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Physicians—Applying the Statute of Limitations in Malpractice Cases—*Spath v. Morrow* (Neb. 1962)

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Notes

PHYSICIANS—APPLYING THE STATUTE OF LIMITATIONS IN MALPRACTICE CASES

I

In *Spath v. Morrow*,[1] the Nebraska Supreme Court allowed a suit to be brought for medical malpractice nearly ten years after the injury occurred, notwithstanding the Nebraska two-year statute of limitations for malpractice actions. In 1951, while her own physician was out of town, the plaintiff was placed in the care of one of the defendant doctors, who called in a second doctor to assist in the delivery of the plaintiff's baby. While suturing the plaintiff after the delivery, the doctors negligently broke a needle, a part of which was left in the plaintiff's body. One week after the operation she was returned to the care of her family physician, and thereafter she suffered pain and discomfort for approximately nine years. After plaintiff learned the cause of discomfort, she brought suit against the two doctors for malpractice in their performance of the operation. The family physician was not joined as a defendant in the suit.

The trial court sustained the demurrer of the defendants which pleaded the statute of limitations as a bar. On appeal, the supreme court held that the cause of action accrued, and the statute started running, when the patient discovered, or through the exercise of reasonable diligence should have discovered the injury. Nebraska thus joined a minority of courts that apply the *discovery* rule to malpractice actions.

II

A serious problem confronts courts when they apply the statute of limitations in malpractice cases. A majority of states hold that the statute starts to run from the time the injury occurs,[2] but a strict application of this rule has resulted in a number of extremely harsh results.[3]

Many courts attempt to avoid these results and to achieve more equitable ends through the adoption of exceptions. One such

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[1] 174 Neb. 38, 115 N.W.2d 581 (1962).

[2] Cases collected in 74 A.L.R. 1322 (1931); 144 A.L.R. 227 (1943); 80 A.L.R.2d 374 (1961).

[3] Summers v. Wallace Hosp., 276 F.2d 831 (9th Cir. 1960) (where plaintiff suffered from severe pain for five years because a curved surgical

exception is based on a theory of fraudulent concealment. Jurisdictions using this rationale reason that because of the fiduciary relationship which exists between a physician and patient, a failure of the doctor to reveal his negligence to the patient constitutes fraud and will toll the statute until the patient discovers, or through the exercise of reasonable diligence should have discovered the injury.[4] Under this rule some jurisdictions hold that an affirmative act of fraud is required,[5] while others say that silence is sufficient.[6] The decisions are further divided concerning whether the doctor need actually know of his negligence[7] or whether knowledge will be imputed to him.[8]

The second theory used to toll the statute is the end of treatment rule, which was adopted in Nebraska before the principal case.[9] This approach is predicated on a theory of continuing negligence, i.e., as long as the doctor continues the treatment, he is negligent in not discovering the injury.[10] If the patient discovers

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needle was left in her abdomen); Quinton v. United States, 203 F. Supp. 332 (N.D.Tex. 1961) (where the wrong type of blood was given to patient resulting in loss of ability to have healthy children and injury was not discovered until child was stillborn three years later); Graham v. Updegraph, 144 Kan. 45, 58 P.2d 475 (1944) (where radium beads negligently left in plaintiff's body caused death six years later); Carter v. Harlan Hosp. Ass'n, 265 Ky. 452, 97 S.W.2d 9 (1936) (where forceps left in plaintiff's body were not discovered until one-half of the forceps was discharged from the bowels thirty months later).

[4] Acton v. Morrison, 68 Ariz. 139, 155 P.2d 782 (1945); Bowman v. McPheeters, 77 Cal. App. 2d 795, 176 P.2d 745 (3d Dist. 1947); Proctor v. Schomberg, 63 So. 2d 68 (Fla. 1953); Draws v. Levin, 332 Mich. 447, 52 N.W.2d 180 (1952); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958).

[5] Pickett v. Aglinsky, 110 F.2d 628 (4th Cir. 1940); Draws v. Levin, *supra* note 4; Bernath v. LeFever, 325 Pa. 43, 189 Atl. 342 (1937).

[6] Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956); Hinkle v. Hargens, 76 S.D. 520, 81 N.W.2d 888 (1957).

