University of Richmond Law Review

Volume 15 | Issue 2 Article 2

1980

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UNIVERSITY OF RICHMOND
LAW REVIEW

VOLUME 15 WINTER 1981 NUMBER 2

VIRGINIA'S CONTINUING NEGLIGENT TREATMENT RULE: *FARLEY v. GOODE* AND *FENTON v. DANACEAU*

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I. INTRODUCTION

Since 1902 the continuing negligent treatment rule has been applied to medical malpractice claims to establish when the statute of limitations begins to run on a particular cause of action. The rule is typically used in cases where the parties have engaged in a course of dealing over a period of time and the wrong complained of has stretched over all or part of this period.

In two recent decisions, *Farley v. Goode*[1] and *Fenton v. Danaceau*,[2] the Virginia Supreme Court applied the continuing negligent treatment rule to medical malpractice claims. Although the court professed to be applying pre-existing law in Virginia, there were no prior decisions in Virginia which had applied the rule to medical malpractice claims. This article will focus primarily on these two recent Virginia Supreme Court decisions and the issues raised in the court's application of the continuing treatment rule.

The earliest decision adopting a continuing negligent treatment

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1. 219 Va. 969, 252 S.E.2d 594 (1979).

2. 220 Va. 1, 255 S.E.2d 349 (1979).

rule occurred in Ohio in 1902 in *Gillette v. Tucker.*[3] In *Gillette,* a doctor performed abdominal surgery on a patient on November 3, 1897, and forgot to remove a surgical sponge before closing the incision. The patient complained of discomfort after the operation and the wound continued to discharge pus. She repeatedly complained to the doctor who each time assured her that it was just taking a long time for the animal tendon used for sutures to dissolve. In November, 1898, an argument ensued between the doctor and patient resulting in the patient's dismissal from the doctor's office with advice not to come back. She then saw another doctor who, on April 2, 1899, removed the sponge. The patient then filed suit on June 27, 1899, against the doctor who had originally performed the operation. The Ohio Supreme Court held that malpractice is a tort arising from the contractual relationship between patient and physician and that the contractual obligation of the doctor was to perform the operation satisfactorily, including removal of all sponges. The court found that this obligation continued so long as the physician-patient relationship existed, and each day's refusal or failure to remove the sponge constituted a fresh breach of the contract. The result was that the statute of limitations did not begin to run until the relationship was terminated in November of 1898.

The continuing negligent treatment rule has developed as one method[4] to give relief from the older and harsher date of the wrongful act or injury rule as applied in Virginia in the case of *Hawks v. DeHart.*[5] In *Hawks* the court held that the statute of limitations in a personal injury action begins to run on the date the wrong is done, not the date of discovery.[6] In medical malprac-

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3. 67 Ohio St. 106, 65 N.E. 865 (1902) (court affirmed decision of lower court in a 3-3 decision).

4. Due to the competing interests between protection of a potential defendant from a state lawsuit and the right of an injured party to assert a claim, several rules have developed as to when the applicable period of limitation commences to run in medical malpractice claims. Some jurisdictions use the occurrence of the wrongful act. Others look to when the injury is suffered. Other jurisdictions look to when the injury is discovered by the patient and still others look to when the treatment is terminated. For a collection of cases, see Annot., 80 A.L.R.2d 368 (1961).

5. 206 Va. 810, 146 S.E.2d 187 (1966).

6. *Id.* at 813, 146 S.E.2d at 189. For a discussion of the harshness of the type of rule applied in *Hawks,* see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 330 (4th ed. 1971).

tice cases, more than in other types of personal injury cases, applying the date of the injury rule results in hardship to the patient because the injured party frequently is unaware of the injury. Many malpractice injuries are not apparent from an external observation and discomfort is normal following surgery or other treatment, whether or not malpractice occurred. Further problems are created by the trust many people place in their doctors and by the reluctance of patients to challenge a physician's advice or actions. In many instances, applying the date of the injury rule could result in the statute of limitations having run before the patient realizes he has been a victim of malpractice.

