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Texas Adopts the Discovery Rule for Limitations in Medical Malpractice Actions.

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COMMENTS

TEXAS ADOPTS THE DISCOVERY RULE FOR LIMITATIONS IN MEDICAL MALPRACTICE ACTIONS

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At common law there was no fixed time for the filing of actions. Limitations of actions have been created entirely by statute to encourage promptness in enforcing rights and to prevent the assertion of fraudulent or stale claims. The theory underlying the establishment of an arbitrary time limit for initiating legal proceedings is two fold; first, that a plaintiff will not ordinarily delay pursuit of meritorious claims, and second, that after a certain number of years have elapsed memories dim, witnesses die or become unavailable, documents are lost, and it is usually inconvenient or impossible to reconstruct the true facts of the case.

The previous interpretation of such statutes was narrow, holding that knowledge by the injured person of the existence of the tort is immaterial, since the statute ran from the date of the negligent act. It is still true in many states that, in the absence of fraud or concealment of a cause of action, the statutory period runs from the time the tort was committed although the injured person may have no knowledge or reason to know of it. This interpretation developed before the days of modern surgery. But, as we have developed medically into the twentieth century, so have we developed legally when the problems of medical malpractice have become known.[1]

In an action for malpractice, especially when a foreign body has been left in a patient, the court must balance the rights of the plaintiff who may be unable to learn of his injury until after the period of limitations has expired, against the defendant's right to be protected from stale claims with the attendant difficulty of securing witnesses and evidence.

Other Judicial Solutions

Courts, of necessity, have tried to make exceptions in order to do justice. Until recently there were only three exceptions to the rule that the statute of limitations began to run at the time the foreign object was left within the patient.

The first exception was in Contract: Plaintiff attempts to frame his

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1 Johnson v. St. Patrick's Hospital, 417 P.2d 469 (Mont. 1966).

pleadings in contract to take advantage of the longer period of limitation. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort, founded on contract, so that an action ex contractu for the breach of contract or an action ex delicto for breach of duty may be brought at the option of plaintiff.[2] The weight of authority, as seen in the California Supreme Court case of *Huysman v. Kirchs*,[3] states that a malpractice action is governed by time limitations provided for tort actions and not by those provided for contract actions.[4] This rule rests on the view that the gravamen of the action sounds in tort and not in contract.[5] In Texas there is no special statute providing for a period of time in which actions for malpractice must be brought. The two year period in Article 5526,[6] Section 6, for injuries done to the person is applicable.[7] The same article, Section 4, provides a similar length of time for oral contracts. A cause of action for breach of an implied warranty in an oral contract is governed by the two-year statute of limitations.[8] Few, if any, contracts for medical services are written, thus attempting to frame an action as a breach of contract would be of no value in Texas.

When his suit is successfully prosecuted, the plaintiff in a contract action obtains only partial relief. The damages recoverable in malpractice are for personal injuries, including pain and suffering which naturally flow from the tortious act. In the contract action, they are restricted to the payments and expenditures used for nurses and medicines or other damages that flow from the breach thereof.

The second exception was Fraud: It has been held that although a plaintiff's ignorance of the wrong committed cannot be considered in determining when the statute begins to run, an exception to this rule is made in case of concealment of the cause of action.[9] It is generally held that fraudulent concealment will toll the statute of limitations, and a party cannot profit by his own wrong in concealing a cause of action against himself until barred by limitation.[10] The stat-

