MEDICAL JURISPRUDENCE†

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Statute of Limitations in Malpractice Actions: Time Within Which Suit Must Be Brought to Recover for the Negligent Leaving of Foreign Matter in a Patient's Body

It is a general rule that a court action by a patient against a physician and surgeon for injuries sustained by reason of the negligent or unskillful treatment administered by the physician is an action sounding in tort and is not based upon the contractual relationship existing between physician and patient. This being so, ordinarily, as in the case of other torts, an action for malpractice is barred under the provisions of Section 340 of the Code of Civil Procedure within the relatively short period expiring one year after the date of the injury. There are, however, recognized exceptions to this rule which, under certain circumstances, extend the time within which an action may be commenced. The courts have been particularly liberal in allowing a patient to prosecute a suit more than one year after the inception of the alleged injury in cases where the physician or surgeon has negligently left some foreign matter, such as a surgical sponge or skin clip, in the patient's body. (See Medical Jurisprudence articles in CALIFORNIA AND WESTERN MEDICINE, March, 1937, and February, 1939, on this same subject.)

It has been held where some such foreign object is allowed to remain within the body after an operation, that the failure to remove is the negligent act which warrants a malpractice action, that the obligation to remove is a continuing obligation and that the negligence does not terminate until the article is in fact removed. Each days' failure to remove gives rise to a new cause of action. On this theory, it is then determined that the statute of limitations does not begin to run from the date of the operation and an action for malpractice is not barred at the expiration of one year from the date of the operation. Again, in the case of *Trombley v. Kolts,* 29 Cal. App. (2d) 699, the court further extended the time within which a patient may sue in such cases by holding that where the relationship of physician and patient continued after the discovery of a skin clip left within the patient's body and where the physician advised the patient that no harm would result from allowing it to remain, the statute of limitations had not run and an action by the patient was not barred even though commenced more than one year after the discovery of the skin clip.

A recent decision of the District Court of Appeal, *Pellett v. Sonotone Corporation,* 55 A.C.A. 196, is another example of the court's tendency in this type of case to permit an action more than one year after the initial negligent act or omission occurs. The *Pellett* case involved an action against the defendant corporation and its agent, a dentist, who had made a plaster impression of the plaintiff's ear in order to properly fit plaintiff with a hearing device which the defendant corporation sold. In March, 1939, the dentist poured plaster into the plaintiff's ear allowing it to remain for a few minutes and then removing the resulting plaster impression. On his way home from the dentist's office, the plaintiff complained to another agent of the corporation that his ear hurt, but was informed that such pain was to be expected. Again, in October, 1939, the plaintiff complained to this same agent, but was told that the pain could be expected until he accustomed himself to wearing the hearing device. In February, 1940, the plaintiff consulted a physician in regard to his ear and was advised that there was a hard foreign substance in his ear which upon removal was ascertained to be bits of plaster and cotton which the defendants had negligently failed to remove at the time the plaster impression had been taken. In May, 1940 (one year and two months after the occurrence of the injury), the plaintiff commenced an action against the Sonotone Corporation and its agent, the dentist, who had taken the impression. The court held that this delay was no bar to the action and that it could be successfully prosecuted at such time, stating the rule to be that in an action to recover damages for negligently failing to remove from a human body a foreign substance which defendant had placed there, the *statute of limitations commenced to run from the date the plaintiff discovered, or from the use of reasonable diligence should have discovered, that the foreign substance had not been removed,* and the statute of limitations does not commence to run from the date the substance was placed in the human body. Although this action did not involve negligence on the part of a physician or a surgeon, the court applied the same rules as in the decisions above discussed.

Another fairly recent case, *Ehlen v. Burrows,* 51 Cal. App. (2d) 141, interpreted this extension of the statute of limitations as being applicable not only to a situation where some foreign matter is allowed to remain in the body but also to a case where a surgeon left broken roots in the jaw of a patient after removing several teeth. The court held that where it did not appear that the patient discovered the roots or should have discovered them more than one year prior to the commencement of the suit, her action to recover damages for the injuries sustained was not barred. On its facts, this case seems to extend the one year statute of limitations in all cases where a surgeon fails to remove some part of the human body which he has undertaken to remove by the operation performed. If this is true, then the one year statute will not commence to run in such cases until the patient discovers, or in the exercise of reasonable diligence should have discovered, the negligent omission of the surgeon.

† Editor's Note.—This department of CALIFORNIA AND WESTERN MEDICINE, presenting copy submitted by Hartley F. Peart, Esq., will contain excerpts from the syllabi of recent decisions and analyses of legal points and procedures of interest to the profession.