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Article 5

CPLR 203(a): Flanagan Rule Applied to Radiation Injuries

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underlying contract and urges that New York conform to the federal approach by adopting the separability rule. The uncertainty of New York law on this matter is illustrated by *Housekeeper v. Lourie,* a recent First Department decision. Adoption of the federal rule would be in keeping with New York's traditional position of encouraging arbitration.

Other cases of special significance include *LeVine v. Isoserve, Inc.,* wherein the *Flanagan* rule was applied to radiation injuries; *In re Dolgin Eldert Corp.,* where the Court of Appeals held that an oral settlement reached at an informal conference in chambers does not satisfy the open court exception of CPLR 2104; *Murray v. City of New York,* in which the Court permitted an infant to file a late notice of claim where his infancy may have been an important factor in the failure to timely file; *Gordon v. Nationwide Mutual Insurance Co.,* in which the Court held that an insurer is not liable in an excess judgment suit where the refusal to defend or settle is based on a good faith belief that the policy had been cancelled; and *Ford v. Unity Hospital,* which holds that an unauthorized act in New York by an agent of a foreign insurer is a sufficient basis for personal jurisdiction.

Additionally, the *Survey* continues to cover two subjects of special interest: indigents' rights and replevin. Under article 11, the division of authority on the public's responsibility for indigents' publication costs in matrimonial actions is summarized. Under article 71, several cases which clarify the requirements of due process as to replevin are reported.

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the *Survey* accomplishes its basic purpose, viz., to key the practitioner to significant developments in the procedural law of New York.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(a): Flanagan *rule applied to radiation injuries.*

In *LeVine v. Isoserve, Inc.,*[1] the Supreme Court, Albany County, applied the malpractice discovery rule enunciated in *Flanagan v.*

Means Committees:
1961 N.Y. LEG. DOC. No. 15 ..... FIFTH REP.
1962 N.Y. LEG. DOC. No. 8 ..... SIXTH REP.

[1] 70 Misc. 2d 747, 334 N.Y.S.2d 796 (Sup. Ct. Albany County 1972).

Mount Eden General Hospital[2] to a negligence action for radiation injuries. In *Flanagan*, the Court of Appeals created an exception to the general rule that the statute of limitations begins to run when a malpractice is committed,[3] holding that where a foreign object has been left in the plaintiff's body, the statute does not begin to run until the plaintiff could reasonably have discovered the malpractice.[4] The Court distinguished *Schwartz v. Heyden Newport Chemical Corp.*,[5] a negligent medical treatment case, from a foreign object malpractice case, in which there is no danger of feigned or frivolous actions and no possible causal break between the negligence and the injury.[6]

In *LeVine*, the co-plaintiff discovered in 1970 that he, his family, and his home were contaminated with alpha radiation from a defective isotope which the defendants had delivered to him in 1963. Approximately one year after discovery, the plaintiffs commenced an action for personal injuries and property damage. The court denied the defendant's motion to dismiss, applying the *Flanagan* discovery rule to the facts of the case and holding that the causes of action were not barred by the statute of limitations. While the court conceded that the question of the causal relationship between the injuries and the radiation resembled the causation question in *Schwartz*, it reasoned that the criteria relied on in *Flanagan* to insure the defendant a reasonable

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2 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), where it was held that the statute of limitations did not begin to run until the plaintiff had discovered that surgical clamps had been left in his abdomen during an operation eight years earlier.

After *Flanagan*, which limited the discovery rule to foreign object malpractice cases, the rule was extended to a malpractice action for the breaking of a prosthetic device placed in the plaintiff's hip four years earlier. Murphy v. St. Charles Hosp., 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 507 (1971). A more recent decision, in which an injury caused to the plaintiff's pancreas during an operation for the removal of his spleen was not discovered for four years, extended the rule further. The court applied the discovery rule to the plaintiff's malpractice action because of the causal connection between the negligence and the injury, the hidden nature of the injury, the availability of medical records, and the absence of a question of professional diagnostic judgment. Dobbins v. Clifford, 39 App. Div. 2d 1, 330 N.Y.S.2d 743 (4th Dep't 1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 153 (1972). *But see* Schiffman v. Hospital for Joint Diseases, 36 App. Div. 2d 31, 319 N.Y.S.2d 674 (2d Dep't 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 151 (1971) (misreading of slides not equated with foreign object malpractice: malpractice action time-barred).

3 Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1st Dep't), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930).

4 24 N.Y.2d at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27.

5 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963). The injection of a chemical, manufactured by the defendant, into the plaintiff's sinus in 1944 allegedly caused a carcinoma which was not discovered until 1957. The court held that the statute of limitations began to run when the chemical was injected.

6 24 N.Y.2d at 430, 248 N.E.2d at 872, 301 N.Y.S.2d at 26.

opportunity to defend against a stale claim were satisfied herein.[7] The presence of excessive radiation in and on the plaintiffs and their property and the availability of investigative reports confirming contamination from a defective isotope,[8] like the surgical clamps in *Flanagan*, precluded questions of credibility or professional diagnostic judgment. It followed that this evidence obviated the danger of a specious claim as to the defective nature of the isotope and entitled the plaintiffs to the opportunity to prove a causal connection between the radiation and the injuries upon trial.[9]

LeVine is an equitable result for plaintiffs unknowingly subjected to radiation injuries.

> To bar plaintiffs from bringing their law suit before any manifestation of injury [would be], on the facts presented, unwarranted. . . . To hold otherwise would, in many radiation injury cases, insulate the defendants from any liability either for breach of warranty . . . or negligence.[10]

In addition, *LeVine* portends the adoption of the discovery rule in malpractice and negligence cases where a foreign substance is introduced into the body and there is a substantial delay before a resultant injury can be detected.[11]

CPLR 217: Petitioner must commence proceeding for writ of prohibition within a time "reasonably necessary to protect his rights."

In *Roberts v. County Court of Wyoming County*,[12] the Appellate Division, Fourth Department, became the first appellate tribunal[13] in New York to determine whether CPLR 217's four-month statute of limitations for proceedings against a body or officer applies to a proceeding for a writ of prohibition. Prohibition is an extraordinary dis-

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[7] 70 Misc. 2d at 751, 334 N.Y.S.2d at 801.

[8] An independent investigation by the Atomic Energy Commission in 1970 confirmed that the source of the contamination was the type of isotope which the defendants had delivered to the co-plaintiff in 1963. *Id.* at 748-49, 334 N.Y.S.2d at 798.

[9] *Id.* at 751, 334 N.Y.S.2d at 801.

[10] *Id.* at 752, 334 N.Y.S.2d at 801.

[11] *See* McLaughlin, *New York Trial Practice*, 168 N.Y.L.J. 72, Oct. 13, 1972, at 4, col. 2. Significantly, as the court pointed out, the Legislature has recognized the insidious nature of radiation-induced injuries and extended the ordinary time limitations for recovery of workmen's compensation benefits for such injuries. They are available, *inter alia*, for disabilities caused by radiation when the injury is discovered, regardless of the time of exposure, provided that an action is brought within 90 days after discovery. N.Y. WORKMEN'S COMP. LAW § 28 (McKinney 1970), § 40(2) (McKinney 1966).

[12] 39 App. Div. 2d 246, 333 N.Y.S.2d 882 (4th Dep't 1972).

[13] The court observed that "[i]t appears that the resolution of this question is a matter of first impression for an appellate court in this State." *Id.* at 249, 333 N.Y.S.2d at 886.