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# CPLR 203(e): First Department Allows Relation Back of Wrongful Death Action Which Had Not Accrued When Personal Injury Action Was Commenced

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Additionally, there are two extended treatments incorporated in the traditional *Survey* format. Under article 32, the "multiple plaintiff anomaly" in mass tort cases is highlighted in a thought-provoking discussion and a possible solution to the problem is suggested. Under article 62, the constitutionality of New York's attachment statute is examined in light of recent decisions in the area of due process.

Also reported herein are cases allowing relation back of a wrongful death action which had not accrued when the original personal injury action was commenced (CPLR 203(e)); applying the *Mendel* rule to an impleader action (CPLR 213); and illustrating the willingness of the court to protect the abused judgment debtor (CPLR 5240).

## ARTICLE 2 — LIMITATIONS OF TIME

*CPLR 203(e):First Department allows relation back of wrongful death action which had not accrued when personal injury action was commenced.*

Pursuant to CPLR 203(e), a cause of action in an amended pleading will be deemed to relate back to the commencement of the action if the original pleading gave notice of the transaction, occurrences, or series of transactions or occurrences to be proved under the amended pleading. Several lower court decisions[1] have construed this provision to permit the relation back of wrongful death claim to an original personal injury pleading where the former was otherwise time-barred by a statute of limitations. Under similar facts the First Department, in *Palmer v. New York City Transit Authority*,[2] recently assented to this interpretation.

In *Palmer* an action was begun in January 1963 to recover for injuries suffered in a subway accident in March 1962. The plaintiff died in May 1967. His administratrix, the substituted plaintiff, moved in January 1969 for leave to add a cause of action for wrongful death, attributing the death in 1967 to the accident in 1962. The court allowed the interposition of the wrongful death claim, finding that the records[3]

1 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., 282, 283 (1966); 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. 306, 307 (1966); *contra*, Roberson v. First Nat'l City Bank, 63 Misc. 2d 105, 311 N.Y.S.2d 601 (Sup. Ct. N.Y. County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 502 (1971).

2 37 App. Div. 2d 766, 324 N.Y.S.2d 550 (1st Dep't 1971).

3 Palmer v. New York City Transit Authority, 33 App. Div. 2d 119, 121, 305 N.Y.S.2d 831, 833 (1969). In the same court's decision on an earlier motion the records referred to were those of the decedent as a mental patient. They established that the initial injury had progressed to mental and emotional trauma and, inevitably, to various addictions which were the cause of death.

provided a sufficient causal relationship between accident and death. In justification of its rejection of the defense that the claim was barred by an applicable statute of limitations,[4] the court noted that the information necessary to establish the plaintiff's wrongful death claim was inaccessible during the statutory time period.[5] The dissent, relying on eminent authority,[6] argued that the original pleadings did not and could not give notice of the wrongful death claim since at the time of the original pleadings there did not exist a cause of action for wrongful death. By relating back the wrongful death claim to the original pleadings, it concluded, the court was in effect tolling the statute of limitations.

The express legislative intent of CPLR 203(e) was to overcome the restrictive effect of prior case law as exemplified by *Harris v. Tams*.[7] Through an alignment with the more liberal Rule 15(c) of the Federal Rules of Civil Procedure,[8] CPLR 203(e) shifted the inquiry away from the legal theory of the claim, which was the *Harriss* rule, to the specified conduct of the defendant upon which the plaintiff relied to enforce his claim. In *Berlin v. Goldberg*[9] the court found CPLR 203(e) to have greater liberality than the federal rule since it only required the original pleading to give notice of the transactions or occurrences out of which the new cause of action in the amended complaint arose. The *Berlin* court flatly concluded that there was no equitable or legal reason why pleadings in a personal injury action did not give notice of a wrongful death, allegedly caused by the original negligent injury, in an amended pleading.[10]

The technical construction rationale of the dissent in *Palmer*

4 The defendant sought summary judgment because the wrongful death cause of action was not commenced within the time prescribed by section 1212 of the Public Authorities Law. 37 App. Div. 2d 766, 324 N.Y.S.2d at 551.