2 Sellers v. Noah, 209 Ala. 130, 95 So. 167 (1923).
3 6 Cal. 2d 302, 57 P.2d 908 (1936).
4 Id.
5 Stafford v. Shultz, 42 Cal. 2d 767, 270 P.2d 1 (1954).
6 TEX. REV. CIV. STAT. ANN. art. 5526 (1925):
There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:
4. Actions for debt where the indebtedness is not evidenced by a contract in writing. . .
6. Action for injury done to the person of another.
7 Thompson v. Barnard, 142 S.W.2d 238 (Tex. Civ. App.—Waco 1940 aff'd without discussion of the point 138 Tex. 277, 158 S.W.2d 486).
8 Smith v. Fairbanks, Morse and Co., 101 Tex. 24, 107 S.W. 908 (1907); Certain-Teed Products Corp. v. Bell, 422 S.W.2d 719 (Tex. Sup. 1968).
9 Rosane v. Senger, 112 Colo. 363, 147 P.2d 372 (1944); Johnson v. Chicago, M & St. P. Ry. Co., 224 F. 196 (W.D. Wash. 1915).
10 Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 744 (1953).

ute of limitations cannot be converted into an instrument of fraud.[11] When an action is framed in fraud, the court is faced with the necessity of deciding whether the fraud must be an affirmative act or if fraudulent concealment will be imputed. Some courts apply the general rule which requires an affirmative act, although other courts reach the contrary result on the theory that in view of the fiduciary or confidential relationship between a practitioner and his patient, there exists a duty on the part of the practitioner to disclose material information to his patient and failure to do so results in concealment. When a trust or other confidential relationship does exist between the parties, silence on the part of one having the duty to disclose, constitutes fraudulent concealment in the absence of any affirmative act. The relationship of physician and patient is considered to be one of confidence,[12] and constructive fraud by the physician is sufficient to toll the statute.[13] Constructive fraud is defined as a breach of legal or equitable duty irrespective of the moral guilt or intent of the fraud feasor, neither actual dishonesty of purpose nor intent to deceive is an essential element. The Texas Supreme Court held that among other essential ingredients, a fraudulent concealment in malpractice cases includes, actual knowledge of the fact that a wrong has occurred, a fixed purpose to conceal the wrong from the patient, and the acts relied upon must be of an affirmative character and fraudulent.[14]

The third exception was Continuing Negligence: When a doctor leaves a foreign object in the body of a patient and continues to treat him thereafter, the doctor is held to not only be negligent in his initial action, but that the negligence continues in his allowing the object to remain while the patient is still under his care. Where the tort is continuing the right of action is also continuing.[15] The statute of limitations does not begin to run until the treatment of plaintiff's ailment by the defendant ceases. The negligent act was not only leaving of the foreign body in plaintiff's body but also the subsequent negligent treatment in failing to discover it.[16] There is a continuing obligation upon the physician to remedy the negligent act, and his daily breach of this duty is in itself malpractice.[17] While the physician-patient relation continues the plaintiff is not ordinarily put on notice of the negligent conduct of the physician upon whose skill, judgment,

11 Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940); Roquemore v. Sovereign Camp W.O.W., 226 Ala. 279, 146 So. 619 (1933).
12 Hinkle v. Hargens, 76 S.D. 520, 81 N.W.2d 888 (1957); Schmucking v. Mayo, 183 Minn. 37, 235 N.W. 633 (1931).
13 Morrison v. Action, 68 Ariz. 27, 198 P.2d 590 (1948).
14 Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942).
15 Sly v. Van Lengen, 120 Misc. 420, 198 N.Y.S. 608 (1923).
16 Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943).
17 Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902).

and advice he continues to rely; that, in the absence of actual discovery of the negligence, the statute does not commence to run during such period; and that this is true even though the condition itself is known to the plaintiff, so long as its deleterious effect is not discovered.[18] Hence, the statute does not begin to run until the doctor-patient relationship terminates. Conversely applying the statute would punish the patient who relies on his doctor's advice and place a premium on skepticism and mistrust.[19]

This theory is of limited value in foreign object cases as the doctor-patient relationship is frequently terminated within a short time after surgery. In *McFarland v. Connally*,[20] both husband and wife, who in May, 1948, had released their physician from any claim for operations performed on the wife in September, 1947, discovered in June, 1948, that a post-operative rupture had appeared but were told by their physician that the wife should wait two years before undergoing an operation to correct it. A suit for negligence was filed by the husband in June 1951, on the ground of continuing patient-physician relationship. The Fort Worth Court of Civil Appeals distinguished this case from the continuing negligence cases saying the cases were not applicable to the facts under consideration, and held the action was barred by the two year statute of limitations.

