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Discovery Rule: Accrual Of Cause Of Action For Medical Malpractice

DISCOVERY RULE: ACCRUAL OF CAUSE OF ACTION FOR MEDICAL MALPRACTICE

An acute problem in medical malpractice litigation is the application of the appropriate statute of limitation, particularly in cases involving foreign objects left in a patient's body as a result of an internal operation. The foreign objects[1] often do not become evident until many years after the initial operation and in many instances only after the prescribed statute of limition has run. When a lawsuit is filed under these circumstances, the question often presented is whether the cause of action accrued at the time of the negligent operation or at the time of the discovery of the negligent act. The most recent theory emerging from the resolution of this question is the discovery rule. Under the discovery rule the cause of action for medical malpractice accrues when the patient learns or, in the exercise of reasonable care and diligence, should have learned of the presence of the foreign object in his body.

In *Gaddis v. Smith*,[2] Texas became the most recent state to adopt the discovery rule, thereby aligning itself with a growing number of other state, as well as federal, courts.[3] In 1959, Dr. W. C. Smith, a Texas physician, performed a caesarean section upon Mrs. Dorothy Gaddis leaving a surgical sponge inside her body. Mrs. Gaddis subsequently suffered internal pain but did not discover the cause of the pain until an exploratory operation was performed on her in 1963. Prior to the operation in 1963, she did not know, and had no way of knowing, that the surgical sponge had been left inside her body. Mrs. Gaddis filed suit in 1964 against the physician for expenses and pain and suffering caused as a result of the physician's negligence. Dr. Smith raised the two-year personal injury statute of limitation as a defense.[4]

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[1]Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936) (surgical tubing); Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964) (surgical sponge); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962) (surgical needle); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961) (wing-nut from a surgical retractor).

[2]417 S.W.2d 577 (Tex. 1967).

[3]Urie v. Thompson, 337 U.S. 163 (1949); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); United States v. Reid, 251 F.2d 691 (5th Cir. 1958); Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964); Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Seitz v. Jones, 370 P.2d 300 (Okla. 1961).

[4]"There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description ... action for injury done to the person of another." TEX. REV. CIV. STAT. art. 5526 (1948).

The Supreme Court of Texas held that, for purposes of the running of the statute of limitation, the cause of action accrued at the time the patient discovered or, in the exercise of due diligence, should have discovered the sponge, and not at the time of the operation. The court recognized that a primary objective of the statute of limitation is to prevent stale and fraudulent claims but concluded that on these facts the possibility of perpetrating a fraud on the defendant was slight. Furthermore, the disadvantage to the defendant was more than counterbalanced by the injustice to the plaintiff resulting from the contrary rule barring the patient from recovery, when he could not have ascertained the negligent act until after the passage of the period prescribed by the statute of limitation.

It is generally stated that there are two American rules governing the running of the statutes of limitation in medical malpractice actions.[5] In the majority of states, the statute begins to run at the date of the operation;[6] while in the minority, the statute commences running only after the discovery of the alleged malpractice.[7]

The principle most frequently relied upon by those courts rejecting the discovery rule is that statutes of limitation were established to protect individuals from long and bothersome waiting periods after which they would encounter the difficulty of defending stale

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[5]*But see* text accompanying note 20 *infra*.

[6]*E.g.*, Saffold v. Scarborough, 91 Ga. App. 628, 86 S.E.2d 649 (1955); Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956); Hill v. Hays, 193 Kan. 453, 395 P.2d 298 (1964); Philpot v. Stacy, 371 S.W.2d 11 (Ky. 1963); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962); Pasquale v. Chandler, 350 Mass. 450, 215 N.E.2d 319 (1966); Wilder v. St. Joseph Hosp., 225 Miss. 42, 82 So. 2d 651 (1955); Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963); Seger v. Cornwell, 44 Misc. 2d 994, 255 N.Y.S.2d 744 (1964); Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); Pump v. Fox, 113 Ohio App. 150, 177 N.E.2d 520 (1961); Hall v. DeSaussure, 41 Tenn. App. 572, 297 S.W.2d 81 (1956); Murray v. Allen, 103 Vt. 373, 154 A. 678 (1931); Hawks v. Dehart, 206 Va. 810, 146 S.E.2d 187 (1966); Lindquist v. Mullen, 45 Wash. 2d 675, 277 P.2d 724 (1954); McCluskey v. Thranow, 31 Wis. 2d 245, 142 N.W.2d 787 (1966); *see* Annot., 80 A.L.R.2d 368 (1961).

