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COMPUTING TIME IN TORT STATUTES OF LIMITATION

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I. Introduction

At common law there were no time limitations placed upon the commencement of actions, and consequently there was no loss or default of a cause of action resulting from the mere lapse of time.¹ Instead of a time limitation the common law developed what was known as a plea of limitation. These pleas were premised on the theory that failure to assert one's rights within a substantial period of time raised the presumption that any obligation of the defendant had been paid or discharged.²

Modern statutes of limitation were developed to replace the various fictional limitations existing at common law. They were designed basically to insure prompt litigation of valid claims and to protect defendants from fraudulent or stale claims.³ The current Wisconsin statutes of limitation reflect the legislative policy of balancing between the needs of plaintiffs to have sufficient time to ascertain and commence their claims and the interest of defendants in not having to defend stale claims.⁴ The Wisconsin statutes of limitation do away with the old common-law rule that lapse of time raises a pre-

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1. *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

2. *Pritchard v. Howell*, 1 Wis. 118 (1853). *Pritchard* provides a good discussion of the theory of limitation at common law and how modern statutes of limitation contravene that theory.

3. *Armes v. Kenosha County*, 81 Wis. 2d 309, 319-20, 260 N.W.2d 515, 519-20 (1977).

4. *Peterson v. Roloff*, 57 Wis. 2d 1, 6, 203 N.W.2d 699, 702 (1973).

sumption that payment has been made. Under current law, the failure to comply with a statute of limitations extinguishes the right as well as the remedy of an injured party.⁵

II. WHEN THE STATUTE BEGINS TO RUN

In all tort actions, the initial inquiry in computing the period of limitation is, when does the statute begin to run? In Wisconsin the pertinent statutory language provides: "Unless otherwise specifically prescribed by law, a period of limitation within which an action may be commenced is computed from the time that the cause of action accrues until the action is commenced."⁶ Under the terms of section 893.04 the statute begins to run when the cause of action accrues, but the legislature has neglected to define the word "accrued."

The Wisconsin Supreme Court has stated that a cause of action accrues when " 'there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it.' "⁷ Despite the simplicity of the rule the courts have found some difficulty in its application to tort actions. There exist three possible points in time where the court could find that a claimant's cause of action has accrued: (1) the time of the negligent act or omission, (2) the time of the injury to plaintiff, and (3) the time when the plaintiff discovers his injury.⁸ Of these three points in time, the Wisconsin court has ruled that a cause of action in negligence does not accrue unless and until the negligent act causes injury.⁹ This rule has found general support. Prosser states that the cause of action ordinarily does not accrue until some damage has been done.¹⁰ The rationale for the adoption of time of injury as the point of accrual was supplied

5. *Pulchinski v. Strnad*, 88 Wis. 2d 423, 276 N.W.2d 781 (1979); *Haase v. Sawicki*, 20 Wis. 2d 308, 121 N.W.2d 876 (1963). See also WIS. STAT. § 893.05 (1979).

6. WIS. STAT. § 893.04 (1979).

7. *Crawford v. Shepherd*, 86 Wis. 2d 362, 365-66, 272 N.W.2d 401, 402 (1978).

8. *Holifield v. Setco Industries, Inc.*, 42 Wis. 2d 750, 759, 168 N.W.2d 177, 182 (1969).

9. 86 Wis. 2d at 366, 272 N.W.2d at 402; *Olson v. St. Croix Valley Memorial Hosp.*, 55 Wis. 2d 628, 635, 201 N.W.2d 63, 64 (1972).

10. W. PROSSER, *LAW OF TORTS* § 30, at 144 (4th ed. 1975). See also *Rosenthal v. Kurtz*, 62 Wis. 2d 1, 213 N.W.2d 741 (1974), wherein the court addressed the issue of when a cause of action accrues in an injury to property action. The court, relying on Prosser, held that the date of injury is the relevant date for accrual.

by the Wisconsin Supreme Court in *Holifield v. Setco Industries*:¹¹

It is the fact and date of injury that sets in force and operation the factors that create and establish the basis for a claim of damages. It is true that, without an act of negligence, no claim for damages based on negligence can arise. It is likewise true that, without the result of injury, no claim for damages based on negligence can be asserted, or at least successfully asserted. Both the act of negligence and the fact of resultant injury must take place before a cause of action founded on negligence can be said to have accrued.

Thus, for a cause of action to accrue there must be a negligent act or omission, causation, and injury.¹²

In the most common types of personal injury actions, *e.g.*, slip and fall or automobile accidents, the injury is usually coincidental with the negligent act, and there is little difficulty in determining when the statutory time commences. In *Schultz v. Vick*,¹³ the court was confronted with a statute of limitations defense in an automobile collision case. In dismissing the plaintiff's cause of action, the court stated that the cause of action arose when the collision took place since it was at that point in time that the substantive rights of the parties came into being.¹⁴ Consequently, in these common types of cases there is little problem in determining when the cause of action accrues because the negligent act and accompanying injury usually manifest themselves at the same time.

A. *Medical Malpractice*

In comparison to automobile collisions, medical malpractice and product liability cases present a more difficult problem in determining when the cause of action accrues. In these cases the date of injury may not, and often does not, coincide with the date of the negligent act.

In medical malpractice actions, the Wisconsin court has long embraced the traditional rule that a cause of action for personal injuries due to medical malpractice accrues at the

11. 42 Wis. 2d 750, 756, 168 N.W.2d 177, 180 (1969).

12. *Peterson v. Roloff*, 57 Wis. 2d 1, 4, 203 N.W.2d 699, 700-01 (1973).

13. 10 Wis. 2d 171, 102 N.W.2d 272 (1960).

14. *Id.* at 174-75, 102 N.W.2d at 274.

time the negligent act occurs with accompanying injury.¹⁵ This means that for the purpose of statute of limitations computations the injury occurs at the time of the negligent act.¹⁶ Application of this rule has met with criticism in cases where it was virtually impossible for the claimant to ascertain the injury at the time of the negligent act, *e.g.*, where a foreign object is left in the body during surgery. The Wisconsin court had staunchly refused to adopt the so-called discovery rule, stating that any change in the statute of limitations is peculiarly a question of policy which should be left to the legislature.¹⁷ The Wisconsin Legislature has recently created a separate statute for medical malpractice actions and thus has taken some medical malpractice actions out of the purview of the general three-year personal injury statute.¹⁸

The new section provides as follows:

893.55 Limitation of actions; medical malpractice.

(1) Except as provided by subs. (2) and (3), an action to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider, regardless of the theory on which the action is based, shall be commenced within the later of:

- (a) Three years from the date of the injury, or
- (b) One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.

(2) If a health care provider conceals from a patient a prior act or omission of the provider which has resulted in injury to the patient, an action shall be commenced within one year from the date the patient discovers the concealment or, in the exercise of reasonable diligence, should have discov-

15. *Rod v. Farrell*, 96 Wis. 2d 349, 352, 291 N.W.2d 568, 569 (1980); *Peterson v. Roloff*, 57 Wis. 2d 1, 4, 203 N.W.2d 699, 700-01 (1973).

16. *Olson v. St. Croix Hosp.*, 55 Wis. 2d 628, 201 N.W.2d 63 (1972).

17. *Rod v. Farrell*, 96 Wis. 2d 349, 291 N.W.2d 568 (1980); *Peterson v. Roloff*, 57 Wis. 2d at 5-6, 203 N.W.2d at 702 (1973); *Reistad v. Manz*, 11 Wis. 2d 155, 105 N.W.2d 324 (1960).

18. Wis. STAT. § 893.54 (1979), which reads as follows:

Injury to the person. The following actions shall be commenced within 3 years or be barred:

- (1) An action to recover damages for injuries to the person.

