1966

William N. Christiansen v. Vincent L. Rees, Doe I and Doe II, and The Salt Lake Clinic : Appellant's Brief

In the Supreme Court of the State of Utah

WILLIAM N. CHRISTIANSEN,
Plaintiff and Appellant,

vs.

VINCENT L. REES, DOE I and DOE II, and THE SALT LAKE CLINIC, a Professional Corporation,
Defendants and Respondents.

CASE NO. 10731

APPELLANT'S BRIEF

Appeal from Judgment of the Third Judicial District Court,
Salt Lake County, State of Utah
The Honorable Leonard W. Elton, Judge

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS (continued)

OTHER AUTHORITIES CITED

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STATEMENT OF THE KIND OF CASE

This is a malpractice action for compensatory damages against a medical doctor and others who may be liable, for negligently causing the broken end of a surgical needle to be left in the Appellant's body during a medical operation.

DISPOSITION IN LOWER COURT

At pretrial upon the Defendants' motion, the Court dismissed the action with prejudice on the ground that it was barred by the Statute of Limitations.

RELIEF SOUGHT ON APPEAL

The Appellant seeks a decision setting aside the judgment of the trial court and remanding the case to the lower court for trial on the merits.

STATEMENT OF FACTS

About September 1950, the Appellant began seeing Dr. Floyd Cannon, a partner in the Salt Lake Clinic, for treatment of a diarrhetic condition (Christensen, Depos., pp. 8 & 9). Dr. Rees, another partner in the Clinic (now a professional corporation), first saw the Appellant in August 1951, in connection with a minor hemorrhoid operation which he performed. In February 1952, Dr. Rees also removed the Appellant's ileum, and in December of the same year he performed a total colectomy. Finally, on April 12, 1955, he removed the Appellant's anus (Christiansen Depos., pp. 9-11). Following a final examination by Dr. Rees, which was made upon the patient's release from the hospital the Appellant returned to Mayfield, Utah, where he was placed under the care of a local doctor and was not treated again by the Respondents.

Subsequent to the operation of 1955, the patient had become extremely nervous and irritable, experiencing pain in his lower body, chills, impotency and other symptoms. At the time of his release from the hospital, the Appellant had asked Dr. Rees about these symptoms and was told that "time will heal it." (Christiansen Deposition, pp. 21 and 47). After returning to southern Utah, the Appellant continued to complain from time to time to his family doctor, who repeatedly reassured the Appellant that the discomfort was normal and that the symptoms would grad-

ually disappear in time (Christiansen Deposition, pp. 19, 21 and 43), but the condition did not improve and the Appellant eventually began consulting Dr. Stewart, of Gunnison, who, in 1962, referred the patient to Dr. Endsley, a physician in Provo, in the belief that the Appellant was suffering from kidney stones. On the subject of Appellant's medical history, Dr. Endsley reports the following:

> "This patient is seen for evaluation of the problem of recurrent left flank pain, chills, fever, and pyuria of approximately 6 years duration. This patient has had a three stage collectomy for ulcerative colitis with an ileostomy in 1955. Since the collectomy was begun the patient has had recurrent left flank and lower guadrant pain with recurrent pyuria, chills and fever. . . ."

Dr. Endsley, who is a specialist, was unable to discover the source of the pain, despite an extensive physical examination, until X-rays revealed the presence of a foreign object in the Appellant's body on July 14, 1962. The radiologist who took the X-Rays, Dr. James Matheson of the Utah Valley L.D.S. Hospital, made the following diagnostic conclusions, which he furnished to Dr. Endsley:

> "Impression: 1. No lesion is seen in the intravenous pyelogram to the extent of visualization.
>
> 2. The spleen appears slightly enlarged.
>
> NOTE: There is a curvolinear metalic-like density just above the synphgals pubis which has the X-ray appearance of a broken surgical needle."

Later the same day, in which the X-ray photographs were made, Dr. Endsley performed an exploratory operation without any substantial finding. Dr. Endsley then sent the patient to Dr. Matheson again for further X-rays, which were taken on August 7, 1962. Dr. Matheson's report reads as follows:

"AP & Lateral Views of the Pelvis.

The curvolinear metallic density thought to be a portion of a surgical needle is seen in the soft tissue just below the coccyx and slightly posterior. It lies almost in the midline just barely to the right. The lower two segments of the coccyx are not visible and this may be due to surgical removal."

Subsequent to that report, Dr. Endsley performed a second operation in which he attempted to locate the needle in the bladder. As his post-operative comment in the hospital record shows, however, he was unsuccessful.

