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Medical Malpractice

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MEDICAL MALPRACTICE

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I. INTRODUCTION

The majority of the New Mexico medical malpractice cases decided during the survey period[1] dealt with the issues surrounding the timely filing of the claim. In these cases the courts discussed the accrual of the cause of action, the tolling of the statute of limitations, and the applicable statute of limitations for an action that arose prior to the enactment of the Medical Malpractice Act.[2] In addition, the court of appeals examined the conflict between the limitation period timing and accrual under the Medical Malpractice Act[3] and the timing and accrual of actions under the Tort Claims Act.[4] Finally, the article analyzes several Tenth Circuit cases concerning medical malpractice claims in New Mexico, and a significant non-New Mexico Tenth Circuit case.

II. THE STATUTE OF LIMITATIONS UNDER THE MEDICAL MALPRACTICE ACT

In most personal injury actions, the statute of limitations begins to run or accrues at the time the injury occurs.[5] This date may or may not correspond to the time of the negligence or wrongful act. Some injuries occur at the time of the wrongful act but do not manifest themselves in a physically objective manner until a later date. Whether the cause of action accrues at the time of the wrongful act, at the time of the injury, at the manifestation of the injury or at the time the patient discovers the cause of the injury depends upon the jurisdiction and its policies.

The New Mexico Medical Malpractice Act[6] was enacted in 1976 with an express legislative purpose of promoting "the health and welfare of the people of New Mexico by making available professional liability insurance for health

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1. An expanded survey period of March 1985 to April 1987 was chosen because medical malpractice cases have not been covered in a survey article since March 1985.
2. N.M. STAT. ANN. §41-5-1 to -28 (Repl. Pamp. 1986) [hereinafter Act].
3. *Id.* §41-5-13.
4. N.M. STAT. ANN. §41-5-14(A), Long v. Weaver, 105 N.M. 188, 730 P.2d 491 (Ct. App. 1986).
5. N.M. STAT. ANN. §37-1-8 (Repl. Pamp. 1986).
6. N.M. STAT. ANN. §41-5-1 to -28.

care providers in New Mexico."[7] The statute of limitations provisions in the Act were part of several tort reforms enacted by New Mexico and other legislatures, in response to the medical malpractice insurance crisis, to curb the increase in the number and severity of claims and assure the availability of malpractice insurance.[8] Having several options for the timing of the accrual of the medical malpractice cause of action, the legislature chose the clear language of the wrongful act rule[9] stating that no claim shall be filed after three years from the date the act of malpractice occurred.[10] Section 41-5-13 of the Act provides that:

> [n]o claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file.[11]

New Mexico courts have strictly construed the Act's wrongful act accrual and limitations provisions since its enactment.[12]

III. PRIMARY SURVEY PERIOD

A. *The Statute of Limitations Prior to the Medical Malpractice Act*

Prior to the adoption of the Act, medical malpractice cases in New Mexico were governed by the limitations period that applied to all personal injury actions, which was three years after the cause of action accrued.[13] The supreme court initially chose the date of the wrongful act as the time for accrual of a negligence action against a medical professional in *Roybal v. White*.[14] The supreme court reasoned (1) that the wrongful act rule was the majority rule and (2) that the legislature evidenced an intent to reject the discovery rule for tort actions when it drafted the general personal injury statute.[15]

Historically, the wrongful act rule recognized that defendant's actions constituted a legal wrong at the time of the occurrence or the alleged wrongful conduct by the defendant to the plaintiff.[16] The policy behind the wrongful act rule discouraged complacent plaintiffs from procrastinating and then suddenly

7. *Id.* §41-5-2; Otero v. Zouhar, 102 N.M. 493, 697 P.2d 493, 499-500 (Ct. App. 1984), rev'd on other grounds, 102 N.M. 482, 697 P.2d 482 (1985) (challenged wisdom of legislative purpose in the Act under due process and equal protection arguments denied where no showing that Act's enactment not rationally related to legislative purpose).

8. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 Law and Contemp. Probs. 57, fn. 1, 71 (Spring 1986).

9. Kern v. St. Joseph Hospital, Inc., 102 N.M. 452, 455, 697 P.2d 135, 138 (1985).

10. N.M. STAT. ANN. §41-5-13.

11. N.M. STAT. ANN. §41-5-13.

12. Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), *writ. quashed*, 98 N.M. 336, 648 P.2d 794 (1982), *cert. denied*, 459 U.S. 1016 (1982) (denial of equal protection challenge to Act's similar treatment of accrual of cause of actions against qualified and non-qualified health care providers). *See also* Crumpton v. Humana, Inc., 99 N.M. 562, 661 P.2d 54 (1983); Ealy v. Sheppeck, 100 N.M. 250, 669 P.2d 259 (Ct. App. 1983), *op. on reh'g*, 100 N.M. 252, 669 P.2d 261, *writ. quashed*, 100 N.M. 259, 669 P.2d 735 (1983).

