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Torts—Malpractice: Statute of Limitations Runs from Date of Discovery Not from Date of Negligent Act (Johnson v. St. Patrick's Hospital, Mont. 1966)

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Other cases have approved diversity of rules flowing from the applicability of local laws, as against a uniform federal rule.[44] *Bumb v. United States,*[45] cited as apposite in the opinion,[46] found no reason to impose a uniform federal rule. *Bumb* held that the Small Business Administration, presumably staffed by competent personnel familiar with the laws of the states where it does business, can acquire valid security interests in the various states. The transaction, local in nature, should accord with sound and well-established local policies.[47] Justice Fortas could find no overriding federal interest which would justify overturning the Texas coverture law in favor of the SBA in *United States v. Yazell,*[48] and noted *Bumb* with approval.

The result of this case, as in all cases involving choices among valid and reasonable policies, will be welcomed or deplored according to the philosophy of the reader. It is submitted that the result in favor of mechanic's liens is correct. Choateness has been a tool for appropriating the benefit of the mechanic's labor and materials to the government, leaving the artisan with only the surplus after the sovereign's share is taken. The doctrine has been so strict as to nullify the historical security of the artisan against the world. On the other hand, the rule of this case, within the limits of the decision, does not portend disaster for the SBA. It may require the SBA to use ordinary business prudence, but it for that agency to argue whether that is a detriment.

WILLIAM J. CARL.

TORTS—MALPRACTICE—STATUTE OF LIMITATIONS RUNS FROM DATE OF DISCOVERY NOT FROM DATE OF NEGLIGENT ACT.—In a medical malpractice action brought ten years after an operation, plaintiff alleged that the defendant surgeon negligently left a surgical sponge in plaintiff's hip. Defendant's motion for summary judgment was granted, the trial court holding the action was barred by the statute of limitations.[1] On appeal, *held,* reversed. The statute of limitations did not commence running until the plaintiff discovered or reasonably should have discovered the presence of the foreign object. Johnson v. St. Patrick's Hospital, 23 State Rep. 581, 417 P.2d 469 (Mont. 1966).

Statutes of limitation generally are held to be statutes of repose

[44] *Bumb v. United States, supra* note 30; United States v. Yazell, 382 U.S. 341, 347 (1966).
[45] *Ibid.*
[46] Instant case at 821.
[47] *Supra* note 44.
[48] *Supra* note 44 at 347.

[1] REVISED CODES OF MONTANA, 1947, § 93-2605(3). (Hereinafter REVISED CODES OF

designed to give the defendant protection from long dormant claims.[2] This purpose is buttressed by the desire to compel relatively early adjudications of claims while the evidence and witnesses are easily obtainable.[3] Such statutes apply with full force to all claims, whether they are meritorious or not.[4]

Actions against physicians for negligence in treating patients are generally governed by the applicable tort statute of limitation.[5] A majority of jurisdictions follow this concept notwithstanding allegations in the complaint of a contractual relationship between the doctor and his patient.[6] These courts reason that the gravamen of the action is negligence,[7] and couching the complaint in contract terms is merely a device to gain the benefit of the longer contract statute of limitation.[8] Other jurisdictions permit the action to be brought in either tort or contract.[9] In a contract action, however, recovery is limited to the doctor's fee plus consequential damages.[10]

In cases where a foreign object is left in the body, various approaches

[2]Order of R. R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348 (1944), WOOD, LIMITATIONS § 2 (4th ed. 1916); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897); LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE § 1306 (1960). See also Guiterman v. Wishon, 21 Mont. 458, 54 Pac. 566 (1898).

[3]*Order of R. R. Telegraphers v. Railway Express Agency, Inc., supra* note 2, at 348.

[4]Shearin v. Lloyd, 246 N.C. 363, 985 S.E.2d 508 (1957).

