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CPLR 203(e): Personal Representative Denied Leave to Amend a Personal Injury Complaint to Add a Timely Wrongful Death Action

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ing statutes. It found that the Minnesota courts apply the statute if a cause of action may be said to have arisen in a foreign jurisdiction, irrespective of the fact that it might also be found to have accrued in the home jurisdiction,²⁷ while Illinois holds that the suit is time-barred if barred by the statute of limitations of *any* jurisdiction in which it could have originally been brought.²⁸ The court predicted that New York would take the literal approach followed in Minnesota, *i.e.*, that "without the state" means just that and no more, and that causes of action accruing both within and without the state would be subject to the terms of the borrowing statute. Clearly, should the New York Court of Appeals approve this reasoning, the import of the borrowing statute will grow. The prolific number of interstate transactions today could give rise to many instances of simultaneous accruals.

Both of the issues discussed above deserve attention from the Court of Appeals or, more appropriately, from the Legislature. The borrowing statute should be re-examined to determine whether its policies are, in fact, being effectuated by the present state of the law.

CPLR 203(e): Personal representative denied leave to amend a personal injury complaint to add a timely wrongful death action.

When a plaintiff in a personal injury action dies from his injuries before verdict, report or decision, Estates, Powers and Trusts Law section 11-3.3(b)(2)²⁹ provides that his personal representative may "enlarge" the personal injury complaint to include a cause of action for wrongful death. When the personal representative attempts to do this after the two-year statute of limitations for wrongful death³⁰ has elapsed, the question arises whether the death action may be deemed to have been commenced when the original process in the personal injury action was served. Prior to the enactment of the CPLR, this question was governed by *Harriss v. Tams*³¹ which held that a new liability or obligation set up in an amended pleading did not relate back, for statute of limitation purposes, to the time when the original pleading was served. Because a wrongful death action involves liabilities separate and distinct from those in a personal injury action,³² relation back was not allowed when a death action was initiated by

²⁷ 478 F.2d at 368, citing *Patridge v. Palmer*, 201 Minn. 387, 277 N.W. 18 (1937).

²⁸ 478 F.2d at 368, citing *Strong v. Lewis*, 204 Ill. 35, 68 N.E. 556 (1903).

²⁹ N.Y. EST., POWERS & TRUSTS LAW § 11-3.3(b)(2) (McKinney 1967).

³⁰ The two-year period runs from the date of death. N.Y. EST., POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967).

³¹ 253 N.Y. 229, 179 N.E. 476 (1932).

³² See *Greco v. Kresge Co.*, 277 N.Y. 26, 31-32, 12 N.E.2d 557, 560 (1938); *Paskes v. Buonaguro*, 42 Misc. 2d 1004, 1005, 249 N.Y.S.2d 943, 945 (Sup. Ct. Kings County 1964).

amendment to personal injury pleadings. CPLR 203(e) was intended to liberalize the rule of *Harriss v. Tams* by allowing relation back whenever the original pleading gives "notice of the transaction, occurrence, or series of transactions or occurrences, to be proved pursuant to the amended pleading."³³ Although courts have interpreted this statute as allowing relation back of new causes of action set up in amended pleadings,³⁴ they have disagreed as to whether this treatment is appropriate for a wrongful death action.³⁵ One justification for denying relation back as to a wrongful death action has been that the personal injury pleading does not give notice of the causal relationship between the injury and the death.³⁶ Courts allowing the relation back have found the notice in the original pleading adequate.³⁷

The relation back controversy took a new turn in *Tromblee v. Capraro*³⁸ wherein the Supreme Court, Nassau County, denied a surviving plaintiff's motion to amend a personal injury complaint to include a cause of action for the wrongful death of a co-plaintiff although the motion was made well within the two-year limitation period. The court quoted Dean Joseph M. McLaughlin, who has stated that

... it is conceptually discomfitting to permit the cause of action for wrongful death to relate back to the original service of process, because at the time that process was served, there did not then exist a cause of action for wrongful death³⁹

³³ CPLR 203(e). See *Berlin v. Goldberg*, 48 Misc. 2d 1073, 1076, 266 N.Y.S.2d 475, 478-79 (N.Y.C. Civ. Ct. N.Y. County 1966), discussed in *The Quarterly Survey*, 41 ST. JOHN'S L. REV. 279, 283 (1966); 1 WK&M ¶ 203.29; SECOND REP. 50, 51.

³⁴ See *Andrews v. Donabella*, 60 Misc. 2d 1007, 304 N.Y.S.2d 266 (Sup. Ct. Onondaga County 1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 771 (1970); *Town Bd. of the Town of Fallsburgh v. National Security Corp.*, 53 Misc. 2d 23, 277 N.Y.S.2d 872 (Sup. Ct. Sullivan County 1967), *aff'd mem.*, 29 App. Div. 2d 726, 286 N.Y.S.2d 122 (3d Dep't 1968).

