
NATURAL RESOURCES JOURNAL

Volume 3
Issue 3 *Perception and Natural Resources; Fall 1963*

Summer 1963

Physicians and Surgeons—Malpractice—Statute of Limitations—"Foreign Objects" Cases: Roybal v. White, 383 P.2d 250 (N.M. 1963)

Robert J. Werner

PHYSICIANS AND SURGEONS—MALPRACTICE—STATUTE OF LIMITATIONS—"FOREIGN OBJECTS" CASES*—The determination of the proper event—either the commission of the negligent act or the discovery thereof—which starts the statute of limitations running against a medical malpractice action brings two social policies into conflict. Statutes of limitations provide for the security of transactions with the passage of time and thus protect defendants against the difficulties inherent in litigating stale claims.[1] On the other hand, statutes of limitations "represent expedients, rather than principles."[2] They should not be used to deny just claims in a manner that cannot be reconciled with their traditional purpose, requiring "the assertion of claims within a specified period of time after notice of the invasion of legal rights."[3] This comment undertakes to discuss the question raised where the negligent act might not be discovered until the statute of limitations has run;[4] the problem that often arises when a foreign object is left in a surgical wound.[5]

Most courts hold that the statute of limitations runs against malpractice actions from the commission of the negligent act.[6] However, in recent years, several states have mitigated the harshness of this rule by adopting the "discovery" doctrine which provides that the statute of limitations does not commence until the injured party has, or reasonably should have, discovered his injury.[7] This mitigation has been accomplished by construction of existing

* Roybal v. White, 383 P.2d 250 (N.M. 1963).

1. Wood, Limitation of Actions § 5 (1st ed. 1882). In Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944), the United States Supreme Court said that statutes of limitations are designed to "promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."

2. Chase Secs. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

3. Urie v. Thompson, 337 U.S. 163, 170 (1949).

4. This comment will not cover the situation in which fraudulent concealment may toll the statute of limitations as provided in N.M. Stat. Ann. § 23-1-7 (1953). In the principal case, Roybal v. White, 383 P.2d 250 (N.M. 1963), fraudulent concealment was not alleged in the complaint, and the court said that this could not be urged on appeal.

5. For an example of another situation in which the damage from a negligent act may not be discovered for several years, see City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954), discussed in note 38 *infra*.

6. Carter v. Harlan Hosp. Ass'n, 265 Ky. 452, 97 S.W.2d 9 (1936); Swankowski v. Diethelm, 98 Ohio App. 271, 129 N.E.2d 182 (1953); Murray v. Allen, 103 Vt. 373, 154 Atl. 678 (1931); Lindquist v. Mullen, 45 Wash. 2d 675, 277 P.2d 724 (1954).

7. Costa v. Regents of Univ. of Cal., 116 Cal. App. 2d 445, 254 P.2d 85 (1st Dist. Ct. App. 1953); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); Ala. Code Ann. tit. 7, § 25(1) (1958); Conn. Gen. Stat. Ann. § 52-584 (1960).

There are jurisdictions that have kept the statute of limitations in foreign objects cases from starting to run at the commission of the negligent act on rationale other than discovery. Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962) (statute of limitations did not start as long as there was con-

statutes of limitations[8] or by enactment of statutes of limitations which deal specifically with malpractice actions and incorporate the discovery doctrine.[9]

In *Roybal v. White*,[10] the plaintiff sought damages for malpractice arising out of an operation performed upon her January 14, 1952, by the defendant doctor. He allegedly left a sponge in the plaintiff's abdominal cavity which resulted in surgery July 24, 1961. The trial court dismissed the plaintiff's complaint on the ground that her cause of action was barred by the statute of limitations.[11] On appeal to the Supreme Court of New Mexico, *held*, Af-

---

tinued treatment by same doctor); Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936) (statute of limitations did not start because there was said to be continuing negligence until object was removed).

8. The following states have adopted the discovery doctrine by construing their statutes of limitations for personal injuries (none of these states have statutes dealing specifically with malpractice): Costa v. Regents of Univ. of Cal., 116 Cal. App. 2d 445, 254 P.2d 85 (1st Dist. Ct. App. 1953), construing Cal. Civ. Proc. § 340(3); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961), construing N.J. Stat. Ann. § 2A:14-2 (1952); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959), construing Pa. Stat. Ann. tit. 12, § 34 (1953).

The following states have adopted the discovery doctrine by construing their malpractice statutes of limitations: Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944), construing Colo. Rev. Stat. Ann. § 87-1-6 (1953); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962), construing Neb. Rev. Stat. § 25-208 (1956).

