintiff discovers or should have discovered the injury.[25] In order that this theory be accepted it is necessary to either make knowledge by the plaintiff a necessary ingredient for a cause of action or refuse to recognize that an injury exists until such time as the plaintiff should have become aware of it.

To make the plaintiff's awareness of the injury an element of a cause of action necessary to start the statute of limitations would be to depart from the older and well established rule that such is not necessary.[26] An even stronger reason for not requiring as much before the statute would commence, at least in Illinois, is that such a requirement was probably never

22 397 Pa. 282, 291, 154 A.2d 788, 792 (1959).

23 35 N.J. 434, 442, 173 A.2d 277, 281 (1961).

24 174 Neb. 38, 41, 115 N.W.2d 581, 583 (1962).

25 Ehlin v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (1942); Ayers v. Morgan, *supra* note 22; Fernandi v. Strully, *supra* note 23; Spath v. Morrow, *supra* note 24; See 54 C.J.S., *Limitations of Actions* § 174 (1960).

26 2 Wood, Limitations of Actions 839, § 177 (4th ed. 1916).

intended by the legislature. Since the statute of limitations is a purely statutory time limit placed on the institution of law suits, the intent of the legislature in enacting the statute must be considered. The present Illinois Statute of Limitations was originally passed in 1872. At that time there was much less question as to when a cause of action accrued than there is presently. It was fairly well understood that a cause of action arose when a tortious act was committed.[27] As the statute contains no definition of a cause of action, it is reasonably safe to assume that the legislature intended the popular meaning of the word to apply. Further, the legislature has not seen fit to amend the law despite the fact that the courts have taken this to have been the intent of the statute.[28]

For the courts to refuse to recognize that an injury had been sustained prior to the time it was discovered by the plaintiff in a case such as *Mosby* would amount to little more than pure judicial fantasy. This, however, appears to be the basis of the *Ayers* case in which the court said, "The injury is done when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable."[29] A court order stating that no injury had occurred until that injury was discovered would do little to alter the fact that a needle has journeyed through Mrs. Mosby's body sowing destruction each inch of its trip. Nor would it be of much solace to Mrs. Mosby to know that a court of law did not look upon her as being injured until she discovered the reason for her pain and incapacity.

Hence, while it does seem just in a situation such as that presented in the principal case to allow the plaintiff to have his day in court, it is not within the authority of the judiciary to reshape the statute to make room for knowledge of the injury as a necessary element of a cause of action, nor to blind itself to the fact that an injury exists. Thus, unless it can be said that there was a continuous tort, the courts cannot properly allow an action brought after the expiration of the statutory period merely on the ground that the plaintiff was ignorant of his right. If such a disposition of the case is inequitable, then the situation should be remedied by appropriate legislation.

Prior to *Mosby*, the specific issue involved in the principal case had not been considered by an Illinois court above the trial level. Several cases dealing with the question of when the statute of limitations should begin to run when the plaintiff was not aware of the full extent of his injuries until after the statutory period had passed held that the statute begins to run from the time the injury is first inflicted.[30] These cases all dealt with situa-

27 *Ibid.*

28 Those cases which were cited in the opinion on the *Mosby* case include: Leroy v. City of Springfield, 81 Ill. 114 (1876); Calumet Elec. St. Ry. Co. v. Mabie, 66 Ill. App. 235 (1st Dist. 1896); and Gangloff v. Apfelbach, 319 Ill. App. 596, 49 N.E.2d 795 (1st Dist. 1943).

29 397 Pa. 282, 290, 154 A.2d 788, 792 (1959).

30 Leroy v. City of Springfield, *supra* note 28; Calumet Elec. St. Ry. Co. v. Mabie, *supra* note 28; Gangloff v. Apfelbach, *supra* note 28.

tions wherein the injured party was actually aware that some injury had been sustained before the end of the statutory period. On that basis they are to be distinguished from the *Mosby* case.

Therefore, *Mosby v. Michael Reese Hospital* was a case of first impression at the appellate level in the Illinois Courts. As such, it is bound to serve as precedent for later hearings of similar cases in the state, and it is likely that under the existing statutory law of Illinois the result will be the same in subsequent cases. However, *Mosby* did not make any changes in the existing case law of the state; it merely extended that rule which already prevailed.

It is important to note, however, that the court was not pleased with the opinion it felt constrained to hand down in the principal case. Justice Dempsey, speaking for the court, expressed the opinion that a more equitable result could have been obtained by commencing the statute of limitations at such time as the plaintiff became aware of the malpractice. That the court felt this to be beyond the scope of its power, however, was expressed by Justice Dempsey's final comment that, "Relief must come from the legislature and not from the courts."[31]

In *Mosby*, while the resulting decision was harsh on the plaintiff, it was the only decision at which the court could arrive. The "end of treatment" rule could not have been employed as Mrs. Mosby had not remained within the care of the hospital long enough to bring her action within the statutory time period under the provisions of that rule. And, for the court to allow the suit on the ground that the plaintiff was merely ignorant of her cause of action would have been to flout the statute, as interpreted by this writer, by not setting it in motion when the cause of action accrued. Therefore, the court was compelled to apply the rule which starts the statute of limitations immediately upon the infliction of the injury. In this instance that was immediately upon the completion of the operation.

Until there is a legislative reform, the courts shall continue to be obliged to issue judgments which are inequitable in cases where the plaintiff, though not defrauded by the plaintiff, remained ignorant through no fault of his own, that a cause of action existed for him.

E. Wm. Bedrava

CONTRACTS—EXCULPATORY CLAUSE—CONTRACTUAL EXEMPTION FROM LIABILITY FOR NEGLIGENCE HELD ABSOLUTE DEFENSE—The case of *Owen v. Vic Tanny's Enterprises*, 48 Ill. App. 2d 344, 199 N.E.2d 280 (1st Dist. 1964), provides an opportunity to reexamine the question of the validity of contractual clauses which purport to exempt one of the contracting parties from the legal consequences of his own negligence.

[31] Mosby v. Michael Reese Hospital, 49 Ill. App. 2d 336, 342, 199 N.E.2d 633, 636 (1st Dist. 1964).