

WRONGFUL DEATH AND PERSONAL INJURIES— JOINDER OF CAUSES OF ACTION AND COUNTERCLAIMS

ROBERT L. WILLS*

By its enactment of Amended House Bill No. 80, effective September 22, 1955, the 101st Ohio General Assembly has made important changes in the law with respect to the procedure in actions brought by administrators and executors for wrongful death and for personal injuries. These changes relate to (1) joinder of causes of action and (2) counterclaims. The changes are purely procedural. The bill makes no change in the substantive principles applicable to such actions, and does not alter the present distinctions between them. The bill does not change the law of *res judicata* applicable to judgments in such actions. The discussion of the 1955 legislative changes and their significance will be preceded by a statement of the pre-existing law.

PRE-EXISTING LAW

In Ohio, a cause of action for personal injuries survives the death of the victim by virtue of Section 2305.21 of the Ohio Revised Code.¹ Such a cause of action includes the elements of pain and suffering, loss of earnings during the lifetime of the injured person, and medical expenses incurred by him. After his death, an action upon such a cause of action is brought by his personal representative, and the proceeds of any recovery become part of his estate, subject to the claims of his creditors, and to the provisions of his will. This cause of action is sometimes referred to as the "survivor cause of action."

At common law, the next of kin of a deceased person had no cause of action for their damages resulting from his death, against the tortfeasor who had wrongfully caused his death. In England, the cause of action for wrongful death was created by the Fatal Accidents Act of 1846, usually known as Lord Campbell's Act.² In Ohio, a cause of action for wrongful death is created by Section 2125.01, et seq., Ohio

*Professor of Law, College of Law, The Ohio State University.

¹ §2305.21 (11235) *Survival of actions*.

In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto."

At common law, the injured person, during his lifetime, had a cause of action for his personal injuries. §2305.21 therefore did not create the cause of action; it merely provided for its survival.

In Am. H. B. No. 80, because of a typographical error, §2309.16 twice incorrectly refers to §2505.21 as the survival statute. §2309.05 and 2309.06 correctly refer to §2305.21.

² 9 & 10 Vict., c. 93.

Revised Code.³ Procedurally, the action for wrongful death must be brought by the personal representative of the decedent, but the action is for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent.⁴ The proceeds of any recovery in an action for wrongful death do not become part of the decedent's estate. Therefore, the proceeds are not available to the creditors of the decedent, and their distribution is unaffected by the provisions of his will.

Ohio law has maintained a sharp distinction between the surviving cause of action for personal injuries and the cause of action for wrongful death. This distinction has been made in several different situations.

Thus, although an injured person can release his cause of action for personal injuries, he cannot release the cause of action of his next of kin for his prospective wrongful death.⁵

A recovery by a personal representative in an action for personal injuries is not a bar to an action for wrongful death against the same defendant by the same personal representative.⁶ A judgment in favor of the defendant in an action by a personal representative for personal injuries is not a bar to an action for wrongful death by the same personal representative against the same defendant.⁷ Likewise, a judgment in favor of the defendant in an action brought by the decedent during his lifetime for his personal injuries is not a bar to an action by his personal

³ Thus the wrongful death statute, §2125.01 *et seq.*, differs from the survival statute, §2305.21, which merely provides for the survival of the decedent's cause of action for personal injuries. See note 1, *supra*. §§2309.05, 2309.06 and 2309.16, as amended by Am. H. B. No. 80, recognize this distinction between the survival statute and the wrongful death statute.

⁴ "While the machinery of the action in the one case is the same as the machinery in the other, the death action is an action given expressly by the statute, and the rights which give rise to the two actions are entirely different." *May Coal Co. v. Robinette*, 120 Ohio St. 110, 115, 165 N.E. 576, 64 A.L.R. 441 (1929).

⁵ *Maguire v. Cincinnati Traction Co.*, 14 O.C.C. (N.S.) 431, 23 O.C.D. 24 (1911), *affirmed without opinion*, 87 Ohio St. 511, 102 N.E. 1121 (1913); *Phillips v. Community Traction Co.*, 46 Ohio App. 483, 189 N.E. 444 (1933), *motion to certify overruled*, Dec. 13, 1933; Note, "*Valid release executed prior to death not a bar to wrongful death action in Ohio*," 6 CIN. L. REV. 212 (1932).