9. Ala. Code Ann. tit. 7, § 25(1) (1958):

> All actions against physicians and surgeons, and dentists for malpractice, error, mistake, or failure to cure, whether based on contract or tort, must be commenced within two years next after the act or omission or failure giving rise to the cause of action, and not afterwards. Provided that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier, provided further that in no event may the action be commenced more than six years after such act.

Conn. Gen. Stat. Ann. § 52-584 (1960):

> No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, chiropodist, chiropractor, hospital or sanatorium, shall be brought but within one year from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counter-claim may be interposed in any such action any time before the pleadings in such action are finally closed.

10. 383 P.2d 250 (N.M. 1963).

11. The trial court held that the action was barred by N.M. Stat. Ann. § 23-1-4 (1953), which provides that actions not otherwise provided for must be brought within four years of the date of accrual of the cause of action. Record, p. 17, Roybal v. White, 383 P.2d 250 (N.M. 1963). On appeal, the supreme court held that although the trial court reached the right decision, it had based its decision on the wrong statute. The supreme court held that the applicable statute was N.M. Stat. Ann. § 23-1-8 (1953), which provides that actions for personal injuries must be brought within three years of the date of accrual of the cause of action. Roybal v. White, 383

firmed.[12] The statute of limitations is not to be construed to include the discovery doctrine.[13]

In *Roybal*, the supreme court said New Mexico follows the general rule that "the mere fact that plaintiff was not aware of the existence or extent of his injuries or his right of action for malpractice does not postpone the commencement of the statute of limitations."[14] In support of this rule, the court cited the New Mexico case of *Kilkenny v. Kenney*[15] and three American Law Report annotations.[16] In *Kilkenny*, the defendant allegedly failed to give the decedent her insulin December 11, 1955. She then went into a diabetic coma which caused total incompetence and her subsequent death December 2, 1958. The supreme court held that the three-year statute of limitations for personal injuries[17] applied and that the plaintiff's complaint, filed November 12, 1959, was not timely.

Kilkenny is easily distinguishable from *Roybal* on its facts. In *Kilkenny*, the plaintiff was cognizant of the cause of action from the day that the injury occurred; in *Roybal*, the plaintiff was completely unaware of her cause of action until several years after the statute of limitations had run. By the same token, the American Law Report annotations,[18] cited by the court in *Roybal* in support of its rule, refer to the broad area of the statutes of limitations in the usual malpractice situation, *i.e.*, where the plaintiff is aware of his injury from the day of the negligent act. Thus, in failing to discuss any of the cases that present the "discovery" doctrine,[19] the court in *Roybal* did not face the issue the case presented—may the remedy of an injured party be taken away from him before he can show that an injury has occurred?

P.2d 250, 251 (N.M. 1963). This mistake did not affect the outcome of the case since the action was not brought within the limitation period, as defined by the supreme court, of either statute.

12. The court also held that N.M. Stat. Ann. § 21-1-1(8)(c) (1953) does not prohibit raising the defense of the statute of limitations by a motion to dismiss under N.M. Stat. Ann. § 21-1-1(12)(b)(6) (1953). Roybal v. White, 383 P.2d 250, 253 (N.M. 1963).

13. 383 P.2d at 252.

14. *Ibid.*

15. 68 N.M. 266, 361 P.2d 149 (1961).

16. Annot., 80 A.L.R.2d 368 (1961); Annot., 144 A.L.R. 209 (1943); Annot., 74 A.L.R. 1317 (1931).

17. N.M. Stat. Ann. §§ 23-1-1, -8 (1953); see note 11 *supra*.

18. See note 16 *supra*.

19. The court did cite four cases that the plaintiff relied on for support: Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934); Bathke v. Rahn, 46 Cal. App. 2d 694, 116 P.2d 640 (1st Dist. Ct. App. 1941); Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936); Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1942). Roybal v. White, 383 P.2d 250, 252 (N.M. 1963). But as the court pointed out, these cases are all distinguishable from *Roybal* on their facts. Further, these decisions do not adequately present the discovery doctrine; rather, they are based on concepts of continuing negligence and fraudulent concealment. The court failed to cite, let alone discuss, several cases presented by the appellent which do present the discovery doctrine. These cases are listed in note 28 *infra* and discussed in some detail in the accompanying text.

