The executrix alleges that a sale is desirable because the conditional life tenant, Slayton, is younger than the testator's children; that the sale would provide prompt and certain receipt of funds and permit prompt distribution of the estate. The very fact of Slayton's age raises the distinct possibility that some of testator's children may predecease her should she fulfill all of the conditions and continue to live in the home until her death.

The court has a duty to the unascertaineed remaindermen and it is not clear that it would be in their best interest to approve this sale. The court also has a duty to uphold the testator's intentions which are clearly not to sell the property and give 40% of the proceeds to Slayton. *Lifter Estate,* 377 Pa. 227, 103 A.2d 670 (1954). Slayton does not have a life tenancy which is alienable. She is given the right to reside in the residence upon certain conditions. Should she not violate those conditions, she may stay there for her lifetime. What is proposed here is a direct violation of those conditions. If the property is sold, she moves out and her interest is defeated. The interest she has is not alienable and she would not be entitled to any of the proceeds from the sale. *Sinnott's Estate,* 53 Pa. Super 383, (1913). *McMaster's v. Shellito,* 14 Pa. Super 302 (1900). To approve such a sale which would give Slayton 40% when she would be entitled to nothing is not in the best interests of the remaindermen, ascertained and unascertained.

The estate alleges that the unborn issue are not a bar to such a sale because the only requirement is that a trustee ad litem be appointed. Clearly, a trustee ad litem is appointed for a reason: to protect the interests of such unborn issue. In this case, the trustee ad litem has been appointed and opposes such sale as not being in their best interests. Moreover, certain of the decedent's children have appeared and object to the sale. Their choice may be a risky one; that is that they may never come into any part of the inheritance because Slayton may survive one or all of them. But that is their decision to make and the court respects it.

The estate contends that the sale is desirable since in the event of nonpayment or default on the mortgage by Slayton, the estate would be liable for the remaining mortgage payments. Even if this were the case, this argument is not so weighty as to convince the court that a sale would be in the best interests of the unborn issue or the protesting remaindermen.

Accordingly this court declines to approve the agreement between Slayton and Strait.

ORDER OF COURT

February 28, 1983, the prayer of the petition to approve the sale is denied. Costs including the guardian ad litem's fee shall be paid by the estate. The guardian shall submit his fee for approval before it is taxed.

SANDERS V. CARBAUGH, C.P., Franklin County Branch, No. 1982 - 175

Trespass - Amended Complaint - Statute of Limitations

1. The general rule is that a plaintiff may not amend a complaint to introduce a new cause of action after the statute of limitations has run.

2. A new cause of action is alleged where the same defense is not open to each, the same proof is not required and the measure of damages are not the same.

3. Averments alleging ordinary negligence may not be amended after the statute of limitations has run in order to allege negligence per se.

John N. Keller, Esquire, Counsel for the Plaintiff

William F. Martson, Esquire, Counsel for the Defendant

OPINION AND ORDER

EPPINGER, P.J., March 3, 1983:

Bryan A. Sanders was injured in a one-car collision which occurred on September 21, 1980. The complaint alleging that Carbaugh, the driver, was careless and negligent, was filed on August 23, 1982 within the two-year statute of limitations. 42 Pa. C.S.A. Sec. 5524(2). On December 22, 1982, Sanders filed a petition for leave to amend the complaint to add allegations of negligence by reason of violations of specific sections 3361, 3301 and 3714 of the Vehicle Code, 75 Pa. C.S.A. and further damages.

The general rule is that a plaintiff may not amend a complaint to introduce a new cause of action after the statute of limitations has run. *Mussolino v. Coxe Bros. and Co., Inc.,* 357 Pa. 10, 53 A.2d 93 (1947). A new cause of action is alleged where the same defense is not open to each, the same proof is not required and the measure of damages are not the same. *Arlia v. Philadelphia Transportation Company (No. 1),* 77 D&C 21 (1951).

Citing 3 Standard Pa. Practice 613, Sec. 20 the Court said:

> One test to be applied to the question whether an amended statement (complaint) presents a new and different cause of action is whether a judgment would bar any further action on either, whether the same measure of damages supports both, whether the same defense is open to each and whether the same measure of proof is required.

The Court also cited *Hertz v. Pennsylvania R.R.*, 302 Pa. 324, 153 A. 686 (1950) where the original complaint alleged willful and wanton negligence, and the plaintiff wanted to amend to include ordinary negligence, and the Supreme Court affirmed the lower court's refusal to grant the amendment saying the amendment would be to introduce a new cause of action. The measure of liability on the part of the defendant is entirely different in one case than in the other.

In this case of the amendments the plaintiff requests is permission to change negligence averments to averments of negligence per se. Ordinary negligence is want of due care under the circumstances. *Philadelphia, W. & B. R. Co. v. Layer,* 112 Pa. 414, 3 A. 874 (1886). Negligence per se may be declared without any argument or proof as to the particular surrounding circumstances, in this case because of the violation of a statute. *Ridley v. Boyer,* 87 Dauph. 81, affd. 426 Pa. 28, 231 A.2d 307 (1967).

The defendant's statements of damages in paragraphs 15, 16, 17, 18, 19 and 20 of the proposed amended complaint are but a more complete statement of the allegations of paragraph 11 and 12 of the complaint and do not change the cause of action and will be allowed.

ORDER OF COURT

March 3, 1983, the petition for leave to amend the complaint as to paragraphs 15, 16, 17, 18, 19, 20 are granted and as to paragraph 14 is denied.