Pilkington v. Saas, 25 Ohio L. Abs. 663 (1937), recognized the rule, but held that a release executed during decedent's lifetime by his mother, who was his sole next of kin, constituted a bar to an action for his wrongful death. The case is noted in 5 OHIO ST. L. J. 122 (1938).

Traci, *Law and Logic: Conflict in Ohio's Wrongful Death Statute*, 4 CLEVELAND-MARSHALL L. REV. 38, 53 (1955), states that the Probate Court of Cuyahoga County, Ohio, in *In Re Minor of Tony Mantarro and Sophia S. Mantarro*, Guardianship, No. 487485, approved the settlement of an infant beneficiary's claim during the lifetime of the injured person. The author also states that at least one court in Ohio has refused to approve such a settlement on the ground that it has no authority to do so.

⁶ *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395, 83 N.E. 601 (1908). The converse would also be true.

⁷ *May Coal Co. v. Robinette*, *supra*, note 4. The converse would also be true.

representative for his wrongful death against the same defendant.⁸

The two-year statute of limitations on a cause of action for personal injuries, Section 2305.10, begins to run from the date of the injury, whereas Section 2125.02 provides that an action for wrongful death must be commenced within two years after the death of the deceased person.⁹

The "Dead Man Statute"¹⁰ apparently prevents the defendant's testifying in an action by a personal representative for personal injuries suffered by his decedent,¹¹ but by its express terms it permits the defendant to testify in an action for wrongful death.

On principle, it would seem that statements by a decedent inconsistent with the position of his personal representative should be admissible as an *admission* in an action for his personal injuries by his personal representative, but not in an action for his wrongful death.¹² However, it would also seem, on principle, that statements of a decedent, of a dis-serving nature, should be admissible even in an action for wrongful death, as a *declaration against interest*.¹³

In an action for wrongful death, brought by the personal representative of a decedent who was killed in a collision between decedent's automobile and that of the defendant, it was held that the defendant could not properly assert a counterclaim for his own personal injuries sustained in the collision.¹⁴

⁸ DeHart, Admx., v. Ohio Fuel Gas Co., 84 Ohio App. 62, 85 N.E. 2d 586 (1948).

⁹ Thus, in DeHart, Admx. v. Ohio Fuel Gas. Co., *supra*, note 8, the decedent suffered his injuries on August 4, 1930. He died February 12, 1942. On April 2, 1942, his administratrix commenced an action for his wrongful death. It was held that the action was commenced in time.

¹⁰ "§2317.03 (11495) *Cases in which a party shall not testify*. A party shall not testify when the adverse party is . . . an executor or administrator This section does not apply to actions for causing death . . ."

¹¹ Cox v. Waltz, 13 Ohio L. Abs. 364 (1932). An administrator sued for injuries received by his decedent when she was struck by an automobile being operated by the defendant. The decedent died from other causes. It was held that the trial court properly excluded the testimony of the defendant, under the Dead Man Statute. It is not clear whether the court attached significance to the fact that decedent did not die as a result of the accident.

¹² The personal representative is the successor in interest of his decedent in an action for personal injuries, but not in an action for wrongful death.

¹³ In Fielder v. Ohio Edison Co., 158 Ohio St. 375, 109 N.E. 2d 855, 35 A.L.R. 2d 1365 (1952), there is a dictum on p. 387 to the effect that ". . . declarations against interest by a decedent are admissible in a survivor action, whereas they are not so admissible in a wrongful death action." Presumably by "declarations against interest" the court meant "admissions."

The distinction between the admissions of a party-opponent and the exception to the hearsay rule for declarations against interest is discussed in 4 WIGMORE, EVIDENCE §1049, 5 WIGMORE, EVIDENCE §1455 *et seq.* (3d ed. 1940). An extensive discussion of the Ohio cases may be found in a Comment by Robert E. McGinnis, *Admissions "Against Interest" in Ohio*, 15 OHIO ST. L.J. 187 (1954).

¹⁴ Epinger, Admx., v. Wade, 142 Ohio St. 460, 52 N.E. 2d 852 (1944). As will be pointed out *infra*, the rule established by this case has been changed by Am. H. B. No. 80.

