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GADDIS V. SMITH, ATKINS V. CROSLAND

Limitations In Professional Malpractice Actions

Gaddis v. Smith

Atkins v. Crosland

In Gaddis, the defendant performed a Caesarean section on plaintiff in 1959. Because of increased abdominal pain and fear of a tumor, plaintiff was operated on in 1963, at which time a surgical sponge left during the prior surgery was discovered. When suit was filed in 1964, the defendant raised the defense of limitations, relying on the two year statute for personal injuries and the cases construing it. The trial court's grant of summary judgment for defendant was affirmed by the Court of Civil Appeals. On appeal to the Supreme Court of Texas,

1. 417 S.W.2d 577 (Sup. Ct. Tex. 1967).
2. 417 S.W.2d 150 (Sup. Ct. Tex. 1967).
5. The court of civil appeals is the intermediate court of appeals in civil cases.
the plaintiff attacked the rule enunciated in Carrell v. Denton. In Carrell, it was held that a cause of action accrues and the statute commences to run when the incision is closed, rather than when the negligent act is or should have been discovered. The majority, in reversing the lower court decision, expressly overruled Carrell and adopted the "discovery" rule in "causes of action in which a physician leaves a foreign object in the body of his patient." Accordingly, the court held that a cause of action accrued on the date when the plaintiff learned of, or in the exercise of reasonable care and diligence should have learned of, the presence of the foreign object in her body.

The Atkins case also presented a limitations question and was decided by the Supreme Court of Texas the same day it decided Gaddis. In Atkins, the plaintiff, who owned and operated service stations, employed the defendant, an accountant, to prepare his income tax returns. If a cash receipts and disbursements method of accounting had been employed, it is undisputed that the plaintiff's income tax liability for 1960 would have been $20,627.69. Under the accrual method of accounting actually used by defendant, the plaintiff's tax liability for 1960 amounted to $8,340.37. In applying the accrual method, however, defendant failed to obtain from the Commissioner of Internal Revenue the required permission to change accounting methods. This failure resulted in an assessment in 1961 of $12,287.32, the difference in amount of tax between the two methods. As in Gaddis, the trial court granted defendant's motion for summary judgment which was based on a limitations defense, and the Court of Civil Appeals affirmed. Reversing, the court held that the plaintiff had sustained no injury until the assessment in 1961, and therefore the statute of limitations began to run from that date. In reaching this decision, the court disapproved some of the language in the case of Crawford v. Davis which it deemed to be in conflict with the instant holding. Crawford was a malpractice action against an attorney for his delay in instituting suit in which it was held that the period of limitation began to run at the time of commission of the negligent act.

Read in conjunction with Gaddis, Atkins' reference to an attorney malpractice case seems to indicate, with the possible exception of certain medical acts, an abandonment of the date of the negligent act as a starting point for the running of the statute of limitations. With these
decisions Texas has joined a growing number of states which recognize
the essential unfairness of the rule of limitations which prescribes accrual
of the cause of action at the time of the negligent act: "Especially
where the plaintiff is unqualified to ascertain the imperfection, as in
the case of negligent performance of expert or professional services, it
seems harsh to begin the period at the time of defendant's act." While Gaddis
and Atkins do not yet represent the majority rule, this
trend is reflected in the law of nearly every state to some degree.

Statutes of limitations, legislative enactments which prescribe
the periods within which actions may be brought on certain claims,
were virtually unknown in the early common law. With respect to
torts, the only limitation was a product of the maxim "actio personalis
moritur cum persona," the consequent effect being that all personal
actions were confined to the joint lifetime of the parties. Although
originally regarded with little favor, statutes of limitations have now
become so firmly embedded in our legal system that their function or
application is rarely questioned by either the legislature or the ju-
diciary. A rudimentary purpose of these statutes is to afford protec-
tion to defendants against stale claims after a period of time which
ought to be sufficient for a person of ordinary diligence to bring an
action.

The primary consideration underlying such legislation is un-
doubtedly one of fairness to the defendant. There comes a time
when he ought to be secure in his reasonable expectation that the
slate has been wiped clean of ancient obligations, and he ought
not to be called on to resist a claim where the "evidence has been
lost, memories have faded, and witnesses have disappeared." The
policy of protecting defendants from old claims is not an entirely
convincing justification for the harsh consequences which sometimes
occur as a result of the fact that the limitations defense is a complete
bar to the action. In cases of negligence by professional practitioners,
it has been persuasively contended that patients and clients ought to
be protected from tortious acts which are often of such a nature that
their discovery is improbable within the statutory period.

Undoubtedly influenced by one or the other of these considerations,
courts have availed themselves of various theories to protect or assist
the particular class or party they favor. Notwithstanding some notable
holdouts, the inescapable trend of these decisions is in favor of the
injured plaintiff.

