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# Legal Briefs

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## Statute of limitations

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Statutes of limitations require that lawsuits be brought within certain periods of time. These statutes balance the plaintiff's right to have a reasonable amount of time to prepare a case with fairness to the defendant. A short statute of limitations encourages promptness (an attribute which is ordinarily not characteristic of the legal system), penalizes people who are not industrious in pursuing their claims, and relieves potential defendants of a prolonged fear of litigation.

There are practical reasons for statutes of limitations. Memories fade, documents can be lost, witnesses can move away or die. Not only do these elements make it more difficult to prove or disprove a case, but they also give an advantage to the unscrupulous who can pursue fraudulent claims knowing that they will be difficult to defend because of the unavailability of witnesses or the loss of documents. Statutes of limitations should provide a reasonable time to bring suit but not so much time as to permit inattention.

While time periods differ from state to state, a 3-year time period for negligence actions is found in many states and would apply to the bulk of actions that might be brought against nurse anesthetists.

### Two special circumstances

In general, the law recognizes two types of special circumstances which would make the operation

of the statute of limitations unfair. The first is where the plaintiff may be under a disability making it difficult for the plaintiff to bring an action within the required time period. The plaintiff can be too young, disabled, or imprisoned. The second is where the plaintiff is unaware of the cause of action and the operation of the statute without some exception would impose an unfair hardship.

In the August 1993 *AANA Journal*, I discussed a case which illustrated the class of exception where the plaintiff was under a disability (1993;61:344-346). In the case of *Seagroves v Hartson* (776 F.Supp. 544, 1991 Dist. Ct. Oklahoma), a woman had been damaged by the negligence of an anesthesiologist. A jury awarded her \$2 million. After trial and to avoid an appeal, she settled with the anesthesiologist for \$1 million, a portion of which was to be used to create an annuity for her minor child. Afterwards, the Oklahoma Supreme Court recognized a new cause of action for the loss of *parental consortium*, the loss of availability of a parent to a child. The injured woman again brought action against the same anesthesiologist with whom she had settled, seeking additional damages for the benefit of her daughter. The anesthesiologist responded that the suit was barred by the settlement and if not by the settlement then by the statute of limitations. The court ruled that Mrs. Segroves' case on behalf of her daughter was not barred. Because the Oklahoma Supreme Court did not recognize the cause of action until afterwards, the previous settlement could not have settled a tort claim which was not in existence at that time. Because the daughter was a

minor, she was not obligated to file her lawsuit until 1 year after she reached the age of an adult.

In May 1994, the Supreme Court of Michigan decided the case of *Chase v Sabin*, (445 Mich. 190, 516 N.W.2d 60, 1994) demonstrating the other major exception concerning statute of limitations. In this case, Mr. Chase claimed that in 1988 he learned that his loss of vision was the result of the negligence of a nurse anesthetist in 1963.

## Facts

In April 1963, the plaintiff underwent two eye surgeries to remove cataracts. In the first surgery, the ophthalmologist administered a local anesthetic, but in the second operation, general anesthesia, administered by a nurse anesthetist, was used. Even though 30 years had elapsed, the ophthalmologist recalled that the administrator of the anesthetic was a nurse anesthetist named Neff and that he gave Neff specific instructions to keep the plaintiff asleep. Apparently, despite the ophthalmologist's specific instructions, the patient woke up or at least became less heavily anesthetized, squeezed the eye, and lost some of the vitreous humor from the eye. After the operation, the ophthalmologist did not inform the plaintiff about the loss of vitreous humor, but the plaintiff's eye rapidly deteriorated, and it was removed 1 year after the procedures.

In 1988, the plaintiff was pursuing a workers' compensation claim when his attorney obtained the hospital record of the 1963 surgery which showed that during the second procedure the plaintiff lifted his hand and squeezed his eye. The plaintiff brought suit in April 1989 and alleged that the loss of anesthetic control caused the partially conscious plaintiff to damage his eye and lose his vision. The trial court granted a motion for summary judgment on the grounds that the statute of limitations barred the claim and the Michigan Court of Appeals agreed. Symptomatic of what is wrong with these cases, the nurse anesthetist has died.