The *Roybal* court recognized its decision worked a hardship on the plaintiff but concluded that it is within the province of the Legislature, not the courts, to alleviate this hardship.[20] The court reached this conclusion by the following thought process: (1) statutes of limitations are creatures of the Legislature, not the courts;[21] (2) the New Mexico statutes are not ambig-

20. Roybal v. White, 383 P.2d 250, 252 (N.M. 1963).

21. The *Roybal* court said:

> '"* * * But the fact that hardship may result can furnish no warrant for the courts to supply what the Legislature has omitted or to omit what it has inserted. * * *"'

383 P.2d at 252, quoting from Natseway v. Jojola, 56 N.M. 793, 799, 251 P.2d 274, 277 (1952).

A continuation of the *Roybal* court's quotation from *Natseway* throws more light on the matter. A more complete quotation from that case reads:

> '* * * But the fact that hardship may result can furnish no warrant for the courts to supply what the Legislature has omitted or to omit what it has inserted. Martini v. Kemmerer Coal Co., supra [38 Wyo. 172, 265 P. 707]; Chmielewska v. Butte & Superior Mining Co., supra [81 Mont. 36, 261 P. 616]. "What the Legislature intends is to be determined, primarily, by what it says in the act. It is only in cases of ambiguity that resort may be had to construction. Courts cannot read into an act something that is not within the manifest intention of the Legislature, as gathered from the statute itself. To do so would be to legislate, and not to interpret. There is no ambiguity in this statute, and it neither requires nor admits of construction." De Graftenreid v. Strong, 28 N.M. 91, [94,] 206 P. 694, 695.'

Natseway v. Jojola, 56 N.M. 793, 799, 251 P.2d 274, 277 (1952), quoting from Vukovich v. St. Louis, Rocky Mountain & Pac. Co., 40 N.M. 374, 379, 60 P.2d 356, 359 (1936).

Natseway held that the cause of action under New Mexico's wrongful death statute (the wrongful death statute at the time of that case was N.M. Laws 1882, ch. 61, §§ 2, 9) arises when the tort is committed, not when the wrongful death occurs. This is the same holding that was reached in *Vukovich*. The wrongful death statute that was being interpreted in *Natseway* said: "Every action instituted by virtue of the provisions of this act must be brought within one year after the cause of action shall have accrued, or after this act shall go into effect." N.M. Laws 1882, ch. 61, § 9. This statute was interpreted to mean that the action must be brought within one year from the date of the injury. This could mean that if the person died more than a year after the injury, there was no cause of action. To alleviate this situation, the Legislature, in 1953, extended the limitation period to three years, N.M. Laws 1953, ch. 30, § 1; but the same problem remained: a person might not die for more than three years after the injury. To eliminate this problem, the Legislature again amended the statute. It now provides:

> Every action instituted by virtue of the provisions of this and the preceding section [22-20-1] must be brought within three [3] years after the cause of action accrues. *The cause of action accrues as of the date of death.*

N.M. Laws 1961, ch. 202, § 1; see N.M. Stat. Ann. § 22-20-2 (Supp. 1963). (Emphasis added).

Thus, the court's insistence in *Natseway* in interpreting the wrongful death statute in the harsh manner described must have prompted the Legislature to make these changes. In 1952, Justice Coors foresaw the inevitability of the Legislature reversing the court when, dissenting in *Natseway*, he said:

> By a quotation from another case in the majority opinion [referring to the one quoted previously in this footnote from *Natseway*] the Court indicates that if its decision is unjust then it is for the legislature to change the statute. With

uous;[22] (3) the statutes do not include the discovery doctrine; (4) this omission is significant—it means the Legislature intended the discovery doctrine should not apply in New Mexico; (5) therefore, the doctrine does not apply in New Mexico and will not apply until the Legislature amends the statute.

If there is no ambiguity in the statute, which would clearly leave no room for application of the discovery doctrine, then, of course, there would be no need to consider the doctrine in New Mexico. But is there no ambiguity in the statute of limitations? It provides that actions may be brought "after their causes *accrue* . . . for an injury to the person . . . within three [3] years."[23]

The word "accrue" is ambiquous. An analogy to the history of the use of this word in the wrongful death statute[24] evidences this ambiguity. In *Natseway v. Jojola*,[25] a 1952 wrongful death action, the court impliedly held that the word "accrue" is ambiguous and interpreted it to mean the statute of limitations[26] begins to run at the time of the negligent act, not at the date of death. The Legislature disagreed with the court's interpretation of "accrue" and amended the statute.[27] The cause of action in a wrongful death case now "accrues" as of the date of death.