12. Developments in the Law — Statutes of Limitations, 63 Harv. L. Rev. 1177,
1201 (1950).
13. "A personal right of action dies with the person." Black's Law Dictionary
15. In Maryland, for example, there has been no significant legislative change in
250 years. With the exception of minor changes in language, the present statute,
Md. Code Ann. art. 57, § 1 (1957), is identical to Act of April, 1715, ch. 23, § 2
16. Developments in the Law — Statutes of Limitations, 63 Harv. L. Rev. 1177,
1185 (1950).
CHOOSING THE APPLICABLE STATUTE

In ruling on a defense of limitations in professional malpractice cases, a court is often faced with the initial problem of determining which, if any, of its statutes of limitations is applicable, since a remedy at law will be barred by delay in bringing the action only when a statute of limitations is applicable to that particular remedy. Although there is some recent authority to the contrary, statutes of limitations are generally strictly construed. In addition, since such statutes cannot be extended by analogy from one subject to another, an action must come clearly within the ambit of the statute if it is to be barred. Although the question of which potentially applicable statute controls in a particular malpractice case usually depends upon the phraseology of the particular enactment, many courts, construing substantially identical language, have reached conflicting conclusions. Some states have specific malpractice statutes of limitations; in those which do not, the preliminary determination to be made is whether the tort or the usually longer contract statute is applicable.

In medical malpractice cases, the overwhelming majority of courts, holding that substance controls, look behind the pleadings and find that the suit sounds in tort regardless of allegations of implied contract. The following statement of the Kansas court in Travis v. Bischoff typifies the approach generally adopted in determining whether the tort or contract limitations statute applies: "The law of this state is

17. See, e.g., United States v. Satz, 109 F. Supp. 94 (N.D.N.Y. 1952); Foremost Properties v. Gladman, 100 So. 2d 669 (Fla. 1958); Wentz v. Price Candy Co., 352 Mo. 1, 175 S.W.2d 852 (1943).
21. In Lakeman v. LaFrance, 102 N.H. 300, 156 A.2d 123, 127 (1959) the Supreme Court of New Hampshire said, speaking of its malpractice statute: "We are of the opinion that by its terms the two year limitation in RSA 508:4 was intended to apply to an action of tort for malpractice but not to an action of assumpsit for breach of contract." Contra, Maercklein v. Smith, 129 Colo. 72, 76, 266 P.2d 1095, 1097 (1954), commenting on a similar statute: "[A] statute of limitation relating specifically to those engaged in the practice of healing arts ... shall govern in all actions against physicians and surgeons growing out of their practice and regardless of the form thereof."
23. In addition there are limitations in many states for assault and battery, personal injury, and fraud and deceit, which are occasionally applied. See Annot., 80 A.L.R.2d 320, 351 (1961).
24. See, e.g., notes 25 & 27 infra and accompanying text.
realistic. Substance prevails over form. It is perfectly manifest that, notwithstanding the form given to the petition [which was contract], the gravamen of the action was malpractice, which is a tort, and the action was barred by the two year statute of limitations.\textsuperscript{28} Similarly, in \textit{Kozan v. Comstock}\textsuperscript{27} the Court of Appeals for the Fifth Circuit, applying Louisiana law, realistically addressed the question:

It is the nature of the duty breached that should determine whether the action is in tort or in contract. To determine the duty one must examine the patient-physician relationship. It is true that usually a consensual relationship exists and the physician agrees impliedly to treat the patient in a proper manner. Thus, a malpractice suit is inextricably bound up with the idea of breach of implied contract. However, the patient-physician relationship\textsuperscript{2} and the corresponding duty that is owed, is not one that is completely dependent upon a contract theory. . . . The duty of due care is imposed by law and is something over and above any contractual duty. Certainly, a physician could not avoid liability for negligent conduct by having contracted not to be liable for negligence. The duty is owed in all cases, and a breach of this duty constitutes a tort.\textsuperscript{28}

Although in the medical context its adherents are steadily decreasing, a few courts have held that the \textit{form} of action is decisive. This is usually the result of an effort to allow the plaintiff to take advantage of the longer contract period. \textit{Sellers v. Noah}\textsuperscript{29} long the leading case in support of this approach, has been recently overruled by statute.\textsuperscript{30} The court's rationale is worthy of note, however, inasmuch as it clearly shows the technique used by those courts which have adopted this position.\textsuperscript{31} In holding that the longer contract statute applied against a surgeon who had allegedly been negligent in performing an appendectomy on the plaintiff, the Alabama court said: "The counts declare upon the breach of the surgeon's contract. They are not in tort; the reference to negligence therein being but descriptive of the method or means whereby the contract was breached."\textsuperscript{32}

Generally, however, with the possible exception of a few states,\textsuperscript{33} any attempt to set up an implied contract to avoid the tort or malpractice statute will be of no avail. This is not necessarily true when an

