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PHYSICIANS' AND SURGEONS' MALPRACTICE—STATUTE OF LIMITATIONS. *Gillette* v. *Tucker*, 65 N. E. 865 (Supreme Court of Ohio, November 18, 1902).—The facts of the case were as follows: On November 1, 1897, the plaintiff, being sick, went with her husband to the defendant, a regular practising physician and surgeon, for treatment. After making an examination the defendant pronounced the malady appendicitis, and decided that an operation was necessary. He agreed to perform the operation and to give "the subsequent necessary treatment" for the sum of twenty-five dollars. On November 3, 1897, the defendant performed the operation for appendicitis, but, finding that this was not the trouble, sewed up the incision with kangaroo tendons. On closing the incision, as it afterwards

transpired, he neglected to remove a small cheese-cloth sponge which had been placed in the opening to absorb the blood. The foreign substance left in the wound soon caused a flow of pus to start and gave the plaintiff great pain. It seems that she consulted the defendant frequently about the matter, but he on each occasion informed her that it would be all right in time, and that the discharge was caused by the dissolving of the kangaroo tendons which had been used in sewing up the wound. From the evidence it appeared that the defendant had advised the woman and treated her as his patient up to some time in the first of November, 1898, when, upon being reproached by her on not giving the proper care and treatment, defendant ordered plaintiff from his office and declared he would have nothing further to do with the case.

During all this time both plaintiff and defendant were ignorant of the real source of the trouble, and the presence of the sponge in the wound was not known till another surgeon operated and removed it in April, 1899. After its removal the wound immediately healed. On June 27, 1899, the plaintiff brought action to recover for damage caused by defendant's malpractice. Section 4983, Revised Statutes of Ohio, provides *inter alia* that an action for malpractice must be brought within one year after the cause of action accrues. Defendant pleaded the statute as a bar to the action. The lower court found for the plaintiff, and on appeal the Supreme Court by an evenly divided vote sustained the decision of the court below, holding that the statute did not begin to run at the time of the negligent operation, but only in November, 1898, when the relation of physician and patient was severed.

Although not so arranged by the court, we will, for the sake of convenience, consider the arguments with which they uphold this decision under three general heads.

## I.

The first proposition which we wish to consider is "that the statute will run from the date of the *injuries* rather than from the date of an event resulting in the injuries."

While the law does not seem exactly settled on this point, and there are many apparently irreconcilable decisions on the question, we submit that the greater number of well-considered decisions are contrary to the above proposition when stated broadly.

Wood on Limitations, Section 177, is as follows: "In the case of torts arising *quasi e contractu,* the statute usually commences to run from the date of the tort, not from the occurrence of actual damage. And ignorance of the facts on the part of the plaintiff will make no exception to the rule, though he discovers the injury

too late to have a remedy. This will be the case too even where the defendant has betrayed the plaintiff into permitting time to elapse in fruitless inquiries and negotiations." (For cases summarized on this particular point see 34 AM. LAW REG. (N. S.), 461.)

The books seem to make an exception to this rule, however, in the case of wrongs of a public character, holding that the right of action only accrues to the individual when he suffers some special damage, hence the statute will not begin to run until the occurrence of the consequential damage.

Mr. Wood goes on to say (Section 178): "But it is otherwise where there is a *private* relation between the parties where the wrongdoing of one at once creates a right of action in the other; and it may be stated as an invariable rule that when the injury, however slight, is complete at the time of the act, the statutory period then commences, but when the act is not legally injurious until certain consequences occur, the time commences to run from the consequential damage, whether the party injured is ignorant of the circumstances from which the injury results or not." Exactly what is meant by "legally injurious" does not seem clear, but we may infer the meaning to be that whenever the act is such that a cause of action arises, and the injured party could at that moment recover at least nominal damages, then the statute begins to run. A consideration of the cases on this point practically establishes this rule as correct.

In *Roberts* v. *Read,* 16 East, 215 (1812), which was an action on the case for injury caused to plaintiff's wall by removal of defendant's ground adjoining, the court said: "It is sufficient that the action was brought within three months after the wall fell, for that is the gravamen; the consequential damage is the cause of action in this case. If this had been trespass, the action must have been brought within three months after the act of trespass complained of." Here, in the distinction between the old actions of trespass and trespass on the case, we see the distinction brought out in the rule first quoted, exemplified. The question is, does the first negligent act in itself give rise to a cause of action? See also *Gillon* v. *Boddington,* 1 Car. and P. 541 (1824), and *Nicklin* v. *Williams,* 10 Ex. 259.