...

ered the concealment or within the time limitation provided by sub. (1), whichever is later.

(3) When a foreign object which has no therapeutic or diagnostic purpose or effect has been left in a patient's body, an action shall be commenced within one year after the patient is aware or, in the exercise of reasonable care, should have been aware of the presence of the object or within the time limitation provided by sub. (1), whichever is later.¹⁹

Under subsection (a) of section 893.55 the claimant had three years from the date of the injury to commence an action. Under this subsection the traditional rule that the date of negligence is the date of injury would be applicable. Subsection (b) adopts a limited version of the discovery rule indicating that the statute of limitations begins to run when the plaintiff is aware or should be aware of the injury as long as it is commenced within five years of the negligent act. For example, if the malpractice occurred on April 1, 1980, and if the injury was not discovered until September 1, 1983, the claimant would have one year from September 1, 1983, to commence an action. However, if the injury was not discovered until September 1, 1985, then the claimant's action would be barred.

Subsection (2) of 893.55 allows for the tolling of the statute of limitations if a health care provider conceals an injury from a patient. An action can be brought within one year of the discovery of such concealment.

Subsection (3) of 893.55 deals with foreign objects left in the patient's body and adopts a pure discovery rule for cases where a foreign object of non-therapeutic value has been left in the patient's body. Under section 893.55(3) the cause of action accrues when the plaintiff discovers or should have discovered the injury.²⁰ For example, a sponge is left in plaintiff's body on January 1, 1980, and it is discovered on August 1, 1985. The plaintiff will have one year from August 1, 1985, to commence the action, provided plaintiff, in the exercise of

19. WIS. STAT. § 893.55 was created by 1979 Wis. Laws, ch. 323, effective July 1, 1980.

20. This is contrary to the traditional rule in Wisconsin that the cause of action accrues at the time of the negligent act, which is considered the point of injury. Section 893.55(3) changes the point of accrual from the date of injury to the date of the discovery of the injury.

reasonable care, would not have discovered it earlier.

In applying section 893.55 the practitioner will face two major problems. First, application of section 893.55 is limited to those individuals falling within the definition of "health care provider." The term "health care provider" is defined in section 655.001(a), which is the definitional section for the medical malpractice panels.²¹ The definition excludes such common health providers as dentists, chiropractors, governmental health facilities, and others. Hence, the limited discovery rule of subsections (1)(b) and (3) would not be applicable to individuals or entities not falling within the statutory definition of a health care provider. In actions involving those not included within section 655.001(a)(8) the traditional limitation of three years from date of injury would apply.

Secondly, under subsections (1)(b) and (3) the claimant is held to a reasonable person standard in regard to his failure to discover the cause of the injury, concealment of the health care provider's negligence, or presence of a foreign object. Such a standard necessitates a factual determination of whether the length of time it took claimant to discover the injury was reasonable.²² This probably means that more cases will have to proceed to trial before a determination can be

21. WIS. STAT. § 655.001 provides:

(8) "Health care provider" means a medical or osteopathic physician or podiatrist licensed under ch. 448; a nurse anesthetist licensed or registered under ch. 441; a partnership comprised of such physicians; podiatrists or nurse anesthetists; a corporation owned by such physicians, podiatrists or nurse anesthetists and operated for the purposes of providing medical services; an operational cooperative sickness care plan organized under ss. 185.981 to 185.985 which directly provides services through salaried employees in its own facility; a hospital as defined by s. 50.33(1)(a) and (c); or a nursing home as defined as s. 50.01(3) whose operations are combined as a single entity with a hospital subject to this section, whether or not the nursing home operations are physically separate from hospital operations. It excludes any state, county or municipal employee or federal employee covered under the federal tort claims act, as amended, who is acting within the scope of employment, and any facility exempted by s. 50.39(3) or operated by any governmental agency, but any state, county or municipal employee or facility so excluded who would otherwise be included in this definition may petition in writing to be afforded the coverage provided by this chapter and upon filing the petition with the commissioner and paying the fee required under s. 655.27(3) will be subject to this chapter.

22. Tallmadge v. Skyline Constr., Inc., 86 Wis. 2d 356, 272 N.W.2d 404 (1978).

made as to whether the statute of limitations has run. This appears to contravene the original intent of the statute of limitations to protect defendants from the bringing of stale claims,²³ *i.e.*, to keep defendant from having to go to court. The issue of whether the legislature intended to create the "reasonable person" standard, similar to the defense of contributory negligence, or some other standard of reasonableness will have to await further litigation.

B. Product Liability

Another problem area in determining when a cause of action accrues involves product liability actions. In applying the general rule that a personal injury action does not accrue until the plaintiff suffers an injury, the courts have left manufacturers liable for damages which could occur an infinite number of years after the date of initial manufacture. For example, a machine was manufactured in 1960, and in 1981 a person was injured using the machine. The statute does not begin to run until the injury in 1981, more than twenty years after the initial manufacture. The Wisconsin Supreme Court continues to hold that a personal injury action based on a defective product accrues at the date of injury, without any limit being placed on how long a period after manufacture the injury may occur in order for there to be recovery.²⁴ In *Holifield v. Setco Industries*,²⁵ Justice Hansen concluded that a cause of action based upon the elements in *Dippel*²⁶ did not accrue until someone had been injured. He reasoned that without the resulting injury no claim for damages based on negligence can be asserted. Both the act of negligence and the fact of injury must take place before the cause of action can be said to have accrued. Since strict products liability in Wisconsin is akin to negligence *per se*, both the act and the injury must result before a cause of action can accrue.

The recent revisions of Chapter 893 do not make any changes as to product cases. Legislation is currently pending in the 1981 legislature which would change the rule, if passed

23. *Denzer v. Rouse*, 48 Wis. 2d 528, 180 N.W.2d 521 (1976).

24. *Holifield v. Setco Industries, Inc.*, 42 Wis. 2d 750, 168 N.W.2d 177 (1968).

25. *Id.*

26. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

by the legislature and approved by the governor.²⁷

C. Real or Personal Property

In actions involving injury to real or personal property the applicable statute is section 893.52:

893.52 Action for damages for injury to property.

An action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within six years after the cause of action accrues or be barred, except in the case where a different period is expressly prescribed.²⁸

As in personal injury actions, the Wisconsin court has determined that actions for damage to property accrue when the injury occurs.²⁹ However, controversy may arise as to when the property damage is of sufficient magnitude so as to cause an action to accrue. In *Tallmadge v. Skyline Construction, Inc.*,³⁰ the Wisconsin court was confronted with this question and held that there is sufficient injury to start the running of the statute of limitations "when the evidence of injury to property . . . is sufficiently significant to alert the injured party to the possibility of a defect."³¹ The court added that "[t]he injury need not, however, be of such magnitude as to identify the causal factor."³² This is a curious statement. If the party is unaware of the cause of his injuries how can he determine against whom to commence the action? Moreover, the Wisconsin court has defined an accrual of a cause of action as requiring that there be " 'a suable party against whom [the claim] may be enforced.' "³³ Therefore, it appears that the above statement in *Tallmadge* is either inconsistent with

27. See, e.g., Wis. A.B. 415 (1981 Sess.); Wis. S.B. 305, 345 (1981 Sess.).

28. Wis. STAT. § 893.52 (1979).

29. *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis. 2d 314, 291 N.W.2d 825 (1980); *Tallmadge v. Skyline Constr., Inc.*, 86 Wis. 2d 356, 272 N.W.2d 404 (1978).

30. *Tallmadge v. Skyline Constr., Inc.*, 86 Wis. 2d 356, 272 N.W.2d 404 (1978). In *Tallmadge* the plaintiff brought suit against the defendant for negligent planning and construction of a twenty-four unit apartment. The trial court granted defendant's motion for summary judgment since it found that the action had not been commenced until more than six years after the action accrued.

