CORE
Metadata, citation and similar papers at core.ac.uk
Provided by St. John's University School of Law

St. John's Law Review

Volume 59
Number 3 *Volume 59, Spring 1985, Number 3*

Article 9

June 2012

CPLR 208: Temporary Effect of Medication Administered in Treatment of Physical Injuries Is Not "Insanity" and Will Not Cause Tolling of Statute of Limitations

Thomas Infurna

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

Infurna, Thomas (1985) "CPLR 208: Temporary Effect of Medication Administered in Treatment of Physical Injuries Is Not "Insanity" and Will Not Cause Tolling of Statute of Limitations," *St. John's Law Review*: Vol. 59 : No. 3 , Article 9.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol59/iss3/9

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

By ensuring that those who have abandoned, or otherwise lack, significant contacts with New York are prohibited from making use of its limitations periods, the Court of Appeals in *Antone* has bolstered significantly the efficacy of the borrowing statute as a tool for limiting forum shopping without destroying the protection it provides for New York residents.

Anthony J. Cornicello

CPLR 208: Temporary effect of medication administered in treatment of physical injuries is not "insanity" and will not cause tolling of statutes of limitation

Section 208 of the CPLR suspends the running of a statute of limitations when one entitled to commence an action is under a disability of infancy or insanity.[1] While "insanity" is not expressly defined by the statute, the courts have construed the term broadly to mean a mere inability to understand and protect one's legal rights.[2] Recognizing the function of statutes of limitation as stat-

---

[1] CPLR 208 (Supp. 1984-1985). CPLR 208 provides in pertinent part:

> If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues . . . the time within which the action must be commenced shall be extended . . . .

Id. The statute also provides guidelines to determine the length of the tolling period. *See id.* When a statute of limitations of three years or more applies, and the time allowed for filing suit would otherwise expire before or within three years after the disability ends or the disabled party dies, the claimant receives an extension of three years after the disability has ceased. *Id.* When a statute of limitations of less than three years applies, the time for commencing an action is extended by the duration of the disability. *Id.* In cases of insanity, the time for commencing an action can not extend more than ten years beyond accrual of the cause of action. *Id.*

For the tolling provision to apply the plaintiff must be burdened by the insanity disability at the time the cause of action accrues. *See* SIEGEL § 54, at 55. However, some authority suggests that if the plaintiff's insanity results from the defendant's negligence the tolling provision will apply notwithstanding a lack of contemporaneity. *See* H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 178 (1978); 1 WK&M ¶ 208.04 (Supp. 1983).

[2] *See, e.g.*, McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 547, 435 N.E.2d 1072, 1074, 450 N.Y.S.2d 457, 459 (1980) (statute does not define insanity); *see also* SECOND REP. at 58 (CPA revision committee supported tolling provisions but attempted to correct inequities that it believed were "unreasonably generous in favor of the disabled plaintiff").

Influenced by other jurisdictions, one New York appellate court construed insanity generically to embrace a mere inability to understand and protect one's legal rights. *See* Hurd v. County of Allegany, 39 App. Div. 2d 499, 503, 336 N.Y.S.2d 952, 957 (4th Dep't 1972); *see also* SIEGEL § 54, at 55 (insanity means inability to protect one's affairs). Historically, in-

utes of repose, the Court of Appeals refined this broad definition slightly to require a factual determination of an "overall inability to function in society."[3] Recently, in *Eisenbach v. Metropolitan Transportation Authority*,[4] the Court further limited the application of the insanity toll by excluding from its scope the temporary effects of medication administered in the treatment of physical injuries.[5]

In *Eisenbach* the plaintiff suffered extensive physical injuries when he fell from a train operated by one of the defendants and was struck by a train operated by another defendant.[6] He was hospitalized and treated with strong narcotic painkillers that allegedly