In *Bank of Hartford County* v. *Waterman,* 26 Conn. 324, which was an action against a sheriff for failure to serve a mesne process, the court held that no right of action accrued until some damage had been suffered, since the damage was the gist of the action. The court seemed to regard the negligence of the sheriff, however, as the breach of a *public* duty, and so coming under the exception mentioned above, for it went on to say that "a distinction is to be observed between breaches of public duties and breaches of duties to individuals. . . . In the latter case the breach of such an obligation is a direct and immediate wrong to the other, so that whether any evil

consequences follow, or whatever consequences follow, the cause of action dates from the wrong, which will be treated as the cause of action whether the plaintiff sues in tort or contract. For instance, if an attorney neglects his client's business."

*Owen* v. *Western Saving Fund,* 9 W. N. C. 465, holds that so far as the running of the statute is concerned there is no distinction between torts arising from contract and those which arise from official misfeasance.

In *Moore* v. *Juvenal,* 92 Pa. 484 (1880), which was a suit against an attorney for negligently failing to bring a suit on a note until after action was barred, it was held that the statute began to run when it first became defendant's duty to sue on the note; that the breach of duty and not the consequential damage was the cause of action. Nor was the fact that relation of attorney and client continued after the negligent act had occurred any bar to the statute. *Rhime's Administrators* v. *Evans,* 66 Pa. 192 (1870), and *Campbell's Administrators* v. *Boggs,* 48 Pa. 524 (1865), are to the same effect.

*Coady* v. *Reins,* 1 Montana, 424, was an action against a physician for damages resulting from his negligence in setting a broken arm. The court said *inter alia:* "The gist of the action in this instance is the negligence and unskilfulness, or breach of duty as laid in the complaint, and not the injury or damage consequent thereon. . . . If such actions were commenced immediately upon a person becoming chargeable in such case, it is probable that no more than nominal damages could be recovered. . . . But the statute in cases of this nature begins to run, regardless of the form of action, whether case or assumpsit, from the time of the negligence or breach of duty." See also *Mitchell* v. *Buffington,* 10 W. N. C. 361, and *Commissioners* v. *Pearson,* 120 Ind. 426.

Without citing any more cases, it is again submitted that as a general proposition the cause of action arises and the statute begins to run at the doing of the negligent act, and not at the time of the consequential damage. As to those cases apparently contrary to this view, we believe that Mr. Baron Parke properly disposes of them in *Nicklin* v. *Williams* (*supra*) when he says: "But on examining those cases, they do not appear to be for injuries to *rights,* but solely for consequential damages *where the original act itself* was no wrong, and only became so by reason of those damages, and therefore they do not apply."

Such being our conclusion under the first proposition, it now becomes necessary to consider whether there is anything in the peculiar relation of physician and patient which will take this case out of the operation of the general rule.

II.

In the opinion of the court repeated reference is made to the rule as laid down in *Craig* v. *Chambers*, 17 Ohio St. 254. The syllabus of that case reads as follows: "The implied liability of a surgeon retained to treat a case professionally extends no further, in the absence of a special agreement, *than that he will* INDEMNIFY *his patient against any injurious* CONSEQUENCES resulting from his want of the proper degree of skill, care, or diligence in the execution of his employment. And in an action against the surgeon for malpractice the plaintiff, if he shows no injury resulting from negligence or want of due skill in the defendant, will not be entitled to nominal damages." The court in the principal case then seems to take this view—if the physician's contract is one of indemnity for injury caused, there can be no breach of such contract until there be an actual injury; hence no cause of action will arise till then, and the statute will only begin to run on happening of the consequential damage." It then becomes a question as to whether *Craig* v. *Chambers* lays down the correct rule as to the nature of the physician's implied contract.