31. *Id.* at 359, 272 N.W.2d at 405.

32. *Id.*

33. *Crawford v. Shepherd*, 86 Wis. 2d 362, 365-66, 272 N.W.2d 401, 402 (1978).

other Wisconsin case law on accrual or the court merely meant that when significant injury has occurred, the statute begins to run and the claimant must proceed to discover a viable defendant within the statutory period.

The test promulgated by *Tallmadge* appears to invoke a factual determination as to whether the injury was sufficiently significant to put an injured party on notice. This was the conclusion reached by the Wisconsin court in the recent case of *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Construction Corp.*³⁴ In *Wisconsin Natural Gas* the plaintiff sued defendants for the defective installation of a natural gas pipeline. The plaintiff found the first defective pipe in May of 1969 and in 1971 found six more defective pipes. The supreme court held that the cause of action did not accrue until the sixth defective pipe section was discovered. The court noted that it was not until then that the plaintiff was really alerted to any defects. The holding clearly modifies the statement in *Tallmadge* that the injury need not identify the causal factor. In light of *Wisconsin Natural Gas* the injury must be such that the causal factor can be identified. Thus, in cases involving injury to property, it would appear that a summary judgment motion on the statute of limitations question will be denied since in most cases there will be a factual question as to whether a plaintiff had sufficient notice of injury.

Wisconsin has enacted special statutes designed to bar claims against those who perform or furnish the design, planning, supervision or construction of improvements to real property. Wisconsin's first "completion" statute was enacted in 1971 and was subsequently struck down as a denial of equal protection.³⁵ The invalid statute was later amended and presently reads as follows:

893.89 Action for injury resulting from improvements to real property. No action to recover damages for any injury to property, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages

34. 96 Wis. 2d 314, 291 N.W.2d 825 (1980).

35. *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

sustained on account of such injury, shall be brought against any person performing or furnishing the design, land surveying, planning, supervision of construction, materials of construction of such improvement to real property, more than 6 years after the substantial completion of construction. If the injury or defect occurs or is discovered more than 5 years but less than 6 after the substantial completion of construction, the time for bringing the action shall be extended 6 months.³⁶

Although the amended statute has not been formally challenged, one author has questioned its constitutionality.³⁷

Section 893.89 has modified the general rule that an action accrues at the time of injury. Actions for an injury resulting from improvements to real property accrue "after the substantial completion of construction." Hence, the date of injury is not conclusive, rather it is the date the improvement is substantially completed.³⁸ For example, a plaintiff was injured by an improvement to real property on June 1, 1980. The building had been substantially completed on January 1, 1974. Under section 893.89 the plaintiff would be barred from commencing the action since the six-year limitation period began to run on the date of substantial completion and not the date of the injury. To date, there is no Wisconsin case law interpreting the phrase "substantial completion."

D. Wrongful Death

The final special area of inquiry in regard to the time of accrual is the wrongful death statute. Section 893.54(2) provides that "[a]n action brought to recover damages for death caused by the wrongful act, neglect or default of another"

36. WIS. STAT. § 893.89 (1979).

37. See Comment, *Defective Design - Wisconsin's Limitation of Action Statute for Architects, Contractors and Others Involved in Design and Improvement to Real Property*, 63 MARQ. L. REV. 87 (1979), wherein the author argues that the present § 893.89 also constitutes a denial of equal protection.

38. Note the different rules for improvements to real property and products liability. In products liability cases it is the date of injury that is determinative, which makes the manufacturer potentially liable for long periods of time after sale of the product. Under § 893.89 architects and contractors are only liable for injuries for a period of six years after completion. Without the statute they would be in the same position as a manufacturer.

shall be commenced within three years.³⁹ The statute by its terms does not answer the question of whether a wrongful death action accrues at the time of injury or the time of death.⁴⁰ This determination becomes critical where the injury occurred on one date and the death occurs a month later.

The Wisconsin court discussed this issue in *Terbush v. Boyle*.⁴¹ In *Terbush* the decedent was injured in an automobile collision on April 24, 1932, and as a result of the injuries died on April 25, 1932. The area of dispute was whether the cause of action for wrongful death accrued on the date of injury, the date of death or the date when the administrator was appointed. The court in its decision noted the split of authority among jurisdictions as to the date of accrual but concluded that an action for wrongful death accrues at the time of death and not at the time of injury.⁴²

Shortly after *Terbush* the court in *Hegel v. George*⁴³ was confronted with the issue of whether the existence of a cause of action for wrongful death during the lifetime of the tortfeasor was a condition precedent to survival of such an action. The court, in deciding the above issue, noted the distinction between when a cause of action arises and when it accrues:

It is true, of course, that in part the cause of action springs from or arises out of negligence or willful wrong. Certainly, it is dependent upon the doing of a tortious act. It is equally true that it has no existence unless and until death occurs, any more than a cause of action for negligence comes into being in advance of injury proximately caused by the act. No one can sue upon it, not because of any personal disability, but because there is no cause of action.⁴⁴

The line of reasoning set forth in *Hegel* appears to follow the majority of jurisdictions having wrongful death statutes similar to Wisconsin's.⁴⁵

39. Wis. STAT. § 893.54 (1979).

40. It is clear that if the death and the wrongful act occur simultaneously, the cause of action for wrongful death accrues at that time.

41. 217 Wis. 636, 259 N.W. 859 (1935).

42. *Id.* at 637, 259 N.W. at 861.

43. 218 Wis. 327, 259 N.W. 862 (1935).

44. *Id.* at 331, 259 N.W. at 864.

45. See Annot., 97 A.L.R.2d 1151 (1964). The Wisconsin statute in effect at the

The reasoning applied in *Terbush* and *Hegel* was recently affirmed in *Bradley v. Knutson*.⁴⁶ In *Bradley* the issue centered around a revision of the wrongful death statute, placing a ceiling on pecuniary loss for wrongful death. The question was whether the time of injury or the time of death was the point in time which fixed the substantive law to be applied. The court reasoned that there were two elements in the cause of action for wrongful death: (1) the wrongful or tortious conduct which renders the tortfeasor potentially liable, and (2) the death of the party which establishes the right of action.⁴⁷ From this the court concluded that the right of action must wait until death occurs and the amount of recovery or liability of the tortfeasor is determined by the law in effect at the time of the death.⁴⁸

III. COMPUTING THE ACTUAL TIME

Once it is determined when the statute of limitations begins to run, it becomes necessary to determine how to compute the applicable period of limitation. The Wisconsin statute, section 893.04, provides: "Unless otherwise specifically prescribed by law, a period of limitation within which an action may be commenced is computed from the time the cause of action accrues until the action is commenced."⁴⁹

Under the terms of section 893.04 time is computed from the time of the accrual of the right, which in most cases is the date of the injury, to the time the action is commenced. However, application of the statute raises two issues in regard to computation: (1) whether day one, the day an action accrues, is to be included in the computation of the period of limitation; and (2) when is an action deemed commenced under the terms of the statute? Resolution of these two issues is essential in order to accurately compute the period of limitation. Accuracy is of utmost importance since an incorrect computation can destroy the claimant's right as well as his remedy against the defendant.

time of *Hegel* stated as follows: "Provided, every such action shall be commenced within two years after the death of such deceased person."

46. 62 Wis. 2d 432, 215 N.W.2d 369 (1974).

47. *Id.* at 438-39, 215 N.W.2d at 374.