## The Michigan statute of limitations

Michigan's statute of limitations affords a plaintiff 3 years from the date the claim occurs to institute a negligence suit. The statute provides that the claim occurs at the time that the wrong is done regardless of when the damage results. In 1963, Michigan recognized some circumstances under which this statute of limitations would be extended if the plaintiff did not discover the wrong until after the statute had expired. One of the problems in bringing a suit after 26 years has elapsed is that the law may have changed, and that is precisely what has happened in this case. In 1975, Michigan

enacted a statute that required that any malpractice action be brought within 6 months after the date of discovery or 2 years from the date of treatment. Should this statute be applied? The first thing for the court to determine then is what statute applies. The court decides that the statute to apply is the statute that was in effect when the plaintiff's cause of action arose.

The court indicates that statute of limitations should provide the plaintiff with a reasonable opportunity to commence suit. On the other hand, the policies for having a statute of limitations would seem directly opposite to a suit after a delay of 26 years. The court discusses the various policies behind the statute of limitations to convince itself that in this case that there would be insufficient reason from barring the plaintiff's claim. "*Admittedly, the plaintiffs 26-year-old negligence claim is stale; however, we deem it inappropriate to prohibit a plaintiff's suit for a circumstance beyond his control.*" The court said that both parties will be looking at evidence which will undoubtedly consist of hospital and physician records. Thus, concerns that the plaintiffs would manufacture evidence are tenuous because the plaintiff could not manufacture the hospital's or the physician's records. "*While it may be true that the defendant hospital, because of the lapse in time, may encounter difficulty in defending the negligence action, the plaintiffs, who carry the burden of proof, are equally handicapped in their attempt to establish the hospital's negligence.*"

That seems like a pretty difficult assumption. First, the plaintiff did not even know who the nurse anesthetist was who administered the anesthesia. The identity of the nurse anesthetist was made solely by the physician who claims that despite the hundreds of procedures he has been involved in over the last 26 years, he remembers this one very well because of the unexpected incident that occurred during the procedure. How trustworthy is anyone's memory after a lapse of 26 years? Might the physician have a strong memory of the incident and a strong memory of the nurse anesthetist for independent and unrelated reasons which over 25 years have melded into a single memory? Similarly, how reliable are hospital records after 26 years? Undoubtedly, the records will be as accurate today as they were at the time of the incident, but are they as complete? Have they been moved in the past 26 years? Might there be pages missing? How reliable is a 26-year-old record?

The court justified its decision on the ground that both parties are equally hampered by the old records and faded memories. However, are the plaintiff and defendants equally handicapped? The court later points out that the plaintiff was uncon-

scious and has never had any recollection of the alleged negligence. The information was in the hands of the doctor, nurse anesthetist, and hospital. While the plaintiff may have the burden of proof, the elements which he has to prove, namely that damage occurred and the likely cause of the damage are much more likely to survive the passage of time than any element that might have mitigated the damage or evidence that might have argued against negligence. Worse, the nurse anesthetist directly involved in the allegedly negligent procedure has since died. Even if the nurse anesthetist were alive, how can the nurse anesthetist and the ophthalmologist rely on 26-year-old memories?

The question of negligence in an anesthetic case is complex and does not rely primarily on documentary evidence. Consequently, the court's reasoning seems weak, and its explanation permitting this ancient case to now be heard seems clearly inadequate.

#### **Can facts and circumstances be recreated?**

Another matter which is not considered, but which should be, is whether it is possible to recreate the facts and circumstances as they existed 30 years ago. As a result of the court's ruling, *Chase v Sabin*

will, unless it is settled, be tried sometime in 1995. To what extent can or should a court or jury recreate the atmosphere in 1963. When this accident occurred in 1963, John F. Kennedy was president, there were a limited number of military advisors in Vietnam, Richard Nixon had not resigned from the presidency, the Arab oil embargo had not yet occurred, man had not stepped on the Moon, and the medical malpractice crises of the mid-1980s had not yet occurred.

The United States is a different place in 1994 than it was in 1963. There have been numerous cultural changes. Can the defendants get the same kind of trial now that they would have had in 1963? Should healthcare professionals have to defend their 1963 actions in the culture of the 1990s. Worse, will this encourage unscrupulous plaintiffs with marginal cases to wait for the passage of time, the loss of evidence, and the evolution of a more favorable culture to air their grievances. Even though it might not be the plaintiff's fault that the plaintiff did not find out about the cause of action until recently, should not there be some trade-off so that the longer one goes before discovering the cause of action, the more compelling or the more weight should be given to barring ancient lawsuits?

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