The facts in *Hawks* present a good example of the harsh effects of the traditional date of the injury rule. In this case, the patient sued a doctor for injuries suffered as a result of his leaving a surgical needle in her throat during a goiter operation in 1946. The patient suffered some discomfort after the operation and claimed to have told the doctor about it. He assured her that she was doing fine. The needle was not discovered until 1962. The Virginia Supreme Court stated that "[w]e are committed in Virginia to the rule that in personal injury actions the limitation on the right to sue begins to run when the wrong is done and not when the plaintiff discovers that he has been damaged."[7] Consequently, the plaintiff's right to recover was already barred by the statute of limitations when she brought suit in 1963.

Many states, recognizing the inequity in the *Hawks* type rule, now have adopted the time of discovery rule. Under this rule the statute of limitations in a personal injury case starts running when the injury is discovered or reasonably should have been discovered in the exercise of due diligence.[8] In 1977, when title 8.01 of the Virginia Code was adopted as a revision of former title 8, the final draft prepared by the Virginia Code Commission included adoption of the time of discovery rule.[9] The General Assembly rejected

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7. 206 Va. at 813, 146 S.E.2d at 189.

8. For a collection of cases, see Annot., 80 A.L.R.2d 368, 387 (1961).

9. *Report of the Virginia Code Commission to the Governor and the General Assembly of Virginia*, H. Doc. No. 14 (1977).

> Proposed 8.01-249. When cause of action shall be deemed to accrue in certain personal actions—the cause of action in the actions herein listed shall be deemed to accrue as follows:

the proposed change in favor of retaining the *Hawks* rule which was codified at section 8.01-230 of the Virginia Code and provides that "the prescribed limitation period shall begin to run from the date the injury is sustained."[10] The statutory language, when compared with the recent opinion in *Farley*, raises interesting questions as to how Virginia courts will deal with medical malpractice cases in the future.

II. *Farley v. Goode*

In *Farley*,[11] a patient brought a malpractice action against a dentist for negligent diagnosis and treatment. The patient filed suit on November 19, 1976, alleging that "during a course of treatment by defendant, which extended over a period of years and which ended in August of 1976, defendant 'failed to properly examine, diagnose, and treat her for a periodontal disease of her teeth and gums. . . .' "[12]

The patient alleged a course of treatment and physician-patient relationship existing from 1966 to August 23, 1976. During this period the patient saw the dentist numerous times.[13] The patient

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2. In actions for malpractice against a person who is, or holds himself out to be, a member of a state-licensed profession when the damage or injury resulting from such malpractice is discovered or by the exercise of due diligence reasonably should have been discovered.

10. VA. CODE ANN. § 8.01-230 (Repl. Vol. 1977) provides:
In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, when the breach of contract or duty occurs in the case of damage to property and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided. . . .

11. 219 Va. 969, 252 S.E.2d 594 (1979).

12. *Id.* at 971, 252 S.E.2d at 595.

13. The chronology of visits and treatment as claimed by the plaintiff was as follows:

1966	Plaintiff selected defendant as her family dentist.
1966-1969	Plaintiff saw dentist at least 20 times for dental problems and during this period, defendant cleaned and filled teeth, took x-rays, did crown and bridge work and capped 16 teeth.
9/69-6/72	Plaintiff did not see dentist professionally.
6/72	Plaintiff saw dentist for either "cleaning and check up" or "cavity."
1973	Plaintiff saw dentist on two occasions complaining of bleeding gums and because she thought the caps were wearing off.
1/74	X-rays of plaintiff's mouth were taken.