13. N.M. STAT. ANN. §37-1-8.

14. 72 N.M. 285, 383 P.2d 250 (1963).

15. *Id.* at 287, 383 P.2d at 252.

16. *See* Barrett v. Jackson, 44 Ga. App. 611, 162 S.E. 308 (1932).

declaring that their knowledge of the cause of action was fresh on discovery of their injury many years after the injury.[17]

In 1977, the court of appeals reread *Roybal* and in *Peralta v. Martinez*[18] expressly disagreed with the Supreme Court's reliance in *Roybal* on New Mexico precedent. After a new reading of the legislative intent for both malpractice and personal injury actions not involving malpractice, the court of appeals concluded that the "injury" language of the general limitations provision in Section 23-1-8, N.M.S.A. 1953 begins running at the time the injury manifests itself in a physically objective manner and is reasonably ascertainable, rather than at the time of the wrongful act.[19] The court specifically stated that the physically objective and ascertainable standard is not the discovery rule.[20] The discovery of the act constituting malpractice (the presence of the sponge on second surgery) did not commence the statute; the statute began to run when the patient experienced pain, which could be ascertainable and correlated to the alleged malpractice only on removal of the sponge during the second surgery.[21]

Recently, in *Loesch v. Henderson*,[22] a case decided during the primary survey period, the court of appeals reaffirmed the manifested and ascertainable standard for cases arising prior to the effective date of the Act. Again, the court insisted that the standard is different from the discovery rule.[23] In *Loesch*, the court rejected the plaintiff's argument that the general limitation period is a discovery limitations rule that would run at the date of the discovery of the injury.[24] Rather, the court stated, the limitation period begins to run from the time the injury manifests itself and is ascertainable.[25]

The *Loesch* court also addressed a tolling issue, which determined the outcome of the untimely filing of the claim. The plaintiff claimed, and the trial court agreed, that the statute of limitations would be tolled while the medical review panel reviewed the malpractice claim and rendered its decision.[26] The court of appeals rejected the tolling argument relying on the provision of the Act which prohibits coverage of the Act to acts of malpractice that occurred prior to the effective date of the Act.[27]

17. *See* Chitty v. Horne-Wilson, Inc., 92 Ga. App. 716, 719, 89 S.E.2d 816, 819 (1955).

18. 90 N.M. 391, 564 P.2d 194 (Ct. App.), *cert. denied*, 90 N.M. 636, 567, P.2d 485 (1977).

19. *Id.* at 393-394, 564 P.2d at 196-197.

20. *Id.* Relying on Layton v. Allen, 246 A.2d 794 (Del. Super. Ct. 1968), the court reasoned that the limitations period would not run from the time of discovery of the foreign object (hemostat or cottonoid) but rather from the time the plaintiff first experienced pain caused by an unknown foreign object. 90 N.M. at 394.

21. 90 N.M. at 394, 564 P.2d at 197. The ascertainment of the injury in this case corresponded to discovery of the cottonoid or alleged malpractice.

22. 103 N.M. 554, 710 P.2d 748 (Ct. App. 1985).

23. *Id.* at 555, 710 P.2d at 749. The alleged act of malpractice occurred on February 20, 1976, seven days prior to the effective date of the Act, so that the general limitations period under N.M. STAT. ANN. §37-1-8 applied. *Id.*

24. *Id.*

25. *Id.* By using the general limitations statute, the plaintiff gained five years and two months to begin the running of the statute of limitations.

26. *Id.* at 555, 710 P.2d at 749. *See also* N.M. STAT. ANN. §41-5-22 (1978).

27. *Loesch*, 103 N.M. at 556, 710 P.2d at 750. The court additionally rejected the plaintiff's argument, not raised in the trial court, that defendants be judicially estopped from contending that the tolling provision of N.M. STAT. ANN. §41-5-22 did not apply because they participated in the panel hearing. *Id.* at 555, 710 P.2d at 749.

B. Fraudulent Concealment Exception

Under the doctrine of fraudulent concealment, the statute of limitations may be tolled if a physician conceals his malpractice.[28] The basis for the fraudulent concealment rule is the relationship of trust and confidence between a physician or hospital and the patient as well as the physician and hospital's corresponding duty to disclose material information to the patient.[29] Most jurisdictions require either an affirmative act or actual knowledge of the patient's condition by the physician as a necessary element of fraudulent concealment.[30] New Mexico has held that mere silence by the physician or hospital and failure to disclose to the patient the fact of the inflicted injury may constitute fraudulent concealment thus following the minority rule on this theory.[31]

