ONE YEAR MALPRACTICE STATUTE OF LIMITATIONS HELD APPLICABLE TO A DRUGGIST FILLING A PRESCRIPTION

Boudot v. Schwallie
114 Ohio App. 495, 178 N.E.2d 599 (1961)

Plaintiff brought an action for personal injuries against defendant pharmacist alleging that he was careless and negligent in filling a prescription for a shampoo. The suit was filed one year and six months after the cause of action accrued. Defendant demurred on the ground that the one year malpractice statute of limitations was applicable to pharmacists.[1] The trial court sustained the demurrer, and the Court of Appeals in affirming the ruling stated:

> The very basis of her cause of action is failure on the part of the pharmacist to exercise that degree of reasonable care employed by those called upon by doctors to fill prescriptions for the physical impediments of their patients. *We hold that under the facts in this case, the pharmacist was practicing a profession. . . . The practice of the profession of pharmacy is a part and parcel of the system of practice of modern medicine.*[2] (Emphasis added.)

It is not entirely clear from the opinion whether the court means the pharmacist's negligence is classified as malpractice because he is practicing pharmacy generally, or whether it is malpractice only in cases where a doctor's patient has a prescription to be filled with the pharmacist serving a necessary function in the chain of treatment. The quoted portion of the opinion discloses the ambiguity.[3]

The case is one of first impression in Ohio concerning the applicability of the malpractice statute of limitations to pharmacists. In *Rudman v. Bancheri*,[4] a New York court held that state's malpractice statute[5] applicable to a pharmacist. However, the court made it quite clear that the statute applied because the defendant was engaging in the unlawful practice of medicine without a license. The malpractice statute would have applied to

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[1] Ohio Rev. Code § 2305.11 (1953) states in part: "An action for . . . malpractice . . . shall be brought within one year after the cause thereof accrued. . . ."

[2] Boudot v. Schwallie, 114 Ohio App. 495, 178 N.E.2d 599 (1961).

[3] The words "in this case" seem to limit the holding to the doctor-patient-prescription-pharmacist relationship. However, the words "profession of pharmacy" indicate that the court considers all pharmacists to be protected by the statute, and in the situation where a pharmacist is negligent toward a customer who has no prescription, his negligence would still be classified as malpractice.

[4] 260 App. Div. 957, 23 N.Y.S.2d 584 (1940).

[5] N.Y. Civ. Prac. Act § 50 states in part: "The following actions must be commenced within two years after the cause of action accrued:

1. An action to recover damages for assault, battery, false imprisonment, malicious prosecution, or malpractice. . . ."

anyone guilty of that offense. Thus, the decision is not authority for holding that negligence while engaged in the practice of pharmacy is to be classified as malpractice.

There being no specific authority in point, the question resolves itself into determining what is meant by the word *malpractice* in the Ohio statute and whether the expansion of the definition to include a pharmacist's negligence is justified.

There are two reasons why it is believed that the Ohio statute should not apply to pharmacists. The first is that announced in a case decided by the New York Supreme Court which held that a nurse's negligence was not malpractice. In *Isenstein v. Malcomson*, the court stated:

> Malpractice is to be understood in its primary meaning, and, as generally understood by the ordinarily intelligent and reasonably informed person, and, in this respect, according to such common usage and acceptance, it has continuously been intended to import an improper treatment or culpable neglect of a patient by a physician or surgeon.[6]

The second and more important reason is that in cases where Ohio courts have construed the statute as applicable to others in the field of medicine, the relationship has always been one where the injured person was a *patient*[7] of the tortfeasor. For example, in holding that malpractice included a dentist's negligence, an Ohio Court of Appeals in *Cox v. Cartwright* set forth the criteria it felt necessary in order to bring the dentist within the statute:

> The practice of dentistry is regulated by statute, and high qualifications govern the licensing of the practitioner. The licensed dentist is a professional man who practices in a special department of medicine. . . . We experience no judicial difficulty in determining that the word malpractice as used in the statute applies to a dentist in performing his work with a patient.[8]