48. *Id.*

49. WIS. STAT. § 893.04 (1979).

A. *Is the First Day Counted?*

Obviously, the question of whether to include the day an action accrues would be critical in a tort action in which the personal injury occurred on June 1, 1980, and the action was not commenced until June 1, 1983.⁵⁰ If the day of accrual was included in the statutory period, the statute would expire on May 31, 1983. June 1, 1983, would be the first day of the fourth year and thus any action filed on that day would be untimely. However, if the day of accrual was not counted, the last day an action could be commenced would be June 1, 1983, which would make the above filing timely. Thus, an attorney must be cognizant of whether to include or exclude the day of accrual in order to take appropriate precautionary measures to avoid expiration.

Section 893.04, by its terms, does not specifically answer the question as to whether the day an action accrues is to be counted in computing the period of limitation. However, the language "computed from the time the cause of action accrues" logically leads to the conclusion that day one of the statutory period is the day on which the action accrues. Applying the plain meaning of the statute, if an injury accrues on June 1, 1980, the statute of limitations would begin to run on that day and expire on May 31, 1983.

The early Wisconsin case law on time computation appears to comport with the contention that the day of accrual should be included in the period of limitation.⁵¹ In *Siebert v. Jacob Dudenhoefer Co.*, plaintiff was injured on June 6, 1916, when he consumed a poisonous liquid mistakenly sold to him as whiskey. Under the then-applicable two-year notice provision⁵² plaintiff was required to give defendant notice of injuries within two years after the happening of the event. In *Siebert* notice was not given until June 6, 1918. The issue was whether the notice given on June 6, 1918, was timely. The court ruled that the notice was ineffective because the day of

50. The applicable statute of limitations for personal injury actions is three years. WIS. STAT. § 893.54(1) (1979).

51. *Siebert v. Jacob Dudenhoefer Co.*, 178 Wis. 191, 188 N.W. 610 (1922).

52. The applicable statute was WIS. STAT. § 4222(5) (1918): "No action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing . . . shall be served upon the person or corporation by whom it is claimed such damage is caused."

the happening of the event must be included in the computation, and therefore the statutory time within which notice could be served expired on the fifth day of June, 1918.

The court in reaching its decision applied the common-law rule regarding computation of time:

The rule is well established on an issue of limitation where the time is to be computed from a certain date, that in the computation the day of the date is to be excluded, and where the computation is from a *certain event* the date of that event must be included.⁵³

After citing the applicable rule the court proceeded to examine Wisconsin Statutes section 4222(5) (1918) to determine whether the statute of limitations began to run from a "*certain event*" or date. In this instance the pertinent statutory language, "within two years after the happening of the event," made it clear that the day an action accrues was an event and therefore was to be counted under the common-law rule.

The court also examined the then-existing general construction statute, section 4971(24), since its terms explicitly excluded the first day in computing time periods. Section 4971(24) provided: "The time within which an act is to be done or provided in any statute, when expressed in days, shall be computed by excluding the first day and including the last."⁵⁴

The court concluded that section 4971(24) created an exception to the common-law rule only where time is expressed in days. Since the time period in section 4222(5) was expressed in terms of years, the statute was inapplicable and the common-law rule including the first day applied.

The precedential value of *Siebert* is diminished by the fact that it involved a notice statute. The notice statute involved in *Siebert* was not a statute of limitations but simply a condition precedent to the maintenance of the action.⁵⁵ In this respect the statute involved in *Siebert* differs from current statutes of limitation which do not involve notice provisions but simply begin to run upon accrual. Moreover, it appears that the *Siebert* court would have held the general construction

53. 178 Wis. at 194, 188 N.W. at 611 (emphasis added).

54. WIS. STAT. § 4971(24) (1918).

55. *Nelson v. American Employers' Ins. Co.*, 262 Wis. 271, 55 N.W.2d 13 (1952).

statute applicable if it had expressed time in terms of years instead of days. Hence, with the subsequent removal of the notice provisions and the amendment of the general construction statute to include time expressed in years, the precedential value of *Siebert* has been diluted.

However, decisions subsequent to *Siebert* have applied the common-law rule of including the first day to statute of limitations computations. These cases did not involve notice statutes but statutes much like those presently in use.

In *North Shore Material Company v. Frank W. Blodgett, Inc.*,⁵⁶ the court was confronted with the issue of whether the day a contract was signed should be the first day counted in measuring the one-year statutory period for commencing a contract action.⁵⁷ The contract involved had been completed and accepted on April 30, 1929, but the action on the contract was not commenced until April 30, 1930. The defendant argued that the day the contract was accepted should be included within the computation, thus barring plaintiff's action. The court examined section 289.16(2) and stated that "[u]nder the provision *within one year after completion and acceptance of said contract*," time was not to be computed from a certain date, "but is to be computed from a certain event, viz., *the completion and acceptance of the contract*."⁵⁸ From this the court concluded that the statute began to run on April 30, 1929, because it was a "certain event" marking the completion and acceptance of the contract as provided by section 289.16(2). Consequently, the thirtieth day of April, 1929, was included in the computation, and the year ended on April 29, 1930.⁵⁹

The rationale of *North Shore* was applied to a wrongful death action in *Terbush v. Boyle*.⁶⁰ In *Terbush*, the decedent was injured on April 24, 1932, and died on April 25, 1932. The action was commenced on April 25, 1934. The particular stat-

56. 213 Wis. 70, 250 N.W. 841 (1933).

57. The applicable statutory section was Wis. STAT. § 289.16(2) (1929): "Any party in interest may, within one year after the completion and acceptance of said contract, maintain an action in his own name against such contractor and the sureties upon such bond required by the section . . ."

58. 213 Wis. at 72, 250 N.W. at 841-42 (emphasis added).

59. *Id.*

60. 217 Wis. 636, 259 N.W. 859 (1935).

ute involved required a wrongful death action to be brought within two years.⁶¹ Relying on *Siebert* and *North Shore*, the court concluded that the cause of action accrued on the date of death and the action was untimely since the two-year period expired on April 24, 1934.⁶² Inherent in the court's conclusion was the fact that the cause of action accrued upon a certain event, *i.e.*, decedent's death, and therefore the common-law rule of including the first day applied.

The *North Shore* and *Terbush* decisions are particularly persuasive because they involved statutes similar to current statutes of limitation. The statutes in both decisions did not involve a question of notice; rather they involved statutes which began to run upon accrual of the action. Moreover, these statutes described computation in terms of a "certain event" such as the existence of a contract or death. Current Wisconsin statutes of limitation do not involve notice provisions and they automatically start to run upon accrual of the cause of action. Also, present statutes define accrual in terms of a certain event, not a date. The similarity between the statutes involved in *North Shore* and *Terbush* and current statutes of limitation makes the decisions in the two cases persuasive authority for computing time by counting the first day. The rule of these two cases has never been changed or amended by the Wisconsin Supreme Court or Court of Appeals.

Despite this strong precedent for including the day of accrual in the limitation period, considerable confusion has been generated by the failure to distinguish between *notice* requirements and statutes of limitation. This confusion is illustrated by the holding of the court in *Hale v. Hale*.⁶³ *Hale* appears to controvert the above precedent in that it holds that the day the action accrues is not to be included in measuring the period of limitation. *Hale* involved an automobile accident

61. WIS. STAT. § 330.21 (1931) provided:
Within two years. Within two years:

. . . .

(3) An action brought by the personal representatives of a deceased person to recover damages, when the death of such person was caused by wrongful act, neglect or default of another.

62. 217 Wis. at 637, 259 N.W. at 861.

63. 275 Wis. 369, 82 N.W.2d 305 (1957).

which occurred on December 9, 1953. The summons was served upon the defendant on December 9, 1955, without giving prior notice to the defendant. At the time the statute required the plaintiff to give defendant notice within two years of injury.⁶⁴ The issue on appeal was how the two-year time period under the notice section was to be computed.

