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Torts - Statute of Limitations in Medical Malpractice Cases - Justice Sought and Almost Attained

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CASE NOTES

TORTS—STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE CASES—JUSTICE SOUGHT AND ALMOST ATTAINED

In October of 1963, Elise Lipsey consulted Dr. Gerald J. Menaker concerning a lump on her left arm. The lump, on advice of Dr. Menaker, was surgically removed at Michael Reese Hospital and a biopsy was performed by the pathology department of the hospital. A report of non-malignancy was returned. In March of 1966, Mrs. Lipsey again consulted Dr. Menaker with a similar lump on her arm which was again surgically removed in April of 1966. At the same time, Dr. Menaker excised a lesion from her left breast. A new pathology report revealed malignancy in both areas and the necessity of further surgery. In late April, 1966, Mrs. Lipsey underwent radical surgery for removal of her left breast, shoulder, and arm at a New York hospital. A frozen section of the lump removed in 1963 was examined by the New York hospital pathology department and pronounced to be malignant. On December 14, 1966, Elise Lipsey brought suit against both Dr. Menaker and Michael Reese Hospital alleging negligence for failure to diagnose her cancerous condition at the time of her first surgery. Defendant moved for summary judgment on the grounds that plaintiff's action was barred by the applicable Illinois two year statute of limitations. The Circuit Court of Cook County granted defendant's motions and dismissed the complaint. On appeal, the Illinois Supreme Court interpreted the Illinois statute of limitations as limiting actions to two years from the *discovery* of the malpractice in medical malpractice cases. *Lipsey v. Michael Reese Hospital* 46 Ill. 2d 32, 262 N.E. 2d 450 (1970).

The decision in the *Lipsey* case represents an advance in Illinois judicial thinking which is most necessary if the injustices which so often occur in the area of malpractice litigation are to be eventually cured. The purpose of this note is to give the reader: (1) A brief review of the concept of the statute of limitations, its purposes, and the injustices which can result from its strict application in the area of professional malpractice (especially medical malpractice); (2) an historical review of Illinois' legislative and judicial modifications and applications of the tort statute of lim-

itations in malpractice cases culminating in the *Lipsey* decision;[1] (3) a summary of the results reached by the legislatures and judiciaries of every other state when confronted with injustices similar to those faced by the *Lipsey* court; and (4) a recommendation for further action necessary to relieve *all* injustice in the area of malpractice litigation. Since most malpractice litigation results from medical malpractice, most, though not all, of the cases cited and/or discussed in this paper are of the medical malpractice variety. But the principles and rulings of these cases have application, as will be seen, in all areas of professional malpractice.

A brief inspection of the codes or statutes of the various jurisdictions within the United States reveals that every set of laws contains a section which, though differently titled, has the effect of limiting the time in which a court action may be brought for a wrong allegedly committed. This time limit begins to run when the act which allegedly caused the injury or damages occurs (in tort) or when the valid contract sued upon is breached. The time limits often vary with the types of actions, *i.e.*, often longer limits exist for contract actions than for tort actions. Also, different states often have different time limits for the same type of action. Nevertheless, some time limit is *always* imposed.

The purpose for these limitations is clear. They exist to prevent the presentation of "old and vexatious demands"[2] and "fraudulent, false, frivolous, speculative or uncertain claims."[3] This purpose is laudable and ought to be preserved. But these limitations are imposed on broad categories of causes of action, such as torts, and the strict application of the general tort statute of limitations to a specific kind of tort, such as the tort of professional negligence (malpractice), often results in injustice to the injured party.

For the purpose of example, suppose state *XYZ* has a two year tort statute of limitations applicable to all torts. This may be an adequate time limit in which to bring a tort action for automobile accident injuries, assault and battery, or trespass. But is it an adequate time limit for one who, unskilled in the craft of surveying, puts his trust in a professional surveyor, and five years after a survey (three years after the statute of limitations has passed), finds that, due to a negligent survey, part of his home is on his neighbor's land? Is it an adequate time limit for one who, unskilled in the construction trade, puts his trust in a professional contractor

