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Joinder of Consecutive Tortfeasors

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COMMENTS

JOINDER OF CONSECUTIVE TORTFEASORS

In numerous cases the tortious conduct of more than one party is involved in producing injury to a plaintiff or his property. Two or more persons may agree to cause intentional harm to the plaintiff, or a plaintiff may be unintentionally harmed by one person as a result of an agreement between two or more persons to do some reckless act. More commonly, injury results from a single accident caused by the simple negligence of more than one person; and in some cases the negligent conduct of one party unites with that of another party unrelated in time or space to produce a single injury. Finally, the conduct of one tortfeasor may cause an injury as a result of which the plaintiff is subjected to further injury produced by the tortious conduct of another.

If the injuries produced by the conduct of more than one party are entirely separate and arise out of wholly unrelated occurrences, it is clear that the tortfeasors cannot be joined in one lawsuit.[1] Any common issues of fact or law would be purely coincidental. It would not be possible to join, for example, a party whose negligence caused the plaintiff to suffer injuries, from which he fully recovered, with a party who caused new and separate injuries.

When the tortfeasors sought to be joined are true joint tortfeasors, as in all cases where there is "concerted action," they may be joined in one action. This "acting in concert" was the essence of a joint tort at common law[2] and is still recognized as a basis for imposing joint and several liability when two or more persons agree to do some intentional or reckless act which results in harm to the plaintiff.[3] At present, when the negligence of two or more parties combines to produce one accident, most jurisdictions will hold the tortfeasors jointly and severally liable, and allow them to be joined in one lawsuit[4] as "joint tortfeasors" even though there is no concerted action.

A real question of whether or not joinder will be permitted seems to arise in only two situations: (1) when the conduct of multiple tortfeasors is unrelated, but a singular or indivisible injury results, and (2) when the conduct of one tortfeasor can be said to be the cause of a subsequent occurrence in which the plaintiff is injured by another tortfeasor, and the original injury is aggravated. The resolution of the question depends upon various factors, including the differences in the statutory rules upon which joinder is based, the courts' interpretation of those rules, and their resolution of conflicting policies of the law.

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[1] *See* Annot., 94 A.L.R. 539, 541 (1935).
[2] PROSSER, LAW OF TORTS 258 (3rd ed. 1964).
[3] *Id.* at 259.
[4] *Id.* at 262.

INDIVISIBLE INJURIES

The Wisconsin case of *Caygill v. Ipsen*[5] is typical of the situation in which a plaintiff is injured in one accident and at some future time is injured in the same manner in an unrelated accident. In *Caygill* the plaintiff received injuries to her cervical spine when the automobile in which she was a passenger was struck from the rear by a car driven by a Mrs. Ipsen. Almost five months later, the automobile in which the plaintiff was driving was struck from the rear by one Thompson, and she sustained injuries which were allegedly inseparable from those received in the first accident. The Wisconsin Supreme Court held that the plaintiff could not join Thompson and Mrs. Ipsen because, while she alleged only one cause of action, there were in fact two separate causes of action which did not affect both defendants.[6]

The decision in the *Caygill* case was based, first of all, upon the court's definition of a cause of action as "a grouping of facts falling into a single unit or occurrence as a lay person would view them."[7] Under this definition, there was clearly more than one cause of action involved in the case.[8] Given the fact that there was more than one cause of action, the court was faced with the question of whether or not the two causes of action could be joined in one lawsuit. The section of the Wisconsin Statutes which pertains to the joinder of causes of action provides:

> The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable or both. But the causes of action so united must affect all the parties to the action and not require different places of trial, and must be stated separately.[9]

While the court in Caygill pointed out that the causes of action were not separately stated and required different places of trial, it made it clear that its decision rested upon its holding that the causes of action did not affect all the parties. The court went on to explain what is meant by the phrase "affect all the parties to the action": "Unless the parties are joint tortfeasors, the cause of action against one is not a cause of action against the other, and each defendant is unaffected by the other asserted claims."[10] Later in the opinion, the court stated:

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[5] 27 Wis. 2d 578, 135 N.W.2d 284 (1965).