In 1974, the New Mexico Court of Appeals recognized the fraudulent concealment exception to the general statute of limitations.[32] Subsequently, the court, in *Garcia v. Presbyterian Hospital,* extended that exception to hospital liability for its employees' nondisclosure.[33] Two recent radiation therapy cases, *Keithley v. St. Joseph Hospital*[34] and *Kern v. St. Joseph Hospital,*[35] present interesting fact situations within the context of concealed malpractice. In both cases the court upheld the general rule that the Act's statute of limitations is tolled where the physician or hospital has knowledge of facts relating to malpractice and fails to disclose such facts to a plaintiff who has no knowledge of the facts or cannot discover them by reasonable diligence.[36]

In *Keithley,* the decedent received radiation therapy for cancer of the bladder and a few months later experienced loss of bladder control and severe back pain in the pelvic region.[37] When the decedent made inquiries to the physician about the cause of the problems, the physician attributed them to arthritis.[38] Four months later it was determined that the decedent's bladder had shrunk, and surgery revealed that his bladder was in poor condition.[39] The decedent reportedly died of cancer a month after the surgery.[40]

Soon thereafter, the decedent's wife wrote to the hospital administrator stating her belief that the radiologist had administered excessive radiation treatments to

28. Hardin v. Farris, 87 N.M. 143, 530 P.2d 407 (Ct. App. 1974).

29. *Hardin,* 87 N.M. at 145, 530 P.2d at 409; *Garcia,* 92 N.M. at 652, 593 P.2d at 487.

30. *See, e.g.,* Ray v. Scheibert, 224 Tenn. 99, 450 S.W.2d 578 (1969). In these jurisdictions, silence alone does not import a deliberate concealment, an intentional hiding or the misrepresentation of material facts. *See, e.g.,* De Haan v. Winter, 258 Mich 293, 241 N.W. 293 (1932). Some jurisdictions require actual knowledge on the part of the physician as to the incidence of wrong done to the patient. *Id.* Other jurisdictions apply the general rule that an affirmative act by the physician is necessary as an element of concealment.

31. *See Id.* at 46, 530 P.2d at 410; Garcia v. Presbyterian Hosp., 92 N.M. 652, 593 P.2d 487 (Ct. App. 1979).

32. *Hardin,* 87 N.M. at 146, 530 P.2d at 410.

33. *Garcia,* 92 N.M. at 655, 593 P.2d at 490.

34. 102 N.M. 565, 698 P.2d 435 (Ct. App. 1984), *writ. quashed,* Murrel v. Keithley, 102 N.M. 565, 698 P.2d 435 (1985).

35. 102 N.M. 452, 697 P.2d 135 (1985).

36. *Keithley,* 102 N.M. at 569, 698 P.2d at 439; *Kern,* 102 N.M. at 456, 697 P.2d at 139.

37. *Keithley,* 102 N.M. at 568, 698 P.2d at 438.

38. *Id.*

39. *Id.*

40. *Id.*

her husband and that the threatment had caused her husband's bladder to shrink.[41] The wife asked the administrator to investigate the cause of her husband's problem and requested a final bill.[42] The director of the hospital's business services responded by notifying the wife that there were no outstanding charges for the decedent's radiation treatments.[43] The director did not mention the plaintiff's allegations of improper treatment.[44]

Two years later, the wife read a newspaper article indicating that the state was investigating radiation treatment overdoses at the hospital.[45] Subsequently, the wife wrote to the New Mexico Environmental Improvement Division relating her husband's treatment.[46] Finally, more than five years after her husband's radiation treatments, the wife filed suit.[47]

In granting defendant's motion for summary judgment, the trial court seemed to have accepted the defendant's argument that the plaintiff had sufficient knowledge to perfect a suit before the statute had run.[48] The court of appeals reversed on the grounds that the hospital's failure to respond to plaintiff's assertions of improper treatment constituted a form of passive fraudulent concealment.[49] The confidential nature of the hospital-patient relationship, the court noted, requires that the hospital disclose to the patient facts indicating improper treatment.[50] Since the hospital did not disclose indications of improper treatment that were reasonably known by the hospital, its silence constituted fraudulent concealment of material information.[51] The court held that the statute was tolled before the wife filed her claim.[52]

Similarly, in *Kern v. St. Joseph Hospital*,[53] the decedent received twenty-five radiation treatments for bladder cancer over a five-week period.[54] The therapy was discontinued early.[55] The doctor failed to respond when asked why treatment was discontinued.[56] Soon thereafter, the decedent noticed difficulty with urination and bloody stools.[57] Five years later, cancer was indicated as the decedent's cause of death.[58]

The trial court granted, and the court of appeals affirmed, the defendant's motion for summary judgment.[59] Subsequently, the New Mexico Supreme Court reversed the lower court's holding that the plaintiff's suit was barred by the