[7] Hudson v. Moore, 239 Ala. 180, 194 So. 147 (1940); Maloney v. Brackett, 275 Mass. 479, 176 N.E. 604 (1931); Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942).

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

[9] Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941).

[10] Myers v. Stevenson, 125 Cal. App. 2d 399, 270 P.2d 885 (1st Dist. 1954); Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); Williams v. Elias, *supra* note 9.

his injury before treatment ends, some cases hold the discovery controlling, and the statute runs from that time.[11]

The third major attempt to relieve the aggrieved patient is announced in the discovery rule. Probably the first case to apply this rule is *Huysman v. Kirsch*,[12] a California decision. There the court held that the statute started to run when the plaintiff discovered, or reasonably should have discovered the injury. In applying this rule, the courts express the view that a plaintiff can realistically have no cause of action if he does not know that a wrong has been committed against him, and therefore, it is only fair to allow him a limited period of time to bring an action after he is aware of his rights.[13] There is a necessity of balancing the legislative policy of repose, expressed in the statute of limitations, with the judicial policy of fairness to the injured party. In the limited area of malpractice suits the balance is in favor of the injured party.[14] The discovery rule has been applied to all malpractice actions in some states,[15] and restricted in others to cases in which a foreign object is left in the patient's body.[16]

III

In its opinion in the *Spath* case, the Nebraska court accepted the reasoning which supports the discovery rule.[17]

> The statute of limitations is a statute of repose; it prevents recovery on stale demands. In re Estate of Anderson, 148 Neb. 436, 27 N.W.2d 632. The statute is enacted upon the presumption that one having a well founded claim will not delay enforcing it beyond a reasonable time if he has the right to proceed. The basis of a presumption is gone whenever the ability to resort to the courts is taken away. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N.W.2d 545. The mischief which statutes of limitations are in-

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[11] Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (2d Dist. 1942); Tortorello v. Reinfeld, 6 N.J. 58, 77 A.2d 240 (1950); McFarland v. Connally, 252 S.W.2d 486 (Tex. Civ. App. 1952).

[12] 6 Cal. 2d 302, 57 P.2d 908 (1936); *cf.* Hahn v. Claybrook, 130 Md. 179, 100 Atl. 83 (1917).

[13] Huysman v. Kirsch, *supra* note 12; Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Seitz v. Jones, 370 P.2d 300 (Okla. 1961).

[14] *Supra* note 13.

[15] Agnew v. Larson, 82 Cal. App. 2d 176, 185 P.2d 851 (2d Dist. 1947); Mills v. Doty, 116 So. 2d 710 (La. App. 1959).

[16] Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Ayres v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Seitz v. Jones, 370 P.2d 300 (Okla. 1961).

[17] Spath v. Morrow, 174 Neb. 38, 41, 115 N.W.2d 581, 583 (1962).

> tended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which it is *practicable* to assert. 34 Am. Jur., Limitation of Actions, s 10, p. 20. If an injured party is wholly unaware of the nature of his injury or the cause of it, it is difficult to see how he may be charged with a lack of diligence or sleeping on his rights. (Emphasis added).

In Nebraska, the statute of limitations prohibits bringing a malpractice suit two years after the cause of action accrues.[18] A cause of action generally arises at the time of injury.[19] But in *Williams* v. *Elias*,[20] where the defendant had incorrectly diagnosed the plaintiff's back injury and treated him according to that diagnosis over a period of time, the court held that "the two-year statute of limitation in a malpractice case does not commence to run until the treatment ends."[21]

If the *Williams* rule had been applied to the facts of the *Spath* case, the cause of action would have accrued at the end of defendant's treatment which was one week after the operation. Although the defendants strenuously argued the end of treatment rule in the principal case, the court refused to apply it because it would bar the plaintiff before she knew of the defendants' negligence. "We do not believe that this is what the Legislature intended." [22]

The adoption of the discovery rule in Nebraska will increase the number of malpractice claims for which the statute can be tolled. This is especially true with respect to the negligent acts of surgeons and hospital specialists. Since the treatment they give a patient is of short duration, sometimes followed by a few post-operative treatments, the end of treatment rule tolls the statute for only a few weeks or months. Conversely, the discovery rule usually will toll the statute for a longer period, and thus give the patient a more practicable remedy.

