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Article 18

Professional Malpractice - Statute of Limitations - Cause of Action Accrues in Professional Malpractice Tort Claims from the Date the Alleged Injury is Discoverd - Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill.2d 129, 334 N.E.2d 160 (1975)

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Acting on the jurisdiction granted in *Janson, Fry* expands the court's new role in expediting environmental litigation by enforcing compliance with its orders through the use of civil contempt without a showing of intent. As a result, where parties agree to install pollution control equipment, and, fail to do so, the court can issue a contempt order solely on the basis that the installation was not made.[44] The court no longer needs to establish that IEPA standards were actually violated, or that the defendant intentionally violated the order. This standard of proof enables the court to expeditiously grant relief where the parties have agreed to the order, and allows individuals yet another forum to enforce compliance with pollution standards.

Roger Smith

Professional Malpractice—Statute of Limitations—CAUSE OF ACTION ACCRUES IN PROFESSIONAL MALPRACTICE TORT CLAIMS FROM THE DATE THE ALLEGED INJURY IS DISCOVERED—*Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill.2d 129, 334 N.E.2d 160 (1975).

The time when a cause of action accrues for purposes of the statute of limitations for professional malpractice tort claims was significantly extended by the Illinois Supreme Court's decision in *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*[1] Until this case a claimant had to bring his action within one year of the date the tort was committed. The court held that the broader discovery rule,[2] generally used only in medical malpractice cases, should be applied instead. Thus, the cause of action would accrue on the date the claimant discovered the alleged injury and the statute of limitations would begin to run on the discovery date. This decision maintains Illinois in a leadership role, along with California, in the development of a trend extending the discovery rule from the strict confines of medical malpractice cases

permits the attorney general to bring an action in the circuit court to fight pollution regardless of any administrative agency.

44. The court held in *Fry* that failure to hold a hearing on the issue of contempt was not a denial of due process since the defendant had an opportunity to be heard on the merits of the decree in a hearing on another motion. 59 Ill.2d at 139, 319 N.E.2d at 477.

1. 61 Ill.2d 129, 334 N.E.2d 160 (1975).

2. The discovery rule holds that a cause of action accrues, and the statute of limitations begins to run, on the date the claimant discovered, or with reasonable diligence should have discovered, the alleged injury. Rozny v. Marnul, 43 Ill.2d 54, 250 N.E.2d 656 (1969).

to other important areas of professional malpractice. This casenote will examine the court's reasons for extending the discovery rule and the implications of that decision.

Dun & Bradstreet, Inc., a nationwide credit reporting agency, conducted an investigation of Tom Olesker's Exciting World of Fashion, Inc., a clothing retailer. A credit report was published on January 22, 1969 and was subsequently distributed. It is the policy of Dun & Bradstreet to hold credit reports in strict confidence and to distribute them only to subscribers who, by contract, agree not to reveal any information contained in the report.[3] A subscriber breached his promise of confidentiality and thirteen months after publication Olesker discovered that the contents of the report were false and not representative of his business.[4] Relating this to several refusals of credit, Olesker determined that the credit report was substantially impairing his business, and instituted a defamation action.[5] The trial court dismissed the libel and negligence complaint on the basis that the action was barred by the one year statute of limitations.[6] On appeal, Olesker failed to persuade the appellate court to adopt the position that the statute of limitations should begin to run at the time he discovered the libel or, with reasonable diligence, should have discovered it, rather than at the time of publication. The court held that adoption of the discovery rule was a matter for the legislature, and dismissed the action.[7]

The Illinois Supreme Court reversed[8] and determined it would follow

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3. By contractual stipulation, each subscriber agrees that [all] information whether printed, written or oral, submitted in answer to regular or special inquiry or voluntarily furnished to the subscriber by Dun & Bradstreet, Inc., is for the exclusive use of the subscriber. *Such information shall be held in strict confidence and shall never be revealed or made accessible in any manner whatever to the persons reported upon or to any others.*

Grove v. Dun & Bradstreet, Inc., 438 F.2d 433, 437 (3d Cir. 1971) (emphasis added).

4. Plaintiff charged that the report grossly underestimated the value of his inventory, equipment, gross sales and number of employees. Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 16 Ill.App.3d 709, 711, 306 N.E.2d 549, 551 (1st Dist. 1973).

5. The complaint contained three counts: libel, negligence and tortious interference with economic advantage. The court's discussion centers, however, on the libel count. 61 Ill.2d 129, 130-31, 334 N.E.2d 160, 161 (1975).