---

sanity has been equated with unsoundness of mind. *See* DeGogorza v. Knickerbocker Life Ins. Co., 65 N.Y. 232, 237 (1875). It should be noted, however, that a litigant need not be adjudicated incompetent to invoke the tolling provision. *See, e.g.*, Hammer v. Rosen, 7 N.Y.2d 376, 379, 165 N.E.2d 756, 757, 198 N.Y.S.2d 65, 67 (1960) (actual adjudication of incompetency unnecessary). Moreover, in light of the protective purpose of CPLR 208, discharge from a mental institution does not, in itself, provide sufficient proof of sanity to deprive an insane litigant of the toll. *See* Gomillion v. State, 51 Misc. 2d 952, 953, 274 N.Y.S.2d 381, 383 (Ct. Cl. 1966). Generally, insanity has been treated as a question of fact, *see Hurd*, 39 App. Div. 2d at 503, 336 N.Y.S.2d at 957, that requires a hearing for proper resolution, *see* Dunn v. Mager, 47 App. Div. 2d 919, 919, 367 N.Y.S.2d 48, 49 (2d Dep't 1975). Furthermore, a temporary inability to protect one's affairs has been deemed sufficient to constitute insanity. *See Hurd*, 39 App. Div. 2d at 502-03, 336 N.Y.S.2d at 956-57; *The Survey*, 47 ST. JOHN'S L. REV. 585 (1973) (discussion of *Hurd* court's definition of "insanity"); *see also* McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 547, 435 N.E.2d 1072, 1074, 450 N.Y.S.2d 457, 459 (1980) (dicta); *infra* note 16.

[3] *See* McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 548, 435 N.E.2d 1072, 1075, 450 N.Y.S.2d 457, 460 (1980). The defendants in *McCarthy* moved for dismissal of the personal injury action as time-barred by CPLR 214. *Id.* at 546, 435 N.E.2d at 1073, 450 N.Y.S.2d at 458. The plaintiff offered expert evidence of a "post traumatic neurosis" that caused him to "repress and forget . . . much of the accident," notwithstanding his ability to attend college, hold a job, and file a third-party complaint in a suit related to the same accident. *Id.* The plaintiff's claim that this affliction constituted the insanity contemplated by CPLR 208 was unanimously rejected, and the Court declared that the toll the plaintiff sought was "untenable as a matter of law." *Id.* at 548, 435 N.E.2d at 1074, 450 N.Y.S.2d at 459. The Court held that the statute should be read narrowly and ruled that the insanity toll applies only to persons unable to protect their legal rights due to "an over-all inability to function in society." *Id.* at 548-49, 435 N.E.2d at 1075, 450 N.Y.S.2d at 460. The Court noted that to the extent that Prude v. County of Erie, 47 App. Div. 2d 111, 364 N.Y.S.2d 643 (4th Dep't 1975), and Hurd v. County of Allegany, 39 App. Div. 2d 499, 336 N.Y.S.2d 952 (4th Dep't 1972), might support the post traumatic neurosis concept, they should not be followed. *McCarthy*, 55 N.Y.2d at 549 n.3, 435 N.E.2d at 1075 n.3, 450 N.Y.S.2d at 460 n.3; *see generally* FIFTH REP. at 43 (expressing desire to draft CPLR 208 in such a way as to avoid broad, unwarranted extensions of time within which to commence an action).

[4] 62 N.Y.2d 973, 468 N.E.2d 293, 479 N.Y.S.2d 338 (1984).

[5] *Id.* at 975, 468 N.E.2d at 294-95, 479 N.Y.S.2d at 339-40.

[6] *Id.* at 974, 468 N.E.2d at 294, 479 N.Y.S.2d at 339.

rendered him disoriented.[7] The plaintiff commenced a negligence action, and in response, the defendants moved to dismiss, asserting that the action was time-barred.[8] Special Term denied the motion and ordered a hearing to determine whether the plaintiff was entitled to a toll of the statute of limitations due to insanity.[9] The Appellate Division reversed, holding that the tolling provision was inapplicable because the plaintiff alleged merely physical, not mental, side effects from his medication, and hence, was not insane.[10] The Court of Appeals affirmed in a unanimous memorandum opinion, holding that the tolling provision of CPLR 208 shall not be construed to embrace the temporary effects of painkilling medications used to treat physical injuries.[11]