testified that at no time during any of the visits or treatment did the dentist mention periodontal disease. When the dentist told her a tooth would have to be extracted, she became concerned and went to see another dentist who referred her to a periodontist. The periodontist discovered that she had "advanced periodontal disease"[14] and testified at trial that the defendant dentist should have diagnosed it. The periodontist further testified that expensive dental work was now necessary and that as early as 1971 the patient "had an 'active periodontal disease' which should have been discovered then by a general dentist exercising ordinary care in the Northern Virginia dental community."[15] He also testified that it was standard practice in that area for a dentist to check for any periodontal disease when a patient came in for other dental care such as plaintiff had done. The evidence established that if the condition had been discovered in 1971, it could have been controlled with a minimum of expense and effort. However, by the time of discovery, treatment was expensive and more involved.[16]

The trial court, relying on *Hawks* and *Morgan v. Schlanger*,[17] sustained a plea by the defendant of the statute of limitations, holding that the disease had existed more than two years prior to filing suit and that the evidence established a breach of duty by the defendant prior to that date. Applying the two year personal injury limitation period, the trial court ruled that time barred the claim.[18]

11/74	Plaintiff saw dentist for bleeding of gums.
1975	No visits.
1976	Plaintiff saw dentist because of teeth that were loose and defendant performed filling work.
8/23/76	Plaintiff last saw defendant professionally.

Id. at 971-72, 252 S.E.2d at 595-96.

14. *Id.* at 972, 252 S.E.2d at 596.

15. *Id.* at 973, 252 S.E.2d at 597.

16. *Id.*

17. 374 F.2d 235 (4th Cir. 1967). In *Morgan*, the court considered the question of whether Virginia would apply the continuing negligent treatment rule (which it concluded was the fairer rule) and decided, based on *Hawks*, that given the opportunity Virginia would not do so. The Virginia Supreme Court had made it very clear that it was not willing to permit any exception to the rule that, in personal injury actions, limitations on the right to sue begin to run when the wrong is done and not when the injury is discovered, absent fraudulent concealment.

18. 219 Va. at 973-74, 252 S.E.2d at 597.

The Virginia Supreme Court reversed the trial court and held that:

> [U]nder these facts . . . when malpractice is claimed to have occurred during a continuous and substantially uninterrupted course of examination and treatment in which a particular illness or condition should have been diagnosed in the exercise of reasonable care, *the date of injury occurs, the cause of action for that malpractice accrues, and the statute of limitations commences to run when the improper course of examination, and treatment if any, for the particular malady terminates.*[19]

The court reasoned that there was a continuing duty on the dentist's part to diagnose the periodontal disease, and thus when he continued to fail to diagnose it, the commencement of the statute of limitations was postponed: "Here, the duty with reference to an accurate diagnosis persisted throughout the entire treatment because upon each diagnosis rested the correctness of any future conduct in respect to the periodontal disease."[20]

III. *Fenton v. Danaceau*

Three months after the *Farley* decision, the Virginia Supreme Court decided *Fenton v. Danaceau*.[21] In this case, the patient filed suit on May 14, 1974 against the defendant doctor, an orthopedic surgeon, alleging that the doctor was "negligent during a period of diagnosis and treatment which commenced in October of 1971 and ended on July 24, 1972."[22] The doctor had operated on the plaintiff in October of 1971, performing a fusion of two vertebrae. In May of 1972, the surgeon again operated on the plaintiff to "refasten" bone grafts which did not take during the first operation.[23]

The patient alleged in her motion for judgment that "defendant failed to use reasonable care or skill: improper diagnosis, failure to make proper and adequate tests, unnecessary surgery, negligent performance of surgery, failure to inform her of the risks inherent

19. *Id.* at 976, 252 S.E.2d at 599 (emphasis added).
20. *Id.*
21. 220 Va. 1, 255 S.E.2d 349 (1979).
22. *Id.* at 2, 255 S.E.2d at 349.
23. *Id.* at 3, 255 S.E.2d at 350.

in the operative procedures, and 'negligence and malpractice in subsequent treatment of the Plaintiff.' "[24] The parties stipulated in the trial court that there was "a single cause of action which arose out of the operation which occurred on October 19, 1971, and the subsequent operation and treatment of the plaintiff down to and through July 24, 1972."[25]