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 570, 698 P.2d at 440.
49. *See Id.*
50. *See Id.*
51. *See Id.*
52. *Id.* at 570-71, 698 P.2d at 440-41.
53. 102 N.M. 452, 697 P.2d 135.
54. *Id.* at 454, 697 P.2d at 137.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 452, 697 P.2d at 135.

statute of limitations.[60] The court stated that under the doctrine of fraudulent concealment a patient must show that the physician knew of the wrongful act, or had material information pertinent to the discovery of the wrongful act, and failed to disclose that information.[61] In addition, the patient must establish that he did not know, or could not have known through reasonable diligence, of the cause of action before the statute had run.[62]

In both *Kern* and *Keithley,* the defendants argued that the defendants' duty to disclose material information about the deceased does not extend beyond the patient's death, when the fiduciary relationship terminates.[63] In both cases, the court rejected the argument, refusing to accept a position that placed patients who are injured in a better position to assert a claim than patients who die from their injuries.[64] In *Keithley,* the court stated the duty to disclose continues to the nearest relatives after the decedent's death.[65]

Moreover, the Court in *Kern* held the statute of limitations accrued from the date of the wrongful act against a challenge by the plaintiff that there was no malpractice until an injury occurred so that *Peralta* should apply to run the statute from the date the injury manifested itself in a physically objective manner and was ascertainable.[66] The court distinguished the *Peralta* holding and its interpretation of the general statute of limitations commencement from the date of the injury and manifestation therefrom differently from Section 41-5-13 of the Medical Malpractice Act which does not mention "injury" and is clear and unambiguous as starting to run from the occurrence of the wrongful act.[67]

Finally, *Kern* held that the fact that a claim may be barred before the injury or death occurred does not violate equal protection or due process.[68] Although the statute is harsh on latent injury cases and recognizing that the wrongful act rule may have fallen into disfavor as a general rule on the running of the statute of limitations and acknowledging that some jurisdictions have incorporated some form of a discovery rule in general or for foreign object cases, the court left any changes to our medical malpractice statute to the Legislature.[69]

After *Kern* there can be no doubt that the clear and unambiguous language of the statute of limitations requires the literal reading of the language of the statute without any rules of construction that the statute begins to run from the date of the alleged wrongful occurrence or wrongful act, and not from the time of the injury.[70]

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60. *Id.* at 457, 697 P.2d at 140.

61. *Id.* at 456, 697 P.2d at 139.

62. *Id.* The court found that early termination of the radiation treatments, the physician's failure to respond to the plaintiff's concerns about the treatment plan, and the affidavits supporting an inference that calculation errors of treatment doses were made created fact issues which preclude summary judgment.

63. *Keithley,* 102 N.M. at 571, 698 P.2d at 441; *Kern,* 102 N.M. at 456, 697 P.2d at 139.

64. *Keithley,* 102 N.M. at 572, 698 P.2d at 442; *Kern,* 102 N.M. at 456, 697 P.2d at 139.

65. *See generally Keithley,* 102 N.M. at 572, 698 P.2d at 442; *Kern,* 102 N.M. at 456, 697 P.2d at 139.

66. 102 N.M. at 454-455, 697 P.2d at 137-138.

67. *Id.* at 455, 697 P.2d at 138.

68. *Kern,* 102 N.M. at 455, 697 P.2d at 138; *see also* Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981).

69. *Kern,* 102 N.M. at 455, 697 P.2d at 138.

70. *See also* Irvine v. St. Joseph's Hosp., 102 N.M. 564, 698 P.2d 434 (1985). (The supreme court quashed its writ of certiorari because the only issue the petitioner raised was the constitutionality of the three year statute of limitations in the Act and *Kern,* 102 N.M. at 455, 697 P.2d at 138, upheld the

C. Tolling by Mailing of Application

Under the Medical Malpractice Act a claimant must submit his case to the medical review panel before he is entitled to file a complaint.[71] This submission tolls the running of the statute of limitations.[72] In *Otero v. Zouhar,* the supreme court held that a claimant meets this requirement when his attorney mails the application to the Panel.[73] The supreme court noted that the Act's requirement for claimants to "submit" their applications rather than "file" their applications allows the court to distinguish between cases brought before the medical review panel and actions filed in district court.[74] After tolling by submission, the statute of limitations begins to run again thirty days after the panel issues its final decision.[75] Under *Saiz v. Barham,*[76] the court of appeals held that the tolling period from medical review panel consideration formally ended thirty days after the panel mails its decision to the claimant's attorney, unless holidays or weekends fall on the thirtieth day.[77] Thus, the supreme court reasoned the same rule of mailing should apply to begin the tolling period.[78]