\textsuperscript{26} 143 Kan. 283, 54 P.2d at 956.
\textsuperscript{27} 270 F.2d 839 (5th Cir. 1959).
\textsuperscript{28} \textit{Id.} at 844.
\textsuperscript{29} 209 Ala. 103, 95 So. 167 (1923).
\textsuperscript{30} In 1953 the Alabama legislature passed a malpractice statute which expressly included tort and contract. \textit{ALA. CODE tit. 7, § 25 (1958)}.
\textsuperscript{31} It appears that Florida is the only state which still allows the plaintiff in medical cases to choose the nature of the suit by his choice of form. \textit{See Manning v. Serrano}, 97 So.2d 688 (Fla. 1957).
\textsuperscript{32} 209 Ala. 103, 95 So. at 168. \textit{Contra}, Kuhn v. Brownfield, 34 W. Va. 252, 257, 12 S.E. 519, 521 (1890), stating that the basis of the action is negligence, and that the implied contract "is only explanatory of how he came to be engaged, and as raising a duty on his part, and is to be treated as if it were inducement."
\textsuperscript{33} Florida may be the only one. \textit{See note 31 supra}.
express contract to effect a specific result is alleged. In states with
malpractice statutes, it is not always clear whether the express con-
tracts are governed by such statutes, although most courts follow the
Colorado court, which stated in Maercklein v. Smith that, “[A] statute
of limitation relating specifically to those engaged in the practice
of the healing arts . . . shall govern in all actions against physicians
and surgeons growing out of their practice and regardless of the form
thereof.” At least one state treats express contracts as an exception
to the malpractice statute. In the jurisdictions without malpractice
statutes, some allow recovery on a contract theory where the injury
resulted from the breach of an express contract, independent of the
normal obligations of the physician-patient relationship. The great
majority, however, simply do not allow recovery on any type of con-
tract theory in medical cases.

Even where a contract action is allowed, it is “[a]n entirely un-
satisfactory remedy affording plaintiff only partial relief.” Recovery
may be had only for the sums expended for medical treatment and other
damage which could be reasonably expected to flow from the breach.
Damages for pain and suffering, or other tort recovery for the unskillful
treatment by the physician, are not included.

Although the same preliminary determination must be made by a
court in actions against attorneys and accountants, the results are not
always identical to those reached in medical malpractice cases. Since
only one state has a statute specifically applicable to attorneys, the
choice of statute problem must be resolved where there are separate
tort and contract statutes. The substance of the action is controlling

34. In Alabama, Arkansas, Indiana, Massachusetts, Minnesota, and South Dakota
the malpractice statutes expressly include actions of tort or contract. In these states
there is a strong presumption that all contract actions are included. There is also
a presumption, although not as strong, that in the other jurisdictions the legislatures
intended to consolidate all forms of action by enacting a malpractice statute. See Lillich,
35. 129 Colo. 72, 266 P.2d 1095 (1954).
36. Id. at 76, 266 P.2d at 1097. See also Barnhoff v. Aldridge, 327 Mo. 767, 38 S.W.2d 1029 (1931).
38. Alabama and Connecticut allowed the contract statute for actions of assumpsit
before they enacted malpractice statutes. See Sellers v. Noah, 209 Ala. 103, 95 So. 167
(1923); Hickey v. Slattery, 103 Conn. 716, 131 A. 558 (1926).
40. This applies to those jurisdictions where substance determines the nature of
the action. A contract remedy is of course available where form is considered.
41. See Lillich, The Malpractice Statute of Limitations in New York and Other
42. Note, 16 ST. JOHN’S L. REV. 101, 104 (1941).
43. See generally Miller, The Contractual Liability of Physicians and Surgeons,
1953 WASH. U.L.Q. 413.
44. ALA. CONG. Tit. 7, § 21 (1958): “The following must be commenced within six
years: . . . (8) Motions and other actions against attorneys at law, for failure to pay
over money of their clients, or for neglect or omission of duty.”
in every state except Tennessee where it was held in Bland v. Smith\textsuperscript{45} that where the plaintiff brought an action for the defendant attorney's alleged negligence in the conduct of a divorce action and alleged "pain and mental anguish," the one year statute for personal injuries would be applied. The court further stated that the six year contract limitation would be applied only in cases in which the whole basis of recovery was contract and where no allegations of personal injury had been made.

In all other jurisdictions, where the substance of the action controls, it is apparent that the nature of the attorney-client relationship sometimes dictates application of the contract statute of limitations; this is due in some measure to the fact that in the business context of the relationship the parties are more likely to think in terms of specific tasks to be performed and to reach an understanding on the essential terms of their agreement. This is in contrast to the normal physician-patient relationship, which usually involves a long-term, general course of examination and, if necessary, treatment. Thus, in Alter v. Michael,\textsuperscript{46} the California Supreme Court held that although medical malpractice sounded in tort and was subject to a one-year limitation,\textsuperscript{47} actions for legal malpractice were governed by the two-year contract statute.\textsuperscript{48}

Since a malpractice statute generally provides the shortest limitation period, attorneys and accountants usually contend that it should be applied in suits against them, whether the action is in implied contract or tort. In Galloway v. Hood,\textsuperscript{49} the Ohio court accepted this contention and applied the one-year malpractice statute in an action against an attorney. In an earlier decision,\textsuperscript{50} the Court of Appeals for the Second Circuit, applying the law of New York, had reached a contrary conclusion in a similar situation: "[The malpractice] statute only applies to wrongs to the person, and does not affect attorneys at law who have negligently conducted a litigation. Furthermore, if 'malpractice' were construed to include injuries to property caused by unskilful professional management, many claims, as in this case, would be barred before they were discovered."\textsuperscript{51} The court further stated that: "[T]he present action is either for a breach of the contract of retainer, or for an injury to property. In either case, Section 48 of the Civil Practice Act applies, and the period of limitation is six years."\textsuperscript{52} It is probably a safe assumption that a malpractice statute which does not specifically enumerate the particular classes of practi-