[6] *Id.* at 581, 135 N.W.2d at 286.

[7] *Id.* at 582, 135 N.W.2d at 286.

[8] The question of what constitutes a "cause of action" is beyond the scope of this article and has been fully discussed in a Comment, *What Identifies a Cause of Action*, at 50 MARQ. L. REV. 101 (1966). The question of joinder of causes of action is discussed herein only in the context of its effect upon joinder of parties defendant.

[9] WIS. STAT. § 263.04 (1967).

[10] 27 Wis. 2d at 585, 136 N.W.2d at 288.

> The fact that [the wrongdoers'] conduct resulted in indivisible injury to the plaintiff does not under these circumstances result in creation of any relationship between them.
>
> This court has consistently refused to allow the joinder of separate and unrelated torts though their *results* do concur to cause an individual injury to the plaintiff.[11]

It would seem that the Wisconsin court has taken a rather restrictive view of the meaning of the phrase "affect all parties to the action." In fact, it is difficult to conceive of any situation arising under Wisconsin law in which joinder of separate causes of action against more than one defendant will be permitted, for, under the Wisconsin court's definition, it seems there will be either one cause of action in which all defendants are joint tortfeasors, or there will be two or more causes of action in which the defendants are not joint tortfeasors, and, therefore, cannot be joined.[12] While Wisconsin is undoubtedly in the majority of states in interpreting the phrase "affect all parties to the action" to require a finding of joint or common liability, courts in jurisdictions with similar statutes have, in other contexts, suggested that a less strict interpretation is possible.[13] Their reasoning has generally been that an interpretation allowing greater freedom of joinder of causes of action will promote the convenient administration of justice and avoid a multiplicity of suits.[14]

Since the Wisconsin court has taken the position that an indivisible injury does not in and of itself give rise to joint liability on the part of the defendants,[15] it seems clear that joinder of defendants in the first

[11] *Id.* at 587-88, 135 N.W.2d at 289.

[12] This is not to say that more than one cause of action cannot arise out of a single occurrence, for it is clear that multiple causes of action in favor of multiple plaintiffs may arise out of one accident, and the plaintiffs may join in prosecuting their claims in one lawsuit. WIS. STAT. § 260.10 (1967). It has also been suggested that more than one cause of action may arise in favor of a single plaintiff when different primary rights are violated simultaneously. *See* Comment, *What Identifies a Cause of Action,* 50 MARQ. L. REV. 101, 105 (1966).

[13] *See, e.g.,* Kaiser v. Butchart, 200 Minn. 545, 274 N.W. 680, 684 (1937); Mayberry v. Northern Pac. Ry. Co., 100 Minn. 79, 110 N.W. 356, 358 (1907). Nevertheless, no case has been found which permits joinder of defendants who are unrelated in time and space and are not jointly liable for the plaintiff's injuries in a jurisdiction requiring that causes of action to be joined must affect all parties.

The Field Code as originally adopted contained a requirement that in order for causes of action to be joined, they must affect all parties equally. Shortly thereafter the word "equally" was dropped. Blume, *Free Joinder of Parties, Claims and Counterclaims,* A.B.A. Special Committee on Improving the Administration of Justice, Judicial Administration Monographs, Series A (Collected) 41, 46 (1942), *cited in* M. ROSENBERG AND J. WEINSTEIN, ELEMENTS OF CIVIL PROCEDURE 1148 (1962). While the Wisconsin court does not require that all parties be affected equally in actions which are equitable in nature, it would seem that such a requirement has in effect been imposed in personal injury actions. *See* Whaling v. Stone Constr. Co., 5 Wis. 2d 113, 118, 92 N.W.2d 278, 281 (1958).

