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Relation Back of Consortium Claims: A Search for Facts and Notice

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COMMENTS

RELATION BACK OF CONSORTIUM CLAIMS: A SEARCH FOR FACTS AND NOTICE

Article 1153 of the Louisiana Code of Civil Procedure provides a method by which an amended petition is allowed to relate back to the time of the filing of the original pleading.[1] Two recent cases demonstrate the confusion among the courts over whether a late-filed petition for loss of consortium may relate back to an earlier filed petition. In *Raziano v. Lincoln Property Co.*,[2] the Louisiana fifth circuit allowed a loss of consortium claim on which the original prescriptive period had expired two years earlier to relate back to the original timely filed petition. Less than two months later, without mentioning *Raziano*, the same circuit held, in *Wood ex rel. Hayes v. Hayes*,[3] that a claim for loss of consortium was a separate cause of action and refused to allow a late petition to relate back to the timely filed petition. Both *Raziano* and *Wood* based their reasoning on *Giroir v. South Louisiana Medical Center*,[4] a case in which the Louisiana Supreme Court set out a four-step test for determining whether an amended petition would relate back.

The purpose of this note is to examine the apparently conflicting decisions from the fifth circuit. Proper analysis of these decisions requires a thorough understanding of the legal concepts involved. Hence, the first section will examine the statutory and judicial basis for the relation back principle. It also examines the two basic requirements for relation back: that of a factual connection between the claims and sufficient notice to the defendant. The final section, relying on the concepts explored in the first section, analyzes the *Wood* and *Raziano* decisions to determine which court, if either, was correct.

RELATION BACK AND PRESCRIPTIVE PERIODS

Under the principle of relation back "an act done today is considered to have been done at an earlier time."[5] This is the justification by which

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1. La. Code Civ. P. art. 1153 provides:
When the action or defense asserted in the amended petition answer arises 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 filing the original pleading.
2. 520 So. 2d 1213 (La. App. 5th Cir. 1988).
3. 524 So. 2d 241 (La. App. 5th Cir. 1988).
4. 475 So. 2d 1040 (La. 1985).
5. Black's Law Dictionary 1158 (5th ed. 1979).

a new petition, which changes the parties, actions, or defenses of the original petition, is allowed to amend the original pleading after the ostensible prescriptive period has passed. This section will examine the principle of relation back under both Louisiana law and the closely analogous federal law. Particular emphasis will be placed on *Giroir*, the primary case in Louisiana on relation back. Following the discussion of that case, the two essential elements of relation back—the factual connexity and notice to the opposing party—are examined.

Relation Back Under Louisiana and Federal Procedural Law

Louisiana Code of Civil Procedure Article 1153[6]

Since this article is based on Federal Rule of Civil Procedure 15(c)[7] doctrinal commentaries and judicial interpretations of 15(c) are "strongly persuasive as to the meaning and application" of article 1153.[8]

Both 1153 and 15(c) are "designed to permit amendment despite a technical prescriptive bar to the matters alleged by the amendment."[9]

The federal courts have construed Rule 15(c) liberally.[10] Louisiana also recognizes this rule of liberal construction.[11] One court stated that

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6. See supra note 1 for text of Louisiana Code of Civil Procedure article 1153.

7. Giroir v. South Louisiana Medical Center, 475 So. 2d 1040, 1042 (La. 1985). At the time that article 1153 was enacted, Rule 15(c) stated:

> (c) RELATION BACK OF AMENDMENTS. 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.

In 1966 the rule was amended and the following sentence was added.

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known, that but for the mistake concerning the identity of the proper party, the action would have been brought against him . . .

Prior to the adoption of the Federal Rules in 1938 relation back was only allowed if the new claim did not recite a new cause of action but merely restated in a different form the cause of action already pleaded. This caused conceptual difficulties in determining whether the amendment contained a new cause of action or not. The 1966 amendment was an attempt to clarify the procedures and safeguards that had evolved since Rule 15(c) was promulgated. *Giroir*, 475 So. 2d at 1043.

8. *Giroir*, 475 So. 2d at 1042.

9. Tate, Amendment of Pleadings in Louisiana, 43 Tul. L. Rev. 211, 233 (1969).

10. *Giroir*, 475 So. 2d at 1043.

11. La. Code Civ. P. art. 5051 provides: "[t]he articles of this Code are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves."

the present philosophy is "that lawsuits should be decided on their merits and should not turn on arbitrary or technical rules of procedure."[12] Justice Tate echoed this sentiment when he wrote that liberalized amendment provisions are "essential to enable Louisiana's procedural system to attain its ideal that, not pleading technicality, but substantive law should determine litigation."[13]

The Giroir *Test*

The most difficult question of relation back cases arises when, after the prescriptive period has run, an amendment is offered that adds new parties or new claims. The most recent Louisiana Supreme Court pronouncement on this issue is *Giroir v. South Louisiana Medical Center*.[14] In that case, the court established a four-step test to determine when an amended claim will be allowed to relate back.