[5]PROSSER, TORTS § 30 (3d ed. 1964); WOOD, *op. cit. supra* note 2, § 179; LOUISELL & WILLIAMS, *op. cit. supra* note 2, §§ 13.14 to 13.64; R.C.M. 1947, § 93-2605(3) provides for a three year limitation for tort actions. See generally Lillick, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339 (1962), Boone, *Torts—The Statute of Limitations as Applied in Malpractice Cases*, 27 ALA. L. REV. 188 (1964). See also 1942 Leg. Doc. No. 65, 1942 Report, N. Y. Law Revision Commission 135. Oregon proposed a specific statute of limitations to apply in malpractice cases and this was rejected by their legislature. See Oregon, SENATE AND HOUSE JOURNAL, p. 758 (1963), for a discussion of the proposed legislation.

[6]See *Practice and Pleading—Statutes of Limitations—Malpractice*, 27 ST. JOHN'S L. REV. 147 (1952), Coady v. Reins, 1 Mont. 424 (1872), held: "But the statute [of limitations] in cases of this nature begins to run, regardless of the form of action, whether case or assumpsit, from the time of the negligence or breach of duty." At least 15 states have enacted specific limitations barring actions against physicians whether in contract or tort. See Litell, *A Comparison of the Statutes of Limitations*, 21 IND. L.J. 23, 40 (1945).

[7]Coulter v. Sharp, 145 Kan. 28, 64 P.2d 564 (1937). In actions against persons engaged in a public calling such as physicians and common carriers, the common law recognized implied obligations of due care and allowed the plaintiff to bring his action in case or assumpsit. Since modern code pleading required the plaintiff to allege only the facts constituting his cause of action, some courts have held that the action sounds in tort and the contract statute of limitations is not applicable. See SHIPMAN, PLEADING § 41 (3d ed. 1923); I CHITTY, PLEADING 149, 183 (16th ed. 1876); CLARK, CODE PLEADING § 47 (2d ed. 1947). In Montana, M. R. CIV. P. 2, 8(a) and R.C.M. 1947, § 93-2605(3) are applicable and plaintiff need only state concise facts showing that pleader is entitled to relief.

[8]Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964) (failure to remove surgical sponge), Annot., 80 A.L.R.2d 320 (1961).

[9]Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1930) (failure to remove forceps); See Littel, *supra* note 6.

[10]In New York, if the plaintiff demands damages peculiar to tort actions, he is governed by the tort statute of limitation; if damages are peculiar to contract he is governed by the contract statute of limitations. Thus the type of damages obtained would depend upon how the claimant framed his complaint. *Conklin v. Draper supra* note 9.

have developed for determining when the tort limitation period begins to run. There is substantial authority that the claim for relief is created and the statutory period begins to run at the instant of the doctor's wrongful act.[11] Thus, plaintiff's right of action accrues when the incision is closed over the foreign object. This "right" may be delusory if the object is not discovered before the statute has barred the action.[12] Where courts have mechanically appplied this "wrongful act rule"[13] to all claims, harsh results have followed.[14]

An exception to the wrongful act rule is applicable where there has been an act of concealment by the physician preventing the plaintiff's discovery of his claim for relief.[15] Jurisdictions which recognize this exception hold that concealment of a patient's claim constitutes fraud, and that the statute of limitations is tolled until the patient discovers his injury.[16] Usually the fraudulent concealment doctrine requires the physician's actual knowledge of his negligence and affirmative conduct in concealing the negligence from the patient.[17] Some jurisdictions have held that the physician has a duty to disclose his negligent acts to the patient and breach of this duty by remaining silent constitutes fraudulent concealment.[18]

A variation of the fraudulent concealment doctrine is the theory of "constructive fraud," which arises out of the fiduciary or confidential relationship.[19] The plaintiff still has the burden of proving negligence, but apparently the mere presence of a foreign object in the body constitutes fraudulent concealment and tolls the statute until reasonable discovery is made by the patient.[20] In *Burton v. Tribble*,[21] the Arkansas

[11]PROSSER, *op. cit. supra* note 5; WOOD, *op. cit. supra* note 5, § 179; Annot., 80 A.L.R.2d 320, 368 (1961).

[12]Vaughn v. Langmack, 236 Ore. 542, 390 P.2d 142, 160 (1963). (See dissent's discussion of the so-called "delusionary right.")

[13]The wrongful act rule is often referred to as the "general rule." Cappucci v. Barone, 266 Mass. 578, 165 N.E. 653 (1929).