The Discovery Rule

The most recent theory for extending time within which to institute action for malpractice is the discovery rule. The discovery rule merely interprets the word "accrual" as used in the statute of limitations to mean the time when the injury was discovered or should have been discovered. A cause of action for malpractice based upon the alleged failure of a physician to remove a foreign object left in the body of a patient by mistake does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered the presence of the foreign object.[21]

The discovery rule was first advocated in the Maryland case of *Hahn v. Claybrook*,[22] which involved a discoloration of the skin through excessive doses of argentum oxide. However, the court held

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18 Hundley v. St. Francis Hospital, 161 Cal. App. 2d 800, 327 P.2d 313 (1958); Meyers v. Stevenson, 125 Cal. App. 2d 399, 270 P.2d 908 (1936); Huysman v. Kirschs, 6 Cal. 2d 302, 57 P.2d 908 (1936); Trombley v. Kolts, 29 Cal. App. 2d 699, 85 P.2d 541 (1938).

19 Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963).

20 252 S.W.2d 486 (Tex. Civ. App.—Fort Worth 1952, no writ).

21 Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503, 505 (1934).

22 Hahn v. Claybrook, 130 Md. 179, 100 A. 83 (1917).

that plaintiff should have discovered the injury within the period of time provided by statute.

The discovery rule was applied in 1934 by the Louisiana Supreme Court in *Perrin v. Rodriguez*.[23] The defendant, a dentist, allowed portions of the roots of two teeth to remain in the patient's jawbone. The court held that the action did not commence to run until plaintiff discovered he had sustained an injury and that it resulted from negligence of the defendant. The court also held that so long as the plaintiff continued to rely upon the professional advice of defendant, there was no obligation on plaintiff's part to commence his suit.

Two years later the California Supreme Court applied the discovery rule in *Huysman v. Kirsch*.[24] The defendant surgeon closed the plaintiff's wound without removing a drainage tube which had been carelessly left in her abdomen. The Court held there was continuing negligence and that the operation was not complete until the opening had been closed in a proper way after all appliances necessary to the successful operation had been removed from the body. In addition, the Court announced the rule that the date of the injury was the time when the patient became aware of his injury or when by the exercise of reasonable care and diligence he might have ascertained the fact. The Court relied on an industrial hazards case,[25] and did not mention or use the reasoning of the *Perrin* case.[26]

An increasing number of jurisdictions are following the discovery rule in various factual situations. The United States Supreme Court in a silicosis case under the Federal Employer's Liability Act held that the statute attaches when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action.[27] Sixteen state jurisdictions have adopted the discovery rule: California,[28] Colorado,[29] Delaware,[30] Florida,[31] Idaho,[32] Louisiana,[33] Maryland,[34] Michigan,[35] Montana,[36] Nebraska,[37] New Jer-

23 153 So. 555 (La. App. 1934).
24 Huysman v. Kirschs, 6 Cal. 2d 302, 57 P.2d 908 (1936).
25 Marsh v. Industrial Accident Commission, 217 Cal. 388, 18 P.2d 933 (1933).
26 153 So. 555 (La. App. 1934).
27 Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949).
28 6 Cal. 2d 302, 57 P.2d 908 (1936).
29 Rosane v. Senger, 112 Colo. 363, 147 P.2d 372 (1944).
30 Allen v. Layton, 233 A.2d 261 (Del. 1967).
31 City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954).
32 Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224 (1964).
33 153 So. 555 (La. App. 1934).
34 Waldmen v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966).
35 Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963).
36 Johnson v. St. Patrick's Hospital, 417 P.2d 469 (Mont. 1966).
37 Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962).