1. Lipsey v. Michael Reese Hospital, 46 Ill. 2d 32, 262 N.E.2d 450 (1970).

2. Mosby v. Michael Reese Hospital, 49 Ill. App. 2d 336, 340-41, 199 N.E.2d 633, 636 (1964).

3. New Market Poultry Farms, Inc. v. Fellows, 51 N.J. 419, 425, 241 A.2d 633, 636 (1968).

and, five years after his home is built and three years after the statute of limitations has expired, finds that his home has collapsed due to faulty construction? Was two years an adequate time limit for Mrs. Lipsey in the cited case? Obviously, a strict application of the two year tort statute of limitations of state *XYZ* would impose extreme hardship on Mrs. Lipsey and the other two individuals. They would each possess a valid cause of action for malpractice; but, since they did not discover or sustain actual damage until after the statute of limitations had run, they have no means of prosecuting their valid claims. The injustice of this "right without a remedy"[4] is apparent.

In Illinois, cases of professional malpractice, and their resulting injustice, have confronted the courts since 1923. In that year the court decided *Treece v. Southern Gem Coal Corp.*[5], an action for damages to property resulting from the subsidence of the ground caused by the defendant's failure to leave sufficient support after abandoning mining operations under the plaintiff's property. Though the court did not elaborate, its ruling is clear—the statute of limitations begins to run from the date of the subsidence (discovery of *actual* damage), not from the date of the removal of the support (the act which allegedly caused the damage). The basis for this ruling seems to rest solely in the logic of the *Treece* court, since there was no legislation to this effect. It seems that the possible injustice to be suffered by the plaintiff was considered by the court and influenced its decision.

The problem of the possible application of a "discovery" rule arose in 1933 with the case of *Madison v. Wedron Silica Company.*[6] In that case, the plaintiff worked for defendant from 1924 to 1930, during which time he contracted silicosis. The plaintiff claimed a violation of the Occupational Diseases Act. The defendant claimed that the standard two year tort statute of limitations[7] applied. In its ruling, the court stated that its ruling was based on logic and an humane (just) view of the law:

> To say that the plaintiff must have filed suit at the time of the first inhalation of the silica dust, means that an injury could not . . . be proved. Such argument is unsound and does violence to the manifest intent of the legislature . . . . The *logical view* is to consider the time when the employee is forced to quit work because of the cumulative effect of successive injuries resulting in final disablement rather than the first inhalation or injury. *This view is the liberal and humane one, accomplishes the purposes of the act* and carries out the intent of the legislature.[8]

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

5. 245 Ill. App. 113 (1923).

6. 352 Ill. 60, 184 N.E. 901 (1933).

7. ILL. REV. STAT. ch. 83, § 15 (1969).

8. *Supra* note 6, at 62, 184 N.E. at 902 (emphasis added).

Apparently the legislature felt the logic espoused by the court was valid because in 1937 it amended the Workmen's Occupational Disease Act to include a statute of limitations which began to run on "disablement" (*discovery* of illness).[9] The discovery rule was thus again employed (but here, not directly in a professional malpractice case).

The Illinois courts' next encounter with the statute of limitations in a professional malpractice case was in 1943 with the case of *Gangloff v. Apfelbach.*[10] This case showed the hard line, strict application of the law by a less liberal court and dealt primarily with the Illinois rejection of a then popular view that the statue of limitations should be extended to two years (or some other time period) after the termination of treatment by the physician. Illinois flatly rejected this rule and applied its strict two year tort statute of limitations from the date of the act causing the injury.

The court retained this strict view through 1964. In that year, the court decided *Mosby v. Michael Reese Hospital.*[11] Here a needle was left in the plaintiff's body during surgery performed in 1956. Subsequent surgery in 1960 disclosed the needle and the substantial injury which it had caused. The court held that the strict two year tort statute of limitations applied and barred plaintiff's recovery when, in referring to the Illinois Workmen's Compensation Act[12] and Workmen's Occupational Disease Act[13] (both of which have time limits which commence running on "discovery" of injury or illness), it emphatically stated:

> We must assume that the legislature acted deliberately in not extending the same relief to malpractice cases as it did to cases of radiological injury and occupational diseases. We *can not do what the legislature has failed to do.*[14]

The court was in fact saying it could not and would not relieve the glaring injustice of the *Mosby* decision which resulted from the strict application of the two year tort statute of limitations to a medical malpractice case without formal legislative action in this area.