The defendant argued that the *Siebert* rule⁶⁵ applied and, therefore, the statute of limitations barred the action. In reviewing the *Siebert* rationale the court noted that the general construction statute in existence at the time *Siebert* was decided only applied to statutes in which time was expressed in days, and for this reason the general construction statute was inapplicable. The court went on to state that since *Siebert* had been decided, the legislature had revised and renumbered section 4971(24) to apply to time periods expressed in years.⁶⁶ On this basis the court overruled the *Siebert* precedent and decided *Hale* in conjunction with section 990.001(4)(a) and (d), the general construction statute. The court held that section 990.001(4)(a) and (d) superseded the rule in *Siebert*, stating that "it [*Siebert*] is no longer of any value as a precedent on the issue of how to compute the two-year period prescribed by section 330.29(5), Stats."⁶⁷

The *Hale* decision can be interpreted in one of two ways: *Hale* can be viewed as only overruling *Siebert* in the narrow area of time computation pertaining to section 330.19(5), a

64. WIS. STAT. § 330.19(5) (1955) provided: "No action to recover damages for an injury to the person shall be maintained unless, within 2 years after the happening of the event causing such damages, notice in writing . . . shall be served."

65. *Siebert v. Jacob Dudenhoefer Co.*, 178 Wis. 191, 188 N.W. 610 (1922).

66. In 1925 § 4971(24) was renumbered § 370.01(24). In 1951 § 370.01(24) was repealed and recreated as 370.001(4). It was also amended to read as follows:

The time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last; if the last day be Sunday or a legal holiday the act may be done or the proceeding had or taken on the next secular day; and when any such time is expressed in hours the whole of Sunday and of any legal holiday, from midnight to midnight, shall be excluded.

In 1955 § 370.001(4) became § 370.001(4)(a) and § 370.001(4)(b)-(e) were created. These sections were renumbered § 990.001(4)(a)-(e) that same year.

67. 275 Wis. at 371, 82 N.W.2d at 306. The court did not consider or refer to the Revisor's Note to § 370.001 of the 1953 and 1955 Statutes which provided as follows:

Revisor's Note, 1951: (1) and (2) are from old 370.01(2); (3) from 370.01(21) and (29); (4) from (24); (5) from (28); (6) from (48); (7) from (49); (8) from (3); (9) from (20); (10) from (36); with no change in the meaning of any one.

personal injury statute with a notice provision; or, alternatively, it can be interpreted as applying the general construction statute to all statute of limitations computations. An examination of the language of section 990.001(4)(a) and the statute involved in *Hale* will illustrate that *Hale* should be read narrowly so as to overrule *Siebert* only on the issue of computing time under section 330.19(5). *Hale* should not be read broadly so as to apply to all present statutes of limitation.

Section 990.001(4)(a) and (d) clearly applies only to "acts or proceedings."⁶⁸ Thus, in order to fall within the parameters of the statute, the time period in issue must involve an "act or proceeding." The term "act" is defined as something affirmative or requiring performance.⁶⁹ The word "proceeding" is defined as the regular and orderly progress of the form of law.⁷⁰ Applying the general rule of statutory construction that statutes are to be construed in accordance with their common meaning, section 990.001(4)(a) and (d) is only pertinent to computing time where the party is required to do something affirmative or where some prescribed mode of action is involved. By necessary implication, section 990.001(4)(a) and (d) does not apply to the computation of time involving a static situation.

In *Hale*, plaintiff was required to do an affirmative act in that section 330.19(5) required the plaintiff to give the defendant notice of his injuries within two years of the accident. The giving of notice was the affirmative act which brought section 330.19(5) within the parameters of section 990.001(4)(a) and (d). It must be emphasized that the statute involved in *Hale* was not a statute of limitations; rather it was

68. § 990.001(4) provides:

(4) TIME, HOW COMPUTED. (a) The time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last; and when any such time is expressed in hours the whole of Sunday and of any legal holiday, from midnight to midnight, shall be excluded.

....

(d) Regardless of whether the time limited in any statute for the taking of any proceeding or the doing of an act is measured from an event or from the date or day on which such event took place shall be excluded in the computation of such time.

69. BLACK'S LAW DICTIONARY 24 (4th ed. rev. 1968).

70. *Id.* at 1083.

a notice statute which imposed the giving of a notice as a condition precedent to the maintenance of an action.⁷¹ Once the condition was satisfied, the injured party had a full three years from the accrual of the cause of action to commence suit.

The *Hale* court in applying section 990.001(4)(a) and (d) relied upon the case of *Pick Industries, Inc., v. Gebhard Berghammer*.⁷² In *Pick*, the court was concerned with how to compute the time for applying to the court for an order confirming an arbitration award. The statute provided for application to the court any time within one year. The *Pick* court stated that the change in section 990.001(4)(a) to years made it applicable to section 298.09 pertaining to arbitration awards. Since 990.001(4)(a) was applicable to time computation, the common-law rule in *Siebert* did not apply. It is important to note that the arbitration proceeding in *Pick* fell expressly within the terms of section 990.001(4)(a). The *Hale* court applied *Pick* to the notice provision and concluded that section 990.001(4)(a) superseded the common law. Both *Hale* and *Pick* involved situations where either an affirmative act or a judicial proceeding was involved. It was this particular characteristic which brought these decisions within the parameters of section 990.001(4)(a). In light of this background *Hale* should be interpreted as only pertaining to the notice provision of section 330.19(5).

With the removal of the notice provision in the 1957 amendment to the statute of limitations, the "act" which brought the personal injury statute within the purview of section 990.001(4)(a) was eliminated. The current tort statutes of limitation do not require any affirmative act in order to begin running; rather the statutes begin to run automatically upon accrual of the cause of action. The statute of limitations merely enumerates the time period for commencing an action; it does not come into existence after a voluntary act on the part of the plaintiff such as giving notice or filing a summons or complaint. A period of limitation is simply a bar to the remedy for the plaintiff's cause of action occasioned by the

71. *Nelson v. American Employers' Ins. Co.*, 262 Wis. 271, 55 N.W.2d 13 (1952).

72. 264 Wis. 353, 59 N.W.2d 798 (1953).

lapse of time since the cause of action accrued.⁷³ Thus, the current statute of limitations is really a static condition which commences upon accrual of the cause of action and does not fall within the terms "act or proceeding" as provided for in section 990.001(4)(a) and (d). The elimination of the need to give notice or do any other affirmative act renders the *Hale* precedent inapplicable to current statute of limitations computations.

If section 990.001(4)(a) and (d) and *Hale* do not apply to current statute of limitations computations, then what law should be applied? Since *Hale* is limited to the notice statute in effect at the time of its decision, it should not be viewed as abrogating the *North Shore* and *Terbush* decisions.⁷⁴ In both of those decisions the court applied the common-law "certain event" rule to statutory limitations which did not involve notice provisions. In fact, the statutes involved in those decisions parallel current statutes of limitation in that they both commence automatically upon accrual and do not require any affirmative action on the part of any party. In light of these similarities, *Terbush* and *North Shore* appear to be controlling; this means that tort statutes of limitation should be computed by counting the day the action accrues in the period of limitation.

Apart from the plain meaning of the statute, section 990.001(4)(a) and (d) should not be applied to statutes of limitation since this would bring the statute in direct conflict with the common-law rule established in *North Shore* and *Terbush*. It is a canon of statutory construction that the intention of the legislature must be clearly expressed in order to abrogate the common law.⁷⁵ This intent can be manifested either in specific language or in such a manner as to leave no reasonable doubt as to its object.

The terms of section 990.001(4)(a) and (d) do not make any specific reference to statutes of limitation but only refer to "act to be done or proceedings had or taken." Nor is there any clear legislative intent to change the common law; the presumption is that section 990.001(4)(a) and (d) was not in-

73. 51 AM. JUR. 2d *Limitation of Actions* § 13 (1970).