sey,[38] Oklahoma,[39] Oregon,[40] Pennsylvania,[41] West Virginia,[42] and Texas.[43]

TEXAS ADOPTS THE DISCOVERY RULE

Reversing its own earlier decisions and joining the growing number of other states embracing this new interpretation of the statute of limitations, the Texas Supreme Court in *Gaddis v. Smith*[44] ruled that a cause of action for the negligent leaving of a foreign object in a patient's body by a physician accrues when the patient learns of, or in the exercise of reasonable care and diligence, should have learned of the presence of the foreign object in his body.

The Court announced the rule in a malpractice suit against two doctors accused of leaving a surgical sponge inside a patient's body while performing a Caesarean section. Plaintiff Dorothy Gaddis and her husband filed suit against defendants on February 21, 1964, alleging defendants performed the Caesarean section upon Mrs. Gaddis on or about January 7, 1959. After a long period of increasing internal pain, Mrs. Gaddis submitted to surgery in California in 1963, for what was believed to be a tumor. It was discovered that she did not have a tumor, but that a surgical sponge had been left inside her body allegedly after the surgery in 1959. Mrs. Gaddis admitted on deposition that she had an appendectomy in 1943 and defendants asserted that the sponge could have been left in either operation.

Defendants interposed the two-year statute of limitations[45] as an affirmative defense, and the trial court granted defendants' motion for summary judgment. The Court of Civil Appeals affirmed, holding the statute commenced to run from the date of the operation. The Supreme Court reversed and specifically overruled *Carrell v. Denton*[46] and *Stewart v. Janes*.[47]

In *Carrell v. Denton*[48] suit was commenced December 15, 1936, and the object of the suit was the recovery of damages for personal

38 Fernandi v. Strull, 35 N.J. 434, 173 A.2d 277 (1961).
39 Seitz v. Jones, 370 P.2d 300 (Okla. 1961).
40 Berry v. Banner, 421 P.2d 996 (Ore. 1966).
41 Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503, 505 (1934).
42 Morgan v. Grace Hospital, 149 W. Va. 783, 144 S.E.2d 156 (1965).
43 417 S.W.2d 577 (Tex. Sup. 1967).
44 Id.
45 TEX. REV. CIV. STAT. ANN. art. 5526 (1925):
There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:
6. Action for injuries done to the person of another.
46 Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942).
47 Steward v. Janes, 393 S.W.2d 428 (Tex. Civ. App.—Amarillo 1965, writ ref'd).
48 Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942).

injury negligently inflicted on the plaintiff on November 24, 1931. Upon completing an operation and closing the incision, Dr. Carrell negligently left a gauze sponge inside plaintiff's body. Plaintiff remained ignorant of the fact that the gauze sponge was in his body until November 17, 1935, on which date his mother, in dressing the wound in his back, discovered a portion of the gauze protruding from the wound.

The Commission of Appeals of Texas[49] held:

> The wrongful act from which the damages sued for resulted, consists of the negligent act of Dr. Carrell in failing to remove the gauze sponge from inside the body of the plaintiff before the incision in his body was closed. The plaintiff's cause of action for the resulting damages accrued at that time. The statute of limitation began to run at that time and had run its prescribed course, without interruption, before this suit was brought. The plaintiff's counsel insists that the statute did not begin to run until November, 1935, when the plaintiff discovered that the gauze sponge had been left inside his body by Dr. Carrell. The proposition which lies at the bottom of this contention is to the effect that the relation between a surgeon and his patient involves trust and confidence, therefore fraudulent concealment is imputed to Dr. Carrell because of his failure to inform the plaintiff that the gauze sponge had been left inside the plaintiff's body. The proposition is essentially unsound. In conducting a surgical operation on his patient, and in respect to any treatment he may administer, a surgeon is under the duty to exercise due care. His failure to discharge this duty constitutes negligence and therefore is wrongful —but the failure does not of itself, constitute fraud or expose the surgeon to the imputation of fraudulent concealment. Among other essential ingredients, a fraudulent concealment in cases of this sort includes, first, actual knowledge of the fact that a wrong has occurred, and second, a fixed purpose to conceal the wrong from the patient. Neither of these ingredients appears from the allegation of the plaintiff's petition.[50]