The appellant's first knowledge that there was a needle in his body and that it had been left there during the operative procedure performed by the Respondent, Dr. Rees, was the statement of Dr. Endsley to the Appellant that a surgical needle had been left in his body, apparently from the operation performed by Dr. Rees. This information was conveyed to the Appellant between July 16, 1962, and August 4, 1962.

It was stipulated by counsel for the Respondent at pretrial that, for purposes of the motion for summary judgment, the following facts were to be taken as true:

(1) That the needle in Mr. Christiansen's back was a surgical needle;

(2) That it was left there during and a result of the last operation performed by the Respondent on Mr. Christiansen on or about April 12, 1955; and

(3) That no other operations had been performed on that portion of the Appellant's body until the needle was found in 1962.

Even though Dr. Endsley felt that it was advisable to remove the needle and made an effort to do so, the needle was not where he thought it was and the exploratory operation, consequently, proved to be unsuccessful. There has been no subsquent attempt to extract the needle and it has remained in the Appellant's body at the location diagramed by Dr. Matheson until the present date.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THE ACTION WAS BARRED UNDER UTAH LAW BY THE STATUTE OF LIMITATIONS.

Traditionally, the justification given by the courts in applying the harsh and often inequitable laws limiting the period in which an action may be brought has been a fear that injustice might result if an end could not be made, sometime, to the possibility of litigation. As a consequence of this fear, an arbitrary, but useful point has been chosen by the Legislature at four years from the time at which the period began to run.

Unfortunately, it has never been clear, as evidenced by the myriad interpretations all over the country, at just what point the statute begins to run. While the Appellant

accepts, reluctantly, the obvious utility of providing some cutoff point for litigation, it does not appear to the Appellant that Utah law requires that point to be the one chosen by the trial court in the case at hand. Indeed, in view of the liberal trend in this area, it would seem that a total consideration of the problem requires an entirely different conclusion: that the statute of limitations should be interpreted to run, in malpractice actions, from the date of discovery by the Plaintiff, not from the date of the negligent act.

It appears to the Appellant that the only important issue before the Court is the proper construction to be placed on the applicable statute of limitation, Title 78-12-25, U.C.A., in the light of: (1) legislative purpose, to the degree that it can be ascertained; (2) national and Utah case law to the extent that actual holdings, as opposed to obiter dicta, can be found; and (3) public policy arguments, particularly where legislative purpose is unclear. The statute reads as follows:

> "78-12-25. Within four yars. - Within four years:
> (2) An action for relief not otherwise provided for by law."

It may readily be seen that sub-section two, which is the relevant portion of the statute, is a catch-all provision, enacted, in all likelihood, without specific consideration by the Legislature of when the period should begin to run in malpractice actions. The only legislative purpose manifested by the wording is that of enacting a statute of limitations provision broad enough to cover all types of actions not previously dealt with specifically. It is thus highly

probable that the Legislature never considered the special problem before the Court in the instant case. The question, therefore, becomes: what would the Legislature have done had it been presented with the specific problem of this case; when does the Statute of Limitations begin to run in a malpractice action, from the date of discovery by the injured or from the date of the negligent act?

It is the contention of the Appellant that the public policy of the State insofar as it has been expressed by the Legislature, supports the running of the statute from the date of discovery. This public policy finds explicit enunciation in Title 78-12-26, U.C.A. dealing with injuries to real and personal property, fraud or mistake, and liability under state statutes, and 78-12-27, U.C.A., covering actions against corporate stockholders or directors. While other sections, such as that dealing with limitation of contractual liability, may expressly name some other point of begining such as the point at which the last charge was made, this is reasonably given the intrinsic differences between contractual and tort liability and their differences in terms of ease of discovery of the wrong. It seems clear that had limitations on malpractice liability been dealt with specifically by the Legislature, the protection given the plaintiff in other areas would have been extended to cover malpractice actions.

A concrete illustration of this interpretation of legisative purpose is the case of **Attorney General v. Pomeroy,** 73 Utah 46, 72 P2d 1277, in which it was held that the statute began running at the date of discovery even though the applicable section, 104-2-20 (1943 Code), made no mention of discovery. Significantly, the discovery principle

was codified, even at that early date, by the related section 104-2-24. Since the court held that the period run from discovery even though Section 20 was silent on the subject, it is obvious that the omission of specific reference to discovery in Title 78-12-26 in no way implies a rejection of the discovery principle by the Legislature especially given the catch-all, generalized nature of the section.