[7]Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944); City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954); Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964); Springer v. Aetna Cas. & Sur. Co., 169 So. 2d 171 (La. App. 1964); Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963); Johnson v. St. Patrick's Hosp., 417 P.2d 469 (Mont. 1966); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Seitz v. Jones, 370 P.2d 300 (Okla. 1961); Berry v. Branner, 421 P.2d 996 (Ore. 1966); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967); Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965).

claims.[8] This rationale exposes a conflict between two basic policies of law: (1) to discourage stale and fraudulent claims; (2) to permit meritorious claimants an opportunity to present their cases. *Tantish v. Szendey*[9] typifiies the majority viewpoint in resolving this conflict by indicating that although a stale claim may be meritorious, the statute of limitation is inflexible and operates without reference to the merits in cutting off claims. In addition, these courts contend that adoption of the discovery rule necessitates an interpretation which denies effect to the plain words of the statute.[10] Consequently, those courts rejecting the discovery rule conclude that adoption of the rule in effect amends the statute of limitation, a function purely legislative in character.[11] The courts find support for their position in the fact that the legislatures of several states have amended statutes of limitation to include the discovery rule in situations involving fraudulent concealment of a cause of action but have remained silent as to situations involving malpractice.[12] They conclude that the expression of one thing is the exclusion of another, and therefore, the legislature did not intend to extend the concept of discovery to simple negligence or malpractice actions; and it is not within the court's province to do so.[13]

In maintaining that a cause of action accrues at the time of the operation, these courts adhere to the fundamental proposition that at some point in time claims must be held to have become barred.[14] It is recognized that the statute of limitation for personal injury actions

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[8]Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962); McCluskey v. Thranow, 31 Wis. 2d 245, 142 N.W.2d 787 (1966); *see* 53 C.J.S. *Limitations of Actions* § 1 (1948).

[9]158 Me. 228, 182 A.2d 660 (1962).

[10]Hill v. Hays, 193 Kan. 453, 395 P.2d 298 (1964); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962); Murray v. Allen, 103 Vt. 373, 154 A. 678 (1931).

[11]Hill v. Hays, 193 Kan. 453, 395 P.2d 298 (1964); Philpot v. Stacy, 371 S.W.2d 11 (Ky. 1963); Lindquist v. Mullen, 45 Wash. 2d 675, 277 P.2d 724 (1954).

[12]*E.g.*, "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the persons 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." ILL. ANN. STAT. ch. 83, § 23 (Smith-Hurd 1965); *see* N.M. STAT. ANN. § 23-1-7 (1953); WIS. STAT. ANN. § 102.12 (1957).

[13]Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962); Pasquale v. Chandler, 350 Mass. 450, 215 N.E.2d 319 (1966); Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963); Seger v. Cornwell, 44 Misc. 2d 944, 255 N.Y.2d 744 (1964); McCluskey v. Thranow, 31 Wis. 2d 245, 142 N.W.2d 787 (1966).