The opinion in the *Spath* case does not make clear whether the discovery rule has superseded the end of treatment rule announced in *Williams*, or whether the two rules are to exist concurrently. The *Spath* opinion makes only two references to *Williams*. First, it cites the decision as embodying a previously existing exception to the general rule of applying the statute of limitations.[23] Second, it recognizes the relationship of mutual confidence

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[18] NEB. REV. STAT. §25-208 (Reissue 1956).

[19] Dewey v. Dewey, 163 Neb. 296, 79 N.W.2d 578 (1956).

[20] 140 Neb. 656, 1 N.W.2d 121 (1941).

[21] *Id.* at 663, 1 N.W.2d at 124.

[22] Spath v. Morrow, 174 Neb. 38, 41, 155 N.W.2d 581, 583 (1962).

[23] *Ibid.*

existing between doctor and patient which was discussed in *Williams*.[24]

The court discussed in broad terms the necessity of the plaintiff's knowledge of his injury before there would be a cause of action. This requirement, if applied as broadly in later cases, will encompass all cases of continuing treatment in which the plaintiff is unaware of his injury. Furthermore, it would seem to follow the reasoning in other jurisdictions that where the patient discovers the injury before the end of treatment the discovery is the controlling factor, and the statute runs from that time.[25] If the court's reasoning is applied in this manner, all situations arising under the end of treatment rule would be included in the discovery rule, rendering the former superfluous.

Despite the breadth of the Nebraska court's language pertaining to knowledge, the authority upon which they rely, *Fernandi v. Strully*,[26] applied the discovery rule only to cases involving foreign objects left in the patient's body. Referring to *Fernandi*, the Nebraska court stated, "The court observed that foreign object malpractice cases present special considerations which set them apart from other cases." [27] If the holding of the *Spath* case is applied only to foreign object cases, the end of treatment rule will still have validity in such cases as faulty diagnosis and administration of drugs. This distinction has been considered in California and abolished.[28] Even if the distinction were likewise abolished in Nebraska, however, the fact of continuing treatment could be of some importance. In California, it was held that the plaintiff need not be as diligent in discovering the injury while continuing under the doctor's care.[29]

It can be argued, at least theoretically, that the Nebraska court applied a restricted authority that was sufficient to decide the facts of the case before it, but intended the *ratio decidendi* to be much broader. If, for example, the court is presented with a factual situation falling between the end of treatment rule and the *foreign object* discovery rule, it appears that the court will have to abandon the discovery rule restriction if it is to give the plaintiff

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[24] Spath v. Morrow, 174 Neb. 38, 43, 115 N.W.2d 581, 584 (1962) referring to Williams v. Elias, 140 Neb. 656, 663, 1 N.W.2d 124 (1941).

[25] See also text at note 11 *supra*.

[26] 35 N.J. 434, 173 A.2d 277 (1961).

[27] Spath v. Morrow, 174 Neb. 38, 42, 115 N.W.2d 581, 584 (1962).

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

[29] Stafford v. Shultz, 42 Cal. 2d 767, 270 P.2d 1 (1954).

practicable relief. *Quinton v. United States*,[30] where the plaintiff was injured by the transfusion of the wrong blood type, presents such a factual situation. In that case, the end of treatment rule would not afford any appreciable time to bring the action since the defendants administered only one treatment. The introduction of blood into the body would not be considered a foreign object in ordinary usage, so a narrow discovery rule would be inapplicable. The serious regard for fairness to the plaintiff expressed in *Spath* indicates that the court would allow an action to be brought on such facts, if done within the statutory time after discovery of the injury. These considerations indicate that as a practical matter the end of treatment rule has been abolished in Nebraska.

In discussing the *ratio decidendi*, it should not be concluded that the court will toll the statute until discovery in cases other than those involving malpractice. The court is confronted not only with stare decisis, but also the legislative policy underlying the statute of limitations. The court would not apply the discovery rule in a suit involving negligence while driving an automobile, even though the injury was not discovered for a period of time after the accident which exceeded the statute of limitations.