The *Otero* court additionally considered whether the State Superintendent of Insurance could act as an agent for qualified health care providers when attorneys request information on the status of those individuals or institutions.[79] In *Otero,* one doctor was listed as a qualified health care provider while an anesthesia service and its employees were not listed because the Superintendent's records were incomplete or in disorder.[80] The supreme court held that the State Superintendent of Insurance acts as a statutorily named agent for the providers for the limited purpose of providing notice of the providers' qualified or non-qualified status.[81] In the event that the Superintendent gives erroneous information to a prospective plaintiff, that plaintiff need not go beyond the Superintendent's representations about qualified status.[82]

D. Tolling Provisions for Minors

In *Moncor Trust Co. v. Feil,*[83] the court of appeals considered whether the tolling provision for minor children in the Medical Malpractice Act applies to a decedent's surviving children.[84] Cheryl Flinn, the decedent, underwent an op-

constitutionality of the statute.); Murrel v. Keithley, 102 N.M. 565, 698 P.2d 435 (1985). (The supreme court quashed writs of certiorari previously granted in this and the *Keithley* appeal because *Kern* disposed of the legal issues involved.); *see also* Armijo, 98 N.M. at 181, 646 P.2d at 1245. Crumpton v. Humana, Inc., 99 N.M. 562, 661 P.2d 54 (1983); *Ealy,* 100 N.M. at 250, 669 P.2d at 259.

71. N.M. STAT. ANN. §41-5-14(D) (Repl. Pamp. 1986); Otero v. Zouhar, 102 N.M. 482, 484, 697 P.2d 482, 484 (1985).

72. N.M. STAT. ANN. §41-5-22 (Repl. Pamp. 1986).

73. *Otero,* 102 N.M. at 484, 697 P.2d at 484. Plaintiff mailed application to the panel one day before and the application was received three days after the statute of limitations ran. *Id.*

74. *Id.*

75. *Id.*

76. 100 N.M. 596, 673 P.2d 1329 (Ct. App.), *cert. denied,* 100 N.M. 689, 675 P.2d 421 (1983).

77. *Id.* at 599-600.

78. *Otero,* 102 N.M. at 484, 697 P.2d at 484.

79. *Id.* at 486, 697 P.2d at 486.

80. *Id.*

81. *Id.* at 487, 697 P.2d at 487.

82. *See Id.*

83. 105 N.M. 444, 733 P.2d 1327 (Ct. App. 1987).

84. *Id.* at 445, 733 P.2d at 1328.

eration for pacemaker implantation in El Paso, Texas, on February 20, 1978.[85] Ms. Flinn was subsequently treated for heart problems by Drs. Feil and Goodman in Deming, New Mexico.[86] Ms. Flinn died on March 3, 1978.[87] Over six years later, on June 20, 1984, Moncor Trust Company, as personal representative of the estate of Flinn, filed a wrongful death action against defendants alleging that the decedent's death was due to the defendants' alleged acts of malpractice.[88] In addition, the complaint alleged that the beneficiaries under the Wrongful Death Act were Ms. Flinn's two surviving minor children.[89] The eldest of Ms. Flinn's surviving children attained the age of nine over two months after Moncor Trust Co. filed the complaint.[90]

The trial court held that the Act's tolling provision for minors does not benefit a minor who was not a patient.[91] The court of appeals reached the same conclusion by construing the tolling provision of the Act and applying it to the Wrongful Death Act.[92] The relevant provisions of the Wrongful Death Act were (1) the provisions creating the wrongful death cause of action,[93] (2) the Wrongful Death Act's limitations provision,[94] and (3) the provision requiring that the action be brought by and in the name of the decedent's personal representatives, who shall have the exclusive right to recover all damages for the benefit of the decedent's survivors.[95]

The court found that the purpose of the Medical Malpractice Act is to address factors adversely affecting the cost of medical insurance, to encourage continued availability of professional medical services and to provide incentives for furnishing professional liability insurance.[96] Additionally, the court found that the purpose of the Act's statute of limitations is to compel plaintiffs to exercise their right of action within a reasonable time so that the party against whom the action is brought has a fair opportunity to defend.[97] The court concluded that, in general, the legislature intended that plaintiffs bring actions at such a time as will enable the parties to prove material facts while the facts are reasonably fresh, before proof becomes stale and memories dim, or before material evidence is lost.[98]

Turning to the Wrongful Death Act, the court acknowledged that a beneficiary is not a proper plaintiff, but does have a right of recovery.[99] The court determined that despite the statutory beneficiaries' right of recovery under the Wrongful Death Act, the tolling provision for minors under the Medical Malpractice Act is personal to the minor under the disability.[100] The Act cannot confer rights on

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 446, 733 P.2d at 1329.
92. *Id.*
93. N.M. STAT. ANN. §41-2-1 (Repl. Pamp. 1986).
94. *Id.* §41-2-2.
95. *Id.* §41-2-3.
96. *Moncor*, 105 N.M. at 446, 733 P.2d at 1329, and authority cited.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 446-47, 733 P.2d at 1329-30.

