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CPLR 203: "Continuing Treatment" Rule Applied to Injury Sustained During Hospitalization

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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.

The Table of Contents is designed to direct the reader to those specific areas of procedural law which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective titles.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203: "Continuing treatment" rule applied to injury sustained during hospitalization.

In *O'Laughlin v. Salamanca Hospital District Authority*,[1] plaintiff patient brought an action for injuries sustained allegedly due to the negligence of defendant hospital. Plaintiff had fallen from a hospital bed on March 15, 1968, and continued to be treated for the injuries which she sustained in the fall until her discharge on June 20, 1968. Plaintiff commenced this action by service of a summons and complaint upon defendant on June 5, 1969. The Supreme Court, Special Term, dismissed the action as not being timely commenced, and plaintiff appealed.[2]

Under Public Authorities Law § 1777(1) and (2) and CPLR 204(a), plaintiff had one year and sixty days from the accrual of her cause of action within which to institute suit. Whether plaintiff had done so depended upon whether the action accrued at the time of her fall or upon her discharge. In *Borgia v. City of New York*[3] the Court of Appeals held that such a cause of action accrues at the conclusion of continuous treatment, even though the original treatment that the patient was receiving is not of the same nature as that subsequent to the injury.[4] The Appellate Division, Fourth Department, concluded

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1 36 App. Div. 2d 51, 319 N.Y.S.2d 128 (4th Dep't 1971).

2 *Id.* at 52, 319 N.Y.S.2d at 129.

3 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962). For discussion of this case see Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 344-47 (1962); McLaughlin, *Civil Practice*, 15 SYRACUSE L. REV. 381, 389 (1963); 27 ALBANY L. REV. 312 (1963); 31 FORDHAM L. REV. 842, 844 (1963); 37 ST. JOHN'S L. REV. 385, 390 (1963).

4 The court expressly held "that at least when the course of treatment which includes [treatment for injuries sustained through] the wrongful acts or omissions has run continuous and is related to the same original condition or complaint, the 'accrual' comes only at the end of the treatment." 12 N.Y.2d at 155, 187 N.E.2d at 778, 237 N.Y.S.2d at 321.

that the *Borgia* case was controlling here and reversed the lower court.[5]

Application of the "continuing treatment" rule to subsequent injuries sustained at the hospital is welcome. For, the same policy considerations supporting the rule where treatment is for the original injury also apply to any other injuries sustained during hospitalization.

CPLR 214(6): Flanagan *rule strictly limited by Second Department.*

Under CPLR 214(6), an action to recover damages for malpractice must be commenced within three years. The historic rule in this state concerning medical malpractice is that this statute of limitations runs from the time when the alleged malpractice occurs.[6] This general rule was modified in *Flanagan v. Mount Eden General Hospital*,[7] wherein the Court of Appeals held that the above statute commences to run upon discovery by plaintiff in cases in which the defendant negligently fails to remove a foreign object from plaintiff patient's body.[8] Is *Flanagan* a first step toward complete rejection of the general rule or merely an exception necessitated by special equities inherent in foreign body cases only?

In *Schiffman v. Hospital for Joint Diseases*[9] the Supreme Court, Kings County, and the Appellate Division, Second Department, declined to further modify this rule. In his complaint, plaintiff alleged that he discovered in 1967 that his tissue specimen taken in 1959 had been falsely diagnosed as malignant. In 1969, plaintiff brought an action charging defendants with negligence and seeking damages for the administration of unnecessary radiation therapy. There was no allegation that defendants knowingly concealed the slides of the aforementioned tissue from plaintiff. Whether the action was timely commenced depended upon whether said statute began to run at the time of the alleged negligence or upon discovery. The supreme court and the Second Department, refusing to equate misreading of slides with failure to remove foreign objects, dismissed the action as barred by the statute of limitations.[10]

However, in light of the factual situation in *Borgia*, it is clear that the court dispensed with the former requirement that the continuing treatment be similar in nature to that which gave rise to the cause of action, 36 App. Div. 2d at 52-53, 319 N.Y.S.2d at 130, *citing* 12 N.Y.2d at 160, 187 N.E.2d at 781, 237 N.Y.S.2d at 325 (Froessel, J. dissenting.)

[5] 36 App. Div. 2d at 53, 319 N.Y.S.2d at 131.

[6] *See* Conklin v. Draper, 254 N.Y. 620, 173 N.E. 892 (1930), *aff'g* 229 App. Div. 227, 241 N.Y.S. 529 (1st Dept).

[7] 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); *see* 7B McKINNEY'S CPLR 214, supp. commentary at 77-78 (1969).

[8] *Id.* at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 26.

[9] 36 App. Div. 2d 31, 319 N.Y.S.2d 674 (2d Dep't 1971).

[10] *Id.* at 31-32, 319 N.Y.S.2d at 675-76.