[14]In Graham v. Updegraph, 144 Kan. 45, 58 P.2d 475 (1936) application of this doctrine created shocking results. The court held that an action was barred by the two year statute of limitation where radium beads were negligently permitted to remain in the body of a patient, despite assurances by the physician to the contrary. The beads ultimately caused the death of the patient six years later, at which time they were discovered. See also Tulloch v. Haselo, 218 App. Div. 313, 218 N.Y.S. 139 (1926) (active concealment of a tooth which became lodged in defendant's lung).

[15]Murray v. Allen, 103 Vt. 373, 154 Atl. 678 (1931) (failure to remove sponge). For excellent definition in a statute embodying this rule, see DeHaan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932) *Accord,* Hinkle v. Hargens, 76 S.D. 520, 81 N.W.2d 888 (1957).

[16]Schmucking v. Mayo, 183 Minn. 37, 235 N.W. 633 (1931).

[17]Carter v. Harlan Hosp. Assn., 265 Ky. 452, 97 S.W.2d 9 (1936).

[18]Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940) (sponge left in body 14 years); *Hinkle v. Hargen, supra* note 14, where doctor remained silent for 21 years about needle left in patient's back, *held,* that silence on the part of one who has duty to disclose constitutes fraudulent concealment. See generally Annot., 74 A.L.R. 1317 (1930).

[19]Acton v. Morrison, 62 Ariz. 139, 155 P.2d 782 (1945), *aff'd,* Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948).

[20]Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944).

[21]189 Ark. 58, 70 S.W.2d 503 (1934). Compare Steele v. Gann, 197 Ark. 480, 486, 123 S.W.2d 520, 523 (1939).

Court inferred the doctor's intent to conceal a ball of gauze negligently left in the patient's abdomen. In *Rosane v. Senger*,[22] Colorado allowed constructive fraud to toll the statute even though plaintiff did not allege the physician knew of the foreign object's presence. In *Morrison v. Acton*,[23] a dentist's drill broke inside plaintiff's jaw. The plaintiff continued to see the dentist in an effort to discover what was causing the pain and was repeatedly assured that the pain was a natural result of the extraction operation. Four years later the same dentist X-rayed the jaw and again assured the patient nothing was abnormal. Later another dentist found the piece of drill and testified that it was easily discernible. The Arizona Court, relying upon a fiction of implied fraud, held that the defendant should have known of the broken drill and his failure to disclose this information constituted constructive fraud. The statute of limitations was tolled until the patient discovered the piece of drill. This decision repudiated the necessity to prove scienter as an element of fraudulent concealment.[24]

Another theory used to toll the statute of limitations in malpractice actions is the "end of treatment doctrine." This theory was first announced in *Gillette v. Tucker*,[25] where a physician failed to remove a sponge from a patient. The court held that the statute of limitations did not begin to run until the physician had terminated his treatment. The court reasoned that the physician had a duty to complete the operation and failure to remove the sponge constituted continuing negligence each second the patient was under his treatment.[26] Under this doctrine, when the patient changes physicians, the continuing negligence ends and the statute of limitations begins to run, even though the patient may not discover the object until many years later.[27] Nevertheless, the statute might start running before treatment has ended if the patient discovers or reasonably should have discovered the negligence before the treatment has terminated.[28] The end of treatment doctrine eases the harshness of the wrongful act rule in cases where the treatment is continuing, but is not helpful where a specialist performs the operation and immediately thereafter terminates his services, leaving post-operative care to another physician.

The most modern theory used to toll the statute of limitations is the "discovery doctrine" adopted by the instant case.[29] This doctrine first

[22]*Supra* note 20.

[23]*Supra* note 19.

[24]*Ibid.*

[25]67 Ohio 106, 65 N.E. 865 (1902).

[26]Sly v. Van Lengen, 120 Misc. 420, 198 N.Y.S. 608 (1923); Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943); Budoff v. Kessler, 284 App. Div. 1049, 135 N.Y.S.2d 717 (1954).

[27]End of treatment does not always mean formal discharge. The physician need only to have ceased to treat the particular injury or malady in question. Schmitt v. Esser, 183 Minn. 354, 236 N.W. 622 (1931).

[28]*Supra* note 26.

