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Medical Malpractice--Adoption of the Discovery Rule

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MEDICAL MALPRACTICE STATUTE OF LIMITATIONS—ADOPTION OF THE DISCOVERY RULE—Plaintiff underwent a sterilization operation and approximately eleven months later delivered a child. One month and three days after the birth of the child, suit was brought against the physician alleging that as a result of the pregnancy plaintiff suffered mental and physical pain and anguish, and her husband incurred and will incur medical expenses, loss of consortium, and expenses incident to nurturing the child until majority. The trial court dismissed the complaint, finding that the action was barred by the statute of limitations. Plaintiff appealed. Held: Reversed. A cause of action for medical malpractice does not accrue under the statute of limitations until the discovery of the injury. Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970).

It has always been the rule in Kentucky that a cause of action for medical malpractice accrues on the date of the operation. The basis

1 The complaint shows on its face that the operation was performed September 24, 1966; that the appellant Lilly Tomlinson became pregnant November 23, 1967; that on December 23, 1967, the appellee examined Mrs. Tomlinson; that on January 19, 1968, Mrs. Tomlinson was again examined by the appellee; that on February 25, 1968, it was determined Mrs. Tomlinson was pregnant; that on August 16, 1968, a child was born from the pregnancy; and that on November 1, 1968, this action was commenced. 459 S.W.2d 166 (Ky. 1970).

   Actions to be brought within one year.
   The following actions shall be brought within one year after the cause of action accrued:
   
   (e) An action against a physician or surgeon for negligence or malpractice.

3 Id.

4 Jones v. Furnell, 406 S.W.2d 154 (Ky. 1966) (patient's action against surgeon brought more than one year after operation is barred by statute of limitations); Turner v. Rust, 385 S.W.2d 175 (Ky. 1964) (action against a physician or surgeon for malpractice shall be commenced within one year after the cause of action accrues); Philpot v. Stacy, 371 S.W.2d 11 (Ky. 1963) (plaintiff's action against physician not commenced within one year after last treatment is barred by the statute of limitations); Carter v. Harlan Hospital Ass'n, 97 S.W.2d 9 (Ky. 1936) (action for malpractice shall be commenced within one year after the cause of action accrues, and not thereafter); Roush v. Wolfe, 47 S.W.2d 1021 (Ky. 1932) (malpractice action barred by one-year statute of limitations); Guess v. Linton, 32 S.W.2d 713 (Ky. 1930) (action against physician for malpractice is barred unless brought within one year from accrual of action).

5 The Supreme Court declared in Reading Co. v. Koons, 271 U.S. 58, 62 (1926) that the word "accrued" as used in the statute, does not have any definite technical meaning and must be interpreted in the light of the statute's general purposes and other provisions, and with regard for the practical ends to be served by any statute of limitations.
for this view began with an amendment to the statute of limitations in 1916 which provided that:

An action for an injury to the person or the plaintiff, or of his wife, child, ward, apprentice, or servant, ... an action against any physician or surgeon for negligence or malpractice ... shall be commenced within one year next after the cause of action accrued, and not thereafter.\(^6\)

According to the opinion in *Roush v. Wolfe*\(^7\) this amendment was added by the Kentucky General Assembly to cope with decisions of the Court of Appeals\(^8\) which held that an action against a physician for malpractice was one *ex contractu* and thus governed by the five-year statute of limitations\(^9\) rather than the one-year statute of limitations\(^10\) applicable to actions for injury and damage to the person.\(^11\)

Several years after *Roush* the Court in *Carter v. Harlan Hospital Association*\(^12\) clarified what was meant by "an action accrues." In that case the Court held a cause of action accrues when a party ascertains that he has a cause of action.\(^13\) Almost three decades later in *Philpot v. Stacy*\(^14\) the Court again attempted to clarify the statute. The following was their explanation of when the statute starts to run.

> [W]ith respect to the Statute of Limitations, the time of injury itself is the controlling fact, and not the means by which the injury is inflicted.\(^15\)

Thus through the years the Court has consistently adhered to this strict interpretation of the statute that an action accrues at the time of the injury, and not until the instant case has it thoroughly re-evaluated this construction of the statute.