If, in *Roybal*, the court had considered the history of the wrongful death

---

such a suggestion I thoroughly disagree. The fault is with the Court and not the legislature. The Court has erroneously misconstrued the plain and unambiguous language of the statute passed by the legislature and thereby has rendered unjust decisions, refusing rights plainly granted by the legislative act.

Shall the Court persist in its error until the legislature takes affirmative action by a simple amendment adding to Sec. 24-102, New Mexico Statutes 1941 Annotated [N.M. Laws 1882, ch. 61, § 9], something like the following words, to wit: 'Notwithstanding the erroneous and unjust decisions of the Supreme Court of New Mexico the action mentioned in this section and in Sections 24-101 and 24-104, New Mexico Statutes 1941 Annotated [N.M. Laws 1882, ch. 61, § 2; N.M. Laws 1947, ch. 125, § 1], is intended and declared to be a new cause of action unknown to the common law and it accrues on the death of the decedent.' As the error is entirely the fault of the Court let us correct our own mistake without compulsion from the legislature.

Natseway v. Jojola, 56 N.M. 793, 818, 251 P.2d 274, 290 (1952) (dissenting opinion).

The Legislature found it necessary to amend the statute. See N.M. Stat. Ann. § 22-20-2 (Supp. 1963).

22. N.M. Stat. Ann. §§ 23-1-1, -8 (1953).

23. N.M. Stat. Ann. § 23-1-1 (1953). (Emphasis added.) This section is to be read in connection with each statute of limitations. It says: "The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided."

N.M. Stat. Ann. § 23-1-8 (1953) is the statute of limitations which the *Roybal* court said applies to action "for an injury to the person."

24. See the history of the statute (presently N.M. Stat. Ann. §§ 22-20-1 to -2 (1953, Supp. 1963)) discussed in note 21 *supra*.

25. 56 N.M. 793, 251 P.2d 274 (1952).

26. N.M. Laws 1882, ch. 61, § 9.

27. N.M. Laws 1953, ch. 30, § 1 (amended by N.M. Laws 1961, ch. 202, § 1; see N.M. Stat. Ann. § 22-20-2 (Supp. 1963)).

statute, it could have logically concluded that there is ambiguity in the word "accrue." In an action under the wrongful death statute, the plaintiff knows that he has a cause of action after the party is injured; thus, there may be some justification in running the statute from the date of injury. However, in the foreign object situation, the plaintiff may have no idea that a cause of action has accrued until the damage resulting from the negligent act is discovered. This may take many years as shown in *Roybal*.

Since there is ambiguity under this analysis, there is a tenable basis for a strong argument for incorporation of the discovery doctrine in the personal injury statute of limitations. However, the court did not make this kind of analysis in *Roybal*, and the result is a more strained interpretation of "accrue."

The proposed interpretation of "accrue" and the adoption of the discovery doctrine are supported by several well-reasoned cases from other jurisdictions that were presented to the court in Roybal's appellate brief.[28] A brief discussion of these cases follows.

In *Fernandi v. Strully*,[29] the New Jersey Supreme Court noted that the New Jersey Legislature had never specified when a cause of action accrued under its statute of limitations.[30] The court held that since "accrues" is a vague word it was the court's function to delineate the statute.[31]

In *Ayers v. Morgan*,[32] the Pennsylvania Supreme Court overruled by implication a line of cases that followed the majority view.[33] The court construed the phrase in the statute of limitations, which states that a cause of action accrues when "the injury was done,"[34] to mean "when the act heralding a pos-

28. Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Ayers v. Morgan, 397 Pa 282, 154 A.2d 788 (1959).

29. 35 N.J. 434, 173 A.2d 277 (1961).

30. N.J. Stat. Ann. § 2A:14-2 (1952):

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

31. In *Fernandi*, the court, quoting the Pennsylvania Supreme Court, stressed

> that statutes of limitation, as all statutes, must be read in the light of reason and common sense and that in their application they 'must not be made to produce something which the Legislature, as a reasonably-minded body, could never have intended.'

Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277, 283 (1961), quoting from Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788, 789 (1959).

32. 397 Pa. 282, 154 A.2d 788 (1959).