74. See notes 56 and 60 *supra*. Neither decision was cited or referred to in *Hale*.

75. *Sullivan v. School Dist.*, 179 Wis. 502, 191 N.W. 1020 (1923).

tended to apply to statutes of limitation. This would leave the certain event rule to govern statutes of limitation computation.⁷⁶

While the appellate courts in Wisconsin have not recently affirmed the applicability of the certain event rule, they have by dicta affirmed the holding of *Hale*. In *Cuisinier v. Sattler*,⁷⁷ the defendant, a physician, was accused of negligently performing an operation which took place on July 5, 1973. The action was finally commenced on July 6, 1976. The fourth of July had fallen on a Sunday, so Monday, July 5, was also a legal holiday. The earliest the plaintiff could have filed the action was July 6, 1976. The issue in *Cuisinier* was whether section 990.001(4)(b) operates to permit the commencement of the action on the next secular day when a period of limitations expires on a legal holiday. Section 990.001(4)(b) provided: "If the last day within which an act is to be done or proceeding had or taken falls on a Sunday or legal holiday, the act may be done or proceeding had or taken on the next secular day."⁷⁸

The court held that section 990.001(4)(b) did apply to the statute of limitations computation, stating that "[t]he legislature . . . has specifically provided for a different computation of time which is applicable in the circumstances of this case" (*i.e.*, when holidays intervene in the computation of time).⁷⁹ The court noted that if the action had been dismissed under the facts it would have given the plaintiff less than the statutorily prescribed three-year period in which to bring an action. In other words, such a decision would require filing before July 4 or 5, which would be less than three years. At first glance, the court's reasoning regarding section 990.001(4)(b) appears to controvert the previous analysis of why section 990.001(4)(a) should not apply to statute of limitations computations. However, a closer analysis of the two sections reveals fundamentally different applications despite the court's adoption of the *Hale* rationale.

Section 990.001(4)(a) relates specifically to when a time

76. *Green Bay Drop Forge Co. v. Industrial Comm'n*, 265 Wis. 38, 50, 60 N.W.2d 409, 421 (1953).

77. 88 Wis. 2d 654, 277 N.W.2d 776 (1979).

78. WIS. STAT. § 990.001 (1979).

79. 88 Wis. 2d at 655, 277 N.W.2d at 777.

period begins to run where an act or proceeding is involved. If the particular time period does not involve an act or proceeding, then section 990.001(4)(a) is inapplicable. As previously discussed, there is no act which serves as the point from which the current statute of limitations begins; hence section 990.001(4)(a) does not apply. On the other hand, section 990.001(4)(b) relates to when the time period ends. The language "if the last day within which an act is to be done" is relevant to computing periods of limitation because the last day of the statute of limitations marks the last time a plaintiff can file a summons and complaint. It is the filing of the summons and complaint that preserves the plaintiff's rights against the defendant. This filing also is the "act" which brings the statute of limitations within the purview of section 990.001(4)(b). Thus, section 990.001(4)(b) is applicable to statute of limitations computations only because all statutes of limitation require the doing of an act (filing summons and complaint) on the last day of the statutory period.

In coming to the conclusion that section 990.001(4)(b) applied to extend the filing date to the next secular day, the court discussed the applicability of section 990.001 to statutes of limitation in general. The court affirmed *Hale*, stating that *Hale* squarely held that the provisions of section 990.001(4)(a) expressed the legislative intent with respect to how a period of limitation was to be computed.⁸⁰ From this the court concluded (as stipulated by the parties) that the last day a complaint could be filed was July 5, 1976 (this excluded the first day). As the issue in *Cuisinier* was whether the holiday provision of the general construction statute applied, the court's reference to *Hale* was not germane to the issue of whether the first day is counted or not. In fact, the same issue would have arisen had the certain event rule or section 990.001(4)(a) been applied. Under the certain event rule the last day to file would have been the fourth of July, and since the fifth was also a holiday the earliest day the plaintiff could have filed would have been on the sixth of July. So no matter which view was applied, the issue came down to whether the holiday provision of section 990.001(4)(b) was applicable. Also, when discussing the applicability of *Hale*, the court in *Cuisinier* did not dis-

80. *Id.* at 657, 277 N.W.2d at 778.

cuss the removal of the notice provision from current statutes of limitation. Thus, the lack of an analysis of section 990.001(4)(a) and the fact that the court's discussion of *Hale* did not note the difference between a notice requirement and a statute of limitations make *Cuisinier* of limited value in resolving the issue of whether to include or exclude the day of accrual. The case does, however, contribute to the present uncertainty in the law.

The Wisconsin court's most recent reference to the statute of limitations time-computation issue is found in *Lak v. Richardson-Merrell*.⁸¹ In *Lak* the injury occurred on November 24, 1975. A summons and complaint was filed on November 24, 1978, naming the defendant by the use of a fictitious name. On January 9, 1979, plaintiff amended the pleadings naming the defendant and served the defendant on January 11, 1979, forty-eight days after the original pleadings were filed. Defendant raised the issue of the statute of limitations. In the course of resolving this issue the court noted: "The facts giving rise to the instant action occurred on November 24, 1975, and therefore the three-year statute of limitation began to run at that time. The three year limitation did not end until November 24, 1978, the day on which the action was commenced."⁸² Thus the court adopted the *Hale/Cuisinier* precedent of excluding the day of accrual and including the day of filing. The court made no analysis of section 990.001(4)(a), nor did it cite any authority for its version of the statutory computation. It appears that the court's remarks were made without any consideration of the confusion inherent in this area. Thus, *Lak*, like *Cuisinier*, is of limited precedential value on the issue of how time is to be computed.

The only other authority supporting the general applicability of section 990.001(4)(a) to statute of limitations computations is the federal district court case of *Prince v. United States*.⁸³ In *Prince*, the plaintiff sustained injuries on May 28, 1957, when he fell on a walkway adjacent to the VA Hospital. Plaintiff filed a summons and complaint on May 28, 1959. The applicable statute of limitations was 28 U.S.C. § 2401(b),

81. 100 Wis. 2d 641, 302 N.W.2d 483 (1981).

82. *Id.* at 647-48, 302 N.W.2d at 486.

83. 185 F. Supp. 269, 271 (E.D. Wis. 1960).

which provides: "A tort claim against the United States shall be forever barred unless the action began within two years after such claim accrues."⁸⁴ The attorney for the United States demurred to the complaint, arguing that it was untimely filed. The basic issue centered around whether the relevant federal statute of limitation mandated exclusion of the day the action accrued in measuring the two-year time period.

The defendant cited *Siebert v. Dudenhoefer*⁸⁵ as indicating that the day the action accrues, May 28, 1957, should be included in measuring the period of limitation. The court rejected defendant's argument, stating that "the rule of this case [*Siebert*] has been changed in Wisconsin by statute so that now Wisconsin excludes the first day."⁸⁶ To support its conclusion, the court cited the Wisconsin Supreme Court's decision in *Hale*.⁸⁷ The court also noted that the *Siebert* rule was a minority position and that the federal judiciary had long followed the majority rule of excluding the first day.

In assessing the impact of *Prince*, it is important to note that the court was obligated to apply federal law and not Wisconsin law. The critical issue in the case was not the applicability of *Hale* or *Siebert* but rather whether Rule 6(a) of the Federal Rules of Civil Procedure was applicable to statute of limitations computations. The relevant portion of Rule 6(a) reads as follows: "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included." The federal court concluded that Rule 6(a), despite a split in the circuits, controlled, and the first day should not be included in the computation.