The Court reasoned that a narrow interpretation of "insanity" was necessary to ensure the viability of statutes of limitation as statutes of repose.[12] The Court did not acknowledge the Appellate Division's distinction between physical and mental incapacity,[13] but explained that only the legislature should undertake to expand the statute to include the temporary effects of the plaintiff's

---

[7] *Id.* The plaintiff claimed that the medication caused him to be "generally confused, disoriented, and unable to effectively attend to [his] affairs." *Id.*

[8] *Id.* The defendants contended that the plaintiff's action was precluded by the applicable statute of limitations found in subdivision 2 of § 1276 of the Public Authorities Law. *Eisenbach*, 97 App. Div. 2d at 808, 468 N.Y.S.2d at 677. Section 1276(2) states in pertinent part: "An action against the authority founded on tort shall not be commenced more than one year after the cause of action therefor shall have accrued . . . ." N.Y. PUB. AUTH. LAW § 1276(2) (McKinney 1982). Relying on this statute, the defendants filed a motion to dismiss in accordance with CPLR 3211(a)(5). 62 N.Y.2d at 974, 468 N.E.2d at 294, 479 N.Y.S.2d at 339. CPLR 3211(a)(5) states in pertinent part: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . [a] statute of limitations . . . ." CPLR 3211(a)(5).

[9] 62 N.Y.2d at 974, 468 N.E.2d at 294, 479 N.Y.S.2d at 339.

[10] 97 App. Div. 2d at 809, 468 N.Y.S.2d at 677. In a memorandum decision the Appellate Division, Second Department, held that "[i]mplicit in the cases construing the word 'insanity'. . . is the requirement that the inability to function in society be a result of mental illness." *Id.*

[11] 62 N.Y.2d at 975, 468 N.E.2d at 294-95, 479 N.Y.S.2d at 339-40.

[12] *Id.* at 974-75, 468 N.E.2d at 294, 479 N.Y.S.2d at 339 (quoting McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 548, 435 N.E.2d 1072, 1075, 450 N.Y.S.2d 457, 460 (1980)); for a discussion of the *McCarthy* case, see *supra* note 3.

[13] 97 App. Div. 2d at 809, 468 N.Y.S.2d at 677. The Appellate Division's holding was based exclusively on the fact that the plaintiff, while alleging physical effects, failed to allege any mental side effects of the medication. *Id.* The holding of the Court of Appeals, however, completely disallowed a toll of the statute for the temporary effects of medication, without regard to whether the effects were physical or mental. *See Eisenbach*, 62 N.Y.2d at 975, 468 N.E.2d at 294-95, 479 N.Y.S.2d at 339-40.

medication.[14]

It is submitted that the *Eisenbach* holding will have little practical effect on the conceptual definition of insanity because a determination of insanity is largely a factual question to be decided within guidelines already established by judicial construction.[15] Relevant case law indicates that for purposes of CPLR 208, insanity includes a permanent or temporary inability to protect one's own legal rights due to an overall inability to function in society.[16] As a result of *Eisenbach*, this definition has been modified only slightly to exclude the temporary effect of medication administered to treat physical injuries.[17]

It is suggested that the greatest significance of *Eisenbach* lies not in its narrow declaration of substantive law, but rather, in the Court's willingness to base its decision solely on the *cause* of the mental condition rather than focus on the merits of the plaintiff's insanity claim.[18] In the past, while acknowledging that insanity is

---

[14] 62 N.Y.2d at 975, 468 N.E.2d at 295, 479 N.Y.S.2d at 340.

[15] *See supra* note 2 and accompanying text.