[14] *See* Ruediger v. Klink, 346 Mich. 357, 78 N.W.2d 248 (1956); Cooper v. Georgia Cas. & Sur. Co., 244 S.C. 286, 136 S.E.2d 774 (1964).

[15] Caygill v. Ipsen, 27 Wis. 2d 578, 585-587, 135 N.W.2d 284, 288-289 (1965).

problem situation (that in which the defendants' conduct is unrelated, but a single injury results) will never be permitted. The result, in jurisdictions having restrictions on joinder of causes of action similar to Wisconsin's, will apparently turn upon the question of whether or not independent tortfeasors are considered "joint," or at least "jointly" liable, when an indivisible injury is produced, or perhaps upon the courts' decision as to whether one or more than one cause of action is involved in such a situation.[16]

Causal Connection Between Occurrences

The second situation in which the question of joinder of defendants arises is that in which one defendant's conduct not only causes injury to the plaintiff, but also subjects him to further harm which results from the tortious conduct of a second defendant. The Wisconsin case of *Fitzwilliams v. O'Shaughnessy*[17] is a typical example. In that case the plaintiff was a passenger in an automobile driven by one of the defendants when it was struck from the rear by another automobile. Because of her injuries in the accident, the plaintiff was placed in an ambulance to be transported to the hospital. While the ambulance proceeded along the highway, it collided with an automobile, resulting in further injuries to the plaintiff allegedly indivisible from the first. She commenced an action in which she joined as defendants the drivers of the automobiles involved in the first accident and the driver of the automobile involved in the second accident. The supreme court held that two causes of action had been improperly joined, in that they did not affect all parties to the action. The effect was, of course, to disallow the joinder of the defendants in the two accidents.

The court's decision in the *Fitzwilliams* case was a refinement of its decision in *Caygill v. Ipsen*[18] in that it further definde what would be considered a single occurrence or event and, therefore, give rise to only one cause of action. In *Caygill* the accidents were separated by almost five months, whereas in *Fitzwilliams,* while it is not clear how much time elapsed between the first and second accidents, it was probably less than half an hour since an emergency vehicle was involved and

[16] *See, e.g.,* Texas Co. v. Taylor, 178 Okla., 21, 61 P.2d 574 (1936); Prairie Oil & Gas Co. v. Laskey, 173 Okla. 48, 46 P.2d 484 (1935); Tidal Oil Co. v. Pease, 153 Okla. 137, 5 P.2d 389 (1931). When the foregoing cases were decided, all of them involving pollution of streams by more than one oil company, there was a statute in effect in Oklahoma which required that causes of action to be joined must affect all parties to the action. The court found the dedefendants jointly liable in each case, and while in the first two cases cited the defendants contended there was a misjoinder of causes of action, the court made no reference to the statute in holding that the parties could be joined. *See also* Annot., 9 A.L.R. 939 (1920); Annot., 35 A.L.R. 409 (1925); Annot., 91 A.L.R. 759 (1934); Lull v. Fox & Wisconsin Improvement Co., 19 Wis. 112 (1865) (relied upon in Caygill v. Ipsen); Mitchell Realty Co. v. West Allis, 184 Wis. 352, 199 N.W. 390 (1924).

[17] 40 Wis. 2d 123, 161 N.W.2d 242 (1968).

[18] 27 Wis. 2d 578, 135 N.W.2d 284 (1965).

the second accident occurred on the same road as the first. Nevertheless, the court concluded that the case was controlled by *Caygill,* and held that the two collisions could not be considered a single unit or occurrence.[19] In *Caygill* the court pointed out that sequential events would be considered a single occurrence only when there is an insignificant time lapse between them, and used the example of a chain reaction accident.[20] In *Fitzwilliams* it was indicated that a chain reaction accident is the *only* situation which will be considered to constitute a single occurrence or event. The court stated,