It would be an oversimplification of the issue to view *Cuisinier*, *Lak* and *Prince* as determinative of whether the first day should be counted in a period of limitation for the following reasons: (1) reference to the applicability of section 990.001(4)(a) to statute of limitations computations was primarily dicta; (2) none of the cases made an analysis of the

84. 28 U.S.C. § 2401(b) (1979).

85. 178 Wis. 191, 188 N.W. 610 (1922).

86. 185 F. Supp. at 271.

87. *Hale v. Hale*, 275 Wis. 369, 82 N.W.2d 305 (1957).

language of section 990.001(4)(a) and its peculiar applicability to the statute at issue in *Hale*; (3) the decisions did not consider that the notice provision has been removed from the current statutes of limitation; and (4) none of the decisions referred to the direct holdings of *North Shore* and *Terbush*.

B. Non-Wisconsin Cases

Because of the confusion in Wisconsin law, it is helpful to examine how other states have resolved this issue. The certain event rule as promulgated in *North Shore* and *Terbush* is a minority position. The majority rule excludes the first day in computing periods of limitation.⁸⁸ Georgia is a state which continues to apply the certain event rule.⁸⁹ It also has a general construction statute phrased similarly to Wisconsin's.⁹⁰ However, this statute has not been applied to statute of limitations computations since it is limited by its language to statutes where time is expressed in terms of days. Thus, the confusion which exists in Wisconsin as to applicability of the general construction statute in statute of limitations computation is not present under the Georgia statute.⁹¹

In Kentucky, there existed a long line of cases which had adopted the certain event rule in regard to computing the applicable period of limitations. Despite numerous challenges to the rule,⁹² the Kentucky court refused to change it, stating that any change in the rule should be made by the legislature.⁹³ In 1970 the Kentucky legislature amended its general construction statute to read as follows:⁹⁴ "In computing any period of time prescribed or allowed by order of the Court or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not

88. Annot., 20 A.L.R.2d 1249 (1951).

89. *Dowling v. Lester*, 74 Ga. App. 290, 39 S.E.2d 576 (1946).

90. GA. CODE § 102-102(8) provides as follows: "When a number of days is prescribed for the exercise of any privilege, or the discharge of any duty, only the first or last day shall be counted; . . ."

91. Since statutes of limitation in Georgia are expressed in terms of years, the general construction statute is inapplicable. This presents a situation similar to that in *Siebert*.

92. *Charles v. Big Jim Coal Co.*, 237 S.W.2d 68 (Ky. 1951).

93. *Fannin v. Lewis*, 254 S.W.2d 479 (Ky. 1952). The general construction statute in effect at the time of these earlier decisions did not express time in terms of years.

94. KY. REV. STAT. § 446.030(1) (1970).

to be included." Subsequent to this amendment the Kentucky Supreme Court in *Derosett v. Burgher*⁹⁵ held that the amended general construction statute was applicable to statutes of limitation, stating: "[T]he legislature has now clearly spoken. The day of the accident should be excluded in computing the limitation period."⁹⁶ The court also noted that it was because of the clear language of the statute that the court was able to abrogate the long line of cases which had included the first day.⁹⁷ In comparison, the Wisconsin general statute is not as explicit. The Wisconsin statute does not use such general language as "any period of time" nor does it use the terms "event or default"; thus, there is no clear legislative intent.

In Iowa, the courts have specifically applied the general construction statute to statutes of limitation. The general construction statute states: "In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday, . . ."⁹⁸ The Iowa Supreme Court in *Happle v. Monson*⁹⁹ held that the statutory method of computing by excluding the first day and including the last day was to be applied in computing time under the statute of limitations, stating that the prefatory words "in computing time" were broad enough to cover all statutory time periods and thus there was no reason why the statute should not be applied to statute of limitations computations. The Wisconsin statute in comparison is much narrower in its application since it only refers to computations of time in relation to acts or proceedings. The Iowa statute refers

95. 555 S.W.2d 579 (Ky. 1977).

96. *Id.*

97. *Id.* But see KY. REV. STAT. § 446.030(1) (1977), which provides:
Time, computation of.

(1) If a statute requires an act to be done a certain time before an event, the day on which the event occurs may be included in computing the time, but if the act is required to be done a certain time before the day on which an event occurs, the day on which the event occurs must be excluded; in either case the day on which the act is done may be counted as one day and as part of the time. The same principle shall apply when a certain time is required to elapse from the doing of an act, or the day of doing an act, before an event may take place.

98. IOWA CODE ANN. § 4.1(23) (1979).

99. 17 N.W.2d 392, 394 (Iowa 1945).

to computations of time in general and makes no distinction between days or years, act or events.

Minnesota, which had by common law excluded the first day of a statutory period, has applied a general construction statute similar to Wisconsin's to statute of limitations problems.¹⁰⁰ The 1905 Minnesota statute provided: "In computing the time within which an act is required or permitted to be done, the first day shall be excluded and the last included. . . ." ¹⁰¹ The statute restricts its application to "acts" whereas Wisconsin limits its application to acts or proceedings. A literal reading of the Minnesota statute would appear to limit its applicability to statutes which require an "act" or performance. If so, it would not be applicable to statutes of limitation which automatically commence upon accrual. Despite the statute's literal interpretation, the Minnesota court still applied it to statutes of limitation. There was, however, one key factor present in Minnesota in 1905 which is missing in Wisconsin. In Minnesota the common-law rule had always been that the first day was to be excluded; therefore, application of the general construction statute would not be in derogation of the common law as it would be in Wisconsin. The *Nebola* court stated that the application of the statute was but declaratory of the common law.¹⁰² This is a critical distinction in light of the rule of statutory construction that statutes are to be construed as being in harmony with the common law unless explicitly stated otherwise.¹⁰³

The Minnesota court has reaffirmed its holding in *Nebola* under a revised Minnesota statute,¹⁰⁴ holding that the revised statute was intended to provide a uniform rule for computation of periods of time except in those cases where statutory

100. *Nebola v. Minnesota Iron Co.*, 102 Minn. 89, 112 N.W. 880 (1907).

101. Minn. Revised Laws § 5514(21) (1905).

102. 102 Minn. at 91, 112 N.W. at 881.

103. *Leach v. Leach*, 261 Wis. 350, 52 N.W. 896 (1952); *State ex rel. Schwenker v. District Court of Milwaukee County*, 206 Wis. 600, 240 N.W. 406 (1932).

104. MINN. STAT. ANN. § 645.15 (1946) provides:

Where the performance or doing of any act, duty, matter, payment, or thing is ordered or directed, and the period of time or duration for the performance or doing thereof is prescribed and fixed by law, such time, . . . shall be computed so as to exclude the first and include the last day of any such prescribed or fixed period or duration of time.

terms affirmatively indicated the contrary.¹⁰⁵ Again it should be noted that the terms of the Minnesota statute are much broader than Wisconsin's in that it applies to situations where "duration of performance or doing thereof is fixed by law."

The foregoing analysis of the so-called majority rule puts in focus the problem in Wisconsin. The Wisconsin Supreme Court in *North Shore*¹⁰⁶ and *Terbush*¹⁰⁷ adopted the rule that the first day is to be included in computing the time for the "running" of the statute of limitations. Subsequent court decisions have assumed that the legislative adoption of section 990.001(4)(a) and (d) changed the common law rule. No such clear legislative intent is evidenced by the wording of the Wisconsin statute. The confusion over whether to include or exclude the day of accrual in statutes of limitation computations should be cleared up once and for all by the Wisconsin Supreme Court. Until this confusion is resolved, attorneys should protect themselves against potential malpractice actions by including the day the action accrues in the computation.