[14]Owens v. White, 380 F.2d 310 (9th Cir. 1967).

begins to run when the negligent act occurs.[15] Courts rejecting the discovery rule contend that to permit an extension in time to allow the presentation of a meritorious claim may also prohibit the physician from presenting a meritorious defense. These courts conclude that the need of certainty in establishing the time when an action accrued outweighs any hardship to a meritorious claimant.[16]

The discovery rule was preceded by other rules designed to avoid the harsh results of the traditional application of the statutes of limitation. A continuous treatment theory has been used by some courts in situations where a doctor leaves a foreign object in the body of a patient and continues to treat him after the operation. The physician is said to be negligent not only in his initial action but also in allowing the object to remain in the patient's body while the patient is still under his care. According to this analysis, the statutes of limitation do not begin to run until the patient leaves the care of the physician.[17] As another means of avoiding the personal-injury statute of limitation, plaintiffs have couched their complaints in terms of contract to take advantage of a longer statute of limitation.[18] Still another means of avoidance exists where knowledge of the injury has been fraudulently concealed by the physician; the statute of limitation does not begin to run until the negligent act is discovered or could have been discovered by reasonable diligence on the part of the injured party.[19]

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[15]Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956); Wilder v. St. Joseph Hosp., 225 Miss. 42, 82 So. 2d 651 (1955).

[16]Owens v. White, 380 F.2d 310 (9th Cir. 1967); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962). The court in *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 145 (1963), said, "[S]ociety is best served by complete repose after a certain number of years even at the sacrifice of a few unfortunate cases."

[17]Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (1942); De Haan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943); Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941); Budoff v. Kessler, 284 App. Div. 1049, 135 N.Y.S.2d 717 (1954); DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952); Peteler v. Robison, 81 Utah 535, 17 P.2d 244 (1932); Lotten v. O'Brien, 146 Wis. 258, 131 N.W. 361 (1911).

[18]Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923); Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956). However, the majority view is that injuries sustained as a result of medical malpractice are tortious in nature. Annot., 80 A.L.R.2d 320 (1961).

[19]Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948); Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944); Saffold v. Scarborough, 91 Ga. App. 628, 86 S.E.2d 649 (1955); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956); Adams v. Ison, 249 S.W.2d

As a growing number of states adopt one or more of these alternative theories it is clear that there is a definite trend away from the majority rule. In a recent case adopting the discovery rule, the Idaho Supreme Court, in considering the alternative theories, suggested that in reality there was no longer a majority rule.[20] The development of the discovery rule represents the most recent departure from the traditional application of statutes of limitation. It has been adopted by statute in three states[21] and by court decision in fifteen others.[22]

The application of the discovery rule to malpractice cases is uncomplicated. It is generally limited by courts to cases involving foreign objects which have been negligently left in a patient's body[23] and provides that the statute of limitation does not begin to run until the patient learns or should have learned of the presence of the foreign object.[24]

Courts adopting the discovery rule do not interpret its application as annulling the purpose of the statutes of limitation. Possible fraud on the part of the claimant is nullified by the very nature of the

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791 (Ky. 1952); Lakeman v. La France, 102 N.H. 300, 156 A.2d 123 (1959); Moses v. Miller, 202 Okla. 605, 216 P.2d 979 (1950); Hinkle v. Hargens, 76 S.D. 520, 81 N.W.2d 888 (1957); Peteler v. Robison, 81 Utah 535, 17 P.2d 244 (1932).

[20]Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224, 232 (1964). The court said, "Indeed, it appears that most jurisdictions, when faced with the set of facts we have presented herein would, on one theory or another, allow appellants to come into court and present their claims. To apply the label of 'general rule' to respondent's position and 'minority rule' to the discovery doctrine is not only misleading but erroneous. If, however, it is necessary to apply labels, it appears that the so-called 'general rule' as stated in A.L.R. is in fact the minority rule."

[21]CONN. GEN. STAT. ANN. § 52-584 (1958); MO. REV. STAT. § 516.100 (1959); ALA. CODE tit. 7, § 25(1) (1958).

[22]Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944); City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954); Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964); Perrin v. Rodriquez, 153 So. 555 (La. App. 1934); Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963); Johnson v. St. Patrick's Hosp., 417 P.2d 469 (Mont. 1966); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Seitz v. Jones, 370 P.2d 300 (Okla. 1961); Berry v. Branner, 421 P.2d 996 (Ore. 1966); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967); Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965).

[23]Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963); Johnson v. St. Patrick's Hosp., 417 P.2d 469 (Mont. 1966); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1962).