> There may be a situation where the acts are consecutive and closely enough related in time sequence to constitute one event and therefore permit a proper joinder of causes in action, but such is not the case now before us.[21]

The above statement is confusing in that the court discusses a joinder of causes of action where the acts are closely enough related to constitute one event. It is clear that if they do constitute one event, there is only one "cause of action" in the context in which the court discussed it.[22] The plaintiff in *Fitzwilliams* pleaded the matter as a single cause of action,[23] but the question agreed upon in the briefs on appeal was whether or not two causes of action had been improperly joined.[24] It seems clear that in *Fitzwilliams,* as in *Caygill,* that question could be reached only after a determination was made that more than one cause of action existed.

While the opinion in the *Fitzwilliams* case is somewhat confusing, it is clear that the court concluded that there were two causes of action and that they could not be joined. Assuming, arguendo, that there were two "causes of action,"[25] the question arises as to whether joinder of the causes of action (and, therefore, of parties defendant) should have been permitted. The court based its refusal to permit joinder of the causes of action on the same ground that it did in *Caygill v. Ipsen,* namely that the causes of action did not affect all the parties who had been joined as defendants.[26] The court did not, however, discuss in any detail the question of whether or not all parties were "affected," but rather relied primarily upon *Caygill* and treated it as controlling.[27] The court stated that the fact of indivisible injuries, alone, is not de-

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[19] 40 Wis. 2d at 126, 161 N.W.2d at 244.
[20] 27 Wis. 2d at 586, 135 N.W.2d at 289.
[21] 40 Wis. 2d at 126, 161 N.W.2d at 244.
[22] Caygill v. Ipsen, 27 Wis. 2d 578, 135 N.W.2d 284 (1965).
[23] Appendix to Appellant's Brief at 102, Fitzwilliaims v. O'Shaughnessy, 40 Wis. 2d 123, 161 N.W.2d 242 (1968).
[24] Brief for Appellants at 3, Brief for Respondents at 2. While the case involved a derivative "cause of action," its joinder was not in issue.
[25] *Cf.* Comment, *What Identifies a Cause of Action,* 50 MARQ. L. REV. 101 (1966).
[26] 40 Wis. 2d at 125, 126, 161 N.W.2d at 243, 244.
[27] *Id.* at 126, 161 N.W.2d at 244.

cisive as to the joinder of causes of action.[28] That this is the rule in Wisconsin was firmly established in the *Caygill* case.

The *Caygill* case also made clear, however, that joint tortfeasors may always be joined "since their responsibility to the defendant would be identical."[29] Nevertheless, the Wisconsin court has made a distinction between "joint tortfeasors" and consecutive tortfeasors who are "jointly and severally liable." The question generally arises when a plaintiff has suffered some injury as the result of the negligence of another, seeks medical attention, and sustains further injury at the hands of a negligent physician or surgeon.[30] In any such case, the first tortfeasor is liable to the plaintiff for all of his damages even though the negligent doctor contributed to them, while the doctor is liable only for the damage he produced.[31] If, however, the plaintiff's injuries are inseparable and both the original wrongdoer and the physician "as consecutive tort-feasors contributed to the single injury, the liability would be joint and several, and each would be responsible for the entire amount of the damages resulting from the single injury."[32] Justice Currie has pointed out:

> [The original tortfeasor] and the defendant physicians are not joint tort-feasors but consecutive tort-feasors. Nevertheless, as to part of plaintiff's damages there may be joint liability, and this is regardless of whether the damages caused by [the original tortfeasor], as distinguished from those resulting from the alleged malpractice, are capable of separate ascertainment or are indivisible. This joint liability extends to any damages which may have been caused by the defendant physicians' act of malpractice in enhancing the original injuries sustained as the result of [the original tortfeasor's] alleged negligence because of the fact that [the original tortfeasor, as well as the defendant] physicians, is liable for the same.[33]

