

## The Problem of Retained Surgical Sponges and the Medical Malpractice Statute of Limitations

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Surgical sponges are cloth pads that are used in surgeries to absorb bodily fluids (most commonly blood) during surgery.<sup>1</sup> Different hospitals utilize different methods to account for the sponges that are placed in the body to make sure that all of the sponges are removed prior to concluding the surgery. Usually scrub nurses count how many sponges are present before the case starts, multiple times during the case, and after the procedure is over.<sup>2</sup> When sponges are placed in the body, most scrub nurses will take account of how many sponges are being placed inside the body. Some hospitals use surgical sponges with radio-opaque material and take an x-ray after the case is over to ensure that there are no sponges left within the body.<sup>3</sup> For many reasons (including inaccurate counting, change in team members during the surgery, etc.), sometimes surgical sponges are left in the body.<sup>4</sup> This occurs so frequently that there is a term for retained surgical sponge: gossypiboma.<sup>5</sup> Complications from retained surgical sponge may include pain, infection (abscess), intestinal obstruction or fistula.<sup>6</sup>

Two recent cases in Texas involving retained surgical sponges bring into question the two-year statute of limitations and the 10-year statute of repose. In both cases surgical sponges were not discovered until 10 years after surgery.<sup>7</sup> In the first case the patient had symptoms immediately after the claimed negligence, but the sponge was not discovered until several years later. In the second case the symptoms occurred 10 years after the alleged negligence and the sponge was subsequently discovered. Although there is no question that a medical mistake was made, the bigger question is whether the legislatively created deadlines for medical malpractice claims should apply to cases such as these or whether an exception should be granted in case of retained surgical foreign bodies.

### Statute of Limitations of Healthcare Liability Claims and Statute of Repose

Section 74.251 of the Texas Civil Practice and Remedies Code states, in part:

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<sup>1</sup> Sarah Jackson, R.N., and Sharon Brady, R.N., *Counting Difficulties: Retained Instruments, Sponges and Needles*, 87:2 AORN J. 315 (Feb. 2008).

<sup>2</sup> *Id.* at 315.

<sup>3</sup> Robert R. Sima, *et al.*, *Incidence and Characteristics of Potential and Actual Retained Foreign Object Events in Surgical Patients*, 207 J. AM. COLL. SURG. 80 (July 2008), available at <http://www.cardinalonesource.com/us/en/brands/presource/files/2008%20Incidence%20and%20Characteristics%20of%20Potential%20and%20Actual%20Retained%20Foreign%20Object%20Events%20in%20Surgical%20Patients%20-%20Cima.pdf>.

<sup>4</sup> *Counting Difficulties*, *supra* note 1, at 315.

<sup>5</sup> H.K. Okur, *et al.*, *Three Cases of Intrathoracic Gossypiboma with Varying Morbidities Depending on the Time of Detection*, 57:7 THORAC. CARDIO. SURG. 432 (Oct. 2009).

<sup>6</sup> *Counting Difficulties*, *supra* note 1, at 315.

<sup>7</sup> Chuck Lindell, *2 Cases Test State Limits on Lawsuits*, AUSTIN AMER.-STATESMAN, Sept. 28, 2009, available at <http://www.statesman.com/news/content/news/stories/local/2009/09/28/0928sponges.html>.

(a)...no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed.

(b) A claimant must bring a health care liability claims not later than 10 years after the date of the act or omission that gives rise to the claim.”<sup>8</sup>

In evaluating these types of cases it is helpful to look at the legislative intent of these statutes. The purpose of § 74.251 is to avoid stale claims, reduce frequency of claims,<sup>9</sup> to address the problem of litigants filing frivolous claims against medical practitioners without adequately investigating them in a timely manner, and to aid in reducing the cost of malpractice insurance.<sup>10</sup>

Potentially at odds with these strict statutes of limitation is the open courts provision of the Texas Constitution which states that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”<sup>11</sup>

#### Walters vs. Cleveland Regional Medical Center-Background

On December 1, 1995, Mrs. Walters underwent a cesarean section for delivery of her fourth child and bilateral tubal ligation performed by Dr. Spooner at Cleveland Regional Medical Center.<sup>12</sup> According to court records, the procedure was without complications and according to Shirley Kiefer, the surgical nurse, all surgical sponges were accounted for.<sup>13</sup>

After the surgery, Mrs. Walters complained of abdominal pain. For the next ten years she continued to have problems with chronic abdominal pain, multiple infections and frequent urination.<sup>14</sup> In April 2005, the Mrs. Walters was seen by a gynecologist, Dr. Mary Garnepudi. During a routine vaginal exam, the doctor saw some unusual findings and decided to do a laparoscopy which revealed a bulky uterus, multiple pelvic adhesions, and pelvic congestion.<sup>15</sup> Mrs. Walters continued to have abdominal pain so Dr. Garnepudi referred her to Dr. Tracy Pipkin, who did an exploratory laparotomy and hysterectomy.<sup>16</sup> Dr. Pipkin discovered a mass connected to the small bowel and called in another surgeon for an intraoperative consultation.<sup>17</sup> The mass was removed and it turned

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<sup>8</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (Vernon 2009).

