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Pleading -- Wrongful Death Statute -- Allegation That Action Is Brought within One Year

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more specific, the use of the term governmental function usually carries with it a well defined meaning. Regardless, the Court in an unanimous decision held that the legislature intended the statute only as a declaration that such an undertaking was for a public purpose.

Following this decision the municipal defendants petitioned for a rehearing on the basis that neither of the parties sought a construction of the statute but that the defendants had merely asked the Court to give effect to the statute as plainly intended by the legislature. The Court in denying this petition said that “unquestionably” the legislature intended that such an undertaking was to be in furtherance of a governmental function, but that the determination of such was for the courts and not for the legislature. The Court in explanation of its prior opinion said that the construction placed upon the language used in the statute was “...to bring it within the legislative authority of the General Assembly and make it consistent with the validity of the statute in which it is used.” The Court did not, however, attempt to explain why it suggested in its former opinion that it might be a wise policy to exempt municipalities from liability in such a situation but that this “...should be expressly granted by the Legislature, rather than by judicial decree.” From these statements it would seem that if the General Assembly intends to grant immunity, it cannot do so by merely declaring a particular undertaking to be a governmental function; and whether an express legislative grant of immunity, though the function be proprietary, is constitutional, quaere?

KENNETH R. HOYLE.

Pleading—Wrongful Death Statute—Allegation That Action Is Brought within One Year

There has been considerable confusion, under the North Carolina Wrongful Death Statute, as to the necessity for a specific allegation in a complaint that the action is brought within one year from the death. In a long line of decisions the statutory requirement that an action for wrongful death must be instituted within one year after the

14 N. C. Gen. Stat. §28-173 (1943) (“...an action ... to be brought within one year after such death.”).
15 See N. C. Gen. Stat. §28-173 (1943), Anno.: II, Limitation of the Action (“Hence it must be alleged and proved by the plaintiff to make out a cause of action...”); McIntosh, N. C. Practice and Procedure §196 (1929) (“The plaintiff should allege and prove that the action is within the time specified.”); 16 Am. Jur., Death §286 (1938); 107 A. L. R. 1049.
death has been stated to be a condition annexed to the plaintiff's cause of action, and not a mere statute of limitations to be pleaded by the defendant. The court has said that the plaintiff must introduce evidence at the trial showing that the action was brought within the statutory period to make out a cause of action. The cases leave the impression that this statutory requirement is a part of the plaintiff's cause of action; as a consequence, it is readily understandable how a pleader might deduce that such an allegation is necessary in a wrongful death complaint. Moreover, the North Carolina Supreme Court indicated by dictum in Wilson v. Chastain that an allegation of compliance with the statutory time limit is necessary.

In the recent case of Colyar v. Atlantic States Motor Lines, however, the court repudiated its former dictum, and held it is not necessary to allege specifically that the action is brought within the statutory period. In this case the complaint alleged the date of the death, but there was no allegation that the action had been brought within one year from the death. It appeared from the summons that the action had been brought within the year. The court reasoned that the statutory period is "not an element of the cause of action," and that the plaintiff could prove compliance with the statutory requirement by introducing the summons in evidence.

The following conclusions seem warranted from a review of the cases. Where the complaint alleges only the date of the death, and the summons shows that the action has been brought within a year, the plaintiff has a complaint sufficient against demurrer; since dates which appear as a matter of record may be considered by the court in ruling on a demurrer, and the statutory period is not an element of the cause of action. Conversely, where the summons shows that the suit was not brought within the statutory period, the complaint is subject to a demurrer or motion to dismiss. Where the complaint contains a specific allegation that the action was brought within the year, and the dates
alleged leave doubt as to whether the action has been brought within this period, the complaint will withstand demurrer. The requirement that the action be brought within a year is absolute, and no explanation as to why the institution of the action is delayed is availing. "The lapse of the statutory period not only bars the remedy but destroys the liability."

The question remains as to the sufficiency of a complaint which fails to allege either the date of the death or that the action has been brought within one year of the death, assuming a cause of action to have been stated otherwise. Certain language in the Colyar case seems to indicate that such a complaint would withstand demurrer. It is believed that the result of the Colyar case is practical and based on sound reason. The purpose of this statutory time limit is said to be to give notice to the defendant so that the evidence may be secured and preserved. This notice is given when the plaintiff institutes his action within the year. It seems unduly technical to require a specific allegation that "this action is brought within one year of the death" when compliance with the statutory requirement may be shown by reference to the summons. If it were held that such an allegation is necessary, then questions would arise as to whether a complaint without this allegation failed to state a cause of action, or merely constituted a defective statement of a good cause of action. If it were held that such a complaint does not state a cause of action, then an amendment after the statutory period containing the required allegation would not relate back to the complaint, and the plaintiff would be defeated on a technicality. It must be remembered that the purpose of the pleadings is to frame the issues between the parties for a trial on the merits of the case, rather than to create a pitfall for the unwary pleader.

MASON P. THOMAS, JR.

Restraint of Trade—Fair Trade Acts—Constitutionality

Manufacturers have long sought ways to protect their good will in the trade-marks, brands, or names of their commodities. One means

Wilson v. Chastain, 230 N. C. 390, 53 S. E. 2d 290 (1949) (Complaint alleged death "... occurred on or about midnight of 21-22 November, 1947, and which is less than one year next proceeding the institution of this action. ..."

Summons was served on November 22, 1948).


See 231 N. C. 318, 319, 56 S. E. 2d 647, 648 (1949) ("The plaintiff complied with the statute when she brought her suit within the prescribed time.").