The possibility of extension of the discovery doctrine was discussed by the New Jersey Supreme Court in *Fernandi v. Strully*.[31] The court said, "In the first place, this is a malpractice case. The decision of the court in this matter can and should be limited to such cases." [32] The court continued, "Justice cries out that she fairly be afforded a day in court and it appears evident to us that this may be done, at least in this highly confined type of case, without undue impairment of the two-year limitation or the considerations of repose which underlie it." [33] The Nebraska court in its opinion referred to "the mutual confidence which is essential in the relation between physician and patient; that the physician should have a reasonable opportunity to correct the mistakes incident to even skilled surgery; and that the physician should not be harassed by premature litigation instituted in order to save the rights of the patient." [34] The peculiar relationship existing between doctor and patient is a distinguishing feature which allows the courts to restrict the doctrine to malpractice cases.

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[30] 203 F. Supp. 332 (N.D. Tex. 1961).

[31] 35 N.J. 434, 173 A.2d 277 (1961).

[32] *Id.* at 450, 173 A.2d at 284.

[33] *Id.* at 451, 173 A.2d at 286.

[34] Spath v. Morrow, 174 Neb. 38, 43, 115 N.W.2d 581, 584 (1962).

IV

Adoption of the discovery rule presents the question: Under what facts will it be concluded that the patient discovered, or in the exercise of reasonable diligence should have discovered his injury? For the most part this question is one for the jury. The Nebraska court, however, ruled on this subject as a matter of law when the principal case was reconsidered on motion for rehearing. The appellant argued that the appellee in her own petition showed that she did not use reasonable diligence. The petition admitted that the appellee suffered pain from the time of the first operation until the needle was removed ten years later, and that she "repeatedly consulted her physician . . . and disclosed to him her symptoms of pricking, pain, and discomfort."[35] On these facts, the appellants urged that reasonable diligence would have disclosed the injury and started the statute running shortly after she left the care of the defendants. Without opinion, the court denied the motion for rehearing. The case was reversed and remanded, leaving for the jury the question of reasonable diligence, but apparently indicating, as a matter of law, that mere pain does not require discovery by the patient.

The California courts seem to have most fully dealt with the subject of sufficient discovery. In *Stafford v. Shultz*,[36] the court held that the plaintiff was not put on notice of negligence when he was informed by his doctor that his leg would have to be amputated, although the doctor had treated the leg previously with supposedly sufficient methods. In the same case, a second cause of action was barred because no facts had been pleaded pertaining to the lack of plaintiff's knowledge of his injury. *Faith v. Erhart*[37] held that the plaintiff did not, as a matter of law, act unreasonably when she and a consulting physician determined it was unnecessary to take X-rays of teeth which the defendant had several years earlier assured her needed no more care. In the case of a small child, it was necessary to plead lack of knowledge on the part of the parents.[38] A pleading which contained no allegation as to the manner in which the plaintiff discovered the negligence was defective, although an amended petition was allowed.[39] Where the

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[35] Supplement to Motion of Appellees for Rehearing, p. 2, Spath v. Morrow, *supra* note 34.

[36] 42 Cal. 2d 767, 270 P.2d 1 (1954).

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

[38] Myers v. Stevenson, 125 Cal. App. 2d 399, 270 P.2d 885 (1st Dist. 1954).

[39] Wohlgemuth v. Meyer, 139 Cal. App. 2d 326, 293 P.2d 816 (1st Dist. 1956).

physician-patient relationship continued and the patient relied on the skill, judgment, and advice of the physician, actual discovery was necessary to start the statute running.[40] In *Hemingway v. Waxler*,[41] the plaintiff received a correct diagnosis of a leg injury from a second doctor. The knowledge of the correct diagnosis was held to place a duty on the plaintiff to discover the effects of the erroneous diagnosis.

V

There are many questions left unanswered by the adoption of the discovery rule in Nebraska, but it is clear that the court intends to enlarge the opportunities for plaintiffs to obtain relief in malpractice cases. Whether the court intends to have the discovery rule supersede the end of treatment rule, or whether it intends to have them exist concurrently, will be clarified in later decisions. The concern shown by the court for the fair treatment of the injured patient makes it probable that the court will abandon any restriction of the discovery rule and apply it to all malpractice claims.

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[40] Hundley v. St. Francis Hosp., 161 Cal. App. 2d 800, 327 P.2d 131 (1st Dist. 1958).

[41] 128 Cal. App. 2d 68, 274 P.2d 699 (1st Dist. 1954).