persons asserting independent actions. Therefore, the court concluded Ms. Flinn's beneficiaries under the Wrongful Death Act, her two surviving minor children, could not take advantage of the Medical Malpractice Act's tolling provision for minors.[101] The tolling provision applies only to minors who suffer an alleged act of malpractice; it does not apply to minors who are beneficiaries under the Wrongful Death Act.[102]

E. Tort Claims Act's Statute of Limitations in Medical Malpractice

The Tort Claims Act's statute of limitations for governmental entity actions differs from the statute of limitations contained in the Medical Malpractice Act by commencing the limitation period from the occurrence resulting in loss, injury, or death,[103] rather than when the wrongful act occurs.

During the primary survey period, the New Mexico courts decided one case that addresses the medical malpractice statute of limitations under the Tort Claims Act. In *Long v. Weaver,* the court interpreted the limitations section of the Tort Claims Act in a medical malpractice action against a governmental entity or public employee.[104] Erin Long, deceased, was admitted to the University of New Mexico Hospital (BCMC) on March 21, 1983, suffering from bleeding esophageal varices.[105] The hospital physicians attempted to stop the bleeding, but on March 30, 1983, the physicians diagnosed a perforated esophagus.[106] The doctors repaired the perforation on April 6 and April 19, 1983.[107] Erin remained hospitalized until her death on August 2, 1983.[108] Larry Long, personal representative of Erin's estate, retained an attorney on October 11, 1983,[109] who obtained Erin's medical records.[110] However, Long retained a second lawyer on September 28, 1984,[111] who wrote the hospital concerning his representation of Long in a wrongful death action against the hospital.[112] The lawsuit was filed on August 2, 1985, two years after Erin Long's death.[113]

Because the action was filed against a state governmental health care provider, the court considered the statute of limitations provisions of the Tort Claims Act, rather than the Medical Malpractice Act.[114] The Tort Claims Act limitation period provides that:

> actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after

101. *Id.*

102. *Id.* at 447. The court borrowed from the reasoning of Regents of University of New Mexico v. Armijo, 103 N.M. 174, 704 P.2d 428 (1985) where the court held that the minority of a decedent, neither a party nor a beneficiary, should not benefit an adult personal representative under no legal disability.

103. N.M. STAT. ANN. §41-4-15(A) (1978).

104. Long v. Weaver, 105 N.M. 188, 730 P.2d 491 (Ct. App. 1986).

105. *Id.* at 189, 730 P.2d at 492.

106. *Id.*

107. *Id.*

108. *Id.* at 190, 730 P.2d at 493. No autopsy was performed, but the certificate of death identified the esophageal perforation as one of several causes or contributing factors leading to Erin's death. *Id.*

109. *Id.* at 190, 730 P.2d at 493.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

> the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.[115]

The court of appeals held that under the New Mexico Tort Claims Act the statute of limitations begins to run when the plaintiff's injury manifests itself and is ascertainable, rather than when the wrongful or negligent act occurs.[116] The language of the statute lends support for either interpretation by providing the action should be commenced "within two years after the date of occurrence resulting in the loss, injury or death."[117]

Defendants argued that under Section 41-4-15(A) of the Tort Claims Act and *Aragon and McCoy v. Albuquerque Nat'l Bank*,[118] the statute of limitations began to run when there was clearly an occurrence resulting in a loss or injury.[119] The defendants further argued that the cause of action should accrue at the time of the injury rather than at the time that the full extent of the damages is ascertained.[120] The court of appeals rejected defendants' arguments and held that the statute of limitations did not begin to run on the date of the occurrence because the action did not arise under the Medical Malpractice Act.[121] With the added requirement under the Tort Claims Act that notice be given to the public entity 90 days after the injury,[122] it is not unreasonable to allow the filing of the action within two years of the date of the occurrence resulting in injury instead of the date of the wrongful act, where the action involves medical malpractice. The different purposes and objectives of the Tort Claims Act and its statute of limitations provisions do not create an equal protection challenge for those government physicians who are not treated equally with private health care providers whose liability is determined under the Medical Malpractice Act and its more restrictive limitations provisions.[123]

F. Probable Cause to a Medical Probability

A plaintiff proving a genuine issue of material fact on negligence is likely to defeat a defendant's motion for summary judgment. A recent Tenth Circuit decision, however, teaches that proof of negligence is not enough when the proof fails on proximate cause. The Tenth Circuit in *Alfonso v. Lund*,[124] upheld a directed verdict based on the plaintiff's failure to establish substantial evidence of damages proximately caused by malpractice to a medical probability. Mr. Alfonso accidentally severed the fingers of his right hand with a power saw.[125]

