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# Torts - Limitation of Actions - Malpractice Statute of Limitations Does Not Accrue until Patient Discovers That Negligently Administered Anesthesia Is the Cause of the Injury

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injury to plaintiff's feelings), two ways in which a plaintiff may be compensated for his mental suffering where his dog has been intentionally and maliciously destroyed. They are (1) compensatory damages for mental pain and suffering and (2) damages which will include the element of sentimental value when considering the value of the wrongfully destroyed animal.

It is important to note, however, that the recovery allowed for mental suffering is actually the same whether it is treated as a separate element of recovery or as a means of computing the value of the dead animal. Yet on one hand, it has been uniformly held that it is improper to include an allowance for sentimental value in computing the value of plaintiff's wrongfully destroyed property,[20] and on the other, that damages for mental suffering are recoverable in cases involving the wanton or malicious destruction of property.[21]

The significance of the instant case lies in the fact that the Supreme Court of Florida did not distinguish between the two. The court simply recognized the fact that the affection of a master for his dog is a very real thing and it must be compensated for in the event the pet is maliciously destroyed. The *La Porte* decision, therefore, wisely emasculates a distinction that was previously based solely upon semantics. Whether a Florida plaintiff has lost a valued grandfather's clock, a favorite portrait or a treasured antique, the character of the defendant's act will determine if the damages will be limited only to the pecuniary value of the article lost. An additional recovery for mental suffering will no longer depend upon the particular words used to describe plaintiff's feelings or the particular way in which damages are computed. This is as it should be. It should not matter whether plaintiff's anguish in seeing her dog destroyed is characterized as mere sentiment or as true mental suffering. One can find no valid reason for distinguishing one from the other.

*Fredric C. Jacobs*

TORTS — LIMITATION OF ACTIONS — MALPRACTICE STATUTE OF LIMITATIONS DOES NOT ACCRUE UNTIL PATIENT DISCOVERS THAT NEGLIGENTLY ADMINISTERED ANESTHESIA IS THE CAUSE OF THE INJURY.

*Rothman v. Silber* (N.J. Super. 1964)

Plaintiff gave birth to her third child on March 10, 1960. Prior to the birth a saddle block anesthesia was administered. Subsequently and allegedly because of a negligent administering of the saddle block during the

20. City of Canadian v. Guthrie, 87 S.W.2d 316 (Tex. Civ. App. 1935); Rider v. Gellenbeck, 21 Ohio Op. 437, 7 Ohio Supp. 126 (1941); Klein v. St. Louis Transit Co., 117 Mo. App. 691, 93 S.W. 281 (1906).

21. Sager v. Sisters of Mercy, 81 Colo. 498, 256 Pac. 8 (1927); Brown v. Zorn, 275 S.W. 572 (Tex. Civ. App. 1925).

delivery, plaintiff suffered recurring "twinges" of pain. The alleged cause of the injury was discovered on November 18, 1960, but the complaint against the defendants, the obstetrician and anesthetist, was not filed until August 29, 1962. The New Jersey statute of limitations[1] for personal injuries provides that the action shall be commenced within two years after the cause of action shall have accrued. The Superior Court of New Jersey was faced with the question as to when, in a malpractice suit against a physician who negligently administered injurious anesthesia, the cause of action accrues. The court *held* that a saddle block anesthesia is a foreign substance and that the two-year limitation period for personal injuries commenced when the patient discovered that the anesthesia was the cause of the injury. *Rothman v. Silber*, 83 N.J. Super. 192, 199 A.2d 86 (1964).

At common law no time was fixed for the bringing of suits. Limitations of actions are created entirely by statute and not by judicial decree.[2] The general rule pertaining to alleged negligent performance is that the statute of limitations begins to run against the cause of action at the time when the act or omission constituting the alleged negligence takes place.[3] In actions for official or professional negligence, the cause of action is founded upon the breach of duty which actually injured the plaintiff, not the consequential damage.[4] Therefore in a negligence action against a physician, the statute begins to run when the breach or negligent act occurs.[5] It is unimportant that the actual damage is not discovered or does not occur until later. It is the breach, however slight, which starts the statute of limitations running against the right to maintain the action. Employing this theory, a patient, even though using due diligence, may not become aware of the physician's negligence within the prescribed period.

Many jurisdictions have avoided such a harsh result by advancing the date when the period of limitations begins to run. Some jurisdictions have held that the cause of action does not accrue until the end of the treatment.[6] These courts utilize the theory of continuing negligence in order to lessen the strict application of the statute in cases where the malpractice extended throughout a prolonged course of treatment. Such courts reason that the negligence is in the nature of a continuing tort and

1. N.J. STAT. ANN. tit. 2A, § 14-2 (1952).
Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within two years next after the cause of any such action shall have accrued.

2. 53 C.J.S., *Limitation of Actions* § 1 (1948).

3. Middelkamp v. Bessemer Irrigating Ditch Co., 46 Colo. 102, 103 Pac. 280 (1909); Baie v. Rook, 223 Iowa 845, 273 N.W. 902 (1937); Johnson v. Beattie, 88 Vt. 512, 93 Atl. 250 (1915).

4. Hahn v. Claybrook, 130 Md. 179, 100 Atl. 83 (1917).

5. Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917); Becker v. Floersch, 153 Kan. 374, 110 P.2d 752 (1941); Vaughn v. Langmack, 390 P.2d 142 (Ore. 1964); Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 (1934); Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942); McCoy v. Stevens, 182 Wash. 55, 44 P.2d 797 (1935).