The next year the legislature, apparently noting the conservative court's failure to rule without formal legislative sanction and, hopefully, noting the injustice caused by the *Mosby* decision, revised the Illinois statute of limitation[15] with regard to medical malpractice cases. It extended the period of limitation to two years from the *discovery* of "any foreign substance"[16]

9. *See* ILL. REV. STAT. ch. 48, § 172.24 (1937).
10. 319 Ill. App. 596, 49 N.E.2d 795 (1943).
11. *Supra* note 2.
12. ILL. REV. STAT. ch. 48, § 138.6(c)(3) (1969).
13. ILL. REV. STAT. ch. 48, § 172.41(c) (1969).
14. *Supra* note 2, at 342, 199 N.E.2d at 636 (emphasis added).
15. ILL. REV. STAT. ch. 83, § 22.1 (1969).
16. ILL. REV. STAT. ch. 83, § 22.1 (1969).

left in the body. This legislative action had the effect of overturning the law espoused in the *Mosby* decision and remedying the injustice inherent in its strict application.

In 1967, the discovery rule was again rejected by the Illinois court, this time in a case regarding the professional malpractice of contractors and architects. In *Simoniz Company v. J. Emil Anderson & Sons, Inc.*,[17] the roof of the plaintiff's building collapsed nine years after completion of the building and the collapse was caused by latent and undiscoverable defects in design and construction of the building. The strict five year statute of limitations was applied by the court[18] and no action could be maintained against the professionally negligent architects or contractors. This decision seems harsh in light of 1967 Illinois legislation[19] imposing a discovery type statute of limitation for negligent work of surveyors. Are surveyors any more or less "professional" than the contractors and architects protected by the *Simoniz*[20] case and, therefore, to be afforded so much less protection? From this judicial ruling and this legislative action, occurring in the same year yet having opposite results in very similar areas, it is apparent that the area of the statute of limitations applicable in professional malpractice cases (other than medical malpractice) is as yet not stable. Hopefully, a uniformity resulting in justice for all parties in this type of litigation is forthcoming in the not too distant future.

In 1969, the statute of limitations applicable to medical malpractice cases was again before the court in the case of *Mathis v. Hejna*.[21] Here the plaintiff alleged that defendants were negligent in allowing pantopaque, a dye injected into the spinal canal during a myelography, to remain in the body of the plaintiff and cause him to contract arachnoiditis. His injury was discovered "within a period of less than two years preceding the date this suit was commenced."[22] The plaintiff contended that the new 1965 "discovery rule" statute of limitations,[23] enacted after the *Mosby* decision, governed. In ruling for the plaintiff, the court demonstrated a liberal, progressive, and just attitude in this area:

> If the legislature intended the statute to apply only to those cases in which sponges, needles, clamps, and like items are negligently left in the body of a patient, . . . they

17. 81 Ill. App. 2d 428, 225 N.E.2d 161 (1967).
18. ILL. REV. STAT. ch. 83, § 16 (1969).
19. ILL. REV. STAT. ch. 83, § 24g (1969).
20. *Supra* note 17.
21. 109 Ill. App. 2d 356, 248 N.E.2d 767 (1969).
22. *Id.* at 358, 248 N.E.2d at 768.
23. ILL. REV. STAT. ch. 83, § 22.1 (1969).

would have chosen different wording to express that intent . . . . We think the facts, as pleaded, come within the technical definition of the statute as well as the object and purpose of the statute.[24]

With justice as its prime concern and almost fifty years of judicial and legislative discussion on this and closely related matters as its guide, the *Lipsey* court in the noted case had no trouble reaching its justice-seeking decision:

[We] consider that the Limitations Act should not be given the narrow construction . . . . Such a construction often brings "obvious and flagrant injustice." (Prosser, Law of Tort, (3rd. ed. 1964), sec. 30). We extend the rule of time of discovery . . . and hold that, in medical malpractice cases as this, the cause of action accrues when the person injured learns of his injury or should reasonably have learned of it.[25]

With this decision, the Illinois court, with substantial assistance from the Illinois legislature, has completely reversed its position on this type of case. It has gone from the strictest, unwaivering, and often unjust application of the two year tort statute of limitations, which began to run when the act causing the injury occurred, through and past various intermediate stages, to this final "discovery rule" where the statute of limitations in medical malpractice cases begins to run when the injury is, or reasonably should have been, "discovered." The law seeks justice and the Illinois courts have finally established a just rule in medical malpractice cases.

