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CPLR 214(g): Flanagan Rule Strictly Limited by Second Department

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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.

The Second Department disapproved of further contraction of the general rule concerning diagnostic negligence through suspension of the running of the statute until the time of discovery could have been made if plaintiff were diligent.¹¹ The court opined "that the preference for repose which the Statute of Limitations reflects outweighs in this case the disadvantage to the plaintiff which results from the application of the general rule."¹² In support of the rule it cited natural impairment of memory due to lapse of time and possible subjection of defendants to claims arising from medical advances subsequent to the time of the alleged malpractice under litigation.¹³ That plaintiff may not discover the malpractice in time to litigate was no obstacle: ignorance of a cause of action does not of itself affect the tolling of the statute.¹⁴

The resolution of the *Schiffman* case — strict limitation of *Flanagan* — complies with current New York law but not with justice. The general rule requires further revision. The interests of protecting a defendant from stale claims should not outweigh the interests of a plaintiff who did not know and could not have known of the defendant's malpractice.¹⁵ Commentators have urged that the statute of limitations should not start to run until plaintiff discovers or with due diligence should have discovered the malpractice.¹⁶ This position has been adopted by the California courts,¹⁷ as the Second Department noted.¹⁸ Nevertheless, in New York, a plaintiff must institute his action within three years from the date of the malpractice or, if the "continuous treatment" rule¹⁹ applies, within three years from termination of treatment, irrespective of when the alleged malpractice could or should have been discovered with due diligence. Legislative reconsideration of this rule is clearly warranted.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 301: Satisfaction of requirements of commerce clause necessarily comports with due process.

¹¹ *Id.* at 33, 319 N.Y.S.2d at 676.

¹² *Id.*, 319 N.Y.S.2d at 677.

¹³ *Id.*, 319 N.Y.S.2d at 678.

¹⁴ *Id.* at 34, 319 N.Y.S.2d at 678, citing 509 Sixth Avenue Corp. v. New York City Transit Authority, 15 N.Y.2d 48, 51, 203 N.E.2d 486, 487, 255 N.Y.S.2d 89, 91 (1964).

¹⁵ 7B MCKINNEY'S CPLR 214, supp. commentary at 77 (1969).

¹⁶ See, e.g., 29 U. PITT. L. REV. 341 (1967); 21 RUTGERS L. REV. 778 (1967).

¹⁷ Thompson v. County of Fresno, 59 Cal. 2d 686, 381 P.2d 924, 31 Cal. Rptr. 44 (1963); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (Ct. App. 1967); Calvin v. Thayer, 150 Cal. App. 2d 610, 310 P.2d 59 (Dist. Ct. App. 1957).

¹⁸ 36 App. Div. 2d at 35, 319 N.Y.S.2d at 678.

¹⁹ See Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).