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# Application of Foreign Objects Discovery Rule Extended to Cause of Action in Negligence and Breach of Warranty

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the committing court has general jurisdiction over the category of cases involved, the fact that the legislature has removed, in the first instance, jurisdiction over a specific proceeding does not totally deprive the original court of all competence. Therefore, legal process issued by that court as a result of an erroneous jurisdictional determination will not give rise to a claim for false imprisonment.

*Application of foreign objects discovery rule extended to cause of action in negligence and breach of warranty.*

Pursuant to the traditional New York rule, a malpractice action accrues upon the commission of the alleged act of malpractice.[240] In *Flanagan v. Mount Eden General Hospital,*[241] however, the Court of Appeals held that where a foreign object is negligently left in a patient's body,[242] a cause of action for medical malpractice does not accrue until the patient discovers or could reasonably discover the malpractice.[243] Although the *Flanagan* discovery rule, subsequently codified in CPLR 214-a,[244] evolved in the medical malpractice setting, the Supreme Court, New York County, in *Reis v. Pfizer, Inc.,*[245] recently extended the rule's application to an action grounded in negligence and breach of warranty for injuries resulting from allegedly defective polio vaccine.[246] In *Reis,* an oral polio vaccine manu-

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[240] *See, e.g.,* Conklin v. Draper, 254 N.Y. 620, 173 N.E. 829 (1930); Gilbert Properties, Inc. v. Millstein, 40 App. Div. 2d 100, 338 N.Y.S.2d 370 (1st Dep't 1972), *aff'd mem.,* 33 N.Y.2d 857, 307 N.E.2d 257, 352 N.Y.S.2d 198 (1973).

[241] 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969).

[242] The plaintiff in *Flanagan* underwent surgery for a gall bladder ailment in 1958. After she began to experience pain in 1966, X-ray analysis revealed that surgical clamps were lodged in her abdominal region.

[243] 24 N.Y.2d at 431, 248 N.E.2d at 872-73, 301 N.Y.S.2d at 27.

[244] CPLR 214-a, applicable to actions accruing on or after July 1, 1975, provides in pertinent part:

> An action for medical malpractice must be commenced within two years and six months of the act, omission or failure complained of . . . provided, however, that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

It has been suggested by one commentator that in foreign object cases the 1-year period is exclusive, *i.e.,* the 2 1/2-year limitation period applicable to other medical malpractice actions is not available to the plaintiff. CPLR 214-a, commentary at 66 (McKinney Supp. 1977). *Contra,* 1 WK&M ¶ 214-1.05 (plaintiff entitled to "whichever period is longer").

[245] 176 N.Y.L.J. 82, Oct. 27, 1976, at 8, col. 2 (Sup. Ct. N.Y. County).

[246] In apparent conflict with *Reis* are three New York supreme court decisions in which recovery was denied. Thornton v. Roosevelt Hosp., 175 N.Y.L.J. 50, Mar. 15, 1976, at 8, col. 3 (Sup. Ct. N.Y. County) (decedent developed cancer 19 years after injection with radioactive substance); Florulli v. Shrag, 174 N.Y.L.J. 8, July 11, 1975, at 12, col. 7 (Sup. Ct. Kings County), *aff'd mem.,* 54 App. Div. 2d 683, 387 N.Y.S.2d 547 (2d Dep't 1976) (plaintiff's

factured by defendant was administered to plaintiff's infant son in October 1966 and January 1967. In February 1967, plaintiff contracted polio, allegedly as a consequence of physical contact with his son.[247] Plaintiff commenced an action in January 1974, alleging negligence and breach of warranty in the manufacture and distribution of defendant's vaccine. Defendant moved for summary judgment on the ground that both causes of action were time barred.[248] In response, plaintiff contended that he could not reasonably have learned of the causal relationship between his son's vaccination and his illness until May 1973, when he read an article explaining that polio could be contracted as a result of contact with recipients of the vaccine.[249] Finding the action "akin" to one for medical malpractice and concluding that the *Flanagan* rationale was applicable to the facts in *Reis,* Justice Gellinoff found that plaintiff's action was timely.[250]