\textsuperscript{45} 197 Tenn. 683, 277 S.W.2d 377 (1955).
\textsuperscript{46} 64 Cal. 2d 480, 413 P.2d 153, 50 Cal. Rptr. 553 (1966).
\textsuperscript{47} See Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936), cited by the court in Alter v. Michael, stating that medical malpractice, as a tort, is subject to the one-year limitation. The Alter court also noted, "[a]rguments that discrimination results in favor of doctors and against lawyers should be addressed to the Legislature and not to the courts." 64 Cal. 2d 480, 413 P.2d at 155, 50 Cal. Rptr. at 555.
\textsuperscript{48} See Marchand v. Miazza, 151 So. 2d 372 (Ct. App. La. 1963), where the court stated that an action in legal malpractice could be predicated on either contract or tort.
\textsuperscript{49} 69 Ohio App. 278, 43 N.E.2d 631 (1941).
\textsuperscript{50} O'Neall v. Gray, 30 F.2d 776 (2d Cir. 1929).
\textsuperscript{51} Id. at 778.
\textsuperscript{52} Id. at 779.
tioners to which it applies is more likely to be construed to include attorneys than one which is specific and on its face does not appear to include attorneys. In the absence of an applicable malpractice statute, the limitation period, as in medical cases, will usually be the shorter tort statute; however, because of the nature of the relationship, courts may be more receptive to allegations of contract.

There is a distinct paucity of cases involving limitations in suits against accountants. The accountant's situation is much more analogous to that of attorneys than to that of physicians, and it is probable that the results will be roughly parallel. In New York, the malpractice statute has been held inapplicable to accountants in *Fed. Int'l. Banking Co. v. Touche.* In addition, in *Carr v. Lipshie,* a New York court refused to apply the contract statute:

Actions for breach of contract have been sustained where a specific result is guaranteed by the terms of the agreement, but not where the contracting party either expressly or impliedly promises to perform services of the standard generally followed in the profession or promises to use due care in the performance of the services to be rendered. The pleading herein does not allege a promise to accomplish a definite result. It merely states that the defendants would perform the services with due care and in accordance with the recognized and accepted practices of the profession.

While the language of *Carr* may seem to indicate otherwise, accountants are probably more susceptible to the contract statute of limitations than physicians or attorneys. This is especially true where an accountant is employed to perform a specific task such as an audit or tax return. In these expressly delineated situations, the parties are more likely to reach a "meeting of the minds" than in other, normally long-term, professional relationships. Where the relationship is in fact bottomed on a contract, it is hard to justify a rule which ignores this reality.

53. Five of the seventeen state statutes, Nebraska, New Hampshire, New York, North Dakota, and Ohio, do not specify against whom the action is to be brought; they merely provide for actions of malpractice. See note 22 supra.

54. Although the common usage of the word "malpractice" connotes a medical practitioner, BLACK'S LAW DICTIONARY 1111 (4th ed. 1951) defines the term as "[a]ny professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct." Therefore, the general malpractice statutes could easily be construed to include attorneys.

55. Twelve of the seventeen statutes specify that the action for malpractice applies to various classes of medical personnel and institutions:

Alabama (physicians, surgeons and dentists); Arkansas (physicians, surgeons, dentists, hospitals, and sanitarium); Colorado (any person licensed to practice medicine, chiropractic, osteopathy, chiropody, midwifery, or dentistry); Connecticut (physician, surgeon, dentist, chiropractor, hospital or sanatorium); Indiana (physicians, dentists, surgeons, hospitals, sanatorium, or others); Kentucky (physician or surgeon); Maine (physicians and all others engaged in the healing art); Massachusetts (physicians, surgeons, dentists, optometrists, hospitals and sanitorium); Michigan (physicians, surgeons or dentists); Minnesota (physicians, surgeons, dentists, hospitals, sanitariums); Missouri (physicians, surgeons, dentists, roentgenologists, nurses, hospitals and sanitariums); South Dakota (physician, surgeon, dentist, hospital or sanitarium). See note 22 supra.

56. 248 N.Y. 517, 162 N.E. 507 (1928).


COMMENCING THE RUNNING OF THE STATUTE

The most crucial determination to be made, once the applicable statute has been selected, is when the period of limitation begins to run. The most common statutory language, whether the statute is expressly for malpractice or has been construed to apply to it, is that the limitation period begins to run when the cause of action accrues. Only seven statutes specify when this point is reached. 59

In medical cases, the traditional approach 60 was that the cause of action accrued, and the statute began to run, at the time of the negligent act. 61 Although such a rule may impose harsh consequences on plaintiffs, this approach is consistent with the policy of protecting defendants from stale claims. In addition, its application is relatively easy from an administrative standpoint. Approximately twenty states subscribe to this theory to some degree, two by statute. 62

Because of the unfairness of this rule to many plaintiffs, it is under constant, often unsuccessful, attack in most jurisdictions. For example, Massachusetts had adopted the rule in Cappuci v. Barone. 63 In reaching its decision, the court's rationale was typical of jurisdictions which utilize the negligent act standard: "The damage sustained by the wrong done is not the cause of action; and the statute is a bar to the original cause of action although the damages may be nominal, and to all the consequential damages resulting from it though such damages may be substantial and not foreseen." 64 Pasquale v. Chandler 65 marked the last unsuccessful attempt to overthrow this standard in Massachusetts. As the basis for its decision, the court cited the legislative history of the pertinent statute, which indicated a "reaffirmation and strengthening of