A personal representative's cause of action for personal injuries suffered by his decedent could not be joined with a cause of action for the wrongful death of the decedent.¹⁵

AMENDMENTS RELATING TO JOINDER OF CAUSES OF ACTION

The decision in the *Fielder* case called attention to the question of the desirability of the Ohio rule denying the personal representative of a decedent the right to join the cause of action for personal injuries with the cause of action for wrongful death.¹⁶ It is probable that separate actions for wrongful death and for personal injuries had frequently been tried together by consent,¹⁷ and that such causes of action had frequently been joined without objection by the defendant. Although a joint trial of the two causes of action requires the submission of more complex issues to the jury, and may create problems as to admissibility of evidence,¹⁸ it has two great advantages: (1) the delay and expense of two suits is avoided, and (2) the possibility of inconsistent verdicts is reduced. The *Fielder* case made it clear that a defendant could prevent a joint trial of the two causes of action by interposing a demurrer for misjoinder of causes of action if the plaintiff attempted to join them, or by refusing to agree to a joint trial if separate actions had been filed in the same court.

Legislation permitting joinder of the two causes of action was proposed by the Ohio State Bar Association.¹⁹ House Bill No. 80, embodying the proposal, was introduced by Representative Joseph E. Lady of Hardin County. It was sponsored in the Senate by Senator Fred L. Hoffman of Hamilton County. After passage of the bill by the House, an amendment relative to counterclaims, which will be discussed *infra*, was effected in the Senate. The House subsequently concurred in the Senate amendment, and the bill was approved by the Governor.

The majority opinion in the *Fielder* case had held that the two causes of action could not be joined because both causes of action do not affect all the parties to the action as required by Section 11307, Ohio General Code, now Ohio Revised Code Section 2309.06. Inasmuch as

¹⁵ *Fielder v. Ohio Edison Co.*, *supra*, note 13. The *Fielder* case was noted in 15 OHIO ST. L.J. 88 (1954). As will be pointed out *infra*, the rule established by the *Fielder* case has been changed by Am. H. B. No. 80.

¹⁶ The dissenting opinion of Weygandt, C.J., in the *Fielder* case, pointed out the desirability of a joint trial of the two causes of action. The dissenting opinion of Taft, J., took the position that the interpretation of the joinder statutes by the majority was incorrect. The majority opinion was widely criticized in the law reviews.

¹⁷ See, e.g., *Lopresti v. Community Traction Co.*, 160 Ohio St. 480, 117 N.E. 2d 2 (1954).

¹⁸ See *supra*, text accompanying notes 10-13.

¹⁹ Report of the Judicial Administration and Legal Reform Committee of the Ohio State Bar Association, 27 OHIO BAR 794, at 800 (October 25, 1954). The writer was a member of the subcommittee concerned with this problem.

the majority opinion in the *Fielder* case was based upon Section 2309.06,²⁰ Amended House Bill No. 80 added a proviso to that Section, to the effect that the Section shall not prevent a joinder of a cause of action for wrongful death with a cause or causes of action²¹ for injuries to the person or property, or both, of the decedent.²²

The amendment of Section 2309.06 probably would have been sufficient to accomplish the purpose of the bill, since the decision in the *Fielder* case, as previously indicated, was based upon that Section. The majority opinion and the two dissenting opinions in the *Fielder* case apparently assumed that joinder of the two causes of action would have been permitted by the basic joinder statute, Section 11306, Ohio General Code, now Section 2309.05, Ohio Revised Code, in the absence of the requirement in the following section that the causes of action joined must affect all the parties to the action.²³ However, to avoid any possible question, the basic joinder statute, Section 2309.05, was amended by the addition of a new paragraph "K," which affirmatively authorizes joinder of a cause of action for wrongful death with a cause or causes of action²⁴ for injury to the person or property, or both, of the decedent.²⁵

As a result of the amendment of Sections 2309.05 and 2309.06 by

²⁰ Ohio Gen. Code Section 11307 provided:

"The causes of action so united must not require different places of trial, and, except as otherwise provided, *must affect all the parties to the action.*" (Italics added.)

The language of Ohio Rev. Code Section 2309.06, when originally enacted in 1953, was the same in substance.

²¹ In Ohio, contrary to the majority rule, injuries to the person and property of the plaintiff resulting from the same tortious act of the defendant constitute two causes of action. *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 61 N.E. 2d 707, 166 A.L.R. 855 (1945). The language of Am. H. B. No. 80 recognizes and conforms to the Ohio rule.