A survey of other jurisdictions in the United States illustrates that all have some type of statute which limits the time in which a

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\(^6\) Ky. Acts ch. 92, § 2516 (1916).
\(^7\) 47 S.W.2d 1021 (Ky. 1932).
\(^8\) See Wood v. Downing's Adm'r, 62 S.W. 487 (Ky. 1901); Menefee v. Alexander, 53 S.W. 658 (Ky. 1899).
\(^9\) K.R.S. § 413.120 (1) (1932).
\(^10\) K.R.S. § 413.140 (1) (e) (1916).
\(^11\) For two cases which held that a suit against a physician was barred by the malpractice statute of limitations applicable to actions *ex contractu*, see Barnoff v. Aldridge, 38 S.W.2d 1029, 1030 (Mo. 1931); Horowitz v. Bogart, 218 App. Div. 158, 217 N.Y.S. 881, 882 (Sup. Ct. 1926).
\(^12\) 97 S.W.2d 9, 10 (Ky. 1936).
\(^14\) 371 S.W.2d 11 (Ky. 1963). See also The Third Annual Kentucky Court of Appeals Review, 54 Ky. L.J. 225, 361 (1965).
\(^15\) Philpot v. Stacy, 371 S.W.2d 11, 13 (Ky. 1963).
tort action must be commenced. These statutes are generally in terms which require commencement of the limitations period "when the cause of action accrues." Traditionally, this phrase has been construed to mean that the statutory period in a malpractice action commences on the date of the alleged act or omission. The reasoning behind this is that it is the act, rather than the ensuing damage, which constitutes the basis of the cause of action. If there is noticeable injury or damage when the original act of negligence occurred this rule usually leads to equitable results. However, strict application of this doctrine presents real difficulties when the statutory period expires before the plaintiff discovers he has been injured at all.

Harsh consequences resulting from a strict interpretation of the statute have led many jurisdictions to judicially develop exceptions to the rule. The injured plaintiff has been allowed to recover on the theory of implied contract. An application of this theory provides the injured party with a longer limitations period, which most jurisdictions make applicable to contract actions. Secondly, where a physician or surgeon continues to treat a patient for a certain ailment, and the plaintiff's action for medical malpractice relates to treatment received

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16 See C. STETLER & A. MORITZ, DOCTOR AND PATIENT AND THE LAW 307, 390-91 (4th ed. 1962); Developments in the Law—Statutes of Limitations, 63 HARV. L. REV. 1177 (1950). Approximately one-half of the states have statutes which are specifically applicable to malpractice actions, and which provide that the action must be commenced within a certain number of years after the cause of action accrues. The remaining make provision for the number of years in which the action must be commenced and give no indication of the time when the statutory period will begin to run.

17 This is the terminology in Kentucky and several other states. See, e.g., Comment, 55 IOWA L. REV. 486 n.2 (1969).

18 For several cases following the "act of omission" rule, see Roybal v. White, 383 P.2d 290 (N.M. 1963); Jewell v. Price, 142 S.E.2d 1 (N.C. 1965); Hawks v. DeHart, 146 S.E.2d 187 (Va. 1966); Reistad v. Manz, 105 N.W.2d 324 (Wis. 1960).

19 This rule is well stated by the Supreme Judicial Court of Massachusetts: Any act of misconduct or negligence . . . in the service undertaken . . . gave rise to a right of action in contract or tort, and the statutory period began to run at that time, and not when the actual damage results or is ascertained. . . . The damage sustained by the wrong done is not the cause of action . . . .


from the physician for that ailment, he may be allowed to recover under a "continuous treatment" exception. The reasoning behind this exception is that the patient is usually not put on notice of the error of the physician, upon whom he continues to rely for treatment, and thus the limitations statute does not commence running until the treatment is completed. Finally, courts may adopt a "fraudulent concealment" exception where the physician or surgeon has knowledge of an error committed while treating a patient and attempts to conceal the error. Under this exception the statute does not begin to run until the patient discovers, or with due diligence should have discovered, his injury.

