

# Michigan Law Review

---

Volume 41 | Issue 4

---

1943

## ATTORNEY AND CLIENT - MALPRACTICE - ACCRUAL OF ACTION - STATUTE OF LIMITATIONS

P. A. L.

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Procedure Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

P. A. L., *ATTORNEY AND CLIENT - MALPRACTICE - ACCRUAL OF ACTION - STATUTE OF LIMITATIONS*, 41 MICH. L. REV. 724 (1943).

Available at: <https://repository.law.umich.edu/mlr/vol41/iss4/11>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

ATTORNEY AND CLIENT — MALPRACTICE — ACCRUAL OF ACTION — STATUTE OF LIMITATIONS — Plaintiff, in March, 1934, while in the employ of a manufacturing concern, suffered severe injuries. In September, 1935, he employed the defendant, an attorney, to present and prosecute a claim for compensation. The claim was filed in March, 1937; it was dismissed by the Industrial Commission on the ground that it was barred by the two-year statute of limitations governing such claims. Apparently the attorney, continuing his efforts on behalf of his client, persuaded the employer to make a voluntary settlement, for the plaintiff alleges that, in May of 1940, he endorsed the employer's check over to the attorney, accepted the attorney's check for a lesser amount,<sup>1</sup> and terminated the attorney-client relationship. Early in May, 1941, plaintiff brought this action, claiming negligent delay, on the part of the defendant, amounting to malpractice. The court sustained the defendant's demurrer, and *held* that this malpractice action was barred by an applicable one-year statute of limitation; this period had begun to run, it was said, as soon as the plaintiff's claim against the employer became stale.<sup>2</sup> *Galloway v. Hood*, 69 Ohio App. 278, 43 N. E. (2d) 631 (1941).<sup>3</sup>

The case presents a novel fact situation. Seldom is a litigant forced to bow twice to the statute of limitations. And, in this particular case, if the dates suggested are correct, it would appear that, at the time the Industrial Commission was denying plaintiff's claim against the employer because of the two-year statutory period, the one-year statute had already operated to bar his action against the allegedly negligent lawyer whose delay resulted in that denial.

<sup>1</sup> A second cause of action, based upon a claim for money had and received, and praying for the recovery of the difference between the amount of the employer's check and that of the attorney, was remanded.

<sup>2</sup> "In the absence of fraud or concealment on the part of the attorney (which is not here alleged) the statute of limitations in cases charging malfeasance or nonfeasance on the part of an attorney at law begins to run (that is, the cause of action 'accrues') when the acts constituting the malpractice occur—in this case when the defendants permitted the time to expire within which the plaintiff's claim could be presented and prosecuted to escape the bar of the statute of limitations on the claim." Principal case, 69 Ohio App. at 281.

<sup>3</sup> The fact that the case may "go up on appeal" prompts more than ordinary restraint in comment.

Moreover, the case presents an interesting legal question. There is a distinct split of authority as to the date when the cause of action accrues in a case involving alleged malpractice on the part of a physician or surgeon. Some courts hold that the statute begins to run against the injured patient "when the wrong is done."<sup>4</sup> Other courts have accepted a doctrine which is more favorable to the patient; they use the "termination of treatment," or "termination of relationship" date.<sup>5</sup> After a little "backing and filling," the Ohio Supreme Court, in 1919, reaffirmed its original position and adopted the rule which permits a malpractice action to be brought, in the physician-patient cases, within the statutory period after the professional relationship has terminated.<sup>6</sup> It was argued, in the principal case, that the same rule should apply in a case charging an attorney with negligent delay. It might be assumed that those courts which have given the patient extra time for the bringing of his suit against a negligent surgeon have done so, primarily, because of the rather helpless situation in which an injured patient finds himself. One would suppose that any consideration for the defendant physician would be, at best, a matter of secondary importance, and merely incidental.<sup>7</sup> But the Ohio court, in the instant case, stressed the fact that, in the leading Ohio physician-patient case, it had been said that it was only fair that the surgeon be given an opportunity to "correct the evils" which made the treatment necessary, and reasonable time and opportunity to "correct the ordinary and usual mistakes incident to even skilled surgery." Then, declaring that this "after-care" argument was not appropriate in the attorney-client case,<sup>8</sup> the court decided that the statute begins to run, in the legal relationship cases, at the time of the wrong. If, as the Ohio Supreme Court has said, we should not "impose upon the patient a duty that he can only know through expert knowledge which he does not possess, but as to which he is compelled to accept the judgment of his physician or surgeon,"<sup>9</sup> it would seem that the same regard for the unfavorable position of the layman would suggest the

<sup>4</sup> See, for example, *Graham v. Updegraph*, 144 Kans. 45, 58 P. (2d) 475 (1936), and cases cited therein. The Kansas case was commented upon in 35 MICH. L. REV. 838 (1937).

<sup>5</sup> See, for example, *Schmit v. Esser*, 183 Minn. 354, 236 N.W. 622 (1931), and cases mentioned in 35 MICH. L. REV. 838 at 841, note 10 (1937).

<sup>6</sup> Professor Dawson's article, "Fraudulent Concealment and Statutes of Limitation," 31 MICH. L. REV. 875 (1933), contains a discussion of the three leading Ohio cases: *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902); *McArthur v. Bowers*, 72 Ohio St. 656, 76 N.E. 1128 (1906); and *Bowers v. Santee*, 99 Ohio St. 361, 124 N.E. 238 (1919).

<sup>7</sup> The language in the opinion in the case of *Bowers v. Santee*, 99 Ohio St. 361 at 368, 124 N.E. 238 (1919), seems to make this quite clear. After pointing out the unfairness, to the patient, of the "time of the wrong" rule, emphasizing the patient's inability to know the facts, and the necessity of reliance, on his part, on the defendant, the court adds: "Moreover, it is clearly just to the surgeon that he be not harassed by any premature litigation."

<sup>8</sup> The facts in the instant case suggest some "after-care." Though he interposed the defense of the statute of limitations against the claim, the employer seems to have been persuaded to make a voluntary settlement of some \$6,000.

<sup>9</sup> *Bowers v. Santee*, 99 Ohio St. 361 at 367, 124 N.E. 238 (1919).

conclusion that he should be given an opportunity to employ another lawyer who can inform him of the necessity of prompt action against the offending attorney.<sup>10</sup>

*P. A. L.*

<sup>10</sup> As suggested in note 3, *supra*, it is fitting that this comment be most restrained. It may be "within bounds," however, to speculate upon the effect of such a decision as this, in an era when leading bar associations are emphasizing the importance of good "public relations." Moreover, in the light of the result of this case, what must a layman do to be even partially certain that his legal rights are being given proper protection by the members of our profession? Must he employ a second attorney to check up on the first? And, finally, in the light of the suggestion as to the harassment involved in premature litigation in the surgeon's case (see *supra*, note 7), one may speculate on the half-hearted presentation of Galloway's claim, in the principal case, if, cognizant of his rights, he had brought this malpractice action in time.