The previous discussion dealt in depth with Illinois' encounters with this difficult problem of the statute of limitations applicable to professional and particularly medical malpractice cases. Every jurisdiction has established time limits in which actions must be brought. Hence, it is only logical that other jurisdictions have encountered the same problem. A review of the results of these encounters would be helpful in seeing the trend of the various courts in this area.

In the past, there seemed to be a great legislative reluctance to adopt the "discovery rule" in medical malpractice cases. Prior to 1957, only one state legislature (Alabama)[26] had formally adopted the discovery rule in the case of medical malpractice. However, since 1957, three additional jurisdictions have joined with Alabama and adopted the discovery rule through legislative action—California,[27] Connecticut,[28] and Oregon.[29] This

24. *Supra* note 21, at 361, 248 N.E.2d at 769-70.

25. *Supra* note 1, at 39, 262 N.E.2d at 455.

26. ALA. CODE tit. 7, § 25(1) (1960), *as amended* ALA. CODE tit. 7, § 25(1)(2) (Supp. 1969).

27. CAL. CIV. PRO. CODE § 340.5 (Supp. 1971).

28. CONN. GEN. STAT. ANN. § 52-584 (1960), *as amended* CONN. GEN. STAT. ANN. § 52-584 (Supp. 1971).

29. ORE. REV. STAT. ch. 12.110 (1969).

sudden surge of action on the part of legislatures may indicate a sudden awareness on the part of legislatures of the injustice inherent in the application of their old limitation laws to modern medical malpractice cases.

This legislative inaction in this area does not mean the judiciaries in the various states have been equally inactive. In fact, the courts have recently attacked this problem vigorously, lending various constructions to existing statutes. Some thirteen jurisdictions[30] have interpreted their individual tort statutes of limitation to be of the "discovery rule" type for *all* cases of medical malpractice (as in the *Lipsey* case). In ten other states, the judiciaries have limited their "discovery rule" construction in medical malpractice cases[31] to cases where foreign objects are left in the body.[32] Three states[33] still cling to an old rule tolling the statutes of limitations until the end of the physician-patient relationship. Two state judiciaries have said the applicable statute of limitations begins to run in medical malpractice cases when "a right to sue"[34] exists. Whether a right to sue exists when the injury to the person becomes manifest by damages (similar to a "discovery rule"), or exists when an act latently causing injury is done to

30. Arizona: Leech v. Bralliar, 275 F. Supp. 897 (D. Ariz. 1967); Rodriquez v. Manoil, 9 Az. A. 225, 450 P.2d 737 (1969); Florida: Vilord v. Jenkins, 226 So. 2d 245 (1969); Hawaii: Yoshizaki v. Hilo Hospital, 50 Haw. 150, 433 P.2d 220 (1967); Iowa: Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967); Louisiana: Kozan v. Comstock, 270 F.2d 839 (5th Cir. 1959) (applying Louisiana law); Maryland: Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966); Michigan: Winfrey v. Farhat, 382 Mich. 380, 170 N.W.2d 34 (1969); Nebraska: Acker v. Sorensen, 183 Neb. 866, 165 N.W.2d 74 (1969); New Jersey: Yerzy v. Levine, 108 N.J. Sup. 222, 260 A.2d 533 (1970); North Dakota: Iverson v. Lancaster, 158 N.W.2d 507 (1968); Oklahoma: Lewis v. Owen, 395 F.2d 537 (10th Cir. 1968) (applying Oklahoma law); Pennsylvania: Schaffer v. Larzelere, 410 Pa. 402, 189 A.2d 267 (1963); Rhode Island: Wilkenson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968).

31. Delaware: Layton v. Allen, — Del. —, 246 A.2d 794 (1968); District of Columbia: Burke v. Washington Hospital Center, 293 F. Supp. 1328 (D.D.C. 1968); Idaho: Billings v. Sisters of Mercy of Idaho, 86 Idaho 488, 389 P.2d 224 (1964); Massachusetts: Pasquale v. Chandler, 350 Mass. 450, 215 N.E.2d 319 (1966); Montana: Grey v. Silver Bow County, 149 Mont. 213, 425 P.2d 819 (1967); New York: Flanagan v. Mt. Eden General Hospital, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); Texas: Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967); Utah: Christiansen v. Rees, 20 Utah 2d 199, 436 P.2d 435 (1968); Washington: Ruth v. Dight, 75 Wash. 2d 660, 453 P.2d 631 (1969); West Virginia: Morgan v. Grace Hospital Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965).