As recently as 1965 the Texas Supreme Court approved this holding when it refused to hear an application for writ of erorr in *Stewart v. Janes*.[51] This was a suit for damages resulting from the doctor's negligently leaving a gauze pad in an incision, the Court of Civil Appeals held the rule of *stare decisis* required it to follow *Carrell v. Denton*[52] and quoted the entire opinion verbatim.

In *Carrell*, the Commission of Appeals relied upon *Houston Water*

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49 Id.
50 Id.
51 Steward v. Janes, 393 S.W.2d 428 (Tex. Civ. App.—Amarillo 1965, writ ref'd).
52 Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942).

Works Co. v. Kennedy,[53] an action to recover damage alleged to have resulted from injury to a house owned by plaintiff. The rule set forth in *Houston Water Works* is:

> When an act is in itself lawful as to the person who bases an action on injuries subsequently accruing from, and consequent upon the act, it is held that the cause of action does not accrue until the injury is sustained. . . . If, however, the act of which the injury was the natural sequence was a legal injury,—by which is meant an injury giving cause of action by reason of its being an invasion of a plaintiff's right,—then, be the damage however slight, limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar.[54]

This case was the only case cited in support of the holding in *Carrell*.[55] In *Gaddis*, the Court distinguished and stated "[Carrell] is usually cited for the proposition . . . where an act causes damage to another's property."[56] Apparently the rule in *Carrell v. Denton*[57] is still valid for injuries done to the estate or the property of another, although not applicable for injury done to the person of another.

The Texas Supreme Court citing the New Jersey case of *Fernandi v. Strully*[58] said the question of when a cause of action accrues is a judicial one, and to determine it in any particular case is to establish a general rule of law for a class of cases, which rule must be founded on reason and justice.[59] Causes of action based upon the alleged negligence of a physician in leaving a foreign object in his patient's body are proper subjects for the "discovery rule." All the procedures for placing objects in and removing them from the body must be in the control of the surgeon. It is a virtual certainty that the patient has no knowledge on the day following the surgery—nor for a long time thereafter—that a foreign object was left in the incision.[60] It is contended that although the plaintiff's essential evidence to establish a cause of action may well be preserved indefinitely, the defense may be severely retarded by the disappearance of witnesses or dimmed recollections through the passage of time. Nevertheless, this is a unique type of case which is not particularly susceptible to fraudulent prose-

53 70 Tex. 233, 8 S.W. 36 (1888).
54 Id.
55 Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942).
56 417 S.W.2d 577 (Tex. Sup. 1967).
57 Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942).
58 Fernandi v. Strull, 35 N.J. 434, 173 A.2d 277 (1961).
59 1 Wood on Limitations, §§ 122a, 685, 686 (4th Ed. 1916).
60 417 S.W.2d 577 (Tex. Sup. 1967).

cution; furthermore, the disadvantage to the defendant is overbalanced by the shocking results of a contrary rule which would bar a plaintiff from recovery when he could not know of the wrongful act until after the period of time prescribed by the statute of limitations had run.[61]

Some jurisdictions have extended the discovery rule to all malpractice actions, others have stated the rule only in terms of foreign objects. The Texas Court has specifically limited the holding to causes of action in which a physician leaves a foreign object in the body of his patient.[62]

This narrow view will prevent the application of the discovery rule to cases of failure to properly diagnose, improper treatment of fractures,[63] failure to properly advise,[64] or failure to properly treat.[65] However further defining and interpretation of the term "foreign object" is necessary. Does the term "foreign object" include a foreign body such as a piece of glass from an automobile accident which the physician does not remove at the time of treatment? Does the term include innate portions of tissue which are left in the patient, but should have been removed at the time of the surgical operation? In *Perrin v. Rodriguez*,[66] the defendant, a dentist, allowed portions of the roots of two teeth to remain in the patient's jawbone. The Louisiana Court applied the discovery rule using the words "no knowledge of damage or injury."