[29]Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959) (sponge).

arose in the early case of *Hahn v. Claybrook*,[30] involving discoloration of the skin caused by excessive appplication of argentum oxide. The Maryland Court reasoned that the statute of limitations began to run when the plaintiff discovered or should have discovered the negligence. However, the court held that the patient was barred by the statute of limitations because he should have discovered the injury more than three years before the action was commenced since the injury was external and easily discernible.[31] California adopted the discovery doctrine in *Huysman v. Kirsh*,[32] involving a rubber drainage tube left in plaintiff's body,[33] and has since applied the discovery doctrine to cases involving radium exposure treatments,[34] negligent surgical operations,[35] administration of drugs,[36] and dental malpractice.[37] The recent Idaho case of *Billings v. Sisters of Mercy*,[38] applied the discovery doctrine where a sponge was discovered 15 years after it was left in the patient's body.[39]

Prior to the instant case, Montana had apparently adopted the "wrongful act rule." In *Coady v. Reins*,[40] plaintiff sued to recover damages from a physician for negligence in setting and treating her fractured arm. The court held that the statute of limitations began to run at the instant of negligent treatment and not from the time the patient discovered the harm. But the court in the instant case held that where a foreign object is left in the body and the patient is ignorant of the fact of its presence, the statute of limitations begins to run when the patient discovers or reasonably should discover its presence.[41]

Justice Doyle, dissenting, claimed the majority overruled *Coady* by implication even though the facts of the two cases differ.[42] This raises the question of whether Montana will apply the discovery doctrine to all types of malpractice in the future. Cases involving foreign objects left in the body are relatively rare, but there is the possibility that Montana will follow California, and apply the discovery doctrine to all types of medical malpractice.[43] Should this occur, it is submitted that the num-

[30]130 Md. 179, 100 A. 83 (1917).

[31]*Ibid.*

[32]6 Cal.2d 302, 57 P.2d 908 (1936).

[33]Trombly v. Kolts, 29 Cal. App.2d 699, 85 P.2d 541 (1938). See also Calvin v. Thayer, 150 Cal. App.2d 610, 310 P.2d 59 (1957) (Action against physician for incorrect diagnosis.) But see earlier case which adopted end of treatment doctrine. Gum v. Allen, 119 Cal. App. 293, 6 P.2d 311 (1931).

[34]Hurlimann v. Bank of America, 141 Cal. App.2d 801, 297 P.2d 682 (1956).

[35]Hundley v. St. Francis Hospital, 161 Cal. App.2d 800, 327 P.2d 131 (1958).

[36]Agnew v. Larson, 82 Cal. App.2d 176, 185 P.2d 851 (1947).

[37]Faith v. Erhart, 52 Cal. App.2d 228, 126 P.2d 151 (1942).

[38]*Supra* note 8.

[39]*Ibid.*

[40]*Coady v. Reins, supra* note 6.

[41]Instant case at 473.

[42]*Ibid.*

[43]For example, external treatment of skin, treatment of fractures, X-ray treatments, administration of drugs, dental surgery, negligent diagnosis, and any number of other various treatments and operations not involving foreign objects left in the body, are all possible cases in which the discovery doctrine may apply if extended by the court.

ber of medical malpractice claims in litigation will probably increase.[44]

In determining whether to allow the discovery doctrine in foreign object cases, two basic policies of the law are in conflict: 1. The policy that there should come a time when the physician ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient claims against him.[45] The policy of allowing claimants an opportunity to present meritorious claims when they discover they have been harmed.[46]

The primary argument for protecting the physician appears to be the injustice of depriving him of security from the threat of suits after a long period of time.[47] This argument is countered by the reasoning that the patient should be allowed to bring his claim. The physician is protected by the fact that the patient still must prove negligence.[48] The plaintiff's case will be burdened by the necessity of gathering evidence which will probably be more difficult to obtain because of a lapse of time. Also, the plaintiff must prove that he used reasonable diligence in discovering the injury or the statute will commence running at the time he reasonably should have discovered the wrong.[49] Another factor which should influence application of the discovery doctrine is the relative ability of the parties to bear the loss.[50] Defendant physicians probably can better absorb the loss because of the availability of medical malpractice liability insurance. It is likely that a majority of physicians will be insured for this type of loss.