32. Identical interpretation of statute as codified in Illinois in 1965. *See* ILL. REV. STAT. ch. 83, § 22.1 (1969).

33. Indiana: Ostojic v. Brueckmann, 405 F.2d 302 (7th Cir. 1968) (applying Indiana law); Minnesota: Swang v. Hauser, 288 Minn. 306, 180 N.W.2d 187 (1970); Missouri: Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968).

34. Colorado: Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957); South Carolina: Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962).

the body (strict application) has not been adequately clarified by the respective courts. The Ohio judiciary[35] has its own rule. That court says there is no cause of action in medical malpractice cases without injury—hence, the statute of limitations begins to run when "consequential injury" results.[36] This rule seems very close to a simple "discovery rule" since discovery usually does not take place until injury resulting from a negligent act is manifest.

From the foregoing, a marked trend in the various judiciaries is apparent. Twenty-nine judiciaries have faced the problem of the statute of limitations in medical malpractice cases and apparently have realized the injustice in applying a strict statute of limitations and construed their existing statutes so as to alleviate, to at least some extent, the hardships resulting from a strict construction. However, eighteen[37] state judiciaries have taken no such initiative when faced with the problem, and continue to impose the strict statute of limitations in medical malpractice cases, often with very harsh results. Fortunately, these states represent a continually shrinking minority.[38]

Medical malpractice cases have not been the only professional malpractice cases where the various judiciaries have sought to eliminate the injustice resulting from a strict application of tort statute of limitations. For example, the courts of at least three states—Iowa, Maryland and Pennsylvania—have established a "discovery rule" statute of limitations for professional architectural malpractice.[39] Additionally, Pennsylvania has exhibited an even greater extension of the "discovery rule" in the case of *Daniels v. Beryllium Corporation.*[40] The plaintiff lived in the vicinity of the defendant's plant and had been exposed to beryllium dust since prior to World War II. She became ill in 1949 and, in 1953, her condition was diagnosed as beryllium poisoning. The court held:

> [t]hat the statute of limitations did not begin to run until plaintiffs, by the exercise of reasonable diligence, could have discovered that the wife's condition was caused by defendant's operations.[41]

35. Cook v. Yager, 13 O. App. 2d 1, 233 N.E.2d 326 (1968).

36. *Id.* at 8, 233 N.E.2d at 331.

37. Alaska, Arkansas, Georgia, Kansas, Kentucky, Maine, Mississippi, Nevada, New Hampshire (has a six year statute), New Mexico, North Carolina, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming.

38. For a chart compilation of each state and its legislative and judicial holdings in this area, *see* Appendix A.

39. Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967); Steelworkers Holding Company v. Menefee, 255 Md. 440, 258 A.2d 177 (1969); Med-Mar, Inc. v. Dilworth, 214 Pa. S.C. 402, 257 A.2d 910 (1969).

40. 227 F. Supp. 591 (E.D. Pa. 1964).

41. *Id.* at 595.

The question of the statute of limitations in *legal* malpractice was raised in a very recent case, *Denzer v. Rouse.*[42] Here, purchasers of real estate sued the estate of an attorney for legal malpractice in negligently preparing a deed in 1947. The negligent preparation was not discovered until 1966, well past the applicable six year statute of limitations. The court ruled in favor of their brother at the bar, stating:

> Tolling of the statute of limitations in this state does not await the time or fact of discovery. When negligence and resultant injury have occurred, the statute starts to run . . . . It follows that the present action is barred by the statute of limitations.[43]

Such a decision is expected in a state where no discovery rule has been applied.[44] But what if this case were decided in a "discovery rule" state such as Pennsylvania or Maryland?[45] It would appear that the decision may have been different.

These examples indicate what hopefully will be the rule and not the exception in the future—an alleviation of injustice in the application of the statute of limitations in all professional malpractice cases by the various judiciaries. Such court rulings are obviously a necessary step in the alleviation of the stated injustice. But do these *court* rulings reach the ultimate just result? A look at the examples previously used in this case note (with a few alterations) will reveal the answer.

