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CPLR 214(6): Second Department Extends Flanagan Rule of Discovery in Foreign-Object Medical Malpractice Cases

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cannot escape the defense of the statute of limitations by pointing out a disability — *e.g.*, infancy — of the distributee.[27]

In *Pulsifep v. Olcott*[28] the Supreme Court, Essex County, was confronted with the question whether the insanity of a surviving spouse tolled the statute of limitations until a committee was appointed. In *Pulsifep* the intestate died in April of 1965, allegedly as a result of injuries caused by defendant. An order appointing a committee for the widow was entered March 16, 1967. Subsequently, letters of administration were granted and the committee instituted a wrongful death action on March 6, 1968.

In view of the facts, the court reasonably concluded that the action was timely commenced. A strict construction of CPLR 208 would have dictated a contrary conclusion on the theory that a person is not entitled to commence an action which requires a representative plaintiff until that person is *actually* appointed to the fiduciary position. Nevertheless, the court recognized the injustice of such an interpretation in the instant case inasmuch as there were only two remaining members of the family, the incompetent wife and a young child, and had the wife been sane, her appointment as administratrix would have been routine.[29] It would seem therefore that a practitioner seeking to avail himself of the tolling provisions contained in CPLR 208 must show that the disabled party had a prior right to letters of administration. This would serve to prove that the real party in interest was in fact the incapacitated one.[30]

CPLR 214(6): Second Department extends Flanagan *rule of discovery in foreign-object medical malpractice cases.*

CPLR 214(6) provides that an action to recover damages for malpractice must be commenced within three years of its accrual. In medical malpractice cases, the general rule is that the cause of action accrues on the date of commission of the wrongful act,[31] unless treatment has

27 Mossip v. F.H. Clement & Co., 256 App. Div. 469, 10 N.Y.S.2d 592 (4th Dep't 1939), *aff'd*, 283 N.Y. 554, 27 N.E.2d 279 (1940).

28 63 Misc. 2d 524, 312 N.Y.S.2d 219 (Sup. Ct. Essex County 1970).

29 *See* N.Y. SURR. CT. PROC. ACT § 1001 (McKinney 1967).

30 If the infant in *Pulsifep* had been an adult it could be speculated that the result would have been different. For, the adult daughter, rather than the disabled wife, would have the right to letters of administration. N.Y. SURR. CT. PROC. ACT § 1001 (McKinney 1967). Since the real party in interest would be an adult, section 208 would be inapplicable. *Cf.* Lamb v. DuPont, 181 Misc. 657, 42 N.Y.S.2d 49 (Sup. Ct. N.Y. County 1943) (statute of limitations is not tolled by reason of infancy in derivative action where the real party in interest is a corporation).

31 *See* Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963); Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1st Dep't), *aff'd*, 254 N.Y. 620, 173 N.E. 892 (1930).

been continuous, in which instance the claim accrues at the end of such treatment.[32] In *Flanagan v. Mount Eden General Hospital*[33] the Court of Appeals established an exception to the general rule, holding that in cases "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."[34] *Flanagan* was predicated on the theory that in foreign-object cases no objection can be made that the plaintiff's claim is false or frivolous; nor is there a causal break between the negligence and the injury inasmuch as the plaintiff's claim rests solely on the presence of a foreign object in his body.[35]

Flanagan was extended in *Murphy v. Saint Charles Hospital.*[36] There, a prosthetic device was inserted into plaintiff's right hip. Four years later the device broke, necessitating surgery for its removal. One year thereafter, plaintiff commenced her action against the hospital. In defense, the latter cited plaintiff's knowledge of the insertion as grounds for classifying the action as one for negligent treatment, accruing on the date of insertion. The Appellate Division, Second Department, ruled that despite plaintiff's knowledge the same evidentiary considerations underlying *Flanagan* were presented: "there is the same minimization of prejudice . . . because of the availability and identifiability of the real evidence involved and thus in critical part both cases are identical."[37]