C. *When the Action is Commenced*

In order to comply with the statute of limitations, one must commence an action within the applicable time period. The Wisconsin statute provides:

Action, when commenced. An action is commenced, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant, when the summons naming the defendant and the complaint are filed with the court, but no action shall be deemed commenced as to any defendant upon whom service of authenticated copies of the summons and complaint has not been made within 60 days after filing.¹⁰⁸

The filing of a summons alone is no longer enough to deem the action commenced. One must file both the summons and complaint and serve both documents within sixty days after

105. *Kokesh v. City of Hopkins*, 307 Minn. 159, 238 N.W.2d 882 (1976).

106. 213 Wis. 70, 215 N.W. 841 (1933).

107. 217 Wis. 636, 259 N.W. 859 (1935).

108. Wis. STAT. § 893.02 (1979).

filing in order to comply with the statute of limitations.¹⁰⁹

IV. TOLLING THE STATUTE OF LIMITATIONS

Both the legislative and judicial branches have established limited exceptions to the running of the statute of limitations. The first exception is found where false information is given to the process server.¹¹⁰

Another exception is found in the application of the equitable doctrine of estoppel. Under this doctrine a litigant may be estopped from relying on the statute of limitations where his conduct is so fraudulent or inequitable as to out-balance the public interest in setting a limitation on bringing actions.¹¹¹ In order for a party to be estopped from asserting the statute of limitations the aggrieved party must show that he relied on the conduct of the defendant and as a result of such reliance failed to commence the action. The conduct of the defendant need not, in a technical sense, amount to actual fraud. The aggrieved party only has to demonstrate that the affirmative conduct of the defendant was equivalent to a representation upon which the party relied to his disadvantage.¹¹² These acts or representations must occur before the expiration of the limitation period in order for the defendant to be estopped. Once the inducement for delaying the filing of the action has ceased to operate the aggrieved party must not unreasonably delay commencement of the action. An unreasonable length of time between discovery of misrepresentation and the commencement of the action may prevent the application of estoppel principles.

109. *Pulchinski v. Strnad*, 88 Wis. 2d 423, 276 N.W.2d 781 (1979).

110. WIS. STAT. § 893.10 (1979) provides:

Actions, time for commencing. The period within which an action may be commenced shall not be considered to have expired when the court before which the action is pending is satisfied that the person originally served knowingly gave false information to the officer with intent to mislead the officer in the performance of his or her duty in the service of any summons or civil process. If the court so finds, the period of limitation is extended for one year.

111. *State ex rel. Susedik v. Knutson*, 52 Wis. 2d 593, 191 N.W.2d 23 (1971). *But see* *Staats v. Rural Mut. Cas. Ins. Co.*, 271 Wis. 543, 74 N.W.2d 152 (1956).

112. *State ex rel. Susedik v. Knutson*, 52 Wis. 2d 593, 191 N.W.2d 23 (1971).

A third exception to the statute deals with the intentional concealment of an injury by a health care provider.¹¹³ This exception is merely a restatement of the common law as established in *Volk v. McCormick*.¹¹⁴ The statute applies the discovery rule to situations where it can be shown that the health care provider concealed an act or omission from the plaintiff. In proving the concealment, the terms of the statute do not appear to require the establishment of fraud. The Judicial Council Committee notes to section 893.65 state that the concealment must be intentional. The language "in the exercise of reasonable diligence, shall have discovered" creates a question of fact for the jury.¹¹⁵ This would appear to require most concealment cases to proceed to trial before a determination can be made whether the statute of limitations has run. In any event, once the patient discovers the concealment he has one year from the date of discovery of concealment to commence an action. Since this sets a specific time and also extends the statute of limitations, the issue of whether to count the first day or not arises anew.

In addition to the previously listed exceptions, the legislature has created a number of statutes which toll the running of the statute of limitations. For instance, section 893.16¹¹⁶ extends the time for persons under disability to bring an action for two years after the disability ceases but limits the maximum extension of time available to those under the disability of insanity or imprisonment to five years. The general rule that the day an action accrues is the first day counted would be applicable to computing the time when a statute of limitations is tolled because of disability unless the Wisconsin Supreme Court applies section 990.001(4)(a) and (d) to the tolling statute.

The disability period for minors provided for in section

113. WIS. STAT. § 893.55(2) (1979) provides:

(2) If a health care provider conceals from a patient a prior act or omission of the provider which has resulted in injury to the patient, an action shall be commenced within one year from the date the patient discovers the concealment or, in the exercise of reasonable diligence, should have discovered the concealment or within the time limitation provided for sub. (1), whichever is later.

114. 41 Wis.2d 654, 165 N.W.2d 185 (1969).

115. *Tallmadge v. Skyline Constr., Inc.*, 86 Wis. 2d 356, 272 N.W.2d 404 (1978).

116. WIS. STAT. § 893.16 (1979).

893.16 is modified where a minor is injured by a health care provider.¹¹⁷ Again the issue of whether one counts the day of the infant's birth could arise. Does the statute run out on the minor's tenth birthday or the next day?

Another tolling provision involves cases submitted to the Patient Compensation Panel. Under section 655.04(6)¹¹⁸ the filing of a controversy with the panel tolls the statute of limitations until either thirty days after the panel issues a written decision or its jurisdiction is terminated. Again, does one count the day of decision or the day jurisdiction is terminated, or is that day excluded? There certainly is no "act or procedure" called for within the meaning of section 990.001(4)(a) and (d).

In addition to the legislative or judicial provisions for tolling a statute of limitations, the parties may agree to modify the statutorily created time periods by contract. Public policy permits parties to bind themselves by contract to shorter periods of limitation than those provided for by statute.¹¹⁹ The majority view is that a waiver of a limitations period subsequent to accrual of the cause of action is valid if restricted to a reasonable time.¹²⁰ If the waiver is silent as to time, the court will generally construe the waiver to be for a reasonable time, which is normally the statutory period. However, the courts have not accepted waiver agreements made at the time

117. WIS. STAT. § 893.56 (1979) provides:

Health care providers; minors actions. Any person under the age of 18, who is not under disability by reason of insanity, developmental disability or imprisonment, shall bring an action to recover damages for injuries to the person arising from any treatment or operation performed by, or for any omission by a health care provider within the time limitation under s. 893.55 or by the time that person reaches the age of 10 years, whichever is later. That action shall be brought by the parent, guardian or other person having custody of the minor within the time limit set forth in this section.

118. WIS. STAT. § 655.04(6) (1979) provides:

(6) **STATUTE OF LIMITATIONS.** The filing of the submission of controversy shall toll any applicable statute of limitations, and such statute of limitations shall remain tolled until 30 days after the hearing panel issues its written decision, or the jurisdiction of the panel is otherwise terminated.

119. *State Dep't of Pub. Welfare v. LeMere*, 19 Wis. 2d 412, 120 N.W.2d 695 (1963); *Lundberg v. Interstate Business Men's Accident Ass'n*, 162 Wis. 474, 156 N.W. 482 (1916).

120. Note, 1951 Wis. L. Rev. 718 (1951).

of the original contractual agreement.¹²¹ Hence, statutes of limitation can, under limited circumstances, be shortened or waived by contractual agreement between the parties.

V. CONCLUSION

In conclusion, the first step in computing a statute of limitations period is to determine when the statute begins to run. In Wisconsin, tort statutes of limitation usually begin to run at the time of accrual, which generally is the point at which the injury occurs. Next, one must determine how to compute the time. Wisconsin law is currently inconsistent as to whether the day of accrual is to be counted. The state of the law in Wisconsin is fraught with confusion. Some case law supports the inclusion of the day of accrual, while other case law applies the general construction statute to exclude the day of accrual without referral to prior case law. The same confusion arises as to tolling provisions. Until the confusion is cleared up, the prudent lawyer should act cautiously and include the day of accrual in his time computation.

121. *Id.*