While the trial court sustained a plea of the statute of limitations, the Virginia Supreme Court reversed and remanded the case for a trial on the merits holding that the *Farley* continuing negligent treatment rule applied. The court found that the statute of limitations did not begin to run until July 24, 1972, the date "when the improper course of examination and treatment for the particular malady terminated."[26]

In *Fenton,* as distinguished from *Farley,* there was no regular visitation of the doctor by the patient over a long period of time.[27] The doctor operated on the patient on two occasions. The patient claimed both were negligently performed. The course of treatment, including post-operative care, continued only from October of 1971 until July, 1972, as contrasted with the ten-year course of treatment in *Farley.*

IV. The Continuing Negligent Treatment Rule

In *Farley,* the court stated that "[t]his is not the first time we have recognized a continuing negligence theory resulting in a statute of limitations commencing to run at the termination of an undertaking."[28] In support of this statement, the court cited two

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24. *Id.*

25. *Id.* The opinion gives no hint about the reason for the stipulation in the trial court. It is not possible to tell from the opinion whether the stipulation affected the outcome.

26. *Id.* at 4, 255 S.E.2d at 350.

27. The chronology of visits and treatment as claimed by the patient is:

10/71	Patient admitted to hospital where defendant doctor undertook to diagnose and treat back and neck problems.
10/19/71	Defendant performed surgery on patient involving a fusion of two vertabrae.
5/14/72	Patient had continued to be seen and treated by doctor after 10/19 surgery. On this day, doctor performed additional surgery on patient involving the "refastening" of bone grafts which did not "take" during the first operation.

Id. at 3, 255 S.E.2d at 349-50.

28. 219 Va. at 980, 252 S.E.2d at 601.

Virginia cases, *Wilson v. Miller*[29] and *McCormick v. Romans & Gunn.*[30] Both of these cases involved contract claims against attorneys for malpractice; neither involved negligence on the part of a defendant doctor.[31]

In *Wilson,* plaintiff was moving out of the state and engaged the defendant, an attorney, to sell all of his real estate and collect all debts due him. Following this the attorney was to give the plaintiff an accounting. After several demands, an accounting was finally furnished by the defendant whereupon a dispute arose, followed by litigation. The court held that the statute of limitations did not begin to run until termination of the agency relationship, noting that "[a]s a general rule, when there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking or agency."[32]

In *McCormick* an attorney misappropriated a client's funds. After discovery of the problem, the client severed the relationship. The court held that the statute of limitations did not begin to run until the relationship was terminated.[33]

In both *Farley* and *Fenton* the continuing relationship existed, but not because the patient either contracted for or sought it. Instead, in each case, the patient contracted for a particular act, *e.g.,* a dental exam or a surgical procedure. However, in *McCormick* and *Wilson* the nature of the agreements contemplated performance over a period of time.

The Virginia Supreme Court distinguished *Farley* from *Caudill v. Wise Rambler, Inc.*[34] and *Hawks,* both of which had been decided under the longstanding rule in Virginia that the statute of limitations commenced running on the date of the wrongful act.

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29. 104 Va. 446, 51 S.E. 837 (1905).

30. 214 Va. 144, 198 S.E.2d 651 (1973).

31. *Accord,* Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (1968); Keaton v. Kolby, 27 Ohio St. 2d 234, 271 N.E.2d 772 (1971). These cases involved malpractice claims against attorneys. In both New York and Ohio, the continuing treatment rule had already been adopted in medical malpractice cases and was subsequently applied analogously to legal malpractice claims.

32. 104 Va. at 448, 51 S.E. at 838.

33. 214 Va. at 148, 198 S.E.2d at 655.

34. 210 Va. 11, 168 S.E.2d 257 (1969).