In March of 1979, Mrs. Giroir sought medical treatment for abdominal pains from the South Louisiana Medical Center. Within a year, Mrs. Giroir visited the hospital a total of fourteen times and had two major surgeries. Mrs. Giroir died on March 20, 1980. On March 13, 1981, her husband filed suit, alleging medical malpractice. Mr. Giroir brought suit as administrator of Mrs. Giroir's estate and individually for his personal loss due to the wrongful death of his wife. On March 23, 1981, three days after the prescriptive period had run, Mr. Giroir filed an amending petition, seeking to appear in his individual capacity and to add his two adult children to the original petition.

The Louisiana Supreme Court court allowed the amended petition to relate back under Louisiana Code of Civil Procedure article 1153. Based on an analysis of federal and state law, the court developed a four-step test to determine when a claim would be allowed to relate back to a petition that had been timely filed.[15] Relation back would be allowed if:

> [1] the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading; [2] the defendant either knew or should have known of the existence and involvement of the new plaintiff; [3] the new and the old plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated; [4] the defendant will not be prejudiced in preparing and conducting his defense.[16]

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12. National Sur. Corp. v. Standard Accident Ins. Co., 247 La. 905, 981, 175 So. 2d 263, 266 (1965).

13. Tate, supra note 9, at 240.

14. 475 So. 2d 1040.

15. Id. at 1043.

16. Id. at 1041.

The court's analysis of the facts using the four steps allowed the claim to relate back. The amended claim arose out of the same transaction because their petition was based on the same malpractice that was alleged in the original claim. The hospital was found to have had knowledge of the children through their own records, which contained entries regarding the children's visits. The records also contained statements by Mrs. Giroir expressing her concern for her children's health. The new plaintiffs were legally entitled to bring the survival[17] and wrongful death[18] actions, so they were not wholly new or unrelated. Finally, the hospital was not prejudiced in its defense by the new claim because the amendment came only three days late.

The dissent in *Giroir* claimed that the majority's decision was in conflict with the holding in an earlier case, *Guidry v. Theriot*.[19] Before the dissenter's position can be understood, some background on the *Guidry* case is necessary. In *Guidry*, under very similar facts, the court refused to allow a late petition for a wrongful death claim. The claim in *Guidry* was based on negligent medical treatment that allegedly occurred in July, 1973. In February, 1974, the malpractice victim filed suit against the attending physician. In July, 1974, the victim died from complications that were traced to the treatment that she had received. Four years later, the victim's husband filed an amending petition, seeking to add his children with their own claims for wrongful death.[20] The plaintiff contended that the filing of the original suit interrupted prescription for the children's claim. Based on an extensive analysis, the court classified as separate causes of action the survival action and the action for the wrongful death. The court held that when an amended claim by a second party, although based on the same facts as the original claim, stated a different cause of action, the filing of the first suit does not interrupt prescription on the second claim. On the facts before it, the court determined that the father's claim was separate and distinct from the children's claim; therefore, the children's claim had prescribed.[21]

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17. La. Civ. Code art. 2315.1.

18. Id. art. 2315.2.

19. 377 So. 2d 319 (La. 1979).

20. Mr. Guidry also sought to amend the petition to substitute himself as party plaintiff. Id. at 321.

21. In Louviere v. Shell Oil Co., 440 So. 2d 93 (La. 1983), the same issue was addressed. The court granted writs in the case to repudiate dicta in the *Guidry* opinion. In *Guidry*, the court had held that filing suit on one cause of action was only a temporary interruption of prescription. In *Louviere*, the court overruled this and held that for the same cause of action the filing of one suit acts as a continuous interruption. In Batson v. Cherokee Beach and Campgrounds, Inc., 530 So. 2d 1128, 1130 (La. 1988), the court held that a petition did not have to state a cause of action to interrupt prescription. Prescription would be interrupted if the pleading that was filed could be classified as "presenting a demand."

According to the dissent in *Giroir*, the holding of the majority was irreconcilable with the earlier *Guidry* case. The dissenter argued that the claim by Mr. Giroir did not interrupt prescription on the children's separate cause of action, and, therefore, the children's claim should not have been allowed to relate back.[22] Justice Marcus raises an issue that cannot be answered simply from a reading of the cases. The majority in *Giroir* did not address *Guidry*, although it was argued extensively by the defendants in their brief and it is unknown how the court in *Guidry* would have ruled on the application of article 1153 because neither the opinion nor the briefs presented by the attorneys addressed article 1153.[23]

It may be possible to reconcile the two cases. If *Guidry* stands for the proposition that the filing of the suit on the original claim does not, by itself, interrupt prescription on the derivative claim, and if *Giroir* is read as holding that the filing of the original suit interrupts prescription for derivative claims only when the four elements have been satisfied, then the two cases may not be inconsistent. Simply stated, the argument is that the claim is allowed to relate back because it has not prescribed; it has not prescribed because the original petition gave the defendant sufficient notice of the new claim; sufficient notice was present because the four elements of *Giroir* were satisfied. If this argument is correct then the two cases are consistent because without the fulfillment of the four elements of *Giroir* the case would have prescribed under the reasoning of *Guidry*.[24]

For the purpose of this note, *Guidry* is read as stating the general conceptual principle that when an amended petition asserts a new cause of action by a new plaintiff, it will not be allowed to relate back. *Giroir* is considered a modification of that rule in certain factual circumstances.