It is submitted that non-discovery of a hidden object which has been negligently left in the body provides an adequate reason to judicially withhold the commencement of the limitation period. Medical science discloses that foreign objects such as sponges and needles can remain in the body for long periods without causing harm or before harm occurs.[51] Thus, it is reasonable to allow a claimant his day in court after the hidden object which eventually causes harm is discovered. As Justice Rosman stated in his dissent against the wrongful act rule in *Vaughn v. Langmack*:[52]

[44]Lindquist v. Mullen, 45 Wash.2d 675, 277 P.2d 724, 733 (1954).

[45]*Supra* note 2.

[46]PROSSER, *op. cit. supra* note 5.

[47]Gangloff v. Apfelbach, 319 Ill. App. 596, 49 N.E.2d 795, 799 (1943). This case involved the treatment of a fractured elbow and the court adopted the wrongful act rule quoting Patten v. Standard Oil Co., 165 Tenn. 438, 55 S.W.2d 759 (1933):

> Recognition of a contrary rule would permit a plaintiff, afflicted with some malady, to trace that malady to an original cause alleged to have occurred years and years ago. No practicing physicians or dentist would ever be safe. The origin of disease is involved in uncertainty at best. While hardships may arise in particular cases by reason of this ruling, a contrary ruling would be inimical to the repose of society and promote litigation of a character too uncertain and too speculative to be encouraged.

[48]PROSSER, *op. cit. supra* note 5.

[49]*Supra* note 30.

[50]PROSSER, *op. cit. supra* note 5, § 4. But see MCCORMICK, EVIDENCE § 168 (1954).

[51]12 CYCLOPEDIA OF MEDICINE AND SURGERY 249 (1962).

[52]Vaughn v. Langmack, *supra* note 32, at 155.

> . . . . who can explain why an individual who is anesthetized [during an operation] should be charged with knowledge that his surgeon failed to remove an object which he had placed in the incision? In fact, who can explain why a person should be charged with knowledge of anything that is unknown or unknowable?

It is illogical and unjust to bar a claim because a person did not discover a wrong which is of its very nature "inherently unknowable,"[53] such as a sponge closed in an incision. The rejection of the wrongful act rule by the court in the instant case was a choice between the jeopardy which practitioners may face in defending old claims and affording a claimant an opportunity for a day in court. In choosing the latter, Montana has adopted a modern minority rule which is rooted in the basic legal maxim: "For every wrong there is a remedy."[54]

EARL J. HANSON.

SEARCH AND SEIZURE: SEARCH OF BODILY CAVITIES.—Defendants John Blefare and Donald Michel were convicted in federal district court of smuggling heroin. They had been stopped and searched by Customs agents, who had reliable information that the defendants were coming across the border from Mexico with heroin in their stomachs. The heroin was recovered from Blefare by restraining him sufficiently to pass a tube through his nose and into his stomach to allow the introduction of an emetic. The two packets of heroin thus recovered were received in evidence over the objection of defendants. On appeal to federal circuit court, defendants claimed the method of obtaining the heroin was violative of their Federal Constitutional rights and the packets should not have been admitted into evidence. *Held:* Convictions affirmed. The procedure used to obtain the packets was not unreasonable, and did not violate "due process." *Blefare v. United States,* 362 F.2d 870 (9th Cir. 1966).

In affirming the reasonableness of the search the majority cites no specific standards, but rather confines itself to an analysis of the facts. The concurring opinion helpfully points out in a footnote that the court was applying the standard of reasonableness first laid down in *Boyd v.*

[53]The phrase "inherently unknowable" harm was first used by Justice Rutledge in Urie v. Thompson, 337 U.S. 163, 169 (1949) in reference to the time of discovery of the disease of silicosis as covered by the Federal Employer's Liability Act. Justice Rutledge in rejecting the wrongful act rule, stated:

> [m]echanical analysis of the accrual of petitioner's injury—whether breath by breath, or at one unrecorded moment in the progress of the disease—can only serve to thwart the congressional purpose . . . . It would mean that at some past moment in tife, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge . . . .

[54]R.C.M. 1947, § 49-115 provides: "For every wrong there is a remedy."