6. ILL. REV. STAT. ch. 83, § 14 (1973).

7. Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 16 Ill. App.3d 709, 713, 306 N.E.2d 549, 553 (1st Dist. 1973). The court affirmed dismissal of the libel and negligence counts but reinstated the action for interference with economic advantage, holding that this count was subject to the five year statute of limitations provision in ILL. REV. STAT. ch. 83, § 16 (1973).

8. The supreme court reversed only as to dismissal of the first two counts, thus remanding the case on all three counts. 61 Ill.2d 129, 138, 334 N.E.2d 160, 165 (1975).

the view it stated previously in the medical malpractice case of *Lipsey v. Michael Reese Hospital.*[9] In *Lipsey*, the court pointed out that there was no legislative determination prohibiting adoption of the discovery rule.[10] Since the legislature had not determined the time at which a cause of action accrues, the court made this determination.[11] Ultimately, by interpreting the meaning of the word "accrued," the court in *Lipsey* was able to apply the discovery rule without contradicting the statute of limitations or the legislative intent.

The court had two conflicting lines of precedent to consider. First, there was an established rule in libel cases holding that a cause of action accrues from the date of publication of the libelous matter.[12] On the other hand, there were several cases in areas of professional malpractice holding that a cause of action accrues when the claimant learns of his injury or should have reasonably learned of it.[13] In deciding which avenue to follow, the court stated that it would not mechanically apply the statute of limitations and look only to the date of publication, but rather, it would follow a policy approach of balancing the hardships on the parties and the purposes served by the statute of limitations.[14]

The statute of limitations is intended to be a "statute of repose,"[15] protecting potential defendants from stale or false claims that might be difficult to defend after a passage of time, and encouraging diligence in the bringing of actions.[16] The statute also serves the "interest in certainty and finality in the administration of [the court's] affairs."[17] However, in cases in which a person is denied his right to bring an action before he has knowledge of his injury, the policies of the statute conflict with the basic rule that every person must be given his day in court.[18]

The courts first faced this important conflict in policies in medical malpractice cases in which a foreign object was left in a patient's body after surgery and was not discovered until the statute of limitations had

9. 46 Ill.2d 32, 262 N.E.2d 450 (1970).

10. *Id.* at 39, 262 N.E.2d at 454.

11. This view was also followed in a case involving legal malpractice. Kohler v. Woolen, Brown & Hawkins, 15 Ill.App.3d 455, 304 N.E.2d 677 (4th Dist. 1973).

12. Winrod v. Time, Inc., 334 Ill.App. 59, 78 N.E.2d 708 (1st Dist. 1948).

13. *See* Lipsey v. Michael Reese Hosp., 46 Ill.2d 32, 262 N.E.2d 450 (1970); Rozny v. Marnul, 43 Ill.2d 54, 250 N.E. 2d 656 (1969).

14. 61 Ill.2d 129, 136-37, 334 N.E.2d 160, 164 (1975).

15. People v. Ross, 325 Ill. 417, 421, 145 N.E. 303, 304 (1927) (criminal case which sets out the distinction between the statute of limitations in criminal cases and in civil cases).

16. Gates Rubber Co. v. USM Corp., 508 F.2d 603, 611 (7th Cir. 1975).

17. *Id.*

18. Peterson, *The Undiscovered Cause of Action and the Statute of Limitations: A Right Without a Remedy in Illinois*, 58 ILL. BAR J. 644, 647 (1970).

expired.[19] The courts were willing to apply the discovery rule because these cases did not raise problems the statute was designed to guard against, such as fraudulent claims or difficulty of proof after a passage of time.[20] Some jurisdictions extended the discovery rule to medical malpractice cases in which a patient received an improper diagnosis[21] or a doctor used improper operative procedures.[22] The rationalization for the extension was that it was "basically illogical"[23] to distinguish between medical malpractice cases involving the leaving of a foreign object in a patient's body and other types of medical malpractice. Further, the Illinois Supreme Court in *Lipsey* indicated that there was no clear legislative intent to justify such a distinction.[24]

The injustice resulting in the medical cases prior to application of the discovery rule prevailed in other cases of professional malpractice. Using the medical cases as precedent, Illinois courts extended the balancing technique and policy approach to non-medical malpractice cases. In *Rozny v. Marnul*,[25] where the defendant negligently prepared an inaccurate land survey which the plaintiff did not discover until nine years later, the Illinois Supreme Court applied the discovery rule and announced a test to determine when it should be applied:

> [The court must balance] the increase in difficulty of proof which

19. *See* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969) (surgical clamps left in plaintiff's body); Berry v. Branner, 245 Ore. 307, 421 P.2d 996 (1966) (needle left in plaintiff's abdomen); Ruth v. Dight, 75 Wash.2d 660, 453 P.2d 631 (1969) (surgical sponge left in plaintiff's abdomen).