The court may have felt compelled to differentiate the cases because the rule in *Hawks* had been codified[35] by the time *Farley* was decided, even though the new statute did not apply to this case.[36]

In *Caudill,* the plaintiff filed suit on April 5, 1967, for personal injuries she received in an auto accident on January 22, 1967. The plaintiff had been a passenger in an American Motors car which she had bought on June 2, 1964, from Wise Rambler. She alleged that although the car was being operated properly by her son, it suddenly became uncontrollable, veered off the highway and struck a barricade. She alleged breach of an implied warranty, negligence, and personal injuries resulting from the accident. The Virginia Supreme Court held that as to her personal injury claim, no right of action accrued until there was a cause of action and that there could be no cause of action for personal injuries until there was some personal injury, however slight.[37] The personal injury cause of action accrued on the date of the accident and the statute of limitations on that claim commenced to run on that date. The court commented that plaintiff's property damage claim for breach of contract or negligent manufacture accrued on the date of sale. Since the plaintiff had suffered some property damage on that date, the period of limitations began to run on the date of sale.[38]

In distinguishing *Hawks* and *Caudill* from *Farley,* the court reasoned that the cause of action in the former two arose from a "single, isolated, noncontinuing wrongful act"[39] rather than from a continuous tort as in *Farley* "in which the negligent failure to diagnose properly resulted in omission to perform or recommend necessary treatment."[40]

V. Necessary Elements for the *Farley* Rule

Farley does not state exactly what elements must be present for

35. Va. Code Ann. § 8.01-230 (Repl. Vol. 1977).
36. Va. Code Ann. §§ 8.01-1, -256 (Repl. Vol. 1977).
37. 210 Va. at 13, 168 S.E.2d at 259. "Right of action" is used in the sense of remedy and "cause of action" refers to when all of the elements of a claim are present. *See* note 55 *infra.*
38. 210 Va. at 13, 168 S.E.2d at 259.
39. 219 Va. at 976, 252 S.E.2d at 599.
40. *Id.*

the continuing negligent treatment rule to apply. The opinion, by analogizing the dentist-patient relationship to the relationship of trust and confidence between attorney and client which was a requisite factor in the *McCormick* case, suggests that the presence of such a relationship is a significant element. However, the opinion does not answer the question of whether any trust relationship will satisfy this requirement. For example, is the rule applicable to the relationship between the owner of a car and the automobile mechanic who continues to treat the car for a particular problem and is negligent in his diagnosis and repair? A negative response would imply a sense of elitism in applying the rule only to professional relationships where the professional must be licensed by the state.

Assuming that the requisite type of trust relationship can be established, a further requirement is that the injury complained of have occurred during the course of continuous treatment. The *Farley* court observed that "continuous treatment" encompasses more than mere continuity of a general physician-patient relationship. Rather, it encompasses "diagnosis and treatment 'for the same or related illnesses or injuries' "[41] during which malpractice must have "occurred during a continuous and substantially uninterrupted course of examination and treatment."[42] Additionally, a break in the treatment for more than the statutory period of limitations does not interrupt the continuity of the course of treatment. The patient in *Farley* did not see the dentist professionally from September of 1969 to June of 1972, a period of some thirty-two months. Yet, she was still able to recover for the dentist's malpractice by applying the continuing negligent treatment rule.

VI. Continuing Relationship v. Continuing Negligence

Another unanswered question in *Farley* and *Fenton* is whether it is the continuing physician-patient relationship or the continuing course of negligence by the doctor which forestalls the commencement of the running of the statute of limitations. In many cases, the physician will discover the malpractice early and attempt to remedy his error. The act(s) of negligence will have

41. *Id.* at 979, 252 S.E.2d at 600.
42. *Id.* at 976, 252 S.E.2d at 599.

ended, but the physician-patient relationship continues. This very situation would have been present in *Fenton* had the patient not claimed that the second surgical procedure was also negligently performed. However, under the actual facts in *Farley,* both the relationship and the negligent acts were continuing. The court in *Farley* arguably deemed each "continuity" sufficient to forestall the running of the statute.

