

Limitation of Actions: When Statute of Limitations Begins to Run in Malpractice Actions

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By statute, a trust company organized pursuant to the provisions of Chapter 221 of the WIS. STAT. may act as an executor of an estate. WIS. STAT. (1941) Sec. 223.03(7).

Objections which go to the temper, disposition, habits and moral character of the nominee are not sufficient to render the named executor "legally incompetent." Nor will the fact that he may be obnoxious to the heirs justify the court in refusing to nominate him. *Saxe v. Saxe*, 119 Wis. 557, 97 N.W. 187 (1903), cited in the principal case.

SYDNEY R. MERTZ.

Limitation of Actions—When Statute of Limitations Begins to Run in Malpractice Actions.—Plaintiff, having sustained a spinal and back injury while working in a rock quarry, went to the defendant doctor for treatment. The full and complete history of the injury was given to the defendant who, the plaintiff alleges, was negligent in failing to make the proper examination and diagnosis necessary to ascertain the nature and extent of the injuries. Plaintiff alleges that it was the doctor's duty to make a thorough examination of his injury so as to determine the nature and extent thereof, and to use means generally and commonly employed by physicians and surgeons for the diagnosis and treatment of such a case. Treatment, following the diagnosis of June 10, 1938, lasted until Aug. 15, 1938 at which date the plaintiff was transferred to a hospital, his injuries having been aggravated by the defendant doctor's treatment. Defendant demurred to plaintiff's petition for the reason that more than two years had elapsed between June 10, 1938, the alleged date of the wrongrful act or omission, and the filing of the petition. Demurrer was sustained by the trial court. On appeal, held, judgment reversed. The statute of limitations in a malpractice suit does not commence to run until treatment ends. In malpractice cases there is difficulty in determining the exact moment when the act or omission which caused the damage took place. The negligent act may occur at some particular moment or may characterize the entire treatment. Since the doctor's service is a continuing one of diagnosis and treatment throughout the case, the physician must be given all reasonable time and opportunity to correct the ordinary and usual mistakes even incident to skilled surgery; premature litigation in order to save the rights of the patient in the event of substantial malpractice, disrupts the mutual confidence that is highly essential to the relationship of doctor and patient. The treatment and employment should be considered as a whole, and, if malpractice occurs therein, the statute of limitations should begin to run when the treatment ceases. *Williams v. Elias*, 1 N.W. (2d) 121 (Neb. 1941).

A majority of courts, especially in adjacent jurisdictions, have held that the nature of the action of malpractice against a doctor requires the statute of limitations to run from the date of termination of the treatment.

The Ohio court adopted the rule in *Gillete v. Tucker*, 67 Ohio St. 129, 65 N.E. 865 (1902). In that case the defendant doctor negligently left a surgical sponge in the incision of an operation and when the wound failed to heal properly, treated the patient for a period of years in an attempt to cure the situation although not removing the sponge. The court in ruling for the plaintiff held that if the surgeon negligently closed the incision and left the sponge therein and this condition is present when he abandons the case or otherwise retires therefrom, the statute of limitations does not commence to run against the action until treatment has been abandoned by the physician or otherwise terminated.

Later the same court in *Bowers v. Santee*, 99 Ohio St. 361, 124 N.E. 238 (1916) held the relation of surgeon and patient grows out of a contract of employment and the statute of limitations does not begin to run until the contract is terminated. The patient has a right to rely upon the surgeon to exercise reasonable skill and care to restore health and may so rely until the contract of employment is at an end. The patient usually could not know how the initial trouble occurred that resulted in the alleged mistreatment. Moreover it is clearly just to the surgeon that he be not harassed by any premature litigation instituted in order to save the rights of the patient in the event that there would be substantial malpractice. The surgeon should have all reasonable time and opportunity to correct the evils which made the treatment necessary.

The Minnesota court adopts the entire reasoning from the *Bowers case* in *Schmitt v. Esser*, 178 Minn. 82, 226 N.W. 196 (1929) where the defendant negligently set the plaintiff's ankle and the plaintiff, relying upon the defendant's statement that the case would take years to heal, did not learn of the fraud until more than two years after the negligent setting. The court held that treatment and employment should be considered as a whole, and, if malpractice occurred therein, the statute of limitations begins to run when the treatment ceases. It must clearly appear that the unskillful act which caused the injury took place so long ago as to bar the action under the statute. See also *Bush v. Cress*, 227 N.W. 432 (Minn. 1929) and *Schanil v. Branton*, 181 Minn. 381, 232 N.W. 708 (1930).