20. The initial application of the discovery rule was actually a result of the court's sense of justice to the unfortunate plaintiff. Several states, including Illinois, now have statutes which provide for application of the discovery rule in the foreign object situation. ILL. REV. STAT. ch. 83, § 22.1 (1973).

21. Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1969) (improper diagnosis resulted in plaintiff undergoing unnecessary surgery); Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E. 2d 450 (1970) (malignant tumor negligently diagnosed to be nonmalignant causing plaintiff to later have her arm and shoulder amputated); Iverson v. Lancaster, 158 N.W. 2d 507 (N.D. 1968) (negligent failure to diagnose true cause of hypertension resulted in plaintiff undergoing unnecessary hysterectomy); Janisch v. Mullins, 1 Wash. App. 393, 461 P.2d 895 (1969) (negligent reading of x-ray resulted in improper diagnosis and treatment).

22. Winfrey v. Farhat, 382 Mich. 380, 170 N.W. 2d 34 (1969) (failure to remove all of a diseased organ system); Yerzy v. Levine, 108 N.J. Super. 222, 260 A.2d 533, *aff'd*, 57 N.J. 234, 271 A.2d 425 (1970) (damage to an organ not to be treated during an operation); Dobbins v. Clifford, 39 App.Div.2d 1, 330 N.Y.S.2d 743 (1973) (damage to an organ not to be treated during operation).

23. Lipsey v. Michael Reese Hosp., 46 Ill.2d 32, 40, 262 N.E.2d 450, 455 (1970). *See also* Frohs v. Greene, 253 Ore. 1, 4, 452 P.2d 564, 565 (1969).

24. 46 Ill.2d 32, 39-40, 262 N.E.2d 450, 454-55 (1970).

25. 43 Ill.2d 54, 250 N.E.2d 656 (1969).

> accompanies the passage of time against the hardship to the plaintiff who neither knows nor should have known of the existence of his right to sue.[26]

Since *Rozny* other courts have used the balancing technique and have considered such factors as the nature of the injury, the availability of witnesses and evidence, the length of time that has elapsed, the diligence of the plaintiff in bringing the action after discovery, and the prejudice to the defendant if forced to defend.[27] The result, in a few jurisdictions, mainly Illinois and California,[28] has been an extension of the discovery rule to cases involving attorneys,[29] insurance agents,[30] stockbrokers,[31] accountants,[32] architects,[33] and now credit reporting agencies.

In applying the discovery rule Illinois courts have firmly stated that the discovery rule is not an all-encompassing rule and will not be mechanically applied in all cases of professional negligence. The court emphasized in *Olesker* that the discovery rule is a balancing mechanism. Its application must be based on the particular facts of each case[34] and on the court's notion of basic fairness to those involved.[35]

On the basis of the facts in *Olesker* the court reached a just decision by considering the conflicting claims of both parties. By applying the

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26. *Id.* at 70, 250 N.E.2d at 664.

27. *See, e.g.*, Lopez v. Swyer, 62 N.J. 267, 276, 300 A.2d 563, 568 (1973).

28. Several jurisdictions have specifically decided not to extend the discovery rule. *See, e.g.*, Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230 (S.D.N.Y. 1974) (stockbroker brought an action against accounting firm for negligence in preparation of accounting opinions; court held that the statute began to run on the date of closing of stock sale and not when plaintiff actually learned of the tort); Lembert v. Gilmore, 312 A.2d 335 (Del. Super. 1973) (involving an inaccurate land survey in which the Superior Court of Delaware held that the statute of limitations begins to run from the date of the injury not on the date on which plaintiffs becomes aware of the injury).

29. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); Kohler v. Woolen, Brown & Hawkins, 15 Ill. App. 3d 455, 304 N.E. 2d 677 (4th Dist. 1973).

30. U.S. Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal.3d 586, 463 P.2d 770, 83 Cal.Rptr. 418 (1970).

31. Twomey v. Mitchum, 262 Cal.App.2d 690, 69 Cal.Rptr. 222 (1968).

32. Moonie v. Lynch, 256 Cal.App.2d 361, 64 Cal.Rptr. 55 (1967).

33. Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967).

34. In each case the court will consider "all relevant facts and circumstances." Lopez v. Swyer, 62 N.J. 267, 276, 300 A.2d 563, 568 (1973).