It is true that the profession of pharmacy is also regulated by statute and that high qualifications govern the licensing of pharmacists; however, the principal function of the pharmacist is selling a *product* to a *customer*. It seems unreasonable to say that pharmacists sell products to *patients* of their own. Therefore, even if the holding in the principal case is limited to the doctor-patient-prescription-pharmacist relationship, the pharmacist is not within the criteria set forth in the *Cartwright* case which expanded the coverage of the malpractice statute. Nor is this distinction between the customer and the patient a mere play on words, for in the same case the plaintiff also alleged that the dentist was guilty of breach of an implied

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[6] 227 App. Div. 66, 68, 236 N.Y. Supp. 641, 643 (1929). In holding that the malpractice statute did not apply to a surveyor, an Ohio court in *Wishnek v. Gulla*, 114 N.E.2d 914 (C.P. 1953), cited with approval the language of the *Isenstein* case.

[7] The extension to attorneys is considered *infra*.

[8] 96 Ohio App. 245, 248, 121 N.E.2d 673, 675 (1953).

warranty and the court held that no warranty existed. In so holding, the court observed: "Indeed, it may be fairly stated that only a strained view of the professional relationship between the dentist and his patient could class the dentist in the category of a salesman of false teeth."[9] However, the professional relationship between a pharmacist and a buyer of drugs has all of the business characteristics of the salesman-customer transaction.

In the case of *Davis v. Eubanks*,[10] an Ohio common pleas court extended the malpractice statute to the negligence of a nurse in administering an injection of penicillin to the plaintiff. The court relied on the definition of the term *malpractice* in *Bouvier's Law Dictionary*:

> Bad or unskilled practice in a physician or other professional person, whereby the health of a patient is injured, is usually called malpractice.[11]

Once again the plaintiff was a patient and the court found that the nurse qualified under the term *other professional person* contained in the definition. Although, the pharmacist also would qualify as a *professional person*, his activities fall short of classifying him as treating patients of his own, and he would therefore fail to qualify under the definition adopted by this court.

Emphasis has thus been placed on the definition of malpractice, the consideration of public expectation and community understanding of the word, and the difference in services provided by pharmacists and those of physicians and other professional medical persons. However, if the intention of the legislature can be ascertained, the courts are bound to follow that intention whether based on explicit words in the statute or gained from the history surrounding the act. For this reason, *Long v. Bowersox*[12] is perhaps the most important case showing that malpractice has been extended beyond what the legislature had in mind. In the *Bowersox* case, malpractice was held to include the negligence of attorneys in dealings with their clients. The plaintiff insisted that malpractice applied only to physicians and surgeons.[13] The court emphasized different dictionary definitions and then stated:

> *Green and Kelley's Ohio Pleading and Practice*, 61; *Bates' Pleading* (1st Ed.), 288; and *2 Bates' Pleading* (2 Ed.), 987 defined malpractice as negligence of attorneys as well as of physicians and surgeons. . . . *Green and Kelley's* was in extensive use by the Ohio Bar while *Bates' Pleadings* and *Bates' Digest* were found in every law office in the state that made any pretense in the practice of law.[14]

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[9] *Id.* at 250, 121 N.E.2d at 676.

[10] 83 Ohio L. Abs. 28 (C.P. 1960).

[11] *Id.* at 31.

[12] 8 Ohio N.P. (n.s.) 249, 19 Ohio Dec. 494 (C.P. 1909).

[13] Ohio Gen. Code § 4983 prescribed a statute of limitations of one year for libel, assault, battery, malicious prosecution, false imprisonment, and malpractice. The present statute is substantially the same except for the addition of slander.

[14] Long v. Bowersox, *supra* note 12, at 255, 19 Ohio Dec. at 499.

This decision, then, helps to show what was in the minds of the legislators when they adopted the amendment and added the word *malpractice* in 1894. With respect to the medical aspect of malpractice, the decision reinforces the contention that malpractice included only the negligence of physicians and sugeons and that this is the common understanding of the word.

It appears that although the court in the principal case felt that the malpractice statute encompassed pharmacists practicing their profession either generally or in the narrower physician-patient-prescription-pharmacist relationship, previous court decisions dealing with dentists and nurses do not justify this extension of the statute due to the general business and selling characteristics of the pharmacist. Finally, the *Bowersox* case tends to show that the extension is beyond community understanding of the meaning of the word and the intention of the legislature.