As noted above, the general rule in New York continues to be that the cause of action accrues on the date of malpractice — not on the date of discovery. Indeed, as opposed to the initiative taken in some jurisdictions,[38] the New York courts have not viewed *Flanagan* as heralding a rule of discovery in all malpractice cases;[39] it is only in foreign-object cases where the evidence is real and indisputable that unwary plaintiffs have been afforded some relief from the severe effects of the statute of limitations. Apparently, the courts are willing to sacrifice the legitimate

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32 Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962); *cf.* Siegel v. Kranis, 29 App. Div. 2d 477, 288 N.Y.S.2d 831 (2d Dep't 1968) (malpractice action against attorney accrued at the conclusion of the litigation).

33 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969).

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

35 *Id.* at 430, 248 N.E.2d at 872, 301 N.Y.S.2d at 26.

36 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970).

37 *Id.* at 66, 312 N.Y.S.2d at 980.

38 *See, e.g.*, Frohs v. Greene, 452 P.2d 564, 565 (Sup. Ct. Ore. 1969):

> We do not believe that the danger of spurious claims is so great as to necessitate the infliction of injustice on persons having legitimate claims which were undiscoverable by the exercise of ordinary care prior to the lapse of two years from the time of the act inflicting the injury.

See generally Sacks, *Statutes of Limitations and Undiscovered Malpractice*, 16 CLEV.-MAR. L. REV. 65 (1967).

39 1 WK&M ¶ 214.18.

suitors in negligent treatment and negligent medication cases because of the greater danger of specious claims.[40]

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

CPLR 302(a)(3)(ii): Case illustrates factors to be considered when determining whether a defendant has derived "substantial revenue from interstate or international commerce."

CPLR 302(a)(3)(ii) extends jurisdiction of New York courts to encompass a nondomiciliary who commits a tortious act without the state causing injury within the state and who "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." Since foreseeability of New York consequences is undeniable in many instances, the operation of this subsection might expose a nondomiciliary to an unfair burden of defending an action here were it not for the additional caveat that the tortfeasor derive substantial revenue from interstate or international commerce.[41]

To date, the phrase "substantial revenue" has escaped precise definition. Given the rationale underlying CPLR 302(a)(3)(ii),[42] it would seem that this state of uncertainty is preferable to a condition of certitude resulting from the establishment of arbitrary dollar volume or percentage of interstate income criteria.[43] Indeed, in *Path Instruments International Corp. v. Asahi Optical Co.*[44] a federal district court demonstrated the necessity of looking beyond the unadorned income quotas to discern the existence of substantial revenue.

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40 *Cf.* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969); *see also* Rapson, *"To Guard Against The Unfounded Actions . . . ."— The Issue Behind The Mendel Labels*, 45 ST. JOHN'S L. REV. 96 (1970).

41 To illustrate the hardship that would be visited upon a nondomiciliary absent the "substantial revenue" requirement, consider the following question posed by Professor McLaughlin:

> Suppose a California tire dealer sold and installed a set of tires on an automobile belonging to a tourist with New York license plates. Presumably, the plates would make it foreseeable that the automobile would eventually return to New York, and that if the tires should fail, an injury would occur in New York. Would it be reasonable to require the tire dealer to defend the action in New York?

7B MCKINNEY'S CPLR 302, supp. commentary at 132 (1966); *see also* Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956).

42 CPLR 302(a)(3)(ii) is premised on the relationship between income derived in interstate and international commerce and the ability to handle litigation away from the primary business location. 1 WK&M ¶ 302.10a.

43 *See, e.g.*, Gluck v. Fasig Tipton Co., 63 Misc. 2d 82, 310 N.Y.S.2d 809 (Sup. Ct. N.Y. County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 348 (1970); *cf.* Gillmore v. J.S. Inskip, Inc., 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. Nassau County 1967).

44 312 F. Supp. 805 (S.D.N.Y. 1970).