<sup>9</sup> *Hyson v. Chilkewitz*, 971 S.W.2d 563 (Tex. App. 5th Dist. 1998).

<sup>10</sup> *In re Collo, & Carney Clinic Ass’n*, 62 S.W.3d 924 (Tex. App. 6th Dist. 2001).

<sup>11</sup> TEX. CONST., art. I, § 13.

<sup>12</sup> *Walters v. Cleveland Reg’l Med. Ctr.*, 264 S.W.3d 154, 156 (Tex. App.-Houston 1st Dist. 2007).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

out to be a surgical sponge that appeared to be encapsulated in fibrous tissue.<sup>18</sup> Due to the appearance of the mass it was hypothesized that the sponge had been there for a long time.<sup>19</sup>

On August 23, 2005, Mrs. Walters brought a negligence suit against Dr. Spooner, Cleveland Regional Medical Center, and Nurse Kiefer.<sup>20</sup> The Defendants filed a motion for summary judgment asserting that the negligence claims were barred by the two year statute of limitations.<sup>21</sup> Mrs. Walters alleged that the statute of limitations violated her open courts guarantee under the Texas Constitution because she did not have a reasonable opportunity to discover the negligent act before the two-year statute of limitations period had expired.<sup>22</sup> The Court granted the Defendant's motions for summary judgment, and Mrs. Walters appealed.<sup>23</sup>

The appellate court judges held that because Mrs. Walters' first doctor visit was March 16, 1998, (more than 2 years after the alleged negligence) that she "failed to establish a fact issue that she did not have a reasonable opportunity to discover her injuries and file suit before the limitations period expired, and, thus, did not meet her burden of establishing the applicability of the open courts guarantee."<sup>24</sup> Mrs. Walters has appealed to the Texas Supreme Court.

#### Rankin v. Methodist Health Care System-Background

On November 9, 1995, Mrs. Rankin underwent a hysterectomy at Methodist Hospital in San Antonio and had no major complaints after surgery.<sup>25</sup> Several years later, during July 2006, she started to complain of abdominal pain. She consulted a number of doctors and eventually underwent an exploratory laparotomy upon which a surgical sponge was found and removed from her abdomen.<sup>26</sup> On October 27, 2006, she filed a lawsuit against Methodist and on January 8, 2007, filed a lawsuit against the physicians that performed the original surgery.<sup>27</sup> The Defendants moved for summary judgment, which the trial court awarded.<sup>28</sup> Mrs. Rankin appealed that decision arguing that it would have been impossible to discover the surgical sponge prior to the expiration of the ten year statute of repose because she did not have any symptoms during that time period, therefore she could not have suspected that she had a retained foreign body, thus it is unconstitutional because it bars her right to an open court.<sup>29</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Walters*, 264 S.W.3d at 156; TEX. CONST., art. I, § 13.

<sup>23</sup> *Walters*, 264 S.W.3d at 156.

<sup>24</sup> *Id.* at 159.

<sup>25</sup> *Rankin v. Methodist Healthcare Sys. of San Antonio*, 261 S.W.3d 93, 96 (Tex. App.-San Antonio, 2008).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

The appellate court held that in order to establish a violation of the open courts provision, the party must show (1) a cognizable, common-law claim that is statutorily restricted, and (2) the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis.<sup>30</sup> The Court found that Rankin met the two prong test and that in her case, applying section 74.251 (b) of the Texas Civil Practices and Remedies Code is unconstitutional under the open courts provision contained in Article I, Section 13 of the Texas Constitution.<sup>31</sup> They reversed and remanded the case back to the trial court. The case has been appealed to the Texas Supreme Court.

### Conclusion

It will be a few months before the Texas Supreme Court renders its decision in these two cases. Both of these women (and people in similar situations) should have the right to have their malpractice cases tried in court. Since the problem of surgical sponges will likely be around for a while, a solution to dealing with medical malpractice cases may be to carve out an exception in the legislation for situations such as this. Thirty-three states have a statute of repose similar to the one in Texas but thirteen states out of that group have exceptions in their legislation for retained surgical foreign bodies.<sup>32</sup> It often takes many years for surgical sponges to be detected and unknowing plaintiffs should have some recourse for such cases of gross negligence.

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<sup>30</sup> *Rankin*, 261 S.W.3d at 97 (citing *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007); *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001)).

<sup>31</sup> *Rankin*, 261 S.W.3d at 103.

<sup>32</sup> Lindell, *supra* note 7.