In *Rich* v. *Pierpont*, 3 F. and F. 35 (1862), where the defendant physician admitted that he had not used due care, the court said: "It was not enough to make the defendant liable that some medical men of far greater experience or ability might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to *lead to a bad result.*"

In *McQuay* v. *Eastwood*, 12 Ont. 402 (1886), it was said: "To entitle the plaintiffs to succeed they must have made out, first, negligence or want of skill on the part of the defendant in his treatment of the female plaintiff; and, secondly, that she was injured by such negligence or want of skill. If the evidence fails to make out both these essentials to be established by the plaintiffs, the defendant is entitled to have his motion and order nisi made absolute." In this case the defendant was admittedly negligent, but there was some doubt as to whether the injury in question proceeded from such negligence, and the verdict for the defendant was set aside. See also *James* v. *Crockett*, 34 N. Bruns. 540 (1898).

In *Ewing* v. *Goode*, 78 Fed. Rep. 442 (1897), Circuit Judge Taft said: "It is well settled that in such an employment the implied agreement of the physician or surgeon is that no injurious consequences shall result from want of proper skill, care, or diligence on his part in the execution of his employment. If there is no injury caused by lack of skill or care,

then there is no breach of the physician's obligation and there can be no recovery. . . . Mere lack of skill, or negligence not causing injury, gives no right of action and no right to recover even nominal damages. . . . Before the plaintiff can recover she must show by affirmative evidence, first, that defendant was unskilful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury."

*Hesse* v. *Knipple*, 1 Mich. N. P. 109 (1870): "It is a self-evident proposition that negligence which does no injury cannot be the basis of an action nor detract from otherwise meritorious services."

All the cases just referred to were actions against a physician for malpractice, and in them all the *injury* to the plaintiff seems to be regarded as essential to give rise to a cause of action. It might be suggested that in several of the cases the courts seem to regard the action as one of pure tort and overlook the contractual element, which latter being eliminated of course makes the matter of easy solution. Some of the cases intimate, however, and two state flatly, that the *contract* of the physician, which the law implies, is one of *indemnity* merely, and a breach can therefore occur only where there are injurious consequences resulting from the negligence. And certainly in a contract of indemnity the statute only begins to run when the plaintiff is actually damnified. *Collinge* v. *Heywood*, 1 P. and D. 502.

But accepting the above view of the nature of physicians' contract, the question then arises in this case, at what exact point in the relation of physician and patient such injury was present as to constitute a complete cause of action. Shall we say that upon the first pain resulting from the presence of the foreign substance in the wound, or at the first discharge of pus, there were sufficient injurious consequences to make a complete cause of action, and that the statute began to run from that time, to bar the action—or, as the court contends, was the continuous suffering of the plaintiff, and the continuing diseased condition of the wound, a constantly arising cause of action, the last one coming into being immediately prior to the severance of the relation in November of 1898?

III.

A part of the opinion of the court reads as follows: "We have seen that it was a continuous obligation, and recognized by the law, and it was alive and binding so long as the relation of physician and patient subsisted. If so, it was the ever-present duty of the surgeon to remove the sponge from the

or negligence had left a foreign substance within the walls of the incision at the operation, it behooved him to afford timely relief, and at least vie with nature in an endeavor to expel the source of the injury and suffering. Neglect of this duty, imposed by a continuous obligation, was a continuous and daily breach of the same, and, as the facts show, caused continuous, increasing daily, and uninterrupted injury. Should she have brought her action immediately on sewing up of the walls inclosing the sponge? If she had done so, there were as yet no injurious consequences, and but nominal, if any, damages could have been recovered." The argument seems to be briefly this—that there is an obligation on the physician, not only to perform the operation without negligence, but to use due care and skill in treatment of the patient thereafter; a breach of this obligation for subsequent care occurred every day that the sponge was allowed to remain in plaintiff's body. (On this point of duty of continued care see *Akridge* v. *Moble,* 41 S. E. 78; *Ballou* v. *Prescott,* 64 Maine, 305; and *Williams* v. *Gilman,* 71 Maine, 21.)

In *Perry County, etc.,* v. *R. R. Co.,* 43 Ohio St. 451, which was an action against a railroad company for injury to a county bridge, the court said: "The plea of the Statute of Limitations which the demurrer interposed to the petition is untenable. From the time the injuries complained of were committed, and at least to the time the commissioners made full restoration, the duty of the defendant to restore the bridge to its former condition of usefulness and safety was a *continuing and subsisting obligation,* and each day's failure to make full restoration was a fresh breach of such obligation, and lapse of time cannot avail to interpose a bar to recovery." Here the same theory of a continuing obligation and a constantly arising cause of action is again advanced. It is to be noted, however, that the cause of action in this case was not due to a breach of contract, but was a plain tort for which there was provided a statutory remedy.