33. See Bernath v. La Fever, 325 Pa. 43, 189 Atl. 342 (1937); Comment, 64 Dick. L. Rev. 173, 175-76 (1960).

34. Pa. Stat. Ann. tit. 12, § 34 (1953):

> Every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death the limitation of action shall remain as now established by law.

sible tort inflicts a damage which is physically objective and ascertainable."[35] In 1953, California liberalized the rule of *Huysman v. Kirsch*[36] to include the discovery doctrine in foreign objects actions.[37] In the following year, Florida adopted the doctrine.[38]

The number of courts taking this position still is in the minority;[39] but especially in light of the Legislature's change in the wrongful death statute,[40] the

35. Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788, 792 (1959). In *Ayers*, Justice McBride, in a separate concurring opinion, said:

> Statutes of limitations must be read in the light of this provision [Pa. Const. art. 1, § 11: "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law . . . ."] for the running of time is not the only test of validity of such statutes. They are desirable in that they prevent oppression by forbidding plaintiffs to litigate stale claims and thus compel defense at a time when such defense is no longer practicable and sometimes even impossible. Nevertheless, the restrictions imposed may not be so arbitrary as to preclude a reasonable opportunity for one who has been harmed to make his claim. If the legislature were permitted *absolute* discretion it would not be merely regulating the remedy but would be abolishing it. . . .
>
> Although courts will not inquire into the wisdom of a statute, nevertheless, they do have power to declare a statute unconstitutional as applied to a given case, or, alternatively, to interpret the statute so as to include an essential requirement which would make its application constitutional. . . .
>
> [Justice McBride concluded that] this is not judicial legislation but is instead constitutional interpretation for without it the statute of limitations, as applied to the facts of this case, would be unconstitutional.

154 A.2d at 794-95 (concurring opinion). (Emphasis the court's.)

A similar position was taken in the Colorado case of Rosane v. Senger, 112 Colo. 363, 370, 149 P.2d 372, 375 (1944), where Justice Burke argued that in the foreign object situation it is

> impossible for plaintiff to sue within the limitation and it is a recognized maxim that the law requires not impossibilities. A legal right to damage for an injury is property and one can not be deprived of his property without due process. There can be no due process unless the party deprived has his day in court . . . .

This argument would be equally valid in New Mexico in view of N.M. Const. art. 2, § 18, which provides that "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

36. 6 Cal. 2d 302, 57 P.2d 908 (1936).

37. Costa v. Regents of Univ. of Cal., 116 Cal. App. 2d 445, 354 P.2d 85 (1st Dist. Ct. App. 1953). See also Hutcheson & Smedley, *Statute of Limitations in California Medical Malpractice Cases*, 28 Ins. Counsel J. 269 (1961).

38. City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954).

Brooks is also noteworthy in that it presents a situation, other than a foreign object case, where the discovery doctrine is applicable. The plaintiff was undergoing x-ray therapy treatment for the removal of warts from her heel. At the time of the treatment she was aware of nothing indicating any radiation injury. The court held that the statute of limitations, Fla. Stat. Ann. § 95.11 (1960), did not commence to run until the plaintiff was first put on notice that she had sustained an injury or had reason to believe that her right of action had accrued.

39. Louisell & Williams, Trial of Medical Malpractice Cases ¶¶ 13.14-.64 (1960).

40. N.M. Stat. Ann. §§ 22-20-1 to -2 (1953, Supp. 1963).

rising voice in support of the discovery doctrine at least should be given consideration by the New Mexico court.

A statute of limitations should allow a person his just remedies at law. However, there is middle ground giving the patient the maximum rights possible while still affording the doctor the maximum protection against stale claims.[41] But if the Supreme Court of New Mexico firmly believes, as stated in *Roybal v. White*, that the discovery doctrine cannot be adopted in New Mexico except through legislative action,[42] then it is submitted that the Legislature should adopt a malpractice statute of limitations similar to Alabama's[43] or, as it did with the wrongful death statute of limitations,[44] specifically state when a cause of action for personal injury accrues.

ROBERT J. WERNER

41. The Alabama malpractice statute is probably the best example. Ala. Code Ann. tit. 7, § 25(1) (1958); see note 9 *supra*.

42. If the Legislature amends the statute, it might enact a statute that would cover all malpractice situations. A court interpretation incorporating the discovery doctrine into the statute of limitations for personal injuries, N.M. Stat. Ann. §§ 23-1-1, -8 (1953), might tend to keep the exception more narrowly confined to the foreign object situation. See Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Note, 42 Neb. L. Rev. 180 (1962).

43. Ala. Code Ann. tit. 7, § 25(1) (1958); see note 9 *supra*.

44. N.M. Stat. Ann. §§ 22-20-1 to -2 (1953, Supp. 1963).