Applications of the Giroir *Principles*

The Search for a Factual Connection

The first step in the *Giroir* test reflects the requirement under both article 1153 and Rule 15(c) that the amended claim arise out of the

22. *Giroir*, 475 So. 2d at 1046 (Marcus, J., dissenting).

23. Appellee's Brief at -i-, Appellant's Brief at -i-, Guidry v. Theriot, 377 So. 2d 319 (La. 1979) (No. 64,666, 64,663).

24. If *Giroir* allows claims to relate back because the filing of the first claim interrupted prescription, then this raises a question that has not been presented to the appellate courts: Does the amended claim require a petition to relate back to? If the original claim has been fully litigated and has reached final judgment, may a new claim be asserted within the year following the judgment? If prescription was interrupted then, under *Louviere* the new party would have one year from the completion of the first suit in which to bring an amended claim.

same factual circumstances as the original claim. This section will examine two cases to determine when a factual connection will allow relation back despite the fact that a new cause of action is added or that a different form of relief is requested.

Gunter v. Plauche[25] illustrates a situation in which a close factual connection allowed a new cause of action to relate back to a timely filed petition. In *Gunter*, the plaintiff filed suit in August, 1977, claiming medical malpractice that stemmed from two surgeries performed during 1976. In September, 1980, the plaintiff attempted to amend his petition to add a claim for a lack of informed consent. The trial court refused to allow the amendment, holding that the new claim was an entirely new cause of action and that the original and the new claim "were not so interwoven that the filing of suit on one would constitute notice on the other."[26] The Louisiana Supreme Court reversed, focusing not on notice but on whether there was some "factual connexity between the original and amended assertions, together with some identity of interest between the original and supplemental party."[27] Since the same party had brought both the original claim and the new claim, the connexity of parties presented no difficulty. Likewise the claims were closely connected, for both the original and the new new claim were based on medical treatment for the same knee injury.[28] The court was unwilling to bar the claim because the causes of action were separate. As the court stated:

> [t]he transaction or occurrence giving rise to the demand or object of the suit remained unchanged by the amendment, and, even if the state of facts which constitute the defendant's wrong differ enough so that two causes of action exist, the facts of the transaction which created both duties is similar enough to support a relation back of the amending petition under art. 1153.[29]

In short, a factual connection was sufficient to allow relation back even though the amendment stated a new cause of action.

The *Gunter* court did not stand alone in its analysis, for in *Bertrand v. St. Paul Fire and Marine Insurance Co.*,[30] a finding of a close factual connection allowed a claim for money damages to relate back to a timely filed demand for injunctive relief. In March, 1981, Mr. Bertrand sought admission to a hospital, suffering from symptoms of appendicitis.

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25. 439 So. 2d 437 (La. 1983).
26. Id. at 440.
27. Id.
28. Id.
29. Id. at 441.
30. 491 So. 2d 474 (La. App. 3d Cir.), writ denied, 449 So. 2d 543 (1986).

The hospital denied admission and sent Mr. Bertrand home. The following day he appeared at the same hospital with the same symptoms. This time he was admitted, but he died later that same day from a ruptured appendix. One month later, his wife and children petitioned for an injunction to prohibit the hospital from destroying or altering any evidence surrounding the death. A temporary restraining order to that effect was issued the same day. In June, 1981, fifteen months after the death, the plaintiffs filed an amended petition alleging medical malpractice and asking for damages for the three original plaintiffs. The defendant objected, claiming that prescription had run on the malpractice action.

The court, relying heavily on federal cases under Rule 15(c) found that "[t]he search under Rule 15(c) is for a common core of operative facts in the two pleadings."[31] The court also found that 15(c) applies to amendments adding new causes of actions.[32] The fact that the original claim was only for an injunction while the amended claim was for damages stemming from medical malpractice was not determinative. The court stated:

> We do not perceive it to be essential for the application of Article 1153 that the demands of the two pleadings be the same. The article does not say so. The only requirement of connexity is that the action in the amended petition arise out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." As we have seen . . . identity of the demand is not required in the federal courts, nor has it been required in this state.[33]

The court went on to say that article 1153 "deliberately adopts no test of identity of cause or legal theory between the original and amending petitions."[34] On these facts, the court found that the notice requirement of article 1153 had been met by the original petition despite the fact that an injunction, not damages for medical malpractice, was sought. The core of the operative fact was the same in both claims, alleged medical malpractice. This, coupled with the sufficiency of notice allowed the new claim to relate back.[35]

A Finding of Sufficient Notice

Giroir recognized that federal courts are liberal in finding sufficient notice to allow relation back, especially if no disadvantage will be

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31. Id. at 478.
32. Id.
33. Id. at 479.
34. Id. at 477-78.
35. Id. at 480.

imposed on the opposing party.[36] The notice requirement stems from the protective purposes of prescriptive periods.