59. The date when the injury was sustained: Del. Code Ann. tit. 10, § 8118 (Supp. 1960), and Pa. Stat. Ann. tit. 12, § 34 (1953); when the injury is or should have been discovered: Mo. Ann. Stat. §§ 516.100, 140 (1952), Ala. Code tit. 7, § 25(1) (1960), and Conn. Gen. Stat. Ann. § 52-584 (1958); the date of the negligent act: Ark. Stat. Ann. § 37-205 (1947), and Ind. Ann. Stat. § 2-627 (1946). It should be noted that the dates of injury and of the negligent act may or may not be the same. For example, in Hahn v. Claybrook, 130 Md. 198, 100 A. 86 (1917), the doctor negligently issued a prescription in 1904, but there was no injury until 1908. See note 101 infra and accompanying text.

60. In the older cases and writings on this subject, this rule is designated as the majority rule. In view of the present state of the law, however, this would no longer be accurate. See notes 61–60 infra and accompanying text.


62. See notes 59 & 61 supra.


64. Id. at 581, 165 N.E. at 655 (emphasis added).

what has been the legislative policy in the years since the Cappuci case."

Although direct attack on the traditional rule has often been unsuccessful, courts have utilized several methods to effectively circumvent it. The continuing treatment theory has been used when the negligent act was part of a continuing course of treatment by the defendant. Led by Ohio in *Gillette v. Tucker*, this theory prevents the statute from running until the relationship between physician and patient ceases for the illness in question. The logical bases for the theory have been succinctly stated in the following terms:

The continuous treatment theory is generally rationalized on one or more of three grounds: (1) the treatment of an ailment must be considered as a whole; (2) the failure to rectify the negligent act constituting malpractice is really continuing negligence giving rise to a single cause of action; and (3) the patient, while the treatment continues, relies completely on his physician and is under no duty to inquire into the effectiveness of the latter’s measures. No matter what its justification, the theory remains an attempt to ameliorate in certain situations the potentially harsh result of the majority accrual rule.

Applied in at least fourteen jurisdictions, the continuing treatment theory, while helpful in some cases, is far from a panacea. It will not, of course, help the plaintiff who sues for an isolated incident of negligence, nor will it afford relief where the injury cannot reasonably be discovered until after limitations have run.

It has been widely held, in avoiding the traditional rule, that a fraudulent concealment of the negligent act would suspend the running of the statute of limitations until the plaintiff discovers or reasonably

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66. 350 Mass. 450, 215 N.E.2d at 323. House Bill 530, a proposed amendment to Mass. Ann. Laws ch. 260, § 4 (Supp. 1966) would have substituted the language “... shall be commenced only within two years next after the injured party has knowledge of the facts which give rise to a cause of action but only within five years after the cause of action accrues.” This was defeated, and Senate Bill 924 was adopted which left the existing law unchanged except for an extension of the limitation period from two to three years.

67. 67 Ohio St. 106, 65 N.E. 865 (1902).


should discover the negligence. The elements which must be proved in a medical malpractice case do not differ from those which must be established in traditional cases of fraud. For this reason, this extension of the accrual date is virtually useless, since, with the exception of those states which impute knowledge to the defendant, the burden of proving scienter is extremely heavy.

The "discovery" test presents the most controversial, and perhaps most reasonable, approach to determining the time when a statute of limitations begins to run. It is presently in force in twenty-two jurisdictions, three by statute. After an exhaustive study of the question, the Supreme Court of New Jersey, in Fernandi v. Strully, accepted the discovery rule for cases in which a physician has negligently left a foreign object in his patient's body. The manifest unfairness of any other conclusion was apparent to the majority:

Here the lapse of time does not entail the damage of a false or frivolous claim, nor the danger of a speculative or uncertain claim. The circumstances do not permit the suggestion that Mrs. Fernandi may have knowingly slept on her rights but, on the contrary, establish that the cause of action was unknown and unknowable to her shortly before she instituted suit. 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 any undue impairment of the two year limitation or the considerations of repose which underlie it. If, as is to be hoped, the


73. Recently, some courts have been willing to charge the defendant with constructive knowledge. See, e.g., Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948); Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953).


resulting jeopardy to defendants produces a greater measure of care in connection with surgical operations, so much the better.\textsuperscript{77}

Almost all the courts which have adopted the discovery test acknowledge the unsoundness of the traditional rule.

It simply places an undue strain upon common sense, reality, logic and simple justice to say that a cause of action had "accrued" to the plaintiff until the X-ray examination disclosed a foreign object within her abdomen and until she had reasonable basis for believing or reasonable means of ascertaining that the foreign object was within her abdomen as a consequence of the negligent performance of the hysterectomy.\textsuperscript{78}

At least one judge has gone so far as to intimate that without the discovery test, statutes of limitations would be unconstitutional as a deprivation of due process of law.\textsuperscript{79} Whether or not this is the case, it is obvious that the discovery test is a potent force today and will continue to grow.