It seems, therefore, that the court's position in refusing to allow joinder in these situations is untenable, in that the court's reasoning behind permitting joinder of defendants who are "joint tortfeasors" is that "their responsibility to the defendant would be identical."[34] Nevertheless, the court indicated in *Caygill* that malpractice cases and others like them do not give rise to a right of joinder.[35] The court pointed out

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[28] *Id.* at 127, 161 N.W.2d at 244.
[29] 27 Wis. 2d at 585, 135 N.W.2d at 288.
[30] *See* Heims v. Hanke, 5 Wis. 2d 465, 93 N.W.2d 455 (1958); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 860 (1955).
[31] Fisher v. Milwaukee Electric Ry. & Light Co., 173 Wis. 57, 60, 180 N.W. 269, 270 (1920); Selleck v. City of Janesville, 100 Wis. 157, 163-164, 75 N.W. 975, 976-977 (1898).
[32] Bolick v. Gallagher, 268 Wis. 421, 427, 67 N.W.2d 860, 863 (1955).
[33] *Id.* at 428, 67 N.W.2d at 864.
[34] Caygill v. Ipsen, 27 Wis. 2d 578, 585, 135 N.W.2d 284, 288 (1965).
[35] *Id.* at 587, 135 N.W.2d at 289. The malpractice cases are probably not distinguishable from cases such as *Fitzwilliams,* since both types are based upon the same legal theory—that the negligent party is liable for all the conse-

earlier in its opinion, however, that an impleader of parties (for contribution) and a joint trial of the actions in malpractice cases (when the injuries are inseparable) are permitted.[36] It would seem that in any such case in which the other defendant is impleaded, the plaintiff may amend his summons and complaint to plead against such defendant,[37] since both defendants are jointly and severally liable for at least a part of the plaintiff's damages as a matter of substantive law.[38] Even if the plaintiff did not so amend his complaint, was not permitted to do so, or if the amended pleading were defeated on demurrer, it would appear that any subsequent contest would be barred on the basis of collateral estoppel, if not on that of res judicata. It is interesting to note the consequences of a demurrer for misjoinder to the amended complaint. If the demurrer were sustained, the issues of liability and damages would still be decided, and yet the plaintiff would have no right of recovery against the impleaded defendant in the action because he was not permitted to plead against him. If the demurrer were not sustained, there seems to be no reason why the plaintiff should not have been allowed to plead against both defendants in the first instance by joining them in one action. It seems clear, therefore, that in refusing to permit joinder of defendants in malpractice cases and cases such as *Fitzwilliams,* the court is blinding itself to the realities of the substantive law. The "causes of action" in such cases *do* "affect all parties to the action," even under the restrictive meaning which the Wisconsin court has given that phrase.

Since it seems clear that joinder should be permitted in the type of case just described, perhaps it can be questioned whether this type is distinguished from the first discussed—that in which the torts are unrelated except for the fact of indivisible injury. There is no doubt that

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quences which his act causes unless there is a superseding cause of some of the harm. Even in jurisdictions where foreseeability is an element in determining the causation question (which, as pointed out in *Fitzwilliams,* it is not in Wisconsin), there should be no distinction between the two types of cases, since it could hardly be contended that one subsequent event is or is not foreseeable as compared to the other. Nevertheless, as the respondents in *Fitzwilliams* pointed out, joinder of the original tortfeasor and the negligent physician has never been permitted in Wisconsin. Brief of Respondents at 10.

[36] 27 Wis. 2d at 586, 135 N.W.2d at 288. *See also* Heims v. Hanke, 5 Wis. 2d 465, 93 N.W.2d 455 (1958); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 860 (1955).

[37] WIS. STAT § 269.44 (1967) provides that amendment of pleadings is discretionary with the trial court and the amended pleading must state a "cause of action arising out of the contract, transaction or occurrence" or be "connected with the subject of the action upon which the original pleading is based." It would appear that an amendment of a complaint to state a cause of action against an impleaded defendant who is jointly and severally liable with