6. Trombley v. Kolts, 29 Cal. App. 2d 699, 85 P.2d 541 (1938); De Haan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932); Bush v. Cress, 178 Minn. 482, 227 N.W. 432 (1929); Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941); Peteler v. Robison, 81 Utah 535, 17 P.2d 244 (1932).

that the statute does not begin to run until the last date of the continuous treatment.[7]

Other courts have completely emasculated the general rule by holding that the statute in such cases does not commence until the patient discovers, or should have discovered the malpractice and its consequences.[8] This discovery doctrine was first used in the case of *Marsh v. Indus. Accident Comm.*[9] *Marsh* involved an industrial mishap whereby workmen who had contacted silicosis sued for compensation. The court held that the date of injury was not the date of their exposure to the dust-laden atmosphere, nor even the date of their last exposure, but rather the time when they became aware or ought to have become aware that their injuries were due to such exposure. In 1936, this discovery doctrine was applied to a malpractice litigation. In the case of *Huysman v. Kirsch*,[10] the defendant doctor performed an operation upon the plaintiff, and in closing the incision negligently failed to remove a piece of rubber tubing. This resulted in an infection from which the patient thereafter suffered for several years. The court, using an analogy to the industrial disease case, held that the statute of limitations did not commence until the cause of the injury became known or reasonably should have become known to the patient.

In the case of *Fernandi v. Strully*,[11] the Supreme Court of New Jersey accepted the reasoning of the discovery doctrine as applying in cases where foreign objects were negligently left in the body. *Fernandi* involved an action for malpractice based on the negligent leaving of a wing nut from a surgical instrument in the patient's body during the course of an operation. The court decided that the period of limitations on the cause of action began when the patient knew or had reason to know about the foreign object, not when the negligent act occurred. The instant case is an extension of the discovery doctrine to situations in which there has been a negligent introduction of drugs rather than foreign substances such as sponges,[12] wing nuts,[13] tubes[14] or pieces of broken bones.[15]

It has been stated that general broad considerations of justice require that there should be statutes of repose to prevent the presentation of stale claims and discourage the assertion of fraudulent ones.[16] In cases of the instant type, the physician is placed in the unfavorable position of having to

7. See Comment, 13 CLEV.-MAR. L. REV. 313, 315-17 (1964).
8. Huysman v. Kirsch, 6 Cal. App. 2d 302, 57 P.2d 908 (1936); City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954); Perrin v. Rodriquez, 153 So. 555 (La. App. 1934); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961). Other states have attempted to resolve this problem by statute: ARK. STAT. ANN. § 37-205 (1947); DEL. CODE ANN. tit. 10, § 8118 (1953); IND. STAT. ANN. § 2-627 (1946); MO. REV. STAT. § 1012 (1939); PA. STAT. ANN. tit. 12, § 34 (1953).
9. 217 Cal. App. 338, 18 P.2d 933 (1933).
10. 6 Cal. App. 2d 302, 57 P.2d 908 (1936).
11. 35 N.J. 434, 173 A.2d 277 (1961).
12. Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); see also 5 VILL. L. REV. 495 (1960).
13. Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); see also 13 SYRACUSE L. REV. (1961).
14. Huysman v. Kirsch, 6 Cal. App. 2d 302, 57 P.2d 908 (1936).
15. Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (1942).
16. Wilder v. Haworth, 187 Ore. 688, 213 P.2d 797 (1950).

defend remote claims when witnesses and evidence may have become unavailable. Secondly, the physician is handicapped in his defense because the sympathies of jurors tend to be aroused by the pitiable condition of the plaintiff. However in spite of these reasons against applying the discovery doctrine, the equities are greatly in favor of the negligently treated patient.[17] First, the patient normally has no knowledge of the course of the operation; all knowledge of what takes place during the operation is exclusively in the possession of the surgeon. Secondly, it is highly improbable that the plaintiff, within a short period of time, can discover the cause of his discomfort after an operation. Many times the pain of a negligent act is misinterpreted as a normal post-operative one. Also, even if the patient does discover the cause of the malady, it is often difficult for him to obtain favorable medical testimony. Finally, patients should not be encouraged to go from physician to physician in an effort to determine whether the diagnosis made and the treatment received were proper.

The instant case expands the discovery doctrine to include drugs. The court reasoned that there is no material difference between leaving a wing nut in a patient's body and negligently introducing a saddle block anesthesia. This reasoning is not entirely valid. Obviously, if a wing nut is left in the body, the fact speaks for itself and the chances of fraud or mistake are slim. However, when a patient suffers pain from an alleged wrongful anesthetization the same conclusion does not necessarily follow. Numerous factors such as age, inherited traits or other latent diseases may have caused the pain. As time progresses the possibility for mistake greatly increases. In spite of these dangers the instant court felt that the character of the foreign substance introduced into the body of the patient by the physician was irrelevant.[18]

As previously mentioned, the basic rationale for limiting such actions is the prevention of stale and fraudulent claims. There is sufficient merit for using the discovery doctrine in the case of negligently forgotten objects so as to justify an overriding of the stale claim element. But, by the extension of the doctrine to the instant case, the court ignores both the stale claim and fraud elements that fostered the initial adoption of the statute of limitations. The court appears to render the statute of limitations nugatory by amending it under the guise of construction. It is submitted that the discovery doctrine should be limited to forgotten object cases and not expanded to those involving negligently administered drugs.[19]

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17. For a full discussion of the equities involved see Mr. Justice Rossman's dissenting opinion in Vaughn v. Langmack, 390 P.2d 142, 155-66 (Ore. 1964).

18. See Agnew v. Larson, 82 Cal. App. 2d 176, 185 P.2d 851 (1947), where a case of similar facts was decided in the same way as the instant case.

19. For a general discussion of malpractice and the statute of limitations see Comments, 32 IND. L.J. 528 (1956); 12 WYO. L.J. 30 (1957); 64 DICK. L. REV. 173 (1959).