Judicial application of the above exceptions has not completely alleviated the harshness of the traditional approach, leading the courts to re-evaluate the point in time when a cause of action "accrues" in a medical malpractice case. This point in time has been generally labeled the "discovery rule" and affords us with a measuring device as to the majority and minority viewpoints in the United States. In general there are two rules in the United States governing the running of statutes of limitation in medical malpractice suits. In the majority of states the statute begins to run at the date of the operation; while in the minority, the statute commences to run only after the discovery of the alleged malpractice.

The principle relied upon most by those jurisdictions rejecting the discovery rule is that statutes of limitation were established to protect parties from long waiting periods after which they would have the problem of defending stale claims. This reasoning reveals a conflict between two basic policies of law: (1) to allow meritorious claimants an opportunity to be heard; (2) to discourage stale and possibly fraudulent claims. Those adopting the majority view resolve

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24 E.g., Couillard v. Charles T. Miller Hosp. Inc., 92 N.W.2d 96, 103 (Minn. 1958); Williams v. Elias, 1 N.W.2d 121, 124 (Neb. 1941).
25 For a more detailed explanation of this exception, see Lillich, supra note 21, at 363-64; 32 IND. L.J., supra note 22, at 535-40.
26 For a Kentucky case in point see Adams v. Ison, 249 S.W.2d 791, 794 (Ky. 1952).
27 The determination of when the party discovers or should have discovered the injury is usually a jury question. See, e.g., Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967). For a general discussion of Gaddis v. Smith, see Comment, 28 MARY. L. REV. 47 (1966).
29 Id. For an excellent discussion of the discovery rule and those jurisdictions adopting it see Note, Medical Malpractice: A Survey of Statutes of Limitations, 3 SUFFOLK U.L. REV. 597, 615 (1969).
the conflict by stating that the statute of limitations is inflexible and functions without regard to the merits of a case. Also these courts feel that adoption of the discovery rule is within the functions of the legislature. These courts also conclude that with the passage of time it becomes harder for the defendant to prove that he was not negligent and if further time passes it may be impossible to determine if the plaintiff's injury was a result of the defendant's negligence at all.

Application of the discovery rule has been most often made to medical malpractice cases dealing with foreign objects left in a patient's body during surgery. Courts have been more reluctant, however, to apply it to other malpractice cases, usually involving a misdiagnosis followed by treatment which proves injurious to the patient. Those courts favoring the discovery rule tend to base their reasoning on the premise that it is more equitable and fair to the patient. They feel that the injured party should be allowed to be heard when his injury was of an "inherently unknowable" origin. The patient is without notice of his injuries and thus unaware of any right he may have until the injury is discovered.

Another factor in judicial adoption of the discovery rule has been the attempt by courts to determine legislative intent when interpreting the statutes. Since the statutes of limitation make no mention of reasoning on the premise that it is more equitable and fair to the patient. They find support for this position as a result of statutory amendments by various state legislatures to include the discovery rule in some situations, but have not specifically mentioned medical malpractice.

A third reason for application of the discovery rule in medical malpractice cases is that the strict adherence to the wording in the statute may penalize the conscientious physician while protecting the unscrupulous one. The reasoning here is that a physician could be aware of the presence of a foreign object in the patient's body.

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31 Hill v. Hays, 395 P.2d 298 (Kan. 1964); Philpot v. Stacy, 371 S.W.2d 11 Mullen, 277 P.2d 724 (Wash. 1954). The courts find support for this position as a result of statutory amendments by various state legislatures to include the discovery rule in some situations, but have not specifically mentioned medical malpractice.

32 Owens v. White, 380 F.2d 310, 316 (9th Cir. 1967); 32 Ind. L.J., supra note 21.


and not reveal this to the patient. If the patient is unable to prove this concealment by the physician, under the traditional approach his action might be barred before he discovers the injury.