Cases of attorney malpractice illustrate a similar divergence of opinion on a much smaller scale. The rule that the period of limitation begins at the time of the negligent act is more widely applied in such cases.\textsuperscript{80} One possible, albeit unfortunate, reason for this is the fact that lawyers, realizing the potential implications of a change of the rule, have not pressed claims with as much vigor as in other areas which do not directly affect them. Circumvention of the rule has been attempted, however; a variation of the continuing treatment rule was applied to attorney malpractice in Ohio in \textit{McWilliams v. Hackett}.\textsuperscript{81} The court held, in an action for malpractice against an attorney, that the cause of action accrued and the statute began to run when the contract of employment was terminated. This was subsequently overruled in \textit{Galloway v. Hood},\textsuperscript{82} in which the court stated that the continuing treatment doctrine applied only in medical cases.

The discovery rule seems to be gaining a foothold in a small number of jurisdictions. In \textit{Marchand v. Miazza},\textsuperscript{83} the Court of Appeals of Louisiana, after noting that a claim against an attorney might sound in contract or tort, stated: "Treating it as one predicated upon tort,

\textsuperscript{77} 35 N.J. 434, 173 A.2d at 286.
\textsuperscript{78} Morgan v. Grace Hosp., Inc., 144 S.E.2d 156, 161 (W. Va. 1965).
\textsuperscript{80} See generally Annot., 118 A.L.R. 215 (1939).
\textsuperscript{81} 19 Ohio App. 416 (1923).
\textsuperscript{82} 69 Ohio App. 278, 43 N.E.2d 631 (1941). See notes 67-70 supra and accompanying text.
\textsuperscript{83} 151 So. 2d 372 (La. 1963).
we do not think the one year would begin to run until the damages have been shown to exist." An exception to the traditional rule was expressed in Jensen v. Sprigg, in which the court stated that a cause of action for defendant's delay which resulted in a judgment against plaintiff accrued "when the delay resulted in damages or injury to plaintiff." The latest case to reach the question of limitations in attorney malpractice was Fort-Myers Seafood Packers, Inc. v. Steptoe & Johnson. In that case, the defendant was directed by a client to send plaintiff a draft of a proposed contract to be used in connection with a business venture with a third party in Venezuela. Due to plaintiff's reliance on defendant's misstatement of Venezuelan law relating to the registry of fishing vessels, the plaintiff's boats were impounded while fishing for shrimp in Venezuelan territorial water. The three year statute of limitations would have run if the cause of action had accrued when plaintiff received the contract, but the action was brought within three years of the impounding of the boats, which was the date of the injury, and thus was timely if the cause of action was deemed to accrue at the impounding date. The trial court held that a cause of action accrued on the earlier date and granted defendant's motion for summary judgment. Reversing, the Circuit Court of Appeals relied on Hanna v. Fletcher, a case of negligence by a landlord, which held: "The action against [defendant] plainly is based on negligence, sounds in tort, and did not accrue until injury resulted from the alleged negligence." Although the statement of the Fort-Myers court that "[w]e see no good reason for drawing such a distinction between malpractice suits and other negligence actions" is logical and in keeping with the trend in medical cases, it is possible that some impetus for this conclusion was the vulnerability of plaintiff's attorney to a subsequent malpractice action based on his delay in instituting suit. In any case, this movement away from the rule that a cause of action accrues on the date of the negligent act is reflective of a general desire to facilitate a day in court for genuinely injured plaintiffs.

Although seldom litigated with respect to accountants, recent cases exhibit movement toward more liberal rules. Atkins represents, at the very least, a shift away from the date of the negligent act as the starting point for the statute of limitations. In Moonie v. Lynch, on a very

84. Id. at 375.
85. 84 Cal. App. 519, 258 P. 683 (1927).
86. 84 Cal. App. 519, 258 P. at 686.
87. 381 F.2d 261 (D.C. Cir. 1967).
89. The contract was mailed to plaintiff on May 16, 1962, the boats were impounded on July 25, 1962, and this suit was filed on July 22, 1965.
92. Id. at 472.
93. 381 F.2d at 262.
94. See Conclusion infra.
95. 64 Cal. Rptr. 55 (Ct. App. 1967).
similar set of facts, an intermediate appellate court in California adopted the discovery test in an action against an accountant.

The circumstances of this case (assuming that the allegations of the cross-complaint are true and that defendant filed this action within two years of the discovery of the alleged negligence, or the time when with reasonable diligence he should have discovered it) cry aloud for a rule which would not have required defendant to have brought his action in a period before he could have known that plaintiff had been negligent and that he, the defendant, had been injured.

We, therefore, hold that in a malpractice action against an accountant the statute of limitations does not run until the negligent act is discovered, or with reasonable diligence could have been discovered.96

Read as part of the over-all trend in malpractice cases, it is apparent that the retreat from the traditional position in accountancy cases is based on the same fundamental policy considerations as those present in the other more widely contested areas of professional malpractice.