[16] *See, e.g.*, McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 547, 435 N.E.2d 1072, 1074, 450 N.Y.S.2d 457, 459 (1980) (acknowledging that temporary afflictions have been judicially declared "insanity," but limiting insanity to overall inability to function in society); Barnes v. County of Onondaga, 103 App. Div. 2d 624, 628-29, 481 N.Y.S.2d 539, 544 (4th Dep't 1984) (insanity is inability to protect a person's own legal rights because of overall inability to function in society); Wenthen v. Metropolitan Transp. Auth., 95 App. Div. 2d 852, 852, 464 N.Y.S.2d 212, 213 (2d Dep't 1983) (mem.) (afflictions rendering one incapable of dealing with facts of incident in question are distinguished from overall inability to function in society). While the Court of Appeals has not directly commented on the concept of temporary insanity, the Court has limited the impact of Hurd v. County of Allegany, 39 App. Div. 2d 499, 336 N.Y.S.2d 952 (1972), by disallowing tolling of the statute for post-traumatic neuroses, *see McCarthy*, 55 N.Y.2d at 549 n.3, 435 N.E.2d at 1075 n.3, 450 N.Y.S.2d at 460 n.3, and for the temporary effects of medications, *see Eisenbach*, 62 N.Y.2d at 975, 468 N.E.2d at 294-95, 479 N.Y.S.2d at 339-40. Thus, it remains possible that other types of temporary insanity will be recognized. *See, e.g.*, Barnes v. County of Onondaga, 103 App. Div. 2d 624, 626-30, 481 N.Y.S.2d 539, 542-44 (4th Dep't 1984) (accident victim received toll for disability endured before victim recovered from mental afflictions).

[17] *See* 62 N.Y.2d at 974-75, 468 N.E.2d at 294-95, 479 N.Y.S.2d at 339-40. On its face, the *Eisenbach* decision excludes from the tolling provision only the *temporary* effects of medication administered in the treatment of physical injuries. *See id.* Although this decision will presumably not preclude courts from granting a toll for the *permanent* effects of medication, it is submitted that there are many temporary reactions from the more potent pain relievers that also merit a toll. *See infra* note 25 (discussing effects of some analgesic medications).

[18] *See* 62 N.Y.2d at 974-75, 468 N.E.2d at 294-95, 479 N.Y.S.2d at 339-40. Ordinarily, the determination of a person's mental capacity is a question of fact. *See* McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 548, 435 N.E.2d 1072, 1074, 450 N.Y.S.2d 457, 459 (1980); *see also* Chartener v. Kice, 270 F. Supp. 432, 439 (E.D.N.Y. 1967) (insanity involves contested factual issues). Rather than ruling that the temporary effects of medication are

generally an issue of fact, the courts have denied the tolling period as a matter of law when the plaintiff's mental affliction was unsubstantiated by evidence[19] or was limited to a narrow area of the plaintiff's affairs.[20] However, the *Eisenbach* Court excluded the temporary effect of painkilling drugs from the definition of insanity without an analysis of the factual support for the plaintiff's claim of incapacity.[21] Instead, the Court based its unqualified holding on the *source* of the plaintiff's affliction—medications administered to treat physical injuries.[22] Because of the Court's indifference to the severity of the plaintiff's affliction, it is suggested that the Court has removed a critical area of factual analysis from the

---

per se insufficient to constitute insanity, it is suggested that the *Eisenbach* court should have distinguished the plaintiff's condition from insanity by examining his actual mental capacity during the relevant period. *See, e.g.*, Barnes v. County of Onondaga, 103 App. Div. 2d 624, 627-28, 481 N.Y.S.2d 539, 543 (4th Dep't 1984) (distinguishing plaintiff's mental condition from post traumatic neurosis or temporary effects of medication).

[19] *See, e.g.*, Lacks v. Marcus, 68 App. Div. 2d 815, 815-16, 414 N.Y.S.2d 139, 140 (1st Dep't 1979) (mem.). In *Lacks*, the Appellate Division dismissed an appeal from the lower court's determination that the plaintiff was not insane because it was "unable to see any evidence that plaintiff was 'insane' within the meaning of the statute." *Id.* The court viewed the scope of the plaintiff's alleged disability as insufficient to constitute insanity and held that her disability was not a disability to sue. *Id.* at 816, 414 N.Y.S.2d at 140; *cf.* Dumas v. Agency for Child Dev., 569 F. Supp. 831, 833-34 (S.D.N.Y. 1983) (plaintiff has burden of proof to show entitlement to insanity toll).