115. N.M. STAT. ANN. §41-4-15(A).
116. *Long*, 105 N.M. at 191, 730 P.2d at 494.
117. N.M. STAT. ANN. §41-5-15(A).
118. Aragon and McCoy v. Albuquerque Nat'l Bank, 99 N.M. 420, 659 P.2d 306 (1983).
119. *Long*, 105 N.M. at 190, 730 P.2d at 493.
120. *See generally Id.* at 190-91, 730 P.2d at 493-94.
121. *Id.* at 191, 730 P.2d at 494.
122. N.M. STAT. ANN. §41-4-15 (Repl. Pamp. 1986).
123. *See also* Emery v. University of New Mexico Medical Center, 96 N.M. 144, 628 P.2d 1140 (Ct. App. 1981). (*Long* reaffirming prior holdings that Tort Claims Act commences running of statute and notice provisions when injury manifests itself and is ascertainable.)
124. 783 F.2d 958 (10th Cir. 1986).
125. *Id.* at 959.

Dr. Lund provided emergency surgical treatment for Mr. Alfonso.[126] Mr. Alfonso was transferred to New Jersey, where he received follow up treatment from Dr. Rauschuer.[127] Dr. Rauschuer found fault with Dr. Lund's failure to refer the plaintiff to a specialist for re-attachment of the fingers and with Dr. Lund's treatment techniques.[128]

The trial court granted a directed verdict in favor of Dr. Lund on the grounds that the plaintiff failed to establish sufficient evidence of negligence and proximate cause.[129] The court of appeals found that the plaintiff established a jury question on the issues of negligence.[130] However, a jury question on the issue of negligence, alone, was not sufficient to defeat the directed verdict.[131] To complete his claim, the plaintiff had to establish to a reasonable degree of medical probability that the injury was proximately related to the malpractice;[132] a mere possibility is not sufficient to create a jury question.[133] The plaintiff did not prove that his disfigurement and disability was caused by the failure to reattach the fingers.[134] The plaintiff's expert, Dr. Rauschuer, could not state to a medical probability that the re-implantation would have been successful.[135] The Tenth Circuit thus confirmed the New Mexico Supreme Court ruling of *Buchanan v. Downing*[136] that proximate cause of an injury must rest on probabilities, not possibilities, and must be established by expert testimony.[137] Evidence consisting of surmise, speculation, or conjecture is insufficient to survive a motion for directed verdict.[138]

G. Negligent Infliction of Psychological Injury

The Tenth Circuit's decision in *Whalley v. Sakura,*[139] may chart new ground in the area of New Mexico's medical malpractice law. United States District Court Judge Campos directed a verdict in favor of defendant Sakura on the plaintiff's claim of negligent post-operative care proximately causing negligent infliction of psychological injuries.[140] The court of appeals examined three issues:

126. *Id.* at 960.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 962.
131. *Id.* at 962.
132. *Id.* at 962-64.
133. *Id.*
134. *Id.*
135. *Id.*
136. Buchanan v. Downing, 74 N.M. 423, 394 P.2d 269 (1964).
137. *Lund,* 738 F.2d 958, 963-64. The court also rejected plaintiff's lost change theory under §323(9) of the Restatement (Second) of Torts, that the physician's negligence increased the likelihood of harm to the patient, arguing that New Mexico courts would not likely adopt such a theory that would allow proof for recovery on a ground less than a probability. *Id.* at 964-65, and conflicting authority cited.
138. *Id.* at 963. Other evidentiary issues were considered that permitted the plaintiff to place Dr. Rauscher's deposition testimony before the court, including the admitting of his testimony over a surprise objection for lack of reasonable notice of its use rather than live testimony. *Id.* at 96. Moreover, the Tenth Circuit was satisfied with the trial court ruling that a New Jersey physician was competent to testify to the knowledge and skill ordinarily used by reasonably well qualified physicians in the same field of medicine in Alamogordo, New Mexico. *Id.*
139. 804 F.2d 580 (10th Cir. 1986).
140. The plaintiff pursued three claims: (1) lack of informed consent; (2) negligent post-operative care; and (3) abandonment. The abandonment claim was withdrawn at the close of plaintiff's case, *Id.* at 582, and the jury returned a defense verdict on the claim of informed consent.