THE SITUATION IN MARYLAND

In malpractice actions in Maryland, the initial problem of determining which statute of limitations is applicable does not arise since the limitations statute encompasses both tort and contract actions:97 "[A]ll actions . . . of assumpsit, or on the case . . . shall be commenced, sued or issued within three years from the time the cause of action accrued. . . ."98

Obviously, then, the date of the cause of action's accrual is the crucial determination which must be made by a Maryland court.99 Maryland seems to have moved away from the traditional approach to this issue.100 In professional malpractice, the earliest case to rule on this question was Hahn v. Claybrook,101 in which the court appa-

96. Id. at 58.
97. For a discussion of the form of action problem in Maryland, in a dental malpractice case, see McClees v. Cohen, 158 Md. 60, 62-64, 148 A. 124, 125-26 (1930).
98. Md. Code Ann. art. 57, § 1 (1964 repl. vol.): "Limitations of Actions." This article also provides that "... actions of assault, battery and wounding . . . [shall be brought] within one year from the time the cause of action accrued." Professional malpractice, sounding in negligence, is not included in this section. See McClees v. Cohen, 158 Md. 60, 148 A. 124 (1930); Angulo v. Hallar, 137 Md. 227, 112 A. 179 (1920); Dashiell v. Griffith, 84 Md. 363, 35 A. 1094 (1896).
99. This question has long been the subject of litigation in Maryland. The earliest statement of the accrual rule was Young v. Mackall, 3 Md. Ch. 399, 408 (1850): "[S]oon as the cause of action accrued, whether it be the case of a trust or not, if it be a fit subject for a suit at law as well as in equity, the statute of limitations begins to run."
100. Although the position was not completely clarified until 1966, at least one writer has maintained that Maryland was the first state to adopt the discovery test. See Note, The Statute of Limitations in Actions for Undiscovered Malpractice, 12 Wyo. L.J. 30, 34 (1957).
101. 130 Md. 179, 100 A. 83 (1917).
ently enunciated the discovery rule. In that case, between 1904 and 1910 the defendant doctor negligently prescribed a drug for the plaintiff which, beginning in 1908, caused skin discoloration in the form of bluishness appearing intermittently around the fingernails, lips and nose. Although the physician-patient relationship was terminated in 1910, plaintiff continued to take the drug. The condition was at its worst in 1913; suit was filed in 1915. The court held that the cause of action accrued in 1908 when plaintiff first noticed, or reasonably should have noticed, her injury. Since this was more than three years before the institution of suit, the action was barred. "The ground of the cause of action in this case was the discoloration of the plaintiff's skin by the use of the drug called argentum oxide, and the statute began to run from the time of the discovery of the alleged injury therefrom." While the court thus apparently enunciated the discovery test for Maryland, the opinion contains confusing dictum to the contrary.

The intent of the *Hahn* court may perhaps be discovered by consideration of *Washington, Baltimore & Annapolis Electric Railroad Co. v. Moss*, decided by the same court in the same term. Plaintiff, a broker, brought an action of assumpsit to recover for services rendered in securing a lease for the defendants. The court was obviously dissatisfied with the prospect of allowing the statute to run on a cause of action for which there would otherwise be no suitable remedy. In holding the action was not barred, the court cited with approval 25 Cyc. 1065:

> The accrual of the cause of action means a right to institute and maintain a suit; and whenever one person may sue another a cause of action has accrued and the statute begins to run. . . . The statute does not attach to a claim for which there is no right of action,

102. The *Hahn* holding was, however, misconstrued in *Pickett v. Aglinsky*, 110 F.2d 628, 630 (4th Cir. 1940): "The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. . . . This rule is generally followed in applying statutes of limitations to actions for malpractice of physicians and surgeons. [citing *Hahn v. Claybrook*]." This misconception apparently resulted from the conclusion that the action in *Hahn* was barred because the cause of action accrued at the time of the negligent prescription. In fact, however, it was barred because the plaintiff discovered the injury in 1908, seven years before the institution of suit. 130 Md. at 187, 100 A. at 86. For correct constructions of *Hahn*, see note 117 infra.

103. 130 Md. at 187, 100 A. at 86.

104. Although it too would have precluded recovery, the court of appeals could have based the *Hahn* decision on the continuing treatment theory which had been promulgated fifteen years earlier by the Ohio court in *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902). *See* note 67 supra and accompanying text. Since the court cited other cases from foreign jurisdictions, it might be concluded that the continuing treatment rule was not considered.

105. 130 Md. at 182, 100 A. at 84:

The general rule, in cases of neglect of duty arising from contract and the breach of a professional duty by a physician, surgeon, or an attorney is held to fall within this rule, and is correctly stated and supported by authority in 25 Cyc. 1116, as follows: "In cases of negligent performance of a contract or neglect of some duty imposed by contract, the cause of action accrues and the statute begins to run from the time of the breach or neglect, not from the time when consequential damages result or become ascertained; for the cause of action is founded on the breach of duty, not on the consequential damage, and the subsequent accrual or ascertainment of such damage gives no new cause of action."

106. 130 Md. 198, 100 A. 86 (1917).
and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. The true test therefore to determine whether a cause of action has accrued is to ascertain the time when plaintiff could have first have [sic] maintained his action to a successful result. The fact that he might have brought a premature or groundless action is immaterial.\textsuperscript{107}

Read in conjunction with \textit{Hahn}, the cited language, taking into account the use of the word "premature," seems to indicate that a cause of action will accrue only when the plaintiff could obtain relief commensurate with the injury. That he could technically maintain an action before he has suffered compensable damage is irrelevant and will not commence the running of the statute.

