St. John's Law Review

Volume 47, October 1972, Number 1 Article 8

CPLR 203(a): Extension of the Flanagan Rule

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The same cause of action may accrue in New York for jurisdictional purposes and in another jurisdiction for statute of limitations purposes.[12] For purposes of CPLR 202, a cause of action should be deemed to accrue in the state with the most substantial contacts with it.

CPLR 203(a): Extension of the Flanagan *rule.*

Generally, the statute of limitations commences to run at the time of injury in malpractice actions.[13] Two exceptions to this rule have been created. The first — the "continuous treatment" doctrine — was enunciated in *Borgia v. City of New York.*[14] Under this doctrine, the statute does not begin to run until the services of the physician for the same or related illnesses or injuries are terminated.[15] The second — the *Flanagan* rule[16] — applies to "foreign objects." This doctrine provides that "where a foreign object has negligently been left in the patient's body, the Statute of Limitations will not begin to run until the patient could have reasonably discovered the malpractice."[17]

Dobbins v. Clifford[18] was a malpractice action initiated against three physicians who operated on the plaintiff on March 10, 1966. Although the operation entailed the removal of the spleen, it was discovered in January, 1970, that the plaintiff's pancreas had been severely injured during the operation. At issue was the time the cause of action accrued.

The Appellate Division, Fourth Department, held that the plaintiff's cause of action did not accrue until discovery of the injury. It indicated that the case fell within the scope of the "foreign object" exception:

> [A]n act of malpractice [was] committed internally so that discovery [was] difficult; real evidence of the malpractice in the form of the hospital record [was] available at the time of suit; professional diagnostic judgment [was] not involved, and there is no danger of false claims.[19]

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12 It certainly does not follow that, if the "place of wrong" for purposes of conflict of laws is a particular state, the "place of the commission of a tortious act" is also that same state for purposes of interpreting a statute conferring jurisdiction, on that basis, over nonresidents. Feathers v. McLucas, 15 N.Y.2d 443, 463, 209 N.E.2d 68, 79, 261 N.Y.S.2d 8, 23 (1965).

13 *See* Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1962).

14 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

15 *Id.* at 156, 187 N.E.2d at 778, 237 N.Y.S.2d at 321.

16 Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969), *discussed in The Quarterly Survey,* 45 ST. JOHN'S L. REV. 500, 508 (1971).

17 *Id.* at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27.

18 39 App. Div. 2d 1, 330 N.Y.S.2d 743 (4th Dep't 1972).

19 *Id.* at 4, 330 N.Y.S.2d at 746-47.

Understandably, the Fourth Department endeavored to obviate the severity of the statute of limitations problem in malpractice actions. The Court of Appeals should look with favor upon the result.

CPLR 203(e): Court refuses to allow amendment of pleading in declaratory judgment action to include a cause of action in negligence.

In *Raggins v. Hartford Accident & Indemnity Co.*,[20] the plaintiffs were injured in an automobile accident and gave notice of the accident to the defendant insurance company, which disclaimed liability on the ground that the policy had been terminated. The plaintiffs sought a declaratory judgment that the disclaimer was invalid, and the Supreme Court, Erie County, ordered that the policyholder be joined as a defendant. This was done, but no negligence action was ever instituted. After the three-year statute of limitations period,[21] the defendant insurance company moved for a summary dismissal of the action, arguing that since the policyholder had a complete defense to any negligence claim by virtue of the expiration of the statutory period, the question of his insurance coverage was purely academic. The plaintiffs cross-moved to amend their pleadings to include a cause of action for damages for personal injuries.

The court distinguished the issues of law in a negligence suit from those in a declaratory judgment action, and concluded that the differences were irreconcilable.[22] While acknowledging the liberal approach to amended pleadings sanctioned by CPLR 3025 and CPLR 3026,[23] the court insisted that these sections "were not intended to be used for purposes of resurrecting an action outlawed by the statute of limitations"[24] and consequently denied the motion to amend.

The *Raggins* decision raises an interesting question as to the possible applicability of CPLR 203(e) to this kind of situation. This section, not mentioned by the court, provides that, for purposes of the statute of limitations, a claim in an amended pleading is considered to have been interposed at the time the claims in the original pleading

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20 68 Misc. 2d 1063, 328 N.Y.S.2d 802 (Sup. Ct. Erie County 1972) (mem.).

21 CPLR 214.

22 *See* General Acc. Fire & Life Assur. Corp. v. Jarmouth, 149 N.Y.S.2d 523, 524 (Sup. Ct. N.Y. County 1956), in which the court noted:

> The issues in the equity action for a declaratory judgment and the tort action for personal injuries are completely independent of each other. . . . In the action for a declaratory judgment the court is required to interpret the terms of an insurance policy. The issues in the personal injury action are that of negligence, contributory negligence and damages.

23 CPLR 3025(b) provides that "leave [to amend] shall be freely given upon such terms as may be just. . . ." CPLR 3026 states that "[p]leadings shall be liberally construed."

24 68 Misc. 2d at 1065, 328 N.Y.S.2d at 804.