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Limitations of Actions - Fraudulent Concealment of Actions - Implied Exceptiion to Statute of Limitations

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loss himself or spreading the risk via insurance.[4] The justification for imposing liability upon tavern operators is that the right to engage in the liquor business is not absolute, but is a privilege granted by the state.[5] Thus the privilege can be encumbered with vicarious liability.[6]

It would appear that a party suing under the provisions of such acts has stated a good cause of action if the following elements are shown: (1) intoxication of the party causing the damage as the result of defendant-vendor's sale of intoxicating liquor; (2) damage or injury to plaintiff's person, property, or means of support; and (3) noncomplicity of plaintiff in procuring such intoxicants for the party causing damage as shown by the instant case.[7]

North Dakota's Civil Damage Act[8] is similar to acts in other jurisdictions. Contrary to the statutory rule[9] in North Dakota, the Supreme Court of this state has held that cases arising under such acts are sui generis and that the only condition necessary for the award of exemplary damages is that a right to actual damages be shown.[10] It should be noted, however, that in North Dakota before liability attaches to the dram shop operators, they must have dispensed intoxicants in violation of the laws pertaining to the sale, licensing, and manufacturing of alcoholic beverages.[11] Hence, it is not sufficient to show merely the three elements to a cause of action as mentioned above. By incorporating such a provision into the act, the legislature has wisely obviated the inequality which exists in holding a dram shop operator liable without regard to any violation of a statutory *duty*.

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LIMITATIONS OF ACTIONS – FRAUDULENT CONCEALMENT OF ACTIONS – IMPLIED EXCEPTION TO STATUTE OF LIMITATIONS. – In September of 1932, the defendant, a physician, performed surgery on the plaintiff, and negligently failed to remove a portion of a surgical needle from the plaintiff's back. Although plaintiff consulted numerous doctors between September of 1932 and May of 1953, the needle was not discovered until the latter date. Plaintiff

4. See 51 Nw. U. L. Rev. 775 (1957).
5. See McQuillin, Municipal Corporations §§ 24.159—161 (3d ed. 1949).
6. See Hill v. Alexander, 321 Ill. App. 406, 53 N.E.2d 307 (1944); Hyba v. C. A. Horneman Inc., 302 Ill. App. 143, 23 N.E.2d 564 (1939).
7. Krotzer v. Drinka, 344 Ill. App. 256, 100 N.E.2d 518 (1951).
8. N. D. Rev. Code § 5-0121 (1943) "Recovery of Damages for Illegal Sale of Liquor: Every wife, child, parent, guardian, employer or other person who shall be injured in person, property, or means of support by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her own name, against any person who, by selling, bartering or *giving* away alcoholic beverages contrary to the provisions of this title, shall have caused the intoxication of such person, for all damages actually sustained as well as for exemplary damages . . ."
9. N. D. Rev. Code § 32-0307 (1943) "In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant."
10. Iszler v. Jorda, 80 N.W.2d 665 (N.D. 1957), *citing* Thill v. Pohlman, 76 Iowa 638, 41 N.W. 385 (1889); Scahill v. Aetna Indemnity Co., 157 Mich. 310, 122 N.W. 78 (1909).
11. N. D. Rev. Code §§ 5-01—03 (Supp. 1957), §§ 5-04—06 (1943); see also Sutherland, Statutory Construction § 5208 (3d ed. 1943). "A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted."

sued for malpractice and the defendant pleaded the statute of limitations. The Supreme Court of South Dakota, two justices dissenting, *held* that fraudulent concealment of a cause of action is an implied exception to the statute of limitations. *Hinkle v. Hargens*, 81 N.W.2d 888 (S.D. 1957).

As a general rule the statute of limitations commences to run upon a cause of action for tort from the time the duty owing to the plaintiff is breached by the wrongful or negligent act of the defendant.[1] However, should the defendant fraudulently conceal from the plaintiff the existence of facts constituting the cause of action, the statute of limitations will not begin to run until the plaintiff discovers, or should have discovered through ordinary diligence, the existence of the cause of action.[2] Ordinarily, there must be some affirmative act or representation made by the defendant intended to prevent discovery of the existence of the cause of action.[3] However, if there exists between the parties a fiduciary relationship, mere silence as to facts which might affect the plaintiff's interests is fraudulent concealment.[4] Courts have held that the relationship between a physician and patient is fiduciary.[5]

Prior to the instant case, South Dakota followed the common law rule which allowed fraudulent concealment to toll the statute of limitations only in courts of equity, where fraud was the basis of the action.[6] The Court, in implying an exception, avoided the express provisions of the statute. The dissenting opinion condemns this usurpation of the legislative function on the grounds that a statute of limitations is "unyielding and inflexible", and as such should not and can not legally be avoided.[7]

Many states,[8] including North Dakota,[9] have solved this problem by enacting statutes of limitations which expressly provide for an exception in cases of fraudulent concealment of the cause of action. This removes the problem from the hands of the courts and provides a clear and concise solution.