The court in *Farley* refers to a "non-continuing wrongful act"[43] as a prerequisite to the application of the *Hawks* date of the wrongful act rule. By implication, a continuing wrongful act would be a prerequisite for the application of the *Farley* rule. The act, not the relationship, is the necessary element: "[t]he statute of limitations commences to run when the *improper* course of examination, and treatment if any, for the particular malady terminates."[44] The court in *Farley* reasoned further than a continuous tort resulted from the dentist's continuing failure to diagnose properly.[45] If, however, the dentist had suddenly realized his mistake and made a correct diagnosis, then the continuous tort would have ceased and the statute of limitations would have commenced to run. By extending the court's reasoning, one could conclude that in order to toll the running of the statute of limitations, the treatment must continue to be negligent, either by a continuing negligent failure to diagnose, as in *Farley,* or by repeated negligent acts or omissions related to the same illness or condition, as in *Fenton.*

However, the court in *Farley* also implicitly supported the contrary conclusion, *i.e.,* that when the continuing relationship, rather than the continuing tort, forestalled the commencement of the running of the statute, when it approvingly quoted from *Borgia v. City of New York:*[46] "[w]e mean diagnosis and treatment 'for the same or related illnesses or injuries, continuing *after* the alleged acts of malpractice. . . .' "[47] The New York court emphasized that the cause of action accrued only when the course of treatment,

43. *Id.*
44. *Id.* (emphasis added).
45. *Id.*
46. 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).
47. 219 Va. at 979, 252 S.E.2d at 600 (quoting *Borgia,* 12 N.Y.2d at 157, 187 N.E.2d at 779, 237 N.Y.S.2d at 322) (emphasis added).

which included the wrongful acts, ended. The Virginia Supeme Court also alluded to the rationale of the Nebraska case of *Williams v. Elias*,[48] observing that since "the physician should have all reasonable time and opportunity to correct mistakes which may be made at the beginning of a course of treatment, . . . 'the statute of limitations should begin to run when the treatment *ceased*.' "[49] Both *Borgia* and *Williams* held that the statute of limitations was tolled until the entire course of treatment or relationship ceased. Whether the court in *Farley* intended to allow a similarly expansive application of the rule remains an open question.

VII. Discovery of the Malpractice by the Patient During Treatment

Another unanswered question is the effect on the commencement of the running of the statute of limitations of the patient's discovery of the malpractice while the physician-patient relationship exists. This can occur either by the physician admitting the mistake or as a result of the patient's own investigation. Under the *Hawks* date of the wrongful act rule the date of discovery has no effect on when the limitation period commences to run. Rather, the date of the injury will start the clock.[50] Apparently under the *Farley* continuing negligent treatment rule, the date of discovery will not affect the application of the rule except insofar as the discovery may cause the relationship to terminate. Under both rules as set out in the Virginia cases, as well as by section 8.01-230 of the Virginia Code,[51] discovery of the injury is not an event that affects the commencement of the statute of limitations. Other jurisdictions have held that discovery will start the period of limitation running.[52] However, in each of these jurisdictions, the termination of negligent treatment, not termination of the relationship, is the event that starts the statute running in cases in which the continuing negligent treatment rule applies.[53]

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48. 140 Neb. 656, 1 N.W.2d 121 (1941).

49. 219 Va. at 978, 252 S.E.2d 600 (quoting *Williams*, 140 Neb. at 663, 1 N.W.2d at 124) (emphasis added).

50. *See* notes 5-7 *supra* and accompanying text.

51. *See* note 10 *supra* and accompanying text.

52. *See* Annot., 80 A.L.R.2d at 383.

53. *See* text accompanying notes 43-44 *supra*.