[20] *See* McCarthy v. Volkswagen of Am., Inc., 55 N.Y.2d 543, 548-49, 435 N.E.2d 1072, 1074-75, 450 N.Y.S.2d 457, 459-60 (1980). In *McCarthy*, the Court held that the plaintiff's claim of insanity in the form of "post traumatic neurosis" was "untenable as a matter of law." *Id.* The *McCarthy* Court reasoned that the tolling provision should apply only to afflictions resulting in an "over-all inability to function in society." *Id.* Thus, the Court denied the plaintiff's claim of insanity because he was capable of dealing with his daily affairs, even though he claimed to be incapable of dealing with the fact of his accident. *Id.* at 548, 435 N.E.2d at 1074, 450 N.Y.S.2d at 459. Unlike its approach in *Eisenbach*, *see supra* notes 11-13 and accompanying text, in *McCarthy*, the Court did not dismiss the plaintiff's insanity claim solely on the basis of the *cause* of his affliction, namely an automobile collision, *see id.* at 545-49, 435 N.E.2d at 1073-75, 450 N.Y.S.2d at 458-60. Rather, the Court weighed the merits of his claim. *See id.* The Court's refusal to recognize "post traumatic neurosis" as insanity was merely a reflection of the Court's belief that a post traumatic neurosis does not constitute a sufficient degree of disability to merit a toll. *See id.* The Court found "post traumatic neurosis" to be simply a limited, rather than an overall, inability to conduct one's affairs. *See id.*

[21] *See* 62 N.Y.2d at 974-75, 468 N.E.2d at 294-95, 479 N.Y.S.2d at 339-40. Although the Court considered the plaintiff's contention that he was "confused, disoriented, and unable to effectively attend to [his] affairs," *id.* at 974, 468 N.E.2d at 294, 479 N.Y.S.2d at 339, the degree to which this affliction affected his mental abilities, and the extent to which it represented an overall disability, rather than a limited impairment of his capacity to manage his affairs, played no apparent role in the Court's reasoning, *see id.* at 974-75, 468 N.E.2d at 294-95, 479 N.Y.S.2d at 339-40.

[22] *Id.* at 975, 468 N.E.2d at 294-95, 479 N.Y.S.2d at 339-40.

trier of fact.[23] In light of the protective role of CPLR 208, it is urged that the Court should merely issue guidelines to aid the trier of fact rather than remove from its consideration an entire source of mental disability.

It is further suggested that since the trend of the Court's recent decisions has been to narrow the use of the insanity toll, the Court may have provided resourceful defense counsel with an opportunity to argue for extensions of the *Eisenbach* holding to other temporary mental afflictions, regardless of their severity.

While the Court's reasoning might appear to be consistent with the legislative intention to construe "insanity" narrowly,[24] it is submitted that this goal might have been achieved somewhat less intrusively by limiting the holding of *Eisenbach* to its facts. It is urged that by doing so the Court could have preserved the protection of CPLR 208 for those who are rendered truly incompetent by the temporary effects of the more potent pain-relieving drugs.[25]

---

[23] The Court's indifference to the degree of the plaintiff's affliction is reinforced by its reasoning that some disability is suffered whenever pain relievers are used. *See id.* at 975, 468 N.E.2d at 295, 479 N.Y.S.2d at 340. It is suggested that the Court's acknowledgment of the various degrees of disability caused by different painkillers, coupled with its use of the word "whenever," *see id.*, indicate that the Court meant to leave no room for exceptions to its denial of the toll when painkillers used to treat injuries result in temporary disability, *see id.* It is urged that the wisdom of this reasoning is questionable in light of the potential unanticipated effects of analgesic drugs. *See infra* note 25 and accompanying text.

[24] *See* FIFTH REP. at 43. The Committee that proposed tentative drafts of CPLR 208 concluded that "[i]t was not possible to substitute the phrase 'mental illness' for the phrase 'insanity,' as had been suggested, since, in this context, the phrase 'mental illness' is too broad and might result in an unwarranted extension of the time to commence action." *Id.* While this language may appear to support the outcome of *Eisenbach*, independent of the logic used to reach that outcome, it is suggested that the Court could have achieved a similar end by merely presenting conservative guidelines to be used by the trier of fact rather than eliminating the factual analysis entirely. *See supra* note 18 and accompanying text. This approach, it is submitted, would harmonize the competing goals of a narrow construction of CPLR 208 and retention of the factual inquiry.