²² The full text of §2309.06, with the 1955 proviso in italics, is as follows:

§2309.06. The causes of action united as provided in section 2309.05 of the Revised Code must not require different places of trial, and, except as otherwise provided, must affect all the parties to the action; *provided, that this section shall not prevent a joinder by an executor or administrator of a cause of action for the wrongful death of his decedent under sections 2125.01 to 2125.04, inclusive, of the Revised Code, with a cause or causes of action for injuries to the person or property, or both, of his decedent, surviving under section 2305.21 of the Revised Code, when both or all of such causes arise out of the same wrongful act or acts.*

²³ Both the majority opinion and the dissenting opinion of Weygandt, C.J., refer to the "same transaction" clause (now paragraph A), and the "transactions connected with the same subject for action" clause (now paragraph B).

²⁴ See note 21, *supra*.

²⁵ The full text of paragraph "K" is as follows:

(K) Claims by an executor or administrator for the wrongful death of his decedent under sections 2125.01 to 2125.04, inclusive, of the Revised Code, and for injuries to the person or property, or both, of his decedent, surviving under section 2305.21 of the Revised Code, when both claims arise out of the same wrongful act or acts.

Amended House Bill No. 80, it is now permissible for a personal representative of a decedent to join a cause of action for the wrongful death of his decedent with a cause or causes of action for personal injury or property damage, or both, on behalf of his decedent. It is not mandatory that he do so; he may still file separate actions against the defendant on the respective causes of action.²⁶ If he files separate actions in the same court, and the separate actions are pending at the same time, the defendant may now properly move that the actions be consolidated, under Section 2309.64,²⁷ as the causes of action may now be joined. If separate actions are filed, and if they are never consolidated, the judgment in one case will not have the effect of *res judicata* on the other; Amended House Bill No. 80 does not change this principle.²⁸

If the personal representative does choose to avail himself of the privilege of joinder which is now afforded by Amended House Bill No. 80, the causes of action should be separately stated and consecutively numbered, pursuant to Section 2309.07.²⁹

As pointed out previously,³⁰ the defendant may testify in an action against him for wrongful death, but probably may not testify in an action against him by a personal representative for personal injuries suffered by the latter's decedent. Therefore, since Amended House Bill No. 80 does not purport to change the rules of evidence, and does not purport to change the nature of the respective causes of action, the defendant's testimony may be admitted as to the wrongful death cause of action, but excluded as to the personal injuries cause of action, when the two causes of action are tried together. This would necessitate an instruction to the jury (at least if requested by the plaintiff) to consider the defendant's testimony only as to the wrongful death cause of action.³¹

²⁶ One possible motive for filing separate actions is that in an action on the surviving cause of action for personal injuries, the Dead Man Statute would prevent the defendant from testifying. See note 10, *supra*.

²⁷ "Ohio Rev. Code Section 2309.64 (11369). *Consolidating actions*.

When two or more actions are pending in the same court, on motion and notice to the adverse party, the defendant may require him to show why they should not be consolidated. If it appears that, at the time the motion is made, *the actions could have been joined*, and if the court finds that they ought to be joined, they shall be consolidated. (Italics added.)

²⁸ See text accompanying note 7, *supra*.

²⁹ Ohio Rev. Code Section 2309.07 (11308). *Each cause to be numbered*.

"When a petition contains more than one cause of action, each cause must be separately stated and consecutively numbered."

³⁰ *Supra*, text accompanying note 10.

³¹ The effectiveness of such an instruction may be open to question.

The principle of multiple admissibility of evidence is discussed in 1 WIGMORE, EVIDENCE §13 (3rd ed. 1940).

A similar problem may arise in the trial of cases in which a counterclaim is asserted. This is discussed *infra*, text accompanying notes 49 and 50.

Experience under the new procedure may indicate the desirability of amending the Dead Man Statute.

In most cases, a dis-serving out-of-court statement by a decedent would be admissible as to the personal injuries cause of action as an *admission*, and would also be admissible as to the wrongful death cause of action as a *declaration against interest*.³² If an exceptional situation should arise in which such a statement is admissible only as to one of the two causes of action, a similar instruction to the jury would be necessary.

Separate forms of verdict should be submitted to the jury on the respective causes of action, so that it will be clear how much, if anything, was awarded by the jury on each cause of action.³³ For the same reason, the judgment entry should clearly specify the amount of recovery, if any, on each cause of action.