It is the position of the Appellant that legislative intent, if it were able to express itself today, would be that the period begins running at the date of discovery of the negligent act by the plaintiff. This follows from a consideration of what must be recognized as a basic trend in the law towards the liberal discovery principle. While it is recognized that two lines of authority exist, successive reading of 74 ALR 1319, 144 ALR 212 and 80 ALR 2d 368 cannot fail to impress the reader with the existence of a widespread trend in the direction of the better reasoned and more liberal rule. The most prominent of the discovery principle jurisdictions is California, but, as shown by 80 ALR 2d 388, the discovery principle has now been accepted in approximately half the cases in which it has been considered , and the proportion following the discovery principle, as shown by the ALR 2d Later Case Service, Vol. 5, appears to be much greater. In addition to the jurisdictions listed in 80 ALR 2d 388, the following jurisdictions have since either adopted the discovery rule on initial consideration or have reversed previous decisions in following the discovery rule: Spath v. Morrow, 174 Neb. 38, 115 NW 2d 581; Stacey v. Pantane, 177 Neb. 694, 131 NW 2d 163; Fernandi v. Strully, 35 N.J. 434, 173 A2d 277; Seitz v. Jones, 370 P2d 300; Billings v. Sisters of Mercy, 86 Idaho

485, 389 P2d 224; Johnson v. Caldwell, 371 Mich. 368, 123 NW2d 785; Mosby v. Michael Reese Hospital, 49 Ill. App. 2d 336, 199 NE 2d 633. It cannot be doubted that modern tribunals consider the discovery doctrine to be the better, more equitable rule.

Although other case law may be cited, the entire case of the Respondents really depends upon a favorable interpretation of two Utah cases, to-wit: Peteler v. Robinson, 81 Ut. 535, 17 P2d 244, and Passey v. Budge, 85 Ut. 37, 38 P2d 712. The Appellant respectfully states that the Utah cases cited above do not stand for the proposition for which they were cited in the lower court; that the principle of the statute of limitations in malpractice cases begins running at the date of the negligent act rather than at the date of discovery by the plaintiff.

In the Peteler case, the physician performed a negligent opration to remove the plaintiff's tonsils and continued to treat the plaintiff until 1926. The action for the resulting injury incurred by the operation of 1919 was not commenced until 1927. The eight year lapse in time was not viewed as an obstacle by the court, however, which reversed and held for the plaintiff on the ground that the statute of limitations did not bar recovery where the conduct of the physician was a continuing form of negligence. In passing, however, the court made comments in the form of obiter dicta, that would imply that had the doctor not continued to treat the patient, the statute of limitations might have begun running when the operation was performed.

As mere dicta, the court's remarks in Peteler need not concern us long. These remarks, however, are understandable in view of the early date of the case and the fact

that in 1932 the clear majority of American decisions, unlike today, supported the court's comments. Despite the unfavorable dicta, however, the Peteler opinion is liberal in tone and, in its day, represented a step in the liberal trend already mentioned.

The dicta of Peteler is also made more understandable when viewed in the light of the special facts of that case. In Peteler, unlike the instant case, the patient's ailment was tonsillitus and and the operation was merely a tonsillectomy. Certainly, the disease was common enough to the layman's experience and the operation was minor enough that the patient should have been alarmed when he not only failed to improve after a few years, but got lock-jaw, received injury to his vocal cords, heart and nervous systems, and suffered infection of both ears, which ultimately resulted in loss of hearing. This might have doomed the Plaintiff's case had not the doctrine of continuing treatment saved it.

In sharp contrast, the Appellant in the instant case had little rason to suspect that his symptoms were due to the Respondents' negligent act: The patient had recently undergone a series of major, somewhat complicated operations, in the lower part of his body which neither he nor the general public could be expected to understand; the seriousness of the patient's original ailment was such that he correctly expected a great deal of suffering in his lower body. This was so unalarming that even his family doctor and the many other physicians whom he subsequently complained to, failed to see anything unusual about it and told him not to worry (Christiansen Deposition, pp. 19, 21, 43 and 47. In fairness, can the Respondent really expect

the Appellant to have recognized and called the Respondent's attention to his negligence when even the many trained doctors to whom the Appellant complained of the pain never suspected the cause until the X-ray was taken?

Mere knowldge of the pain was not enough. The Appellant went to numerous doctors in a vain attempt to eliminate the pain and other symptoms. He cannot realistically be expected to have returned to Dr. Rees (continuing treatment doctrine) unless he had some reason to suspect first, that the pain and other symptoms were caused by the Respondent's operation and, second, that the operation had tortiously or wrongfully caused him injury.