The writer has been able to find very few cases of this nature in which this doctrine of continuing breach of contract was advanced, and none directly in point. Perhaps the leading case, however, in which the point was raised and considered is that of *Wilcox* v. *Plummer,* 4 Peters, 172, and this case we should like to consider rather closely. The action was against an attorney for negligence in failing to bring action against the endorser of a promissory note until the claim had been barred. Defence was the Statute of Limitations. Mr. Wirt, counsel for the plaintiff, advanced the argument we are considering, *i. e.,* that the attorney's negligence was a continuing breach of his obligation, and that every year in which he failed to bring his action on the note there was a fresh repetition of the breach, and a new cause of action arose. Mr. Justice Story said: "This principle applies only in cases of torts, and it has been expressly decided not to apply to cases of assumpsit." Mr. Webster, in his argu-

ment for the defendant, replied: "It seems to have been contended for the plaintiff in the court below, on the first count, that Mr. Plummer was bound to sue the endorser; that this was a continuing obligation; and that every day furnished a new fault and a new injury till the claim on which he should have sued was extinguished. If this mode of argument be plausible, it is no more. The same reason would apply, and with equal force, to every case of implied promise. If one borrows money, it is his duty to pay; and he is in default every day and commits a new injury every day until he does pay. Yet the statute runs in his favor from the day he first ought to pay." It is submitted that this exposes the fallacy of the "continuing breach" argument where the action is *ex contractu*. In his opinion in this case Mr. Justice Johnson says: "When the attorney was chargeable with negligence or unskilfulness, his contract was violated, and the action might have been sustained immediately. Perhaps in that event no more than nominal damages may be proved and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear that the damage is not the cause of action."

This case, it is seen, and a great number which follow it practically deny the existence of any such rule as that contended for above.

But although this ground seems hardly tenable, it is submitted that the doctrine which would require a patient who is following the directions of a physician, and relying on the statements and on the skill of that physician, to bring an action each year, or within whatever may be the statutory period, in order to make sure of a remedy for some grossly negligent act on the part of the physician, the existence of which is unknown to the patient at the time, from his lack of technical knowledge, or perhaps from the great degree of trust reposed in the physician, is not only unjust, but is unreasonable. In cases like this, where the employee is supposed to be possessed of a peculiar knowledge which the ordinary person does not have, how is the patient to know when an act is negligent or proper? Perhaps that which appears to a layman as careless and unskilful is in the eyes of the medical profession the exact opposite, and that which to the layman seems perfectly proper may to the physician be grossly improper. Must one who is taking continued treatment from a physician bring an action on the occurrence of every suspicious circumstance, or on every change of treatment, lest by the time any injurious consequences arise the statutory period, beginning with the suspicious occurrence, shall have elapsed?

It is suggested that cases of this description might well come under the rule as stated in Angell on Limitations, Section 120: "Where there is an undertaking which requires a continuation of

services the statute does not commence running until they can be completed. Thus it has been held that the statute does not commence running against the claim of an attorney-at-law for professional services so long as the debt which he seeks to recover for his client remains unpaid. . . . The contract of an attorney to carry on or defend a suit is an entire contract to manage a suit to its close, and therefore the time runs only from the termination of the proceedings." It is true all the cases cited in support of this proposition are those in which the professional man or other employee is suing for the sum due him. *Zeigler* v. *Hunt,* 1 McCord (S. C.), 577; *Waller* v. *Goodrich,* 16 Ill. 341; *Mygott* v. *Wilcox,* 45 N. Y. 306; *Phelps* v. *Patterson,* 25 Ark. 185.

But although the author evidently did not intend the section referred to to cover cases of this class, why does the spirit of the rule not properly apply? Cannot justice be more nearly done when the contract of a physician is regarded as an entire contract to care for the case until by some means the relation is severed, and regard the statute as running from the close of the relation? Thus the physician may be allowed to work for ultimate results, and not be liable to action for small lapses in care which may be well remedied before the case is given up, and also gives the patient an opportunity to judge of the kind of treatment he has received, whether proper or negligent, by the presence or absence of injurious results.

*J. B. C.*