Take the example of the plaintiff who discovered his home was on his neighbor's land five years after a negligent survey—assume the discovery of the negligence was made thirty-five years after the survey. If the court applied a full "discovery rule" in the application of the statute of limitations in this professional malpractice case, the plaintiff could still bring his action, since the malpractice (negligent survey) was not *discovered* until thirty-five years after it was made. Is it fair or just to the defendant surveyors to subject them to the fear of litigation for a thirty-five year period? Quite probably his records are destroyed, he remembers nothing about this particular survey, and therefore has no chance to defend this claim. If he is recently deceased, it would be impossible for his estate to defend this claim. Further, is it fair to the defendant to force him to bear the greatly increased cost of professional liability insurance[46] which would undoubtedly result when the defendant's malpractice exposure is increased by thirty-

42. 48 Wisc. 2d 528, 180 N.W.2d 521 (1970).

43. *Id.* at 533, 180 N.W.2d at 524.

44. *Supra* note 37.

45. *Supra* note 30.

46. Such insurance is almost always bought by professionals to protect themselves in the event of a claim against them for professional negligence.

three years? If, in the second example, thirty-five years had elapsed from the construction of the plaintiff's building to its collapse due to the negligent construction, would it be fair to the defendant contractor to allow a suit on this case? Again, any records, blueprints, or personal knowledge of the specific job are long lost, and the defendant has little or no hope of defending this action. Also, his cash expenditure for professional liability insurance might be prohibitive. In the cited case, if it were medically possible for Mrs. Lipsey to discover Dr. Menaker's and Michael Reese Hospital's negligence thirty years after her initial diagnosis, would it be fair to both defendants to allow a suit after thirty years? Lack of records, personal knowledge, and loss of possible witnesses make defense of this case impossible. This increased exposure would also increase the already astronomical cost of medical malpractice insurance by substantial amounts. Thus, where prior strict application of the tort statute of limitations resulted in grave injustice to many plaintiffs, present liberal, unrestrictive application of a "discovery" type statute of limitations could result in grave injustice to many professional defendants. Unfortunately, it is these injustices which result from these two extreme applications of a law by the judiciary. In no case where the "discovery rule" has been employed has an outside time limit been set by a court to alleviate injustice to a defendant, and rightly so. The judicial branch of the government can not do the job of the legislative branch. The courts may recommend, but, at least in theory, they can not make or change laws. This duty belongs to the legislature and the various legislatures must do their duties by acting in this area. To insure justice to all litigants, legislatures must not only formally adopt the "discovery" type statutes of limitations in professional malpractice cases to protect the plaintiffs, as the courts have espoused, but also must set a maximum time limit for instituting such actions to protect defendants. In essence, what is required is the establishment of a time limit in which an action may be brought—a statute of limitation—but this time limit must be extended to more than the standard tort time limit in malpractice cases where non-discovery of an injury for long periods of time is possible.

With the requirement for justice thus isolated, the only problem to be resolved is what time limit is *just* for both parties. A review of the statutes of limitations of the four states adopting discovery rules for *medical* malpractice cases will reveal their feelings as to a just time limit.

The California statute[47] is the most recent. It provides for a four year limit from date of injury, or one year from discovery by use of reasonable diligence, whichever first occurs. This statute allows, then, the longest pos-

47. CAL. CIV. PRO. CODE § 340.5 (Supp. 1971).

sible extension of the statute of limitations to be four years. Connecticut's statute[48] affords even less time—two years from date of injury or two years from date discovered using reasonable care but not longer than three years from the date of the act causing the injury. Alabama[49] affords two years from the date of the act unless undiscovered; then six months from the date of discovery, but no more than six years from the date of the act causing the injury. Oregon's statute[50] succinctly says two years from the discovery of the negligence, but never more than seven years from the act causing the injury. The Illinois statute[51] enacted in 1965, subsequent to the *Mosby* decision (though of a limited "discovery" type), allows a two year statute of limitations from date of discovery of a foreign substance in the body, but never more than ten years after the negligent operation or treatment.