The Kentucky Court, in the instant case, begins the discussion of its reasoning in adopting the "discovery" rule by conceding that "[i]t has always been the rule in this state that causes of action such as the present one 'accrue' on the date of the operation." Mention is then made that the appellants also concede this to be the law but insist that this law be overruled and the discovery rule be adopted. The Court was in agreement with this premise and in adopting it relied heavily on Delaware, Pennsylvania, California and federal court cases which have followed the discovery rule. The Court also listed states which take the view that time of discovery is immaterial. From the case authority the Court found a definite trend in many jurisdictions to adopt the discovery rule. In deciding to adopt the discovery rule in Kentucky, the Court concluded:

It may be thought that changing the rule in this jurisdiction so that the cause of action does not accrue under the statute until the discovery of the injury may result in great hardship to physicians and surgeons because of the possibility that the cause of action may accrue long after the operation, but when measured against total loss of plaintiff's cause of action barred under the formal rule, we think the change is less likely to produce injustice. In any event, this possible hardship on the physician or surgeon may wash out on the trial of the merits of the controversy.

It thus seems evident that the Court's reasoning, analysis and application of the law in this case was both equitable and justifiable. The "discovery" approach seems to be the most equitable, for not until a plaintiff has discovered his injury does he have an opportunity to claim his cause of action. To deny recovery to the plaintiff when he could not possibly discover the negligent act until after the statute had run would be a far greater injustice than the resulting disadvantage to the defendant.

36 459 S.W.2d at 167.  
41 For other states that have adopted the discovery rule see Davis v. Bonebrake, 313 P.2d 982 (Colo. 1957); Thomas v. Lobrano 76 So. 2d 599 (La. 1954); Thatcher v. DeTar, 173 S.W.2d 760 (Mo. 1943); Nowell v. Hamilton, 107 S.E.2d 112 (N.C. 1959); McFarland v. Connally, 252 S.W.2d 486 (Tex. 1952).  
43 459 S.W.2d at 168.
The Court saw a situation in which the strict interpretation of the statute of limitations was causing harsh consequences, decided not to wait for legislative action to change the wording of the statute, and acted on its own authority to give the patient an effective means of obtaining relief. Hopefully this will bring about the enactment of legislation which will change the wording of the present statute and incorporate the discovery rule into its actual language.

Michael W. Hawkins

Constitutional Law—Defendant’s Right to a Jury Trial—Is Six Enough?—In Williams v. Florida, the United States Supreme Court held that a twelve-man jury is not a necessary part of “trial by jury” and that a six-man panel does not violate a defendant’s sixth amendment rights as applied to the states through the fourteenth amendment. The reasons put forth by the Court for overturning a constitutional mandate which has existed since at least 1898 are not only inadequate, but are not in fact the basis for the decision. An examination of the Court’s rationale reveals that no basis for change was found; only an absence of evidence strong enough to prevent the removal of the constitutional requirement. The choice the Court posed for itself was not between a twelve-man jury and a smaller panel, but rather was a choice between continued recognition of a constitutional right and harmonious development of a judicially

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1 90 S. Ct. 1893 (1970). Williams, charged with robbery, filed a pretrial motion in a Florida state court to impanel a twelve-man jury rather than the six-man jury as provided by Florida law in all criminal cases except those designated as capital. “Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases.” Fla. Stat. Ann. § 913.10(1) (1967). Petitioner claimed that the statute violated his sixth amendment right to a jury trial. The motion was denied and petitioner was convicted and given a sentence of life imprisonment. The Florida District Court of Appeals affirmed the judgment. Certiorari was granted on petitioner’s subsequent appeal to the United States Supreme Court which affirmed. 90 S. Ct. 1893, 1907 (1970). Petitioner filed a second pretrial motion seeking to be excused from Fla. R. Crim. P. 1.200 which required, among other things, a defendant, on written demand of the prosecuting attorney, to give advance notice if he planned to claim an alibi, and to furnish the prosecuting attorney with information such as the names and addresses of witnesses he intends to call. Williams contended that these requirements violated his constitutional rights under the fifth and fourteenth amendments not to be compelled to testify against himself. This motion was denied by the Florida court and affirmed on the appeal to the United States Supreme Court. 90 S. Ct. 1893, 1898 (1970). The Court found that the notice-of-alibi rule required nothing additional of the defendant nor bound him to pretrial acts. The only effect was to force him to make decisions about his defense at an earlier date but he still retained the right to change that defense. Id.

2 See note 4, infra, and accompanying text.