Nor can it be claimed that the Appellant did not try to find out the cause of the pain. The record shows that he went to numerous (at least 4) doctors after the operation and he asked them, frequently, about the problem. (Christiansen Deposition, pp. 22 and 23). The reason he did not suspect the cause of his troubles was that he was repeatedly reassured by his physicians that the symptoms would eventually go away and that they were normal or due to some other problem such as gall bladder trouble. Quite naturally, he believed what his doctors told him; yet he remained sufficiently alarmed to go to four different doctors before the needle was discovered.

The second and most important case to Respondent's position is **Passey v. Budge,** 85 Utah 37, 38 P2d 712. In this case the defendant removed the plaintiff's tonsils but in doing so caused a portion of the scalpel blade to break. The blade fell down the plaintiff's throat and the defendant failed to remove the broken piece of steel. This operation took place on May 13, 1925. From that time on the

plaintiff went to the defendant for treatment until June 17, 1930. Subsequent to that date she discovered the presence of the broken blade in her body and it was removed on January 6, 1932. The action was commenced thereafter and the defendant claims that it was barred by the Statute of Limitations. The Court in this instance relied upon the Peteler case; thus the cited cases of the defendant did not apply. The case, by the same dicta, indicated that perhaps a different rule would apply had the action been commenced more than three years after the alleged negligent operation.

We respectfully submit that the two Utah cases cited by the Defendant are merely obiter dicta so far as this particular issue is concerned and that Utah has not considered a case such as the instant case. There is no Utah rule; consequently, one has to look to other primary authority to determine the law.

There are two lines of authority concerning the same question. So far as the Appellant can determine they are about equally divided.

We believe that the Utah Court has consistently followed the California decisions and that California is the prime source of authority for Utah cases where the Utah Court itself has not decided. Under the circumstances, it is merely a question of which line of authority this Court wants to follow. We respectfully submit that the best line of authority is the one that renders substantial justice and does not bar a person from bringing an action for a condition caused by the negligent conduct of another when the circumstances of the other persons' negligence were unknown to the plaintiff and could not be known to the plain-

tiff by reason of ordinary care. We respectfully submit that the purpose of law is to render justice between the parties and that any other rule which would prevent a person from seeking his remedy within a reasonable time after the cause of injury is known, is a bad doctrine and not consistent with justice and is inconsistent with the newer and better reasoned rule. The rule as stated by the California Court is as follows:

> "That where a foreign substance is negligently left in a patient's body by a physician, surgeon, or dentist and the patient is ignorant of the fact, and consequently of his right of action for malpractice, the limitation period does not begin to run against a malpractice action until the patient learns or, in the exercise of reasonable care and diligence, should have learned of the presence of such foreign substance in his body."
>
> Huysman v. Korsch (1936) 6 Cal. 2d 302, 57 P(2d) 908.
>
> Ehlen v. Burrows (1942) 51 Cal. 2nd 141, 124 P (2d) 82.
>
> Pellett v. Sonstone Corp. (1942) 55 Cal. App. 2d 196, 130 P(2d) 181.

The case of **Agnew v. Larson,** a 1947 California case, cited at 185 P2d 851, digests some of the earlier decisions on the question. In the Agnew case the defendant contended that the rule applied in California cases identical to the instant case was not applicable to the Agnew case for reason that this was the prescribing of medicine rather than the performance of a negligent operation. In the Agnew case the Judge said, after analyzing the surgery cases, the following:

"Defendant, while conceding the applicability of the foregoing rule to cases arising out of surgery, in which the patient subsequently discovers foreign substances such as sponges, clamps, tubes pieces of broken bones and other obects to have been left in his body, contends that it does not apply to the administration or introduction into the patient's body of a drug or medicine. We fail to find any basis of differentiation, however, in the respective situations."

The Court went on to hold, therefore, in the Agnew case, that the Statute of Limitations did not run until discovery of the condition.

In a case entited **Faith v. Earhart,** 52 Cal. App. 2d 228, 126 P2d 151, the Court denied the defendant's plea in bar of the Statute of Limitations in a situation where a dentist had failed to remove broken bones or the roots of teeth, after making extractions and notwithstanding the fact that the plaintiff did not discover the dentist's error for ten and one-half years thereafter when x-ray films revealed to her for the first time the presence of the said broken roots.

Bowers v. Olch, 120 CA 2d 108, 260 P2d 997, was a malpractice action, commenced within a year after plaintiff discovered that a needle was left in his abdomen after a surgical operation on him in a hospital. The court held the action was not barred by the Statute of Limitations as to hospital's resident surgeon participating in operation, which was performed over one year before the commencement of the action, because the Statute of Limitations did not commence to run as to such surgeon until the plaintiff discovered that the needle was left in his body.