In reaching this conclusion, the *Reis* court considered the policy considerations underlying the judicial limitation of the discovery rule to foreign object cases. The court noted that the chief reason for this limitation is the difficulty in proving negligence and causation where something other than a tangible object has been left in the body of a patient.[251] Where other than real evidence is involved, Justice Gellinoff pointed out, courts may be compelled to rely upon testimony evaluating the professional judgment of the treating physician at a time long after the patient has been treated.[252] In such a case, the possibility of stale and specious claims is apparent. In weighing these considerations, the court maintained that, as in *Flanagan,* the *Reis* case did not present a subjective claim based

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intestate contracted hepatitis following blood transfusion); Granoff v. Ayerst Lab. Div. of Am. Prods., 172 N.Y.L.J. 85, Oct. 30, 1974, at 20, col. 1 (Sup. Ct. N.Y. County) (plaintiff sustained injury several years after ingesting drug).

[247] 176 N.Y.L.J. 82, at 8, col. 2.

[248] *Id.* The court indicated that the negligence and breach of warranty causes of action both were governed by the 3-year statute of limitations contained in CPLR 214. *Id., citing* Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

[249] 176 N.Y.L.J. 82, at 8, col. 2. Defendant did not contest these assertions, "presumably," the court noted, "because such contention would raise an issue of fact." Defendant evidently assumed, albeit erroneously, that its motion for summary judgment surely would be granted. Under traditional accrual rules, plaintiff's action indeed would have been untimely, as the court noted. *Id.* As a result of defendant's failure to contest plaintiff's allegations, it was unnecessary to determine the expiration of a reasonable time within which the plaintiff could have discovered the defendant's negligence. *Id.*

[250] *Id.,* col. 3.

[251] *See id.*

[252] *See id.*

upon professional diagnostic judgment or discretion.[253] Nor, stated the court, did it entail the possibility of a feigned or frivolous claim, or involve a causal break between the alleged negligence and the injury suffered.[254] In support of this position, the court noted that defendant contested neither plaintiff's allegation that he had polio, nor his allegation that he contracted it as a result of contact with his son.[255] Furthermore, the court observed, it was undisputed that plaintiff instituted suit immediately after he reasonably could have discovered that his injury occurred as a result of defendant's alleged tortious conduct. Consequently, the *Reis* court concluded[256] that plaintiff's cause of action presented a sufficiently analogous factual situation to bring it within the ambit of the discovery rule formulated in *Flanagan*[257] and subsequently extended by other courts.[258]

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[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] In reaching its decision, the court noted that, unlike the plaintiff in *Flanagan*, the plaintiff in *Reis* knew of his injury soon after the occurrence of defendant's allegedly tortious act. Only the fact that the injury was the result of tortious conduct remained undiscovered until a later date. In negating this distinction, the court relied upon Murphy v. St. Charles Hosp., 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970). In *Murphy*, a case in which a prosthesis broke 4 years after implantation in the plaintiff's hip, the Appellate Division, Second Department, rejected the contention that the plaintiff's knowledge of the existence of the device in his body distinguished the case from *Flanagan*. *Id.* at 67, 312 N.Y.S.2d at 980. Similarly, the *Reis* court concluded that although the present plaintiff had knowledge of his illness, he was unaware of the defendant's negligence. It is submitted, however, that *Murphy* is distinguishable. The *Murphy* plaintiff suffered no injury until the prosthesis broke. Thus, the plaintiff in *Murphy* had notice of neither injury nor negligence at the time the prosthesis was implanted, a situation similar to that in *Flanagan*.

[257] 24 N.Y.2d at 430-31, 248 N.E.2d at 872-73, 301 N.Y.S.2d at 26-27. Many courts refuse to extend the discovery rule, adhering strictly to the distinction between foreign object claims and medical treatment and diagnosis claims formulated by the *Flanagan* Court. *See, e.g.*, Randall v. Weber, 45 App. Div. 2d 731, 356 N.Y.S.2d 1016 (2d Dep't 1974) (mem.) (negligent diagnosis and treatment); Schiffman v. Hospital for Joint Diseases, 36 App. Div. 2d 31, 319 N.Y.S.2d 674 (2d Dep't 1971) (misdiagnosis of biopsy slides); McQueen v. County of Nassau, 83 Misc. 2d 865, 373 N.Y.S.2d 767 (Sup. Ct. Nassau County 1975) (improper setting of broken bone); Fonda v. Paulsen, 79 Misc. 2d 936, 361 N.Y.S.2d 481 (Sup. Ct. Albany County 1974), *rev'd on other grounds*, 46 App. Div. 2d 540, 363 N.Y.S.2d 841 (3d Dep't 1975) (negligent examination of cancerous body tissue). *But see* note 258 *infra*.