Does the term "foreign object" include blood which is given to the patient? In *Quinton v. United States*,[67] a federal torts claim case, the plaintiff, whose R-H blood factor was negative, was given blood with R-H positive factor. The mistake was unknown to the plaintiff until several years later because of complications during her pregnancy. The court applied the discovery rule against the United States holding an action could be maintained by the party as long as it is brought within two years after the discovery of injury.

Does the term "foreign object" include emission from radioactive sources? In *City of Miami v. Brooks*,[68] the plaintiff's ankle was treated by X-ray and subsequently after the statutory period of limitations expired, the ankle ulcerated. The Florida Court applied the discovery rule using the term "injury" rather than foreign object.

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61 Id. at 581.
62 Id. at 581.
63 Waldmen v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966).
64 United States v. Reid, 251 F.2d 691 (5th Cir. 1958).
65 Johnson v. Caldwell, 371 Mich. 368, 123 N.W.2d 785 (1963).
66 Perrin v. Rodriquez, 153 So. 555 (La. App. 1934).
67 304 F.2d 234 (5th Cir. 1962).
68 City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954).

It is yet to be decided by any jurisdiction if the term "foreign object" includes the new plastic or pure gold replacement parts that are being placed in the patient's body as prosthesises. This problem would necessarily involve the issue of lack of informed or knowledgable consent. If informed consent has been given, the patient must necessarily have such knowledge as to start the statute running at the time the incision is closed.

Does a physician who subsequently operates on a patient for an unrelated malady have a duty to search and remove a foreign object left during the course of a prior surgical procedure? This issue could have been raised, but it was not discussed in *Gaddis*.[69]

Another problem presented by the "discovery rule" is under what facts will it be concluded that the patient discovered, or in the exercise of reasonable diligence should have discovered his injury. For the most part this question is one for the jury using similar guidelines as in a cause of action for fraud. This seems to be the Texas rule. The Texas Supreme Court stated, "Texas Courts have not invariably ignored the inability to know of the existence of the cause of action in determining when such cause of action accrues. For example, a cause of action based on actionable fraud accrues when the fraud is discovered, or by the exercise of reasonable diligence should have been discovered."[70]

CONCLUSION

Changing economic, social and political conditions and scientific advancements produce new problems which are thrust upon the courts. These problems often require the remoulding of the law, the extension of old remedies or the creation of new remedies. The courts tend to solve these new problems with gradual change. Gradual change in the law based on sound reason and careful consideration allows a step by step development of the law.

The Texas courts have limited their decisions to lawsuits in which physicians leave a foreign object in the body of the patient. If unforeseen difficulties do not develop, the court may enlarge the rule to include all malpractice actions. The court might determine under the facts and circumstances of each particular situation when the plaintiff knew or should have known of his injury (due to an act of malpractice) and apply the statute of limitations from that time. If problems develop of securing witnesses and evidence for a meritorious defense, the court or the legislature at some future time may declare some point

69 417 S.W.2d 577 (Tex. Sup. 1967).
70 Id. at 579.

in time beyond which a claim must be regarded as barred. Possibly in some situations, the length of time since the surgery will be so long that as a matter of law the cause will be barred because "essential justice requires prevention of the imposition of liability upon physicians who, because of the passage of time, have become disempowered to present meritorious defenses. At some point in time, claims must be held to have become barred."[71]

[71] Owen v. White, 380 F.2d 310, 315 (9th Cir. 1967).