In **Billings v. Sisters of Mercy of Idaho,** 389 P3d 224, 86 Idaho 485, it was determined that a patient's cause of

action for malpractice arising out of the fact that a surgeon left a gauze sponge in the patient when performing an operation in 1948 was not barred by the Statute of Limitations although the suit was not brought until 1962, when the presence of the sponge was discovered after an exploratory operation was performed in 1961.

It is interesting to note at this time, the most recent case concerning this area of the law, especially since it is from the sister State of Montana. This case overrules a long standing precedent and interprets a statute almost identical to our statute. The court held the statute begins to run upon discovery of the injury, not upon commission of the tort. A synopsis of the case is reported in the American Trial Lawyers Association Newsletter, Vol. 9, No. 7, page 222, dated September, 1966. Because the editor of the Newsletter put the reasoning so eloquently, Appellant quotes the article from the above cited Newsletter.

The case is **Johnson v. St. Patrick's Hospital,** 417 P2d 469 Mont. (Decided August 8, 1966).

> "One of the most gnarly problems in the intractable area of medical malpractice is when the statute of limitations begins to run in cases of undiscovered malpractice, such as those in which the surgeon sews up a foreign object inside the surgical wound. How shoud the law handle the problem of the forgotten sponge, Kelly clamp, hemostat, or other examples of miscellaneous misplaced surgical hardware? The "foreign-object" cases are classic examples of inherently unknowable harms, and to apply the strict general rule that the statute of limitations starts to run from the date of the malpractice (closing of incision) and not the date of its diligent discovery, harshly insisting that blameless ignorance of the injury does not prevent the

cause of action from accruing and the statute from running would seem to be gross unfairness and a wen on the fair face of justice.

The modern trend is to avoid this harsh rule and to allow the malpractice victim to bring an action at any time within the statutory period following discovery of defendant's malpractice. See, e.g., Johnson v. Caldwell, 123 N.W.2d 785 (Mich. 1963) ("Simply and clearly stated the discovery rule is: The limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act . . . We are persuaded we should adopt the rationale of the discovery doctrine"), Ayers v. Morgan, 154 A.2d 788 (Pa. 1959), 25 NACCA L.J. 131-38 (statute began to run not when surgeon left sponge in plaintiff's abdomen during an operation, but when patient discovered presence of sponge, almost 9 years later); Fernandi v. Strully, 173 A.2d 277 (N.J. 1961) (surgeon left wing nut from instrument used in hysterectomy in patient's body: "Justice cries out that she fairly be afforded a day in court"); 80 ALR2d 368; Louisell & Williams, Trial of Medical Malpractice Cases, ss 13.06-13.12.

Rejecting the cross-grained date-of-malpractice rule, the Supreme Court of Montana has just commend-ably held that its 3-year malpractice statute of limitations started to run from the date the patient discovered or should have discovered that a surgical sponge had been left in his body by hospital employees, and not from the date of the negligent act.

In reaching this equitable result, the court overruled a prior inconsistent 94-year-old unjust precedent, thereby demonstrating that in Torts, no rule is settled until it is settled right. Error does not become invulnerable with age."

Other authorities:

Rosane v. Singer, 112 Colo. 363, 149 P2d 372.

Morrison v. Acton, 68 Ariz. 27, 198 P2d 590.

Stafford v. Schultz, 259 P2d 494 superceded 42 Cal. 2d 767, 270 P2d 1.

Myers v. Stevenson, 125 CA 2d 399, 270 P2d 885.

Hurlimann v. Bank of America, 141 C.A. 2d 801, 297 P2d 682.

In the western states, Arizona, Colorado, Idaho, Montana and California support the California rule. New Mexico, Washington and Oregon are the only western states that have ruled on the subject, that do not support the California rule.

CONCLUSION

The Appellant respectfully urges the Court to set aside the judgment of the trial court and remand the case to the lower court for trial on the merits. The Appellant respectfully contends, (1) that the basic trend in the law today is toward the more liberal rule, to-wit: the limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by reasonable care, plaintiff should have discovered the wrongful act, and (2), that the peculiar facts of this case present a problem not yet considered by the Utah Court. In view of the above and the recent decisions of the Sister States, Appellant re-

spectfully submits that it would be appropriate for Utah to join California, Arizona, Colorado, Idaho, and Montana, and allow the Plaintiff to present his case to the jury.

Respectfully submitted,

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Mailed a copy of the foregoing, postage prepaid, to John H. Snow, Attorney for Defendants-Respondents, 701 Continental Bank Building, Salt Lake City, Utah, this _____day of November, 1966.

_____

Jackson B. Howard