A principal objective of permitting joinder of a cause of action for wrongful death and a cause of action for personal injuries suffered by the decedent was the avoidance of inconsistent judgments.³⁴ It may reasonably be anticipated that when the two causes of action are tried together, and damages on both causes of action are established, the jury will ordinarily make consistent determinations of liability. That is, the jury will either find in favor of the plaintiff on both causes of action, or find in favor of the defendant on both causes of action. In some cases a jury may be justified in finding in favor of the plaintiff on one cause of action, and in favor of the defendant on the other cause of action.³⁵

If, in a particular case in which two such causes of action are being tried together, an attorney fears that the jury may make inconsistent determinations of liability, and that the evidence does not justify inconsistent determinations, he may consider the use of a special verdict or special interrogatories.³⁶

It may also be reasonably anticipated that a jury with both causes of action (personal injuries and wrongful death) before it will have a better understanding of the scope of the respective causes of action than a jury with only one of the causes of action before it. A jury, in an action for wrongful death only, may not understand the reason for the absence of any mention of medical expenses, loss of earnings, etc.

³² See text accompanying notes 12 and 13, *supra*.

³³ The difference between the disposition of the proceeds of an action for wrongful death, and the disposition of the proceeds of an action for injury to the person or property of the decedent, is discussed *supra*, text preceding note 2.

³⁴ See note 7, *supra*, and accompanying text.

³⁵ Thus, if only a short period of time elapsed between injury and death, and the jury is not convinced that the injured person suffered any pain, it may return a verdict in favor of the defendant on the cause of action for personal injuries, solely because of the failure of proof of damages on that cause of action.

If the court has instructed the jury to consider the testimony of the defendant only on the wrongful death cause of action, it may be justified for this reason in returning a verdict in favor of the defendant on the wrongful death cause of action, and in favor of the plaintiff on the personal injuries cause of action.

³⁶ The decision as to the use of a special verdict or special interrogatories often involves a difficult problem of trial tactics.

AMENDMENT RELATING TO COUNTERCLAIMS

As stated previously, the Ohio Supreme Court had held that in an action by a personal representative of a decedent for the *wrongful death* of the decedent, the defendant could not properly assert a counterclaim against the personal representative for his own personal injuries sustained in the same collision.³⁷ The court gave as its reason that "there is no mutuality between the claim of the plaintiff for the wrongful death of her decedent and the claim of the defendant for her personal injuries."³⁸ The defendant could, of course, bring a separate action as plaintiff against the personal representative as defendant. However, the filing of such a separate action would result in two lawsuits instead of one. Furthermore, inconsistent judgments might result.³⁹ The opinion in the *Epinger* case recognized that in an action by a personal representative to recover for *personal injuries* suffered by his decedent, the defendant might properly assert a counterclaim arising out of the transaction set forth in the petition as the foundation of the claim of the personal representative.⁴⁰

As originally recommended by the Ohio State Bar Association, and as introduced and passed by the House, Amended House Bill No. 80 was confined solely to the matter of joinder of causes of action, and amended only Sections 2309.05 and 2309.06. However, the bill was amended in the Senate so that it also amended Section 2309.16, the basic counterclaim statute, by the addition of a new third paragraph.⁴¹ The new paragraph expressly authorizes the defendant in a wrongful death action to assert as a counterclaim a cause of action against the estate of the decedent arising out of the transaction which is the foundation of plaintiff's wrongful death claim. Thus the new paragraph abrogates the rule established by the *Epinger* case.

³⁷ *Epinger v. Wade*, *supra*, note 14.

³⁸ *Epinger v. Wade*, *supra*, note 14, at page 463.

³⁹ That is, in an action by a personal representative for the wrongful death of his decedent against defendant X, the jury might find that defendant X was negligent, and that the decedent was not contributorily negligent, and thus return a verdict in favor of the personal representative, whereas in a separate action brought by X as plaintiff against the personal representative as defendant, the jury might find that the decedent was negligent and that X was not contributorily negligent, and thus return a verdict in favor of plaintiff X against the personal representative.

⁴⁰ "Of course, if plaintiff's action had been one for the benefit of decedent's estate to recover for personal injuries suffered by the decedent in his lifetime, there could be little question as to the right of the defendant to assert her counterclaim by way of cross-petition in this action. Under such circumstances, there would be mutuality of parties as well as mutuality of claims." *Epinger v. Wade*, *supra*, note 14, at page 464.

