

CPLR 203(e): Relation Back of Wrongful Death Action to the Commencement of Personal Injury Claim Allowed

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The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped, that the *Survey* accomplishes its basic purpose, viz., to key the practitioner to significant developments in the procedural law of New York.

The Table of Contents is designed to key the reader to those specific areas of procedural law which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective titles.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 203(e): Relation back of wrongful death action to the commencement of personal injury claim allowed.

On a unique set of facts, the court in *Berlin v. Goldberg*¹ allowed the amendment of a timely personal injury complaint to include a cause of action for wrongful death where the statute of limitations for the amended claims had run. The original action was commenced in 1963, and a motion to amend the complaint to include a cause of action for wrongful death was made in 1964, a year after the death of the plaintiff's deceased. The motion was originally granted and an amended complaint, including the wrongful death claim, was served on the defendant in 1964. On reargument, however, the motion was denied, and such denial was affirmed by the appellate division.² The plaintiff brought the instant motion under CPLR 203(e), after the statute of limitations for the wrongful death action had run.

Prior to enactment of CPLR 203(e), there was no statutory provision allowing for the circumvention of a statute of limitations by the addition, to a timely complaint, of an amendment containing a claim on which the period had run.³ Such amendments were discretionary with the court, and were governed restrictively by the rule of *Harriss v. Tams*.⁴ That case held that amendments merely expanding the allegations in the original pleadings were not barred by the statute of limitations, and thus "related back" to the first claim. Conversely, however, if the amendment introduced a

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

² 22 App. Div. 2d 770, 253 N.Y.S.2d 647 (1st Dep't 1964).

³ 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 203.29 (1965).

⁴ 258 N.Y. 229, 179 N.E. 476 (1932). See 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 203.29—.32 (1965).

new or different cause of action, a new suit was in fact in issue and the statute of limitations was available as a defense.⁵

To avoid this "expansion—introduction" antithesis, the Advisory Committee proposed CPLR 203(e),⁶ based on Rule 15(c) of the Federal Rules of Civil Procedure,⁷ expressly "to overcome the effect of *Harriss v. Tams*."⁸

Considered more liberal than both *Harriss* and Rule 15(c)⁹ CPLR 203(e) was regarded to be especially effective with regard to amendments which added a statutorily created liability to a common-law cause of action.¹⁰ Since Section 130 of the Decedent Estate Law created an action for wrongful death, and since Rule 15(c) had not been applied to wrongful death statutes,¹¹ the test of the effectiveness of 203(e) would be most apparent in amendments adding a claim for wrongful death to a personal injury pleading.

In *Paskes v. Buonaguro*,¹² a personal injury action was not considered a claim which would give a defendant notice of the additional facts to be proved upon amendment, so as to allow 203(e) to apply. The court in the instant case, however, dismissed the *Paskes* ruling on "relation back" as "obiter dictum" since CPLR 218, in prohibiting the application of 203(e) to actions barred by the statute of limitations before September, 1963, was dispositive of the issue in *Paskes*.¹³

⁵ *Harriss v. Tams*, 288 N.Y. 229, 179 N.E. 476 (1932). It is interesting to note that the Court of Appeals quoted and seemingly agreed with the liberal statement of the Supreme Court in *New York Cent. & Hudson River R.R. v. Kinney*, 260 U.S. 340, 346 that: "when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist . . ." However, the Court emphasized the singularity of "a claim" in devising its own rule.

⁶ CPLR 203(e) states that: "A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

⁷ FED. R. CIV. P. 15(c) is of slightly, but significantly different terminology. It provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." See 1 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶203.30 (1965).

⁸ SECOND REP. 50, 51.

⁹ 1 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶203.31 (1965).

¹⁰ *Id.* at ¶203.32.

¹¹ In *Hudson v. Lazarus*, 217 F.2d 344 (D.C. Cir. 1954) the court held: "Pendency . . . [of] an action for personal injuries does not toll the statute of limitations on a death claim."

¹² 42 Misc. 2d 1004, 249 N.Y.S.2d 943 (Sup. Ct. Kings County 1963).

¹³ *Supra* note 1, at 1075, 266 N.Y.S.2d at 477. CPLR 218 was not considered in *Ringle v. Bass*, 46 Misc. 2d 896, 260 N.Y.S.2d 1006 (Sup. Ct.

Clearly guided by criticisms of the *Paskes* ruling, and stating that CPLR 203(e) must be "liberally interpreted,"¹⁴ the court ruled that "there is no equitable (or legal) reason why a personal injury action in the original pleading does not give notice of a wrongful death, allegedly caused by the original negligent injury. . . ."¹⁵

What must be borne in mind in relation to the question of notice is that defendant was aware not only of the facts surrounding the personal injury claim in 1961, but was also served with a summons and amended complaint including the wrongful death action in 1964—prior to the tolling of the statute of limitations.

It could perhaps be argued that the instant case is not actually applying the 203(e) "relation back" to wrongful death as an action per se, but rather is merely applying this statute to situations in which there is actual as well as constructive notice from the pleadings. However, it would seem that both the language of the court and the intention of the legislature were such as to include any new claim, provided that "*the original complaint gave notice of the transaction out of which the amended complaint arose.*"¹⁶

CPLR 210(b): Time for commencement of action is not extended where eighteen-month period after death of potential defendant expired prior to the running of the statute of limitations.

CPLR 210(b) provides that a "period of eighteen months after the death . . . of a person against whom a cause of action exists is not a part of the time within which the action must be commenced against his executor or administrator." This provision alleviates the difficulty which claimants have during the period between the potential defendant's death and the appointment of an executor or administrator of the estate.¹⁷ It leaves "substantially unchanged"¹⁸ its predecessor sections, CPA §§ 12 and 21, merely

Ulster County 1965), where, contrary to *Paskes*, relation back of a wrongful death claim to a personal injury pleading was allowed. See criticism and evaluation of *Ringle v. Bass* in *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 307-08 (1966).

¹⁴ *Supra* note 1, at 1077, 266 N.Y.S.2d at 480.

¹⁵ *Ibid.*

¹⁶ *Berlin v. Goldberg*, 48 Misc. 2d 1073, 1075, 266 N.Y.S.2d 475, 476 (N.Y.C. Civ. Ct. 1966).

¹⁷ I WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 210.04 (1965). "The Legislature seems to have recognized that there is inevitably a period of time following the death of a person when it would be difficult, if not impossible, to commence an action against his estate. In order, therefore, to prevent any hardships or loss of rights to a plaintiff under such circumstances, the Legislature by the enactment of section 21 suspended the running of the statute for a period of eighteen months after the death of the person against whom a cause of action exists." *Butler v. Price*, 271 App. Div. 359, 362, 65 N.Y.S.2d 688, 690 (4th Dep't 1946).

¹⁸ FIFTH REP. 46.