Ten years later, in \textit{Chestertown Bank v. Perkins},\textsuperscript{108} the court again appeared to apply the discovery test, once more in a non-malpractice area. In a mistaken belief as to an estate's solvency, the executrix made full payments on notes to the defendant bank in 1921 and 1922. In 1924, a final accounting revealed the insolvency and the fact that the payments to the defendant actually represented an overpayment of $1,822 more than its pro rata share. The suit to recover these overpayments was filed in 1926, five years after they had been made. The defendant claimed that the statute began to run in 1921, but the court held that it did not commence until discovery of the error.

The executrix at the time of the payments of said notes was of the honest belief, as alleged in the bill, that the estate was solvent, and not until she had knowledge, acquired after proper effort and diligence on her part, or actual or constructive knowledge of the insolvency of the estate, and the fact that she had overpaid the appellant, could she sue to recover such overpayments, and it was not until such time, at the earliest, that any right of action accrued to her, to recover from the appellant the overpayments made to him. And if, as alleged in the bill, she had no knowledge of such insolvency until the 20th day of May, 1924, the debt sued for was not barred by the statute at the time of the institution of the suit on the 25th day of November, 1926.\textsuperscript{109}

In the recent case of \textit{Waldman v. Rohrbaugh},\textsuperscript{110} an action was brought in September, 1964, for alleged negligence in an operation performed in June, 1961, and in subsequent treatment of plaintiff's ankle. The defendant doctor filed, \textit{inter alia}, a plea of limitations and later, "not realizing that they had strayed from customary surroundings in the District of Columbia into Maryland,"\textsuperscript{111} a Motion for Judgment on the Pleadings. This device is not provided for in the Maryland rules, although it is authorized by Rule 12 of the Federal Rules of Civil Procedure. Judge Shook, shaken by "the same federal virus that felled

\begin{itemize}
\item[\textsuperscript{107}] Id. at 205, 100 A. at 89 (emphasis added).
\item[\textsuperscript{108}] 154 Md. 456, 140 A. 834 (1927).
\item[\textsuperscript{109}] Id. at 461, 140 A. at 836.
\item[\textsuperscript{110}] 241 Md. 137, 215 A.2d 825 (1966).
\item[\textsuperscript{111}] Id. at 138, 215 A.2d at 826.
\end{itemize}
counsel for the doctor,112 heard arguments on the motion and granted it on the basis of limitations. While holding that the proceedings should be remanded under Maryland Rule 871 because of the procedural defect, the court engaged in extensive dictum on the substantive question of limitations. The complaint set out a claim based on the continuing treatment theory, although at trial the plaintiff relied on the discovery test. After a review of the trend of national authority, the court approved both rules. In support of the continuing treatment rule the court cited two Maryland cases113 and then stated:

In our view, if the facts show continuing medical or surgical treatment for a particular illness or condition in the course of which there is malpractice producing or aggravating harm, the cause of action of the patient accrues at the end of the treatment for that particular illness, injury or condition, unless the patient sooner knew or should have known of the injury or harm, in which case the statute would start to run with actual or constructive knowledge.114

In enunciating, or re-affirming the discovery test for Maryland, where no continuing treatment relation exists, the court noted that Hahn had almost uniformly been interpreted to state the discovery test.115 In concluding, the court stated:

On reason and principle and the authority of Hahn and cases of like import elsewhere which have been cited and referred to, we conclude that the right of action for injury or damage from malpractice may accrue when the plaintiff knows or should know he has suffered injury or damage. In many cases he will or should know at the time or soon after the wrongful act that he has been the victim of negligent care; in other settings of fact it may be impossible for him, as a layman, unskilled in medicine, reasonably to understand or appreciate that actionable harm has been done him. If this is fairly the fact, we think he should have the statutory time from the moment of discovery, the moment he knows or should know he has a cause of action, within which to sue.116

Although there are no cases specifically dealing with attorneys or accountants, the discovery test has been applied in other areas,117 and it seems entirely likely that the court of appeals would extend its application to all cases of professional malpractice.

112. Id. at 139, 215 A.2d at 826.
114. 241 Md. at 142, 215 A.2d at 828.
116. 241 Md. at 145, 215 A.2d at 830.
CONCLUSION

Because of the numerous exceptions to the traditional rule that a cause of action accrues, and the statute begins to run, at the time of commission of the negligent act, it is apparent that this traditional rule no longer represents the majority position. In their efforts to give effect to the policy of affording relief to wronged plaintiffs, however, the courts have been somewhat less than consistent. In addition to the variations of application from state to state, courts have failed in some instances to establish viable rules which would apply uniformly to all professional malpractice cases within their jurisdiction. The instant cases present such a situation. While the court in both *Gaddis* and *Atkins* obviously recognized the impropriety of a rule of law which would bar a valid claim before it could reasonably have been maintained, it did not, in fact, establish a uniform rule. *Gaddis* articulated the discovery test in medical malpractice cases where a foreign object had been negligently left in a patient's body. In *Atkins*, since the date of the injury, the assessment of tax, coincided with the earliest possible time of discovery, the result under either test would have been the same. The court, however, framed its opinion in terms of the date of injury, and since this date will not always coincide with the date of discovery, these two cases have seemingly created the anomalous situation of two different rules flowing from the same policy consideration. Although this result may not have been intended by the Texas court, it is to be hoped that as other courts re-examine their approaches to statute of limitations determinations, they will uniformly apply the discovery test to all cases of professional malpractice and thereby avoid reaching conflicting results.