⁴¹ The full text of Section 2309.16, with the paragraph added in 1955 in italics, is as follows:

Sec. 2309.16. A counterclaim is a cause of action existing in favor of one or more defendants against one or more plaintiffs or one or more defendants, or both, between whom a several judgment

In general, the phraseology of the new third paragraph of Section 2309.16 follows the pattern of the first paragraph, which is the general counterclaim provision. However, there is one exception. The third paragraph omits the phrase, "or arising out of contract," which is employed in the first paragraph. This phrase was deliberately omitted in the bill, as it was thought that undue prejudice might result from the trial of an unrelated contract counterclaim in an action for wrongful death. Thus a cause of action in favor of the defendant in a wrongful death action does not qualify as a proper counterclaim against the personal representative simply because it arises out of contract.⁴²

As is true of counterclaims generally in Ohio practice, the counterclaims authorized by the new third paragraph of Section 2309.16 are permissive, and not compulsory. That is, a defendant is not required to assert his cause of action as a counterclaim, and may instead assert it in a subsequent independent action. Ohio has not adopted the concept of the compulsory counterclaim, which is embodied in Rule 13 of the Federal Rules of Civil Procedure. In Ohio, the only penalty for failure to assert a cause of action as a counterclaim is that he cannot recover costs in a subsequent independent action on the cause of action.⁴³

might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action or arising out of contract or ascertained by the decision of a court.

Such counterclaim shall not be limited to the amount claimed by the plaintiff or defendant against whom such counterclaim is asserted.

In an action by an executor or administrator upon a cause of action for the wrongful death of his decedent under sections 2125.01 to 2125.04, inclusive, of the Revised Code, or upon a cause of action for injuries to the person of his decedent, surviving under section 2505.21 of the Revised Code, or upon a cause of action for injuries to the property of his decedent, surviving under section 2505.21 of the Revised Code, or in an action by an executor or administrator in which two or more of such causes of action are joined, a defendant may assert as a counterclaim a cause of action existing in favor of such defendant against such executor or administrator in his capacity as representative of the estate of his decedent, and arising out of the transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action or ascertained by the decision of a court.

⁴² It may be questioned whether the danger of an unrelated contract counterclaim is any greater in a wrongful death action than in any other kind of action. Little if any use has been made of the contract provision in the first paragraph. It has been in the counterclaim statute since 1947, and no case has come to the writer's attention in which a counterclaim has been based on the contract clause, and could not have been asserted as a set-off under the pre-1947 law. The possibility that a defendant in an action for wrongful death might have a counterclaim based on an unrelated contract seems remote.

⁴³ Section 2323.40 (11624). *Defendant to pay costs.* ". . . If a defendant omits to set up a counterclaim he cannot recover costs against the plaintiff in any subsequent action thereon."

If a defendant in a wrongful death action should fail to assert his cause of action for personal injuries as a counterclaim, and should file an independent action for his personal injuries against the personal representative in the same court, it is not entirely clear that the court has power to order the two actions consolidated. The consolidation statute, Section 2309.64,⁴⁴ makes the right to consolidation depend upon whether "the actions could have been joined." This language may be broad enough to include the assertion of a counterclaim. If such a separate action is filed and if the two actions are never consolidated, a judgment in one action will not have the effect of *res judicata* on the other; Amended House Bill No. 80 does not change this principle.

The effect of Amended House Bill No. 80 upon the use of counterclaims in actions by personal representatives for wrongful death and personal injuries will be discussed by the use of illustrations based upon the following hypothetical set of facts:

Richard Roe held a note against John Smith, in the amount of \$1,000.00. Roe also recovered a judgment against Smith in the Supreme Court of New York, in the amount of \$2,500.00. There was no connection between the note and the judgment. By a strange coincidence,⁴⁵ while Roe and Smith were operating their respective automobiles, a collision occurred in which both Roe and Smith were injured, and in which both automobiles were damaged. Several weeks later, Smith died as a result of the collision. His widow was appointed as his executrix.

Illustration 1. Smith's executrix files an action against Roe for Smith's personal injuries. Roe may assert as a counterclaim his cause or causes of action for personal injuries, or for property damage, or both. This was the law prior to 1955,⁴⁶ and Section 2309.16 now explicitly so provides.

Illustration 2. Smith's executrix files an action against Roe for Smith's wrongful death. Roe may assert as a counterclaim his cause of action for personal injuries, or for property damage, or both. Section 2309.16 now explicitly so provides. In this respect the law as established by *Epinger v. Wade*,⁴⁷ has been changed by Amended House Bill No. 80.

Illustration 3. Smith's executrix files an action against Roe in which she joins a cause of action for Smith's wrongful death with a cause of action for his personal injuries, as she is now permitted to do. Roe may assert as a counterclaim his cause of action for personal injuries, or for property damage, or both. Section 2309.16 now explicitly so provides.