[258] 24 N.Y.2d at 430-31, 248 N.E.2d at 872-73, 301 N.Y.S.2d at 26-27. The discovery rule has been extended by some lower New York courts beyond medical malpractice cases involving strictly defined foreign objects. *See, e.g.*, Dobbins v. Clifford, 39 App. Div. 2d 1, 330 N.Y.S.2d 743 (4th Dep't 1972) (pancreas damaged during surgery 4 years earlier); Murphy v. St. Charles Hosp., 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970) (prosthesis broke 4 years after its implantation in plaintiff's hip), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 507 (1971); Le Vine v. Isoserve, Inc., 70 Misc. 2d 747, 334 N.Y.S.2d 796 (Sup. Ct. Albany County 1972) (radioactive contamination from defective isotope not discovered for 7 years).

It is submitted, however, that *Reis* is distinguishable from *Flanagan.* The plaintiff in *Reis* was not the recipient of the allegedly defective vaccine, a point neglected in the court's opinion. In contrast, the plaintiff in *Flanagan* was the recipient of the tortious instrumentality. In failing to limit the discovery rule to a recipient plaintiff, the *Reis* court overlooked an important factual distinction. Application of the discovery rule in *Flanagan* exposed the treating physician to liability only to the patient on whom he operated, while in *Reis* its application exposed the defendant manufacturer to liability to anyone who came in contact with the recipient of the vaccine. The vast difference in potential liability is a factor that should have been considered by the *Reis* court.[259]

Nonetheless, the *Reis* decision signals the potential development of a common law discovery rule applicable to negligence actions independent of the medical malpractice discovery rule codified in CPLR 214-a.[260] Several factors militate against the development of such a rule, however, not the least of which is the fact the *Flanagan* holding is quite narrowly worded.[261] Indeed, for this reason, subsequent cases that extended the discovery rule have been subjected to criticism.[262] One court recently concluded that the legislature, too, has recognized "the strong policy considerations which have mandated the strict construction of the Flanagan rule" by

[259] Le Vine v. Isoserve, Inc., 70 Misc. 2d 747, 334 N.Y.S.2d 796 (Sup. Ct. Albany County 1972), may have involved a similar situation. Plaintiffs brought suit for personal injuries and property damage after having discovered that they and their home had been contaminated by radioactivity. Plaintiff Harris D. Le Vine was contaminated by direct contact with defendant's allegedly defective isotope. His wife, two children, and home, however, presumably were contaminated as a result of contact with him. The court applied the discovery rule to the claims of all four plaintiffs without discussing the fact that Harris D. Le Vine was the only plaintiff who came in direct contact with the isotope.

[260] This would be analogous to the development of the "continuous treatment" doctrine, which tolls the running of the statute of limitations in a malpractice action until discontinuance of related professional services. This doctrine, like the discovery rule, arose as a means of mitigating the harsh consequences occasioned from strict application of traditional accrual rules. Although also codified in CPLR 214-a, the doctrine of continuous treatment has been extended by case law to other areas of professional malpractice, such as law, public accounting, dentistry, and architecture. *See The Survey,* 49 ST. JOHN'S L. REV. 794, 795 (1975).

[261] *See* 24 N.Y.2d at 429, 431, 248 N.E.2d at 872, 873, 301 N.Y.S.2d at 25, 27. In his practice commentary to CPLR 214, Dean McLaughlin maintained that: "Flanagan is perhaps more significant for what it did not hold. The majority opinion took great pains to restrict its ruling to foreign object cases." CPLR 214, commentary at 434 (McKinney 1972).