³⁵ *Wilkening v. Fogarty*, 40 App. Div. 2d 1031, 338 N.Y.S.2d 985 (2d Dep't 1972) (concurring opinion) (relation back should not be allowed); *Palmer v. N.Y.C. Trans. Auth.*, 37 App. Div. 2d 766, 324 N.Y.S.2d 550 (1st Dep't 1971) (mem.), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 563 (relation back allowed); *Roberson v. First Nat'l City Bank*, 63 Misc. 2d 105, 311 N.Y.S.2d 601 (Sup. Ct. N.Y. County), *aff'd mem.*, 34 App. Div. 2d 896, 311 N.Y.S.2d 265 (1st Dep't 1970), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 503 (1971) (relation back disallowed); *Berlin v. Goldberg*, 48 Misc. 2d 1073, 266 N.Y.S.2d 475 (N.Y.C. Civ. Ct. N.Y. County 1966), discussed in *The Quarterly Survey*, 41 ST. JOHN'S L. REV. 279, 283 (1966) (relation back allowed); *Ringle v. Bass*, 46 Misc. 2d 896, 260 N.Y.S.2d 1006 (Sup. Ct. Ulster County 1965), discussed in *The Biannual Survey*, 40 ST. JOHN'S L. REV. 303, 307 (1966) (relation back allowed).

³⁶ See *Roberson v. First Nat'l City Bank*, 63 Misc. 2d 105, 106, 311 N.Y.S.2d 601, 603 (Sup. Ct. N.Y. County), *aff'd mem.*, 34 App. Div. 2d 896, 311 N.Y.S.2d 265 (1st Dep't 1970).

³⁷ See, e.g., *Berlin v. Goldberg*, 48 Misc. 2d 1073, 266 N.Y.S.2d 475 (N.Y.C. Civ. Ct. N.Y. County 1966), discussed in *The Quarterly Survey*, 41 ST. JOHN'S L. REV. 279, 283 (1966).

³⁸ 73 Misc. 2d 87, 341 N.Y.S.2d 623 (Sup. Ct. Nassau County 1973).

³⁹ 73 Misc. 2d at 88, 341 N.Y.S.2d at 624, quoting 7B MCKINNEY'S CPLR 203, commentary at 122 (1972).

In denying the plaintiff's motion, the court relied on cases where personal representatives had sought to assert time-barred wrongful death claims by motions to amend personal injury pleadings.⁴⁰ While recognizing that the plaintiff could achieve an identical result by bringing a separate wrongful death action and then seeking a consolidation,⁴¹ the court declared that it could not "on the grounds of expediency, permit an amendment which . . . is conceptually unsound."⁴²

The doctrine of relation back is invoked to save a cause of action which would be time-barred if asserted in a separate action. It would appear that when the wrongful death action is timely, there need be no relation back and no resulting conceptual discomfiture. The cause of action may be deemed to have been commenced at the time of the motion to amend. The *Tromblee* holding defies Estates, Powers and Trust Law section 11-3.3(b)(2) and numerous cases which have permitted the amendment upon a showing of a causal relationship between the original personal injury and the death.⁴³ Additionally, the *Tromblee* decision appears to conflict with CPLR 3025(b). That statute provides that "[a] party may amend a pleading or supplement it by setting forth additional or subsequent transactions or occurrences at any time by leave of the court . . ." The statute further requires that "[l]eave shall be freely granted." The addition of a cause of action for wrongful death certainly appears to be a supplementation to set forth a subsequent transaction. In light of these statutory requirements, a plaintiff asserting a timely wrongful death claim should not be put to the circuitous procedure of commencing a separate action and then seeking a consolidation.

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

CPLR 308(5): Judicially devised service held permissible in matrimonial actions.

DRL 232⁴⁴ seemingly forbids entry of a default judgment in a

⁴⁰ 73 Misc. 2d at 88, 341 N.Y.S.2d at 625, citing *Wilkening v. Fogarty*, 40 App. Div. 2d 1031, 338 N.Y.S.2d 985 (2d Dep't 1972) (concurring opinion); *Roberson v. First Nat'l City Bank*, 63 Misc. 2d 105, 311 N.Y.S.2d 601 (Sup. Ct. N.Y. County), *aff'd mem.*, 34 App. Div. 2d 896, 311 N.Y.S.2d 265 (1st Dep't 1970).

⁴¹ Actions involving common questions of law or fact may be consolidated pursuant to CPLR 602.

⁴² 73 Misc. 2d at 89, 341 N.Y.S.2d at 625.

⁴³ See, e.g., *Fuller v. Preis*, 34 App. Div. 2d 514, 308 N.Y.S.2d 264 (1st Dep't 1970); *Nugent v. Downing*, 33 App. Div. 2d 1030, 309 N.Y.S.2d 119 (2d Dep't 1970) (mem.); *Coleman v. Gelb*, 12 App. Div. 2d 915, 211 N.Y.S.2d 229 (1st Dep't 1961) (mem.).

⁴⁴ DRL 232 provides that when the complaint is not served with the summons in a