5 33 App. Div. 2d at 121, 305 N.Y.S.2d at 833. The records relied upon as providing a basis for the wrongful death claim were confidential and, pursuant to sections 20 and 34 of the Mental Hygiene Law and CPLR 4504, were not made available to counsel until subpoenaed to court for trial.

6 7B McKINNEY'S CPLR 203, commentary at 123 (1972). Dean McLaughlin concluded that to apply CPLR 203(e) "where the death occurs during the lawsuit should . . . require a clearer expression of legislative intent."

7 258 N.Y. 229, 179 N.E. 476 (1932). The Court held that amendments merely expanding or amplifying the allegations in the original pleadings related back, whereas ones introducing different causes of action were the equivalent of a new suit.

According to the Advisory Committee's notes, CPLR 203(e) was intended to expand the class of amended pleadings which relate back to the original pleading and "to overcome the effect of *Harriss v. Tams*. . . ." SECOND REP. 50-51.

8 1 WK&M ¶203.30. In implementing its design to overcome the restrictive effect of *Harriss v. Tams*, the Advisory Committee chose the "transaction-occurrence" terminology of rule 15(c) of the Federal Rules of Civil Procedure.

9 48 Misc. 2d 1073, 266 N.Y.S.2d 475 (N.Y.C. Civ. Ct. N.Y. County 1966).

10 *Id.* at 1077, 266 N.Y.S.2d at 480.

underscores the overly broad reading given CPLR 203(e) in the *Berlin* decision. However, where the facts of the case permit the reasonable conclusion that notice of the wrongful death claim was given by the original pleadings, justice is disserved by denying the assertion of such claim upon a technical construction of the provision. It is true that the new cause of action is supplemental in nature, since it did not exist when the original action was commenced, but in light of the liberal construction mandate, CPLR 203(e) should not be restrictively interpreted to exclude supplementary causes of action from the operation of the relation back doctrine. The best approach lies in a balancing of the equities; the resultant hardship to the plaintiff if the claim is denied as opposed to the prejudice to the defendant if insufficient notice were given by the original pleadings. Under these standards, *Palmer* clearly achieves a just result.

*CPLR 213:* Mendel *rule applied in impleader context.*

In *Mendel v. Pittsburgh Plate Glass Co.*[11] the Court of Appeals held, 4 to 3, that the statute of limitations for a cause of action in breach of warranty ran from the time of sale rather than from the time of injury. The anomalous result — that the action was barred before the injury was incurred — was justified as necessary "to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum."[12] While *Mendel* involved only one sale, it was read as "stand[ing] for the proposition that when a defendant is sued in warranty the period of limitations against him is measured from the time he sold the item. . . ."[13] Thus, it is not surprising that the *Mendel* rationale has been extended to the impleader situation.[14]

The foundation for this application was laid in *C. K. S., Inc. v. Helen Borgenicht Sportswear, Inc.*,[15] which clearly held that the statute of limitations on a warranty claim commences to run at the time that the third-party defendant sells the item to the third-party plaintiff. This reasoning was adopted in *Perez v. Chutick & Sudakoff*,[16] wherein a federal district court refused to allow amendment of a complaint by

11 25 N.Y.2d 340, 252 N.E.2d 207, 305 N.Y.S.2d 490 (1969). For a symposium on *Mendel*, see 45 ST. JOHN'S L. REV. 62 (1970). *See also* 1 WK&M ¶ 214.14a.

12 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.

13 Siegel, *Procedure Catches Up-And Makes Trouble*, 45 ST. JOHN'S L. REV. 63, 69 (1970).

14 *See* Note, *An Appraisal of Judicial Reluctance to Imply an Indemnity Contract in Time-Barred Breach of Warranty Suits*, 39 ST. JOHN'S L. REV. 361 (1965).

15 22 App. Div. 2d 650, 253 N.Y.S.2d 56 (1st Dep't 1964) (per curiam).

16 50 F.R.D. 1 (S.D.N.Y. 1970). The court cited C.K.S., Inc. v. Helen Borgenicht Sportswear, Inc., 22 App. Div. 2d 650, 253 N.Y.S.2d 56 (1st Dep't 1964) and City & Country Sav. Bank v. Kramer & Sons, 43 Misc. 2d 731, 252 N.Y.S.2d 224 (Sup. Ct. Albany County 1964).