VIII. Consequences of a Mistake as to the Type of Case

When a plaintiff mistakes a *Hawks* case for a *Farley* one, the obvious consequence is that the claim may be barred by the statute of limitations. If a plaintiff mistakes a *Farley* case for a *Hawks* case and the physician-patient relationship or improper course of treatment has continued up to the time of filing suit, the claim may be demurrable because the cause of action has not accrued. In *Caudill,* the Virginia Supreme Court held that there must be an injury before there is a cause of action.[54] The court in *Farley* held that no injury occurs until the trust relationship or improper course of treatment ceases. Thus, in a *Farley* case no cause of action would accrue until the injury occurred, which would be at that point in time when the improper treatment or the relationship ended. If suit were filed before the injury occurred, the claim would be demurrable for lack of an existing cause of action.[55]

This reasoning produces interesting consequences in *Farley* type cases. It may discourage a doctor from trying to correct a mistake. The sooner the relationship is terminated, the quicker the statute of limitations will positively begin to run. Thus the patient, in order to be safe, would have to end the relationship so that a cause of action could accrue and then file suit. On the other hand, if the doctor believed the case to be a *Hawks* type, then he would be encouraged to continue the general physician-patient relationship and hope the patient did not discover the claim until after the period of limitation had run. The patient's safest resort would be to terminate the relationship and file suit.

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54. 210 Va. 11, 168 S.E.2d 257 (1969).

55. Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1946). The court in *Farley* uses the language "the cause of action accrues" when it may mean the right of action accrues. Right of action speaks to the remedy, while cause of action refers to the existence of all the elements necessary for claimant to make out a case. The court in *Farley* may well have meant that when the right to sue accrues, the remedy matures.

If no cause of action exists, no right of action could be present, but if a cause of action does exist, there may still be no right of action, as where the statute of limitations has run.

See also 31 Fordham L. Rev. 842 (1963). In this article on *Borgia* the author points out how the court was careful to confine the rule and its language to computing time limitations while avoiding substantive questions as to when the cause came into being. The Virginia court did not follow this approach.

IX. Effect on Wrongful Death Actions

A wrongful death action cannot be brought in Virginia unless the deceased had a right of action against the defendant immediately prior to death.[56] If the deceased died from an act of malpractice and the doctor had continued to negligently treat the patient up to the point of death, no right of action would have existed prior to death, and thus no wrongful death action could be brought. Applying the *Farley* rule, no cause of action would accrue during the patient's lifetime since the injury could not occur until the "improper course of examination, and treatment if any, for the particular malady terminates."[57]

X. Effect of Section 8.01-230 of the Virginia Code on Post-October 1, 1977 Claims

The Virginia Supreme Court faces the problem of reconciling the language of section 8.01-230 of the Virginia Code[58] with the continuing negligent treatment rule in cases in which the cause of action accrues subsequent to October 1, 1977.[59] In *Farley* the cause of action accrued prior to October 1, 1977; thus the court was able to deal only with the existing law embodied in the *Hawks* rule. The court may choose to avoid the statutory language by utilizing the *Farley* rationale, *i.e.*, the injury does not occur until the relationship or improper course of treatment ends. On the other hand the court may be reluctant to renege on its statement in *Comptroller of Virginia ex rel Virginia Military Institute v. King*[60] that the legislature, rather than the court, should initiate a change in the law regarding when the statute of limitations commences to run. Given section 8.01-230 of the Virginia Code, the *Farley* rationale could have been limited to the facts, which would have obviated the need for the problematic language as to when the wrongful act occurs. The advantage the court realized from including the language was eliminating the need to modify or overrule *Hawks* and

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56. Va. Code Ann. §8.01-50 (Repl. Vol. 1977).
57. 219 Va. at 976, 252 S.E.2d at 599.
58. *See* note 10 *supra.*
59. *See* note 35 *supra.*
60. 217 Va. 751, 760, 232 S.E.2d 895, 900 (1977), *quoted in Farley*, 219 Va. at 980, 252 S.E.2d at 601.

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Encouraging a patient to permit a negligent physician to attempt to correct his mistake, without the patient running the risk of the statute of limitations barring his action, is a proper goal for both legislative and judicial bodies. The Virginia Supreme Court in trying to deal *Farley* with a victim of medical malpractice has created several unanswered questions to which only time and litigation will supply the resolution.