⁴⁴ *Supra*, note 27.

⁴⁵ Such a coincidence is most likely to occur in a detective story or a law school examination question.

⁴⁶ See note 40, *supra*.

⁴⁷ *Supra*, note 14.

Illustration 4. Smith's executrix files an action against Roe for Smith's wrongful death. Roe may not assert as a counterclaim his cause of action upon the \$1,000.00 note which he held against Smith, because the phrase "or arising out of contract" is not employed in the new third paragraph of Section 2309.16.⁴⁸ The problem is not likely to arise.

Illustration 5. Smith's executrix files an action against Roe for Smith's personal injuries. Roe probably may not assert as a counterclaim his cause of action upon the \$1,000.00 note which he held against Smith, because the phrase "or arising out of contract" is not employed in the third paragraph of Section 2309.16. Prior to the enactment of Amended House Bill No. 80, Roe could have asserted such a cause of action as a counterclaim, because of the phrase "or arising out of contract" in the first paragraph of Section 2309.16. Thus, in this one respect, Amended House Bill No. 80 restricts the scope of counterclaims. The problem is not likely to arise.

Illustration 6. Smith's executrix files an action against Roe for Smith's wrongful death. Roe may assert as a counterclaim his cause of action upon the \$2,500.00 New York judgment against Smith, because of the phrase "or ascertained by the decision of a court" in the third paragraph of Section 2309.16. The problem is not likely to arise.

Illustration 7. Assume for this illustration only that the foregoing hypothetical state of facts is changed to the extent that Roe also died some weeks after the collision, and that an administrator was appointed for his estate. Smith's executrix files an action against Roe's administrator for Smith's wrongful death. Roe's administrator may probably assert as a counterclaim a cause of action for Roe's wrongful death. The third paragraph of Section 2309.16 does not explicitly so provide, but this result would seem to follow from its provisions.

The preceding illustrations have shown the scope of permissible counterclaims under the 1955 amendment. The following illustrations will show the operation of the 1955 amendment with respect to evidence, verdicts and judgments. The illustrations are based on the same hypothetical fact situation.

Illustration 8. Smith's executrix files an action against Roe for Smith's wrongful death. Roe counterclaims for his personal injuries.

At the trial, Roe may testify as to the wrongful death cause of action in plaintiff's petition, but not as to the personal injuries cause of action set forth in his cross-petition, because of the Dead Man Statute.⁴⁹ If Roe testifies, the jury should be instructed to consider his testimony only as to the wrongful death cause of action in plaintiff's petition.⁵⁰

⁴⁸ See note 42 and accompanying text, *supra*.

⁴⁹ See text accompanying note 10, *supra*.

⁵⁰ In *Barber v. Kihlken, Admr.*, 17 Ohio L. Abs. 599 (1934), rev'd on other grounds, 129 Ohio St. 435, 196 N.E. 164 (1935), the automobiles of Barber and Schmardebeck collided. Barber was seriously injured and Schmardebeck was

A statement by Smith might be admissible as a declaration against interest on the wrongful death cause of action, or as an admission on Roe's personal injuries counterclaim, or both.⁵¹

Ordinarily, the jury will either (a) return a verdict in favor of Smith's executrix on her petition, and against Roe on his cross-petition, or (b) return a verdict against Smith's executrix on her petition, and in favor of Roe on his cross-petition, or (c) return a verdict against Smith's executrix on her petition, and against Roe on his cross-petition. Even if the evidence as to negligence is the same on both the petition and the cross-petition, it is possible that a jury might improperly return a verdict in favor of Smith's executrix on her petition and a verdict in favor of Roe on his cross-petition. Such a possibility seems no more likely in this situation than in any other collision case in which a cross-petition is filed.⁵² If a jury should return such inconsistent verdicts, it would appear to be the duty of the court not to accept them, and to require the jury to deliberate further.⁵³

If the jury follows course (b), that is, returns a verdict against Smith's executrix on her petition, and in favor of Roe on his cross-petition, and if judgment is entered on the verdict, the judgment on the petition

killed. Barber brought an action for personal injuries against Kihlken, as administrator of Schmardebeck's estate. The administrator filed a cross-petition for wrongful death. Apparently no objection was made to the cross-petition. During the trial the defendant dismissed his cross petition. The jury returned a verdict in favor of the defendant, and plaintiff appealed. Quoting from the opinion of the court of appeals:

"The trial court refused to permit the plaintiff Barber to testify except to facts which occurred after the death of the decedent in accordance with the provisions of §11495, GC [now §2317.03, Ohio Rev. Code.] This section contains the provision that 'nothing in this section shall apply to actions for causing death.' The contention of plaintiff in error is that by reason of the fact that the defendant filed a cross-petition for wrongful death, there was a waiver of the 'incompetency' of the plaintiff to testify. It will be observed that §11495, GC, does not make a party an incompetent witness but merely contains provisions which forbid him to testify except as to certain matters. Of course, if the cause had been submitted upon the issues made on the cross-petition, then the testimony of the plaintiff would have been competent on those issues; but even then *it would have been the duty of the trial judge to instruct the jury not to consider the testimony of the plaintiff upon the issues made on the petition.* In view of the fact that the cross-petition was dismissed, the court properly refused to permit the plaintiff to testify to any transactions which occurred prior to the decedent's death and by proceeding into the trial without dismissing the cross-petition the defendant did not waive his right to object to the plaintiff's testifying." (Italics added.)

⁵¹ See text accompanying notes 12 and 13, *supra*.

⁵² The possibility of such inconsistent verdicts may be reduced by the submission of appropriate forms of verdict to the jury.

⁵³ Cf. *Miller v. Scott*, 66 Ohio L. Abs. 308, 117 N.E. 2d 179 (1952).

There would be no way to prevent the rendition of such inconsistent verdicts if Roe were to assert his cause of action in an independent action, as he was required to do under the former law. A judgment in one action is not *res judicata* in the other. See text accompanying note 7, *supra*.

is against Smith's executrix in her capacity as representative of the widow and next of kin, while the money judgment on Roe's cross-petition is against Smith's executrix in her capacity as representative of the estate of her decedent, and is payable out of Smith's estate in the same manner as any other judgment against his estate. It does not impose liability on Smith's widow and children.

Illustration 9. Smith's executrix files an action against Roe for Smith's wrongful death. Roe counterclaims on the \$2,500.00 New York judgment. The jury returns a verdict for \$10,000.00 in favor of Smith's executrix on her petition, and a verdict for \$2,500.00 in favor of Roe on his cross-petition. The verdicts are not inconsistent, and judgment may properly be entered in favor of the executrix for the full amount of \$10,000.00, and in favor of Roe for the full amount of \$2,500.00. The two judgments are independent of each other. If Roe satisfies the wrongful death judgment, the \$10,000.00 will be distributed directly to Smith's widow and next of kin; it is not an asset of Smith's estate. The \$2,500.00 judgment on the cross-petition is against Smith's executrix in her capacity as representative of Smith's estate, and is payable out of his estate in the same manner as any other judgment against his estate. It does not impose liability on Smith's widow and children.

Illustration 10. Smith's executrix files an action against Roe for Smith's personal injuries. Roe counterclaims on the \$2,500.00 New York judgment. The jury returns a verdict for \$10,000.00 in favor of the executrix on her petition, and a verdict for \$2,500.00 in favor of Roe on his cross-petition. Since the respective verdicts are in favor of and against the executrix in the same capacity, that is, in her capacity as representative of Smith's estate, the \$2,500.00 verdict should be subtracted from the \$10,000.00 verdict, and judgment rendered in favor of the executrix against Roe for the balance, \$7,500.00. The \$7,500.00 judgment is an asset of Smith's estate.

EFFECT OF COUNTERCLAIM PROVISION UPON UTILIZATION OF JOINDER PROVISION

It is possible that the amendment of the counterclaim statute, Section 2309.16, will tend to cause a personal representative to join the causes of action for personal injuries and wrongful death, as he is now permitted to do, rather than to file separate actions. Under the law prior to 1955, a personal representative might choose to file separate actions, for the reason that in the wrongful death action, the defendant could not counterclaim for his personal injuries. Since the 1955 counterclaim amendment, however, this reason for filing separate actions does not exist; the defendant may assert his counterclaim for his own personal injuries to the same extent, whether the personal representative (1) files an action for personal injuries, or (2) files an action for wrongful death, or (3) files one action in which he joins a cause of action for personal injuries and a cause of action for wrongful death.

CONCLUSION

Amended House Bill No. 80 makes possible an improvement in judicial administration in Ohio. Although some increase in the complexity of trials may result, this is the price which must be paid for reducing the number of lawsuits. Furthermore, the problems presented by the 1955 legislation do not appear to be unduly difficult.