[24]Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Seitz v. Jones, 370 P.2d 300 (Okla. 1961); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967).

negligent act,[25] and it is difficult to maintain that a claimant is "sitting on his rights" when in fact he is unaware that he has such rights.[26] The possibility of a fraudulent or stale claim which the statutes are designed to prevent does not exist in this particular situation.[27]

Courts adopting the discovery doctrine are cognizant of the reluctance of legislative bodies to incorporate the rule in a statutory scheme but do not necessarily consider legislative inaction determinative of the ordinary meaning of "accrued" as it is used in the present statutes of limitation.[28]

> The cause of action must necessarily accrue to some person or legal entity. To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one.[29]

These courts contend that its application does not amount to judicial legislation. The legislature, in formulating the statutes, provided a specified time limit within which to sue for the defendant's negligence but left undetermined the question of when the cause of action actually accrued. They contend that originally the *courts* determined when the cause of action actually accrued, and for the courts to re-determine the matter in view of unusual circumstances does not constitute judicial legislation but is a matter of statutory interpretation, a purely judicial function.[30]

Courts declining to adopt the rule premise their decisions on

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[25]*See* Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Seitz v. Jones, 370 P.2d 300 (Okla. 1961).

[26]Berry v. Branner, 421 P.2d 996 (Ore. 1966); Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965).

[27]As stated in *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277, 286 (1961), "It must be borne in mind that Mrs. Fernandi's claim does not raise questions as to her credibility nor does it rest on matters of professional diagnosis, judgment or discretion.... Here the lapse of time does not entail the danger of false or frivolous claim.... Justice cries out that she fairly be afforded a day in court and it appears evident to us that this may be done... without any undue impairment of the two-year limitation or the considerations of repose which underlie it."

[28]Berry v. Branner, 421 P.2d 996 (Ore. 1966); Linquist v. Mullen, 45 Wash. 2d 765, 277 P.2d 724 (1954) (dissenting opinion).

[29]Berry v. Branner, 421 P.2d 996, 998 (Ore. 1966); *accord,* Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 878 (1959).

[30]Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156, 160 (1965); *accord,* Berry v. Branner, 421 P.2d 996, 999 (Ore. 1966); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959).

three arguments. Initially, the statutes of limitation are designed to prevent stale and fraudulent claims and the discovery rule annuls this purpose. Secondly, the rule hinders the defendant's presentation of a meritorious defense due to the unusual delay. Finally, adoption of the rule amounts to judicial legislation in that it makes knowledge a prerequisite to the accrual of a cause of action when the statute does not mention knowledge.

An analysis of the three arguments indicates that the courts are directing their attention more to an abstract application of the statute than to its application to the particular facts involved. Fraud is not a relevant consideration as the possibility of a fabricated claim is nullified by the very nature of the negligent act. The presence of the object in the claimant's body precludes any contention of a false injury or attempted fraud. Moreover, in view of the unusual circumstances, to deny recovery to the plaintiff when he could not possibly discover the negligent act until after the statute had run is a far greater injustice than the resulting disadvantage to the defendant.

The judicial legislation argument is more difficult to contend with because all courts, whether adopting or rejecting the rule, are engaging equally in judicial legislation. To reject the rule is actually to indulge in judicial legislation by saying that since the legislature has not added the requirement of knowledge, in fact, it intended to exclude it. To adopt the rule, thereby making knowledge a prerequisite to the running of the statute, also involves legislation by the courts since there is no express language in the statute indicating that knowledge is required for the accrual of an action.

Admittedly, the statutes are silent as to the relationship between knowledge and the accrual of a cause of action. However, unlike the legislatures, the courts when confronted with this problem are forced to make a decision, unaided in most cases by legislative pronouncements. The courts are required to resolve the issue presented by the statutes' silence, and the most equitable means of insuring that there will be no injustice to the claimant is to adopt the discovery rule and require knowledge of the existence of a cause of action as a prerequisite to the running of the statute of limitation.

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