Prescription statutes, according to the *Giroir* court, "protect . . . against lack of notification of a formal claim within the prescriptive period, not against the pleading mistakes that his opponent makes in filing the formal claim within the period.[37] In other words, guarantee the defendant timely notice of the claim, not blanket protection against all claims that are technically filed late. Hence, when a defendant has notice of a particular claim within the prescriptive period, that claim will usually be allowed to relate back even if it is filed outside the period.

A number of relation back cases have refined this notice concept, and examination of those cases will be useful. When an amended petition attempts to add a new plaintiff with a cause of action that was not asserted in the original claim, some courts have held that mere notice of the general fact situation from which the claim arises is not sufficient. In *Williams v. United States*,[38] for example, the court allowed a mother to amend her minor son's original petition with a claim for damages that she suffered due to her son's injury. The court said that in adding a new party "[n]ot only must the adversary have had notice about the operational facts, but it must have had fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in."[39] The defendant in *Williams* knew of the mother's existence because she had brought the action on behalf of the minor. In addition, the court found that the government was put on notice of the mother's claim because "the circumstances of these individuals was such as would reasonably indicate a likelihood that the parent would incur losses of a recoverable kind."[40]

The *Giroir* court used roughly the same reasoning, holding that in order to allow a claim to relate back, the defendant must either have known or should have known of the existence *and involvement* of the new plaintiff.[41] The hospital was aware that Mrs. Giroir had children and that the children by statutory law had a right to a claim for the wrongful death of their mother. Therefore, the hospital had sufficient notice to allow the claim to relate back.

The notice of the potential new party must come within the prescribed period of time.[42] If the defendant does not get notice of the

36. *Giroir*, 475 So. 2d at 1043.
37. Id. at 1045.
38. 405 F.2d 234 (5th Cir. 1968).
39. Id. at 238.
40. Id. at 239.
41. *Giroir*, 475 So. 2d at 1044 (emphasis added).
42. Schiavone v. Fortune, 477 U.S. 21, 31, 106 S. Ct. 2379, 2384 (1986); Williams v. United States, 711 F.2d 893, 898 (9th Cir. 1983).

existence of a new party with a potential claim until after prescription has run, then the new claim will not be allowed to relate back. Rule 15(c) expressly recognizes this when it states that the notice must come "within the period provided by law for commencing the action."[43] Although article 1153 does not specify that the notice must come within the prescriptive period, Louisiana decisions are in accord with the federal rule.[44]

Both *Giroir* and federal law recognize that the notice need not come directly from the original petition.[45] The courts have been willing to infer notice in a variety of different circumstances in which the parties are related in such a way that notice to one provided notice to the other.[46] Most courts have been fairly willing to infer notice, but no court showed greater willingness than the *Giroir* court. The court found that the defendant hospital had actual notice of the children's claims due to the fact that the medical records of the deceased contained entries noting visits by the children and that the deceased had spoken to several hospital personnel about her children.[47] The Louisiana Supreme Court has, in *Giroir*, gone further than any previous Louisiana or federal decision concerning sufficiency of notice.[48]

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43. Fed. R. Civ. P. 15(c).

44. *Giroir*, 475 So. 2d 1040 (La. 1985); *Gunter*, 439 So. 2d 437 (La. 1983); Ray v. Alexandria Mall, 434 So. 2d 1083 (La. 1983); Louviere v. Hartford Ins. Co., 531 So. 2d 299 (La. App. 3d Cir. 1988); Poirier v. Browning Ferris Ind., 517 So. 2d 998 (La. App. 3d Cir. 1987); Pontiff v. Bailey, 509 So. 2d 451 (La. App. 3d Cir. 1987); *Bertrand*, 491 So. 2d 474 (La. App. 3d Cir.), writ denied, 449 So. 2d 543 (1986).

45. Fed. R. Civ. P. 15(c), Notes of Advisory Committee, 1966 Amendment.

46. For some examples, see Barkins v. International Inns, Inc., 825 F.2d 905, 907 (5th Cir. 1987); Hendrix v. Memorial Hosp. of Galveston County, 776 F.2d 1255, 1257-58 (5th Cir. 1985); Kirk v. Cronvich, 629 F.2d 404, 407 (5th Cir. 1980); Bush v. Oceans Int'l, 621 F.2d 207 (5th Cir. 1980); Marks v. Proattco, Inc., 607 F.2d 1153, 1156 (5th Cir. 1979) (when the amended party had the same counsel as the party with actual notice); Simmons v. Fenton, 480 F.2d 133 (7th Cir. 1973); Williams v. United States, 405 F.2d 234 (5th Cir. 1968); Stoppelman v. Owens, 580 F. Supp. 944, 947 (D.D.C. 1983) (amended claims against limited partners when the general partner had notice); Ray v. Alexandria Mall, 434 So. 2d 1083 (La. 1983) (original petition contained a misnomer but the actual defendant was served). Although all of the examples are for changing defendants, the same reasoning should apply to a change in plaintiffs by analogy, see La. Code Civ. P. art. 5051; Williams v. United States, 405 F.2d 234 (5th Cir. 1968); Meredith v. United Airlines, Inc., 41 F.R.D. 34 (S.D. Cal. 1966) (when the defendant received notice through participation in legal proceedings).

47. *Giroir*, 475 So. 2d at 1045.

48. This writer was unable to find any Louisiana or federal decision that was as liberal with informal notice as *Giroir*. The closest case found was Meredith v. United Airlines, Inc., 41 F.R.D. 34 (S.D. Cal. 1966). There the plaintiff was injured when the commercial airline, in which he was a passenger, swerved suddenly to avoid a mid-air collision. The plaintiff sued United Airlines and the United States since it was originally thought that the near miss was due to the fault of a military aircraft. After the prescriptive

The notice element of prescription serves to protect a defendant "from stale claims and from the loss of non-preservation of relevant proof."[49] When the original petition is filed the defendant has been given notice that judicial relief is being sought from a general fact situation. This gives him notice that his evidence concerning the situation should be collected and preserved.[50] If the defendant has received such notice and is aware or should be aware of any potential claim that may arise out of the fact situation then the protective purpose of prescription has been satisfied. The defendant who has such notice should protect himself by collecting and preserving relevant evidence and therefore should not be able to claim that he would be prejudiced by the amendment.

The problem that arises with relation back is that there is always a potential conflict with prescription.[51] If relations back is allowed there will appear to be an "arguable violation"[52] of the rules of prescription. Upon initial observation it would appear that these two concepts are inconsistent with one another, but in reality they are not. Relation back is intimately connected with the policy of prescription.[53] The courts' reliance on the fulfillment of the four elements allows the two to co-exist. The test set forth in *Giroir* is a guide by which a court may ascertain whether or not allowing an amended petition to relate back would violate the underlying policies of prescription. If the four steps are applied correctly, then any amendment that is allowed to relate back should not violate the "protective purpose" of prescription.

Application of Giroir *to Consortium Claims*

Giroir established a four-step test to determine when a claim will relate back. These steps, by requiring a factual relationship between the

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period had run, the plaintiff learned that it was not a military plane but one belonging to Lockheed Aircraft Corp. that was involved. The court allowed the plaintiff to amend his petition to add a claim against Lockheed under Rule 15(c). The court permitted this because it found that Lockheed had received sufficient notice of the accident and the injury through an investigation by the Civil Aeronautics Board, which occurred shortly after the incident. The court held that Lockheed knew or should have known that the action would have been brought against it but for a mistake concerning the identity of the proper party. Although this decision has been criticized in its own circuit for its finding of notice, it is still not as liberal as *Giroir*. In *Meredith*, the defendant received notice through a type of formal hearing, not by conversations that an employee had about the accident. It should be noted that for the purpose of this Note the *Giroir* decision is considered the correct interpretation of the law. It is beyond the scope of this Note to determine the correctness of the informal notice that *Giroir* found sufficient.

49. *Giroir*, 475 So. 2d at 1045.

50. Tate, supra note 9, at 233.

51. Note, Federal Rule of Civil Procedure 15(c): Relation Back of Amendments, 57 Minn. L. Rev. 83, 84 (1972).

52. Id.

53. Fed. R. Civ. P. 15(c), Notes of Advisory Committee.

claims and that the defendant have had notice of the new plaintiff and cause of action, allow prescription and relation back to co-exist. This section will analyze two recent cases involving relation back of consortium claims where the courts reached different results under very similar circumstances. In both instances the court relied on the *Giroir* test. The facts of each case along with the court analysis will be examined to determine which court, if either, correctly interpreted *Giroir*.

In the first case, *Raziano v. Lincoln Property Co.*,[54] a volunteer fireman, injured while fighting a fire, filed suit within the one-year prescriptive period. His petition contained a claim for lost income, medical expenses, mental and physical pain, and "miscellaneous losses, connected with his family life, past, present, and future."[55] The petition did not contain any express indication that the plaintiff was married. More than three years after the accident, the plaintiff's wife filed an amended petition seeking damages for her "loss of love, affection, care, attention, companionship, protection and consortium."[56] In the second case, *Wood ex rel. Hayes v. Hayes*,[57] a minor's mother filed the original petition in her representative capacity, claiming damages arising from the alleged sexual abuse of her child by the defendant. After the prescriptive period had run, the mother attempted to amend the son's original complaint to add her own demand for damages based on her loss of consortium. Both *Raziano* and *Wood* presented an identical issue, whether a loss of consortium claim filed after the prescriptive period had run would relate back to the filing of the original petition. In both cases, the courts turned to the four-part *Giroir* test to determine if the new amendments would be allowed to relate back.

The first step in the *Giroir* test is to determine whether the amended claim arises out of the same conduct set forth in the original petition. Both *Raziano* and *Wood* found that the consortium claim arose from the same conduct set forth in the original petition, the negligence of the defendant in injuring the original plaintiff. The factual connection between the original negligence and the loss of consortium satisfied both courts that the first part of the *Giroir* test was met. This result, although reached with virtually no analysis, was correct. Loss of consortium is a claim for damages when a person has been deprived of a relationship with a member of his family because of an injury to that family member.[58] Although the consortium claim is derivative in the sense that

54. 520 So. 2d 1213 (La. App. 5th Cir. 1988).

55. Id. at 1215.

56. Id.

57. 524 So. 2d 241 (La. App. 5th Cir. 1988).

58. Finley v. Bass, 478 So. 2d 608, 614 (La. App. 2d Cir. 1985). Loss of consortium may involve up to seven types of losses. They are: (1) love and affection; (2) society and companionship; (3) sexual relations; (4) performance of material services; (5) financial services; (6) aid and assistance; and (7) happiness.

it exists due to the injury to the original plaintiff, it is a direct injury to the person who has suffered the loss of consortium.[59] In these cases the demand for a loss of consortium is as attributable to the fault of the defendant as is the demand for the victim's injuries. Hence, a loss of consortium claim arises out of the same transaction as the original petition.

The second requirement of *Giroir* is that the defendant knew or should have known of the existence and involvement of the new plaintiff. Both courts focused on specific facts from which they inferred notice. In *Raziano*, the court found that the wording of the original petition satisfied the notice element. The court stated that the "defendants should have known of the existence of Mrs. Raziano by the allegations of the original petition relating to family life."[60] In *Wood*, the court noted that Mrs. Wood had brought the original action as representative on her son's behalf and that this fact should have put the defendant on notice of her individual claim.[61] Although this inquiry rests heavily on the facts of the individual cases, it can be said with a fair amount of certainty that it was reasonable for the courts to find notice in these cases.

The third inquiry in the *Giroir* test is whether the new and the old plaintiffs are sufficiently related that the added or substituted party is not wholly new or unrelated. The *Raziano* court stated that there was a sufficient relationship between Mr. and Mrs. Raziano such that the new claim was not wholly new or unrelated.[62] The *Wood* court held that the claim by the mother was "wholly new and unrelated to her son's original claim for damages"[63] and denied her amendment because of this. Neither court was correct in its application of this step. Here it is the plaintiffs that require a relationship not the claims.

The requirement of some relationship between the new and the old plaintiffs is intended to further restrict the first step's "transaction or occurrence" test.[64] The relationship requirement is meant to restrict the number and type of *parties* that would be eligible to bring an amended demand; it is not intended to restrict the types of *claims* that may be brought.[65] Restriction of the types of demands is controlled by the

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59. Black's Law Dictionary 280 (5th ed. 1979).

60. *Raziano*, 520 So. 2d at 1217.

61. *Wood*, 524 So. 2d at 244.

62. *Raziano*, 520 So. 3d at 1217.

63. *Wood*, 524 So. 2d at 244.

64. Williams v. United States, 405 F.2d 234, 238 (5th Cir. 1968); Andujar v. Rogowski, 113 F.R.D. 151, 156 (S.D.N.Y. 1986).

65. Requiring a relationship between the new and the old plaintiffs could be used by the courts to restrict relation back of claims in multi-victim accidents. The courts would have a greater difficulty allowing an amendment by an entirely unrelated party

"factual connexity" requirement in the first step. The *Raziano* and *Wood* courts' approach combined the first element of the *Giroir* analysis, the transaction or occurrence test, with the third element, the relationship between the parties test.

The *Raziano* court reached the correct result despite its flawed analysis. Just as in *Giroir* the new plaintiffs, because they had the exclusive right to bring the wrongful death action, were not new and wholly unrelated, so in *Raziano* the wife had the exclusive right to bring the consortum claim. The close analogy between the new claimants in both cases dictated that the *Raziano* plaintiff, like the *Giroir* plaintiffs, be allowed to assert her claim.

The *Wood* court's combination of the two steps was not as harmless, for it led to denial of a claim that should have been allowed. The court stated that the new claim attempted to assert a new cause of action, thus changing the underlying claim "from damages for mental problems, etc., resulting from sexual abuse, to a loss of consortium resulting from those mental problems."[66] The court based this distinction on language in *Giroir*. In allowing the claim to relate back, the *Giroir* court had stated that the amending claimants were not wholly new or unrelated to the original claimant and that "the addition of them as plaintiffs . . . [did] not change the basic underlying claim."[67] The *Wood* court interpreted this as not changing the underlying claim because it was the same cause of action being asserted by additional plaintiffs.[68] Since the *Wood* court viewed the claims as separate causes of action, it denied the amendment.[69]

The *Wood* court's position is untenable. In *Gunter v. Plauche*[70] the court held that an amended claim could contain a new cause of action. The court stated that "even if the state of facts which constitute the defendant's wrong differ enough so that two causes of action exist" that the amendment will be allowed if it is based on the same transaction or occurrence.[71] *Bertrand v. St. Paul Fire and Marine Insurance Co.*[72] also recognized that the claims could be different. There an amended

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even though it arose out of the same transaction or occurrence. Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1309 (D.C. Cir. 1983); Williams v. United States, 405 F.2d 234, 238 (5th Cir. 1968).

66. *Wood*, 524 So. 2d at 244.

67. *Giroir*, 475 So. 2d at 1045.

68. *Wood*, 524 So. 2d at 244. In *Giroir*, the amended petition by the children was not the same cause of action asserted by different plaintiffs. The wrongful death actions by each child was separate and distinct from the father's claim for wrongful death, Guidry v. Theriot, 377 So. 2d 319, 326 (La. 1979).

69. Id.

70. 439 So. 2d 437 (La. 1983).

71. Id. at 441.

72. 491 So. 2d 474 (La. App. 3d Cir.), writ denied, 494 So. 2d 543 (1986).

petition for medical malpractice was allowed to relate back to an injunction that was filed within the prescriptive period. In allowing this amendment the court stated that "[t]he article deliberately adopts no test of identity of cause or legal theory between the original and amending petition."[73] The *Bertrand* and *Gunter* courts focused on the conduct that gave rise to the two claims and held that it was a factual connexity that was required for relation back and not that the new claims state the same cause of action.[74] There was a sufficient relationship between the plaintiffs in *Wood*[75] to allow the amendment, and it should not have been denied on the basis that the claims were "wholly new and unrelated."

The fourth and last requirement that must be satisfied under the *Giroir* test is that the defendant not be prejudiced by the amendment. It is important to recall that the prejudice considered is the prejudice that the relation back will cause in the preparation and conduction of his defense. The prejudice at issue here is "that the proposed defendant will be deprived of the fair opportunity to obtain evidence before it becomes stale."[76] The *Raziano* court found no prejudice because the trial had been continued and the defendant would have "ample discovery opportunities to prepare for the claim."[77] In *Wood*, the court never addressed the prejudice since it held that the amendment failed on other grounds.

The *Raziano* court did not analyze the prejudice issue in great detail; it simply stated its conclusion[78] based on the fact that the defendant had sufficient time to conduct an investigation. This superficial analysis seems to ignore the essential purpose of prescription—timely notice. The court should have looked not just to the time the defendant had between the request for amendment and the trial, but whether the failure to get notice of the claim had actually impaired the defendant's ability to preserve and collect evidence. Since the *Wood* court did not reach the issue of prejudice, there are few facts from which prejudice may be judged; nonetheless, it will be instructive to analyze the issue. Since the defendant knew of the existence of the mother and that she was authorized by law, to the exclusion of all others, to bring a consortium claim, it would not be unreasonable to hold that the defendant knew of the claim and should have taken steps to protect himself.

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73. Id. at 477-78.

74. Id. at 478.

75. La. Civ. Code art. 2315.

76. Note, supra note 51, at 115.

77. *Raziano*, 520 So. 2d at 1217.

78. Id. This conclusion without any factual analysis is common among courts. Note, supra note 51, at 115.

Evidence relevant to a claim for the loss of consortium would rapidly grow stale. The primary types of losses suffered with a consortium claim often do not leave permanent evidence. Indeed the only sort of evidence available would be interviews of people who knew the plaintiffs well enough to establish whether or not any of the losses claimed actually occurred. This sort of evidence depends on the memory of the people, which likely would fade with the passage of time. In addition to this problem, the inherent mobility of people in today's society may make it difficult to locate persons who knew the plaintiffs well enough to provide relevant evidence on the consortium claim. In sum, allowing the consortium claim after the prescriptive period has run will usually be prejudicial, for witnesses may no longer live in the area, and the ones who are available will be relying on memories that have faded with time.[79] At the very least, a court should conduct some type of inquiry into the availability of evidence before ruling on the prejudice issue. The cursory approach of the *Raziano* court should be rejected.

Another reason the *Raziano* court found a lack of prejudice was that the defendant had received notice of the new claim through the actual wording of the original petition.[80] It is easy to predict that some courts will combine the notice and prejudice elements into one and find that there can be no prejudice if the defendant had been put on notice. The potential argument is that if the defendant knew or should have known of the new claim, then the purpose of prescription has been served, and the defendant who fails to protect himself should not be able to claim the protection of prescription. If the courts adopt this argument, it will effectively eliminate the prejudice element from the *Giroir* test. The courts should instead strive to keep analysis of the notice and prejudice issues separate. The court should first determine if there was notice. If none is found the inquiry ends and the amendment would be denied. But if notice is found the court should then determine if the defendant will be prejudiced in the preparation of his defense.[81] This would allow prejudice to act as a "backstop" to the notice requirement and would allow the courts to broadly interpret the notice element without fear of violating the policies of prescription.[82]

Conclusion

Article 1153 provides a method by which a technically late claim is allowed to relate back to a petition filed within the prescriptive period.

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79. This problem with the lapse of memory over time would be inherent with any type of claim.

80. *Raziano*, 520 So. 2d at 1217.

81. Craig v. United States, 413 F.2d 854, 858 (9th Cir.), cert. denied, 396 U.S. 987, 90 S. Ct. 483 (1969).

82. Note, supra note 51, at 116-17.

The Louisiana Supreme Court in *Giroir v. South Louisiana Medical Center* established a four-step test to determine when a claim will be allowed to relate back under article 1153.

For relation back to occur a court must make two basic findings of fact. There must be a factual connection between the new and the original claims and the defendant must have received notice of the new claim. The *Giroir* test allows a court to conduct a factual inquiry to determine if these two requirements have been met.

In searching for a factual connection the court will have to determine if the new claim arose out of the same transaction or occurrence. If the factual inquiry reveals that this connection has been satisfied then relation back may occur. When a sufficient factual connection is found, a new claim should not be denied simply because it states a new cause of action or demands a different form of relief.

Once a factual connection is found the court should then determine if the defendant received sufficient notice of the new claim to allow relation back. To determine sufficiency of notice the principles of prescription are followed. Prescription statutes protect a defendant from late claims by requiring notice within a specific time so that he will not be prejudiced in the preparation or maintenance of his defense. To allow relation back the court must find that the defendant received such notice, within the original prescriptive period, that he will not be prejudiced in his defense of the new claim. In its analysis the court should make separate inquiries into the notice and prejudice elements.

The *Raziano* and *Wood* courts applied the *Giroir* test to determine if an amended claim for loss of consortium would relate back. Neither court was entirely correct in its application. The *Raziano* decision failed to determine whether there was any real prejudice to the defendant in allowing the new claim to relate back. The court should have made further inquiry into the availability of the evidence and not simply based its decision on the fact that the trial had been continued. The *Wood* court erred by misreading one of the requirements. The test is that the new and old plaintiffs need to be related in such a way that the new *plaintiff* is not wholly new or unrelated, not that the new claim must be wholly new or unrelated. Whether or not a different type of claim will be allowed to relate back will be determined by the factual connexity that the new demand has with the original.

When an amended petition attempts to add a claim for a loss of consortium after the prescriptive period had run, the court needs to examine the claim using the four elements of *Giroir*. With an amended claim for a loss of consortium the first and third steps of the *Giroir* test will usually be present. A new claim for the loss of consortium is based on the negligence of the defendant in injuring the original plaintiff. The very act of negligence that was asserted in the original petition is the basis of the new plaintiff's claim. In an amended petition for a

loss of consortium the new plaintiff is not wholly new or unrelated. The immediate family members of the original victim are authorized by law, to the exclusion of all other persons, to recover in loss of consortium actions.[83]

The potential problems arise when the second and fourth elements are implemented. The courts need to examine the facts closely and decide whether the defendant received actual notice or should have known of the existence and involvement of the new plaintiff within the original prescriptive period. If the notice element is satisfied the court must then determine if the defendant will be prejudiced in the preparation of his case due to the amended petition. If these two elements are satisfied then no protective purpose of prescription will be violated in allowing the new claim for the loss of consortium to relate back.

The chief problem that arises with relation back under article 1153 is an overly technical application by the courts in an attempt to restrict its application.[84] As stated by the court in *Raziano*, the new law on relation back "may appear to many to change some long cherished and well established previous interpretations regarding prescription. Nevertheless, they are certainly the law of the land today, by which we are all bound, and appear to be in step with current trends toward liberalized pleadings to grant greater equitable results."[85] If the lower courts realize that the law of relation back and prescription has changed and that the test as announced in *Giroir* allows for relation back without violating the principles of prescription then Louisiana's procedural system may attain its goal that substantive law, not pleading technicality, should determine litigation.[86]

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83. La. Civ. Code arts. 2315 and 2315.1.
84. Tate, supra note 9, at 236.
85. *Raziano*, 520 So. 2d at 1217.
86. Tate, supra note 9, at 240.