35. In this case the court based its decision on several factors: (1) the credit report was confidential and the plaintiff had no practical means of discovering the contents; (2) the plaintiff was diligent in bringing his action; (3) the court believed that it was unjust to allow a person to be silently wronged; and (4) the general trend of the court was to protect those being investigated by credit reporting agencies. 61 Ill.2d 129, 334 N.E.2d 160 (1975).

statute of limitations mechanically, the court would have automatically precluded an analysis of the equities of the case. However, how far may this decision be extended? Should its application be limited to maintain the goals of certainty and finality of the statute of limitations? By using the argument of medical cases that some distinctions are "basically illogical"[36] the discovery rule could extend from the *Olesker* case, in which there was contractual secrecy, to situations in which there is a non-contractual agreement or no secrecy agreement. The result could be that the discovery rule, which began as an exception to the general rule, could become the general interpretation of the statute. This seems contrary to the court's intent which was to apply the rule only in certain situations to achieve equity.

The application of the discovery rule could be limited by distinguishing between "professional" and "ordinary" negligence cases, and by applying the discovery rule only to the former. Professional negligence would be defined as tortious conduct occurring in the "performance of professional or fiduciary duties,"[37] that is, conduct within the scope of the skill, prudence, and diligence commonly exercised by practitioners of the profession.[38] Whereas, ordinary negligence would be defined as tortious conduct by a person who is not under a duty to exercise a particular kind of professional skill or expertise.[39]

A second question raised by the decision is exactly how long the court will extend the period for bringing an action. In *Olesker* discovery was only thirteen months after publication; but, what if discovery occurred several years later? Will the court allow an action to be viable for an infinite period of time? By use of the balancing technique the court may establish an end limit in a particular case.[40] However, the precedential value of such a case may be of little assistance in another case with different facts.

One possible solution would be for the legislature to take positive action in providing a definite end limit for the bringing of actions. In

36. Lipsey v. Michael Reese Hosp., 46 Ill.2d 32, 40, 262 N.E.2d 450, 455 (1970).

37. Gopaul v. Herrick Memorial Hosp., 38 Cal.App.3d 1002, 113 Cal.Rptr. 811 (1974).

38. *Id.* at 1007, 113 Cal. Rptr. at 814. The court held that failure to strap a patient to a guerney was ordinary negligence because the situation did not require professional skill or knowledge.

39. For example, an attorney who is under a duty to his client to file an action before the statute of limitations runs out, and fails to do so would be chargeable with professional negligence. However, the same attorney who injures a pedestrian while driving an automobile would be chargeable, under the definition, with ordinary negligence.

40. A situation could arise where the court uses the balancing technique but decides that the discovery rule should not be applied because the factors weigh against the plaintiff.

cases of medical malpractice the legislature provided that a cause of action accrues from the time the negligence is discovered or should with reasonable diligence be discovered; however, the action must be brought within ten years of the date of the negligent act.[41] By extending this statute to other areas of professional negligence, or by enacting a separate statute applicable to professional negligence cases other than medical cases, the legislature could achieve the purposes of the statute of limitations and maintain the flexibility of the balancing mechanism.

Diane Kosmach

Torts—Strict Liability—STRICT LIABILITY NOT APPLICABLE TO USED CAR DEALERS ABSENT ACTUAL CREATION OF DEFECT—*Peterson v. Lou Backrodt Chevrolet Co.*, 61 Ill.2d 17, 329 N.E. 2d 785 (1975).

Recently, the Illinois Supreme Court in *Peterson v. Lou Backrodt Chevrolet Co.*,[1] refused to extend strict liability to the used car dealer.[2] The case arose when the driver of a six-year-old used car hit two pedestrians, both minors, killing one and permanently injuring the other. Plaintiff sued under strict liability in tort, alleging that the automobile was not reasonably safe when sold by the used car dealer because it contained a defective braking system. The trial court dismissed the strict liability count on grounds that a strict liability cause of action requires an allegation that the defect existed when it left the manufacturer's control, not the used car dealer's.[3]

The appellate court reversed the trial court.[4] It took the position that

41. ILL. REV. STAT. ch. 83, § 22.1 (1973).

1. 61 Ill.2d 17, 329 N.E.2d 785 (1975).

2. *Id.* at 20, 329 N.E.2d at 786. The complaint alleged that the used car was defective when sold by the dealer. It did not allege that the used car dealer caused the defect. For a discussion of this point *see* note 13 *infra*.

3. *Id.* at 19, 329 N.E.2d at 786. This ruling relies upon Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965), the leading Illinois strict liability case.

Suvada stated the requisite standard of proof for the strict liability in tort of a manufacturer in a defective products case as proof that (1) injury or damage resulted from a condition of the product, (2) the condition was an unreasonably dangerous one, and (3) the condition existed at the time it left the *manufacturer's control*. 32 Ill.2d at 623, 210 N.E.2d at 188.

4. 17 Ill.App.3d 690,698, 307 N.E.2d 729,735 (2d Dist. 1974).