As can be seen, all five of these statutes have a time limit in which to bring an action after the cause of action is discovered. This limit varies but in all cases has the effect of preventing a plaintiff from delaying the filing of his suit till long after the discovery of his claim so as to take advantage of a change in the defendant's circumstances—such as the defendant's death or senility—which would make the case harder for the defendant to defend. This type of provision gives a little added protection to the defendant but takes nothing from the plaintiff or his case. But the maximum time limit provision of each statute is of greater concern. Does the three year maximum limit allowed by Connecticut afford a *just* time limit for an unknowing plaintiff to discover and bring an action? Is California's four years a sufficiently just time for a similarly situated plaintiff? Is Illinois' ten year maximum limit fair and just to a defendant? In light of the types of injustices suffered by the litigants from the different (strict or "discovery") applications of the exisiting statutes of limitation, it seems that Illinois' maximum time limit, proposed in its limited legislation in this area, affords both parties sufficient protection and equal justice. It affords justice to the defendant in three ways: ten years is not an unreasonably long time to keep records; availability of possible defense witnesses is greatest in the years immediately following an occurrence but is usually nonexistent after ten years; and, though the costs of professional liability insurance will increase with the increased exposure, at least a time limit exists which limits a defendant's liability and with which actuaries may work to compute the insurance premiums. It is just for the plaintiff in that, though a few injuries

48. CONN. GEN. STAT. ANN. § 52-584 (1960), *as amended* CONN. GEN. STAT. ANN. § 52-584 (Supp. 1971).

49. ALA. CODE tit. 7, § 25(1) (1960).

50. ORE. REV. STAT. ch. 12.110 (1969).

51. ILL. REV. STAT. ch. 83, § 22.1 (1969).

or damages may remain latent and undiscovered for more than ten years, *most* injuries or damages will become at least partially manifest within ten years of the act allegedly causing them and hence give warning of the existence of a possible cause of action to the plaintiff within a ten year period. Thus, a well drafted legislative change in this area including a ten year maximum time limit in conjunction with the other previously mentioned provision would eliminate most, if not all, of the injustice possibly resulting from various applications of the statute of limitations to professional malpractice cases. However, in some specific types of professional malpractice cases, in which records of professional action are kept by official agencies (such as surveys kept by the Recorder of Deeds of Cook County), the legislature might consider a longer time limit since one injustice imposed previously on the defendant—that of impossible record keeping—has been eliminated.[52] In any event, the legislature must act in this area to extend the time limit beyond its present unjust time and yet limit it so as to prevent unjust limitless claims.

From the foregoing, it is apparent that the *Lipsey* case in Illinois was a necessary step in the overall endeavor to relieve the injustice which resulted to the plaintiff from the strict application of the statute of limitations in medical malpractice cases. Similar injustices are occurring in other areas of professional malpractice and are being dealt with in similar ways in Illinois and other jurisdictions. But the action in these other areas is not nearly as fast and direct as in the area of medical malpractice. With judicial pronouncements such as in the *Lipsey* case as a spur, hopefully the legislative action necessary to prevent *all* injustice in medical malpractice cases will be taken in every legislature as it has already been taken in Alabama, California, Connecticut, and Oregon. From there, application of these new laws to *all* areas of professional malpractice is an easy step.

Philip F. Ignarski

52. *See* ILL. REV. STAT. ch. 83, § 24g (1969).

APPENDIX A

Present rule in each state as to the statute of limitations applicable in medical malpractice actions.

STATE	A	B	C	D	E	F
Alabama	X					
Alaska						X
Arizona		X				
Arkansas						X
California	X					
Colorado					X	
Connecticut	X					
Delaware			X			
Dist. of Col.			X			
Florida		X				
Georgia						X
Hawaii		X				
Idaho			X			
Illinois		X				
Indiana				X		
Iowa		X				
Kansas						X
Kentucky						X
Louisiana		X				
Maine						X
Maryland		X				
Massachusetts			X			
Michigan		X				
Minnesota				X		
Mississippi						X
Missouri				X		
Montana			X			
Nebraska		X				
Nevada						X
New Hampshire						X
New Jersey		X				
New Mexico						X
New York			X			
North Carolina						X
North Dakota		X				
Ohio		X				
Oklahoma		X				
Oregon	X					
Pennsylvania		X				
Rhode Island		X				
South Carolina					X	
South Dakota						X
Tennessee						X

APPENDIX A (Cont'd)

STATE	A	B	C	D	E	F
Texas			X			
Utah			X			
Vermont						X
Virginia						X
Washington			X			
West Virginia			X			
Wisconsin						X
Wyoming						X

Column A = Specific statute applies.
B = Discovery rule adopted by case law for ALL medical malpractice.
C = Discovery rule adopted by case law for OBJECTS left in the body.
D = Statute commences at the termination of the physician/patient relationship.
E = Statute commences when "right to sue" exists.
F = No discovery rule adopted—strict application of existing tort statutes of limitations.