(1) whether the plaintiff presented a claim of negligent infliction of emotional distress;[141] (2) whether the evidence created a jury question on the issue of whether Defendant Sakura's post-operative care proximately caused plaintiff's psychological injury;[142] and (3) whether the requirement of resulting physical injury existed to support a claim of negligent infliction of emotional distress.[143] With regard to the first issue, the court was convinced that the plaintiff presented a claim of negligent infliction of psychological injury with emotional distress.[144] Liberal construction of the plaintiff's general assessments of negligence in post-operative care, coupled with the testimony of plaintiff's expert on lack of proper post-operative communication and counselling, constituted a claim of negligent post-operative care producing alleged psychological injury with physical manifestations.[145]

The court then turned to the proximate cause issue. It found Dr. Roll's testimony sufficient to require submission to the jury the claim that negligent post-operative care caused psychological injury with physical manifestations.[146] The court rejected the defendant's argument that Dr. Roll, a clinical psychologist, was not competent to present expert testimony in a medical malpractice suit.[147] The court found that *Fierro v. Stanley's Hardware*,[148] which required expert medical testimony on the causal connection between an accident and disability in a workman's compensation case, was inapposite.[149] The court was convinced that a clinical psychologist can testify as to the causal connection between the negligent act and psychological injury for cases of negligent infliction of psychological injury and emotional distress.[150] The court noted that Dr. Roll was a professor of psychology and psychiatry at the University of New Mexico, had published numerous scholarly articles, and was qualified to render the opinion that, "with a high degree of scientific certainty," the plaintiff's mental distress was causally related to the operation and its aftermath.[151]

Finally, the court addressed the issue of whether the requirement of resulting physical injury existed to support a claim of negligent infliction of emotional distress.[152] Once again, relying on Dr. Roll's testimony, the court explained that the tort of negligent infliction of emotional distress requires some "physical manifestations of, or physical injury to the plaintiff," that was resulting from the emotional injury.[153] The court found, based on plaintiff's own testimony as well as the testimony of Dr. Roll, that plaintiff's physical manifestations of loss of energy, fatigue, psychomotor retardation or slowing down of mobility, low energy level and sleep disturbance were sufficient physical consequences from

141. *Whalley*, 804 F.2d at 582.
142. *Id.* at 584.
143. *Id.* at 582-83.
144. *Id.* at 584.
145. *Id.*
146. *Id.* at 584.
147. *Id.* at 585.
148. 104 N.M. 401, 722 P.2d 652 (Ct. App. 1985), *rev'd on other grounds*, 104 N.M. 50, 716 P.2d 241 (1986).
149. *Whalley*, 804 F.2d at 585.
150. *Id.* at 585.
151. *Id.* at 584-85.
152. *Id.* at 586.
153. *Id.*

which a compensable physical injury could be inferred in an action for negligent infliction of mental distress.[154]

After *Whalley*, it appears that the Tenth Circuit has relaxed the *Lund* court's requirement that proximate cause of injuries must rest on probabilities and on facts regarding the medical care, and must be established by expert testimony.[155] A panel consisting of Chief Judge Holloway and Judges Doyle and McKay held in *Whalley* that proximate cause to a medical probability could be established by testimony from a clinical psychologist that the plaintiff's mental distress was "with a high degree of scientific certainty,"[156] causally related to the operation of Dr. Sakura and its aftermath.[157] The court rejected the defendant's argument that expert medical testimony by psychiatrists was necessary to provide competent evidence of the alleged negligent infliction of mental distress.

In one fell swoop, the Tenth Circuit has recognized a cause of action in New Mexico of negligent infliction of psychological injury in a medical malpractice case that can be substantiated merely by physical manifestations rather than by physical injury.[158] The court relied heavily on *Ramirez v. Armstrong*,[159] a New Mexico Supreme Court case handed down after the trial in the *Whalley* action. The *Ramirez* court recognized an action for negligent infliction of emotional distress to bystanders when either a physical manifestation or physical injury results from the emotional injury of witnessing a negligent act to a family member. The Tenth Circuit was convinced that New Mexico would recognize a claim for negligent infliction of psychological injury with physical manifestations.

CONCLUSION

The cases decided during the two year survey period put to rest the issues regarding the applicable statute of limitations for actions arising prior to and after the enactment of the Medical Malpractice Act as well as issues concerning the tolling provisions, whether by fraudulent concealment, commencement of the tolling, or tolling by minority of a child suffering injury. Although the statute of limitations for a medical malpractice action under the Tort Claims Act allows the statute to accrue from the time the injury is manifested and ascertainable, rather than the date of the wrongful act, the other protections in the Tort Claims Act do not place governmental physicians on a different standard of care than private physicians or expose them to a measurably greater period in which a plaintiff may pursue an action in medical malpractice. Moreover, it is up to the New Mexico state courts to decide whether the Tenth Circuit's decision in *Whalley* opens the door to allow proof of proximate cause to a medical probability from non-physician health care providers in medical malpractice actions that are not actions for negligent infliction of psychological injury.

154. *Id.* at 587.
155. *Lund*, 783 F.2d at 963.
156. *Whalley*, 804 F.2d 580.
157. *Id.*
158. The court relied on *Ramirez*, 100 N.M. 538, 673 P.2d 822 (1983) for its holding.
159. 100 N.M. 583, 673 P.2d 822 (1983).
160. *Whalley*, 804 F.2d at 587.