[262] *See* McQueen v. County of Nassau, 83 Misc. 2d 865, 373 N.Y.S.2d 767 (Sup. Ct. Nassau County 1975); Fonda v. Paulsen, 79 Misc. 2d 936, 361 N.Y.S.2d 481 (Sup. Ct. Albany County 1974), *rev'd on other grounds,* 46 App. Div. 2d 540, 363 N.Y.S.2d 841 (3d Dep't 1975); 1 WK&M ¶ 214-a.04; Comment, *Malpractice Statute of Limitations in New York: Conflict and Confusion,* 1 HOFSTRA L. REV. 276, 291-92 (1973).

enacting CPLR 214-a.[263] Moreover, as Dean McLaughlin has suggested, it would be somewhat ironic if the discovery rule was applied liberally in negligence actions yet strictly applied in those actions which were the source of the rule—medical malpractice actions.[264] Despite these obstacles, it is submitted that the *Reis* court's extension "of the Flanagan rule make[s] eminently good sense;"[265] it seems manifestly unjust to bar a plaintiff from asserting a cause of action before he even knows of its existence.

*Equitable conversion of surplus mortgage foreclosure proceeds.*

It is a settled principle of New York law that there cannot be a tenancy by the entirety in personal property.[266] When there is a voluntary sale of real property held as a tenancy by the entirety, the proceeds are considered personalty and the tenancy by the entirety is terminated, creating either a joint tenancy or a tenancy in com-

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[263] Proewig v. Zaino, 176 N.Y.L.J. 80, Oct. 25, 1976, at 16, cols. 2, 3 (Sup. Ct. Nassau County).

[264] McLaughlin, *Trends, Developments: New York Trial Practice,* 176 N.Y.L.J. 92, Nov. 12, 1976, at 2, col. 4.

[265] CPLR 214, commentary at 55 (McKinney Supp. 1977).

[266] Originally, the New York rule prohibiting tenancies by the entirety in personal property was established by case law. *See, e.g.,* Hawthorne v. Hawthorne, 13 N.Y.2d 82, 192 N.E.2d 20, 242 N.Y.S.2d 50 (1963); *In re* Estate of Blumenthal, 236 N.Y. 448, 141 N.E. 911 (1923); *In re* Albrecht, 136 N.Y. 91, 32 N.E. 632 (1892). The principle since has received statutory codification. EPTL § 6-2.1(a)(4); N.Y. GEN. OBLIG. LAW § 3-311(1) (McKinney 1969).

Only a husband and wife can hold property as tenants by the entirety. *See* Vlcek v. Vlcek, 42 App. Div. 2d 308, 310, 346 N.Y.S.2d 893, 896 (3d Dep't 1973) (there can be no tenancy by the entirety in real property held by parties never married); Ackerman v. Ackerman, 78 Misc. 2d 1, 2, 342 N.Y.S.2d 720, 722 (Sup. Ct. Westchester County 1973), *aff'd mem.,* 45 App. Div. 2d 856, 358 N.Y.S.2d 535 (2d Dep't 1974) (tenancy by the entirety may exist only between a husband and wife validly married at time of transfer of property). EPTL § 6-2.2 is the operative statute in determining the type of tenancy created by a disposition. The only instance in which a tenancy by the entirety may exist appears in subdivision (b) which provides: "A disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common." EPTL § 6-2.2(b).

As tenants by the entirety, no one spouse may unilaterally partition the real property, nor dispose of any interest in such property which will adversely affect the other spouse's right of survivorship. Hiles v. Fisher, 144 N.Y. 306, 312, 39 N.E. 337, 338 (1895). Tenancy by the entirety is based on the common law concept of the unity of husband and wife. *Id.;* Ackerman v. Ackerman, 78 Misc. 2d 1, 1, 342 N.Y.S.2d 720, 722 (Sup. Ct. Westchester County 1973); 9A P. ROHAN, NEW YORK CIVIL PRACTICE ¶ 6-2.2[8][a] (1970). The right of survivorship can be destroyed only by the dissolution of the marriage or the voluntary act of both husband and wife. *In re* Estate of Dickie, 55 Misc. 2d 976, 978, 286 N.Y.S.2d 893, 896 (Sur. Ct. Erie County 1968). For a general discussion of tenancies by the entirety, with emphasis on the spouse's right to alienate his or her own interest, see Klorfein, *Tenancies by the Entirety in New York,* 9 N.Y.L.F. 460 (1963).