In absence of statute, the implied exception to the statute of limitations is a necessary and reasonable means of protecting those persons from whom a cause of action is concealed till the running of the statute. The courts must be on guard, however, to prevent application of the doctrine where there is no conclusive proof of the defendant's knowledge of the negligent act. In the instant case, fraudulent concealment seems to be a harsh term to apply

1. Archer v. Huntington Nat'l. Bank, 92 Ohio App. 229, 109 N.E.2d 677 (1952); Linkenhoger v. American Fidelity & Cas. Co., 152 Tex. 534, 260 S.W.2d 884 (1953).

2. Neff v. New York Life Ins. Co., 30 Cal.2d 165, 168 P.2d 423 (1946); St. Clair v. Bardstown Transfer Line, 310 Ky. 776, 221 S.W.2d 679 (1949).

3. Stetson v. French, 321 Mass. 195, 72 N.E.2d 410 (1947).

4. Beatty v. Armstrong, 247 Iowa 302, 73 N.W.2d 719 (1955); See also Bowman v. McPheeters, 77 Cal. App. 2d 795, 176 P.2d 745 (1947) (The California courts, while reaching the same result as the instant case, base their decision on the theory of estoppel. The defendant is estopped from pleading the statute of limitations where he has fraudulently concealed the cause of action. The defendant will not be allowed to benefit from his wrong). *Contra*, Draws v. Levin, 332 Mich. 447, 52 N.W.2d 180 (1952) (A malpractice case, Fraudulent concealment means employment of artifice to prevent inquiry and hinder acquirement of a right of action).

5. Bowman v. McPheeters, 77 Cal. App. 2d 795, 176 P.2d 745 (1947); Breedlove v. Aiken, 85 Ga. App. 719, 70 S.E.2d 85 (1952).

6. S. D. Code § 33.1232 (6) (c). Schindler v. Spackman, 16 F.2d 45 (8th Cir. 1926).

7. Hinkle v. Hargens, 81 N.W.2d 888, 890 (S.D. 1957) (Dissent); Lipp v. Corson County, 66 S.D. 270, 78 N.W.2d 172 (1956); Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

8. Ill. Ann. Stat. c. 83 § 23 (1954); Mich. Laws c. 9 § 609.20 (1948); Minn. Ann. Stat. § 541.05 (6); Miss. Code Ann. § 742 (1942).

9. N. D. Rev. Code § 28-0124 (1943).

to defendant's "silence" when it was not shown he knew, or could reasonably have been expected to know, of the facts from which the plaintiff's cause of action grew. By the very nature of his profession a physician must be held to a high degree of care, but the law cannot consider him as superhuman and omnipotent. Public policy considerations justifiably dictate many decisions, but care must be exercised lest logic suffer to an unreasonable degree.

SHANNON MAHONEY.

SET-OFF AND COUNTERCLAIM — EFFECT OF FAILURE TO ASSERT OR CLAIM — IDENTITY OF PARTIES UNDER COMPULSORY COUNTERCLAIM RULE. — Plaintiff brought an action against defendant as the administratrix of an estate. Previously, defendant, in her personal capacity, had recovered a judgment against plaintiff for injuries arising out of the same incident. Defendant contended that her recovery of a judgment was res judicata to the plaintiff's claim under Rule 97 (a) of the Texas Rules of Civil Procedure which provides for compulsory counterclaims.[1] The Court of Civil Appeals of Texas *held* that the compulsory counterclaim rule did not apply since the defendant had sued as an individual and the plaintiff had no cause of action against her, while in this action she was sued in her capacity as administratrix with the result that the plaintiff was not bringing his action against her, but against the estate — a different party — and the issue was not res judicata as contended. *Robertson v. Estate of Melton,* 306 S.W.2d 811 (Texas 1957).

A counterclaim is a cause of action in itself and seeks affirmative relief, while a defense merely defeats the plaintiff's claim.[2] It meets the plaintiff's claim by opposing to it a demand on the part of the defendant to the end that a complete determination of the right to and amount of recovery may be had in the same action. It represents the defendant's right to have the claims of the parties counterbalanced in whole or in part, judgment to be entered for the excess, if any.[3]

Where the parties are not the same in both actions, it has been held that the failure to assert a counterclaim under Federal Rule 13 (a)[4] in the prior action did not preclude assertion of the claim in a separate and subsequent action. In a case similar to the principal case, the plaintiff, as administrator, brought an action to recover for the wrongful death of his intestate alleged to have been caused by the negligence of the defendant. The plaintiff in a later action sought to recover as representative of the beneficiaries, where in the former action he had been acting on behalf of the creditors. The court pointed out that for the purpose of res judicata the administrator in acting on behalf of the beneficiaries was not, under the death statute, the same person

1. Texas Rule 97 (a) is substantially the same as Rule 13 (a) of the North Dakota Rules of Civil Procedure which provides: "COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurance that is the subject matter of the opposing parties' claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

2. Secor v. Siver, 165 Iowa 673, 146 N.W. 845 (1914).

3. Olsen v. McMaken & Pentzien, 139 Neb. 506, 297 N.W. 830 (1941).

4. Texas Rule 97 (a) and Federal Rule 13 (a) both deal with compulsory counterclaim.