In the case of *DeHaan v. Winter*, 258 Mich. 293, 241 N.W. 923 (1932), the court held in an action for malpractice for negligently setting a leg, that until treatment of the fracture ceases, the relation of patient and physician continues and the statute of limitations does not run. Where a sponge was negligently left within the body of the patient and not removed until two and a half years later it was held the cause of action accrued upon the removal of the sponge. Plaintiff's cause of action accrued as much by reason of the alleged continuous breach of duty on the part of the defendant in treating the plaintiff and in failing to remove the sponge during that time as on the day of the operation. The tort was a continuing one; so also was the cause of action. *Sly v. Van Lengen*, 198 N.Y.S. 608 (1923).

It has been held, however, that the statute of limitations begins to run at the time of the act of malpractice and not from the date that the patient-physician relationship is severed. *Barnes v. Gardner*, 9 N.Y.S. (2d) 785 (1939).

In *Wetzel v. Pius*, 78 Cal. App. 104, 248 Pac. 288 (1926) the plaintiff's cause of action was barred because the negligent setting of the bone occurred over one year previously. The court held that the action for malpractice of physician sounds in tort, is classified as an action ex delicto and is not based on the contract of employment. Subsequent acts which merely aggravate the damage already done or later developments which frequently add new elements of damage merely attach themselves to the original cause of action and do not of themselves become independent causes of action, nor do they revive the original cause of action if the same has become barred.

In a Connecticut case, the defendant negligently made a blood transfusion whereby the plaintiff contracted syphilis. Plaintiff sued on this count and also on a second count of breach of contract to cure him after he had contracted the disease. The court held that an action for malpractice presents a claim of a hybrid nature. In one aspect it may be viewed as based on negligence; in another aspect as based on the breach of contract. The term malpractice itself may be applied to a single act of physician or surgeon or to a course of treatment.

The statute begins to run when the breach of duty occurs. When the injury is complete at the time of the act, the period commences to run at that time. When however, the injurious consequences arise from a course of treatment, the statute of limitations does not begin to run until the treatment is terminated. *Giambozi v. Peters*, 16 Atl. (2d) 833 (Conn. 1940).

Where the treatment of the doctor continued in an attempt to cure burns caused by negligent use of X-ray on the plaintiff, the statute was held to run from the time of the X-ray treatment. *McCoy v. Stevens*, 182 Wash. 55, 44 Pac. (2d) 797 (1935).

Negligence sufficient to give a cause of action may occur either in the treatment of the patient's injury or in the preceding diagnosis. The Vermont court explains this in *Dominiz v. Pratt*, 13 Atl. (2d) 198 (1940). The standard of the degree of care and skill that is ordinarily possessed and exercised in like cases by physicians in the same general line of practice who follow their profession in the same neighborhood applies not only to physical treatment of the patient's injury but as well to his diagnosis of the malady and hence negligence may exist in a failure to apply a proper remedy upon correct determination of existing physical conditions or it may precede that and result from a failure properly to inform himself of these conditions. Wisconsin follows the rule that malpractice may consist in a lack of skill or care in diagnosis as well as in treatment. *Kuechler v. Volgmann*, 180 Wis. 238, 192 N.W. 1015 (1923); *Jaeger v. Stratton*, 170 Wis. 579, 176 N.W. 61 (1920).

In *Lottin v. O'Brien*, 146 Wis. 258, 131 N.W. 361 (1911), where the last treatment of the patient was over one year before the suit was started, the Wisconsin court held the mere fact that there was no discharge of the defendant on that day would not prevent the statute from running. The statute of limitations began to run when the cause of action accrued and this accrued when the negligent acts were committed without reference to discharge. The negligent omission to discover the improper setting occurred at such dates and times as the defendant undertook to examine, treat, and care for the disabled arm. If there was negligence in treating the arm after negligently setting of the bones, this latter negligence occurred not later than the date when treatments by the defendant ceased. The fact that there was no official discharge of the patient was considered immaterial.

The Minnesota court, in deciding that the statute of limitations begins to run at the end of treatments, commented on language used in the *Lotten case*, *supra*, as follows: "This language appears to express the thought that, so long as the doctor continues the treatment so unskillfully and negligently that he fails to discover the condition brought about by a prior unskillful and negligent act, he is not in a position to urge that the statute of limitations has started to run." *Schmitt v. Esser*, 193 Minn. 354, 226 N.W. 196 (1929).

RALPH J. STRANDBERG.

Municipal Corporations—Liability of Municipality for Defects in Sidewalks and Streets.—The defendant, Hosmer, obtained access to the basement of his building by means of a trapdoor on the sidewalk. The hinges of the trapdoor were about $\frac{3}{4}$ inches high. In the sidewalk, about a foot and a half from the trapdoor, there was a crack which led into the center expansion joint of the walk, and which had broken away forming an irregular hole, triangular in shape. The hole, was about 11 inches long and 3 inches wide at one end, and tapered to a blunt point at the other end. Its depth was about one inch at the