[25] It is suggested that the Court could have rejected the plaintiff's contention on the facts of the case, *see supra* notes 6-8 and accompanying text, rather than issue an unqualified exception to the definition of insanity. By entirely rejecting the possibility of temporary insanity induced by painkilling drugs used to treat physical injuries, *see supra* notes 21-23 and accompanying text, the Court has ignored the possibility that truly severe temporary mental afflictions can be caused by the more potent analgesics, particularly by narcotic agonist analgesics frequently used to treat severe or chronic pain, *see* DRUG FACTS AND COMPARISONS 798-802 (J. Boyd ed. 1984); 6 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 186-92 (P. Cantor ed. 1962). Among the more pronounced reactions occasionally noted from the effect of such medications on the central nervous system are delirium, mental clouding, transient hallucinations, mood changes, disorientation, confusion, and visual disturbances. *See* DRUG FACTS AND COMPARISONS, *supra*, at 801. *See generally* DRUG TREATMENT: PRINCIPLES AND PRACTICE OF CLINICAL PHARMACOLOGY AND THERAPEUTICS 319-25 (G. Avery ed.

Nevertheless, *Eisenbach* is a strong reminder of the Court's rapidly developing determination to reverse the expansion of the tolling provision accomplished through past litigation.

Thomas Infurna

CPLR 3025(c): Amendment of the pleadings to conform to the evidence adduced at trial precluded when proposed amendment would add new theory of liability based on previously unpleaded facts resulting in prejudice

The CPLR mandates that pleadings be liberally construed[1] to

---

1980) (discussing different uses of various analgesics in treatment of pain). It is suggested that the penalization of individuals suffering, albeit temporarily, from these afflictions, conflicts with the legislative goal of protecting litigants who already "have difficulty enough." *See* SECOND REP. at 58.

---

[1] *See* CPLR 3026 (1974). CPLR 3026 provides:

> Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.

Id. In addition to CPLR 3026, other provisions of the CPLR counsel against a rigid construction of the pleadings. *See, e.g.*, CPLR 3013 (1974) (requiring statements made in pleading to be "*sufficiently* particular") (emphasis added); CPLR 3017(a) (Supp. 1984-1985) (allowing court to grant "any type of relief . . . appropriate to the proof whether or not demanded"); CPLR 3025(b) (1974) (requiring leave to amend pleading to be freely given).

One of the major accomplishments of the CPLR was the liberalization of pleadings. SIEGEL § 207, at 244. The Civil Practice Act, which preceded the CPLR, prohibited the pleading of evidence and required that pleadings state only material facts. *See* CPA § 241 (repealed 1963). These rigid pleading requirements of the CPA were abandoned by the CPLR, which simply requires that the pleadings give the adverse party "notice" of the "transactions [or] occurrences . . . intended to be proved" and indicate "the material elements of each cause of action or defense." *See* CPLR 3013 (1974). Generally, "if [any] cause of action can be spelled out from the four corners of the pleading," then the pleading is acceptable under the CPLR. *See* SIEGEL § 208, at 245.

In addition to the rejection of strict pleading requirements, the CPLR abandoned the "theory of the pleadings" rule, which permitted a party to recover only on the theory pleaded in his complaint. *See id.* § 209, at 247.

Soon after the enactment of the CPLR, the judiciary embraced the policy of liberality contained in the CPLR in Foley v. D'Agostino, 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964). *See* SIEGEL § 208, at 246. In *Foley*, the First Department vacated an order dismissing a complaint for failure to state a cause of action because the pleadings, "when viewed with reason and liberality," were " 'sufficiently particular' " to give the defendants notice of the claims and their material elements. 21 App. Div. 2d at 68-69, 248 N.Y.S.2d at 129-30. The court noted: