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## Wrongful Death - Effect of Limitation Statute - Accrual of Cause of Action

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under one set of circumstances may not be reasonable under another. Thus, disputes would be promoted and the result would be an increase in litigation. Therefore, if there is to be any revision of the rule it should be by legislative action. The common law rule against perpetuities, without material alteration, is in force in about two-thirds of the states.<sup>9</sup> California has adopted by statute the rule already in existence by virtue of a constitutional provision.<sup>10</sup> North Dakota has no statute against perpetuities, although there are statutory restraints on alienation. There was some indication in *In re Gray's Estate*<sup>11</sup> that the law in North Dakota included a rule against remoteness in vesting; however, since the decision in *Anderson v. Blixt*,<sup>12</sup> it is certain that no such rule exists here.

JAKE C. HODNY

**WRONGFUL DEATH — EFFECT OF LIMITATION STATUTE — ACCRUAL OF CAUSE OF ACTION.** — In 1954 defendant forced plaintiff's car off the highway killing plaintiff's wife and child. Defendant did not stop at the scene of the accident, nor did he report the incident to authorities as required by statute.<sup>1</sup> Plaintiff learned defendant's identity in 1956 and filed suit the same year. Defendant pleaded the one year statute of limitations<sup>2</sup> for wrongful death actions. The Supreme Court of Missouri *held* that the cause of action accrued at the time of the death and was not tolled under the general statutory provisions for fraudulent concealment or other improper acts.<sup>3</sup> *Fraze v. Partney*, 314 S.W.2d 915 (Mo. 1958).

A cause of action for wrongful death is a statutory creation having its origin in England in 1846.<sup>4</sup> The first wrongful death statute in the United States was passed by New York in 1847,<sup>5</sup> and we now have similar enactments in all the states.<sup>6</sup>

Every state has a time limitation for commencing action for wrongful death,

9. Smith, *Real Property Survey*, c. 9 h (10) (1956).

10. *Victory Oil Co. v. Hancock Oil Co.*, 125 Cal. App.2d 222, 270 P.2d 604 (1954) (Section 715.2 of the Civil Code, provides as follows: "No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies . . .").

11. 27 N.D. 417, 146 N.W. 722 (1914).

12. 72 N.W.2d 799 (N.D. 1955) (The lease involved agricultural land with an option to purchase, and was to continue as long as any one of the lessors was alive or until the option was exercised. It was contended that § 47-1602 of the N. Dak. Rev. Code (1943) was a rule against perpetuities, therefore the lease was invalid. The court held that there was no statutory or common law rule against perpetuities in force in North Dakota.).

1. Mo. Rev. Stat. § 564.450 (1949) (Provides no person involved in an accident while operating a vehicle on a highway shall leave scene without stopping and giving personal information to injured party or police officer.).

2. Mo. Rev. Stat. § 537.100 (1949) ("Every action . . . shall be commenced within one year after the cause of action shall accrue . . .").

3. Mo. Rev. Stat. § 516.280 (1949) ("If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented.").

4. Lord Campbell's Act 9 & 10 Vict. c. 93 (1846).

5. N. Y. Sess. Laws 1847, c. 450, §§ 1 & 2. See also *Salsedo v. Palmer*, 278 Fed. 92 (2d Cir. 1921).

6. 11 Blashfield, *Cyc. Auto Law & Pr.* § 7412 (Perm. ed. 1936).

varying from one to six years.<sup>7</sup> No states were found that specifically provided for a tolling of the time limitation where a defendant concealed his identity. Therefore the question in cases such as the instant one is whether wrongful death statutes are tolled under provisions for tolling the general statute of limitations.

The majority of states and the federal courts hold that circumstances which toll the general statute of limitations, either expressly or by implication, will not toll the limitations period in a wrongful death statute, in the absence of a savings clause to that effect.<sup>8</sup> These courts reason that a provision relating to the time an action must be commenced constitutes a part of the substance of the right to maintain such action.<sup>9</sup> The minority view holds that the provision in the statute is a limitation upon the remedy and not upon the right to the action.<sup>10</sup>

Where a statute requires a motorist involved in an accident to make a report to a public agency, there is further split of authority. While decisions are not numerous, they appear to be resonant in holding that such a statute dispenses with any other efforts required on the part of a deceased party's administrator to discover a tortfeasor in regards to the expiration of a time limitation period for wrongful death actions.<sup>11</sup> The basis for this reasoning is that a statute to give notice is enacted to provide opportunities to seek compensation.<sup>12</sup> Therefore, the time period does not begin to run until the defendant's identity is discovered.<sup>13</sup>

The decision in the instant case stated that the court was forced to construe the "cold, clear words" of the statute, whereby in the absence of a special tolling provision to the wrongful death statute, tolling provisions to the general statute of limitations could not apply; any future remedy would be legislative, not judicial. It is questionable that the legislative intent was for such a strict construction when they also provided that a motorist leaving the scene of an accident in which he is involved without reporting information about himself to the other party or authorities, is guilty of a felony.<sup>14</sup>

7. *Ibid.* (Fourteen states have enacted statutes providing actions for wrongful death must be commenced within one year; twenty-eight have two year provisions; four have three year provisions; and two have six year provisions.).

8. *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921). See, e.g., *The Harrisburg*, 119 U.S. 199 (1886); *Peters v. Public Service Corp.*, 132 N.J. Eq. 500, 29 A.2d 189 (1942). The *Peters* case upheld the rule that commencement of an action was an indispensable condition of liability, but held that equity will not permit defendant to take advantage of the bar where defendant's wrongful conduct causes plaintiff to delay subjecting his claim to the bar.

9. See, e.g., *The Harrisburg*, 119 U.S. 199 (1886); *Rodman v. Missouri Pac. Ry.*, 65 Kan. 645, 70 Pac. 642 (1902); *Poff v. New England Tel. & Tel. Co.*, 72 N. H. 164, 55 Atl. 891 (1903); *Lapsley v. Public Service Corp.*, 75 N.J.L. 480, 68 Atl. 1113 (1908).

10. *McDonough v. Cestare*, 3 App. Div.2d 201, 159 N.Y.S.2d 616 (1957); *Sharrow v. Inland Lines Ltd.*, 214 N. Y. 101, 108 N.E. 217 (1915); *Brookshire v. Burkhart*, 141 Okla. 1, 283 Pac. 571 (1929); *Rosenzweig v. Heller*, 302 Pa. 279, 153 Atl. 346 (1931). The *Sharrow* case decision was the initiate standing for the proposition that the period of limitation governing wrongful death action in New York is in the nature of a general statute of limitations.

11. *Kurry v. Frost*, 214 Ark. 386, 162 S.W.2d 48 (1942); *St. Clair v. Bardstown Transfer Line*, 310 Ky. 776, 221 S.W.2d 679 (1949).

12. *St. Clair v. Bardstown Transfer Line*, *supra* note 11.

13. *Ibid.*

14. Mo. Rev. Stat. §§ 564.450, 564.460 (1949); *Hurley v. Edison*, 258 S.W.2d 607 (Mo. 1953). Cf. N. D. Rev. Code §§ 39-0610, 39-0624 (1943) (Provides revocation or suspension of license and that the offense is a misdemeanor).

No cases have been found wherein the North Dakota Supreme Court has ruled on the question in the instant case. Our courts have indicated that our wrongful death statute must be strictly construed,<sup>15</sup> but Section 1-0201 of the 1943 Revised Code states: "The rule of the common law that statutes in derogation thereof are to be construed strictly has no application to this code." On the foundation provided by this statute and in the public interest, it is believed that an identity concealing defendant should not be allowed to benefit by pleading the time limitation for a wrongful death action.

LAWRENCE NACATOMO.

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15. Willard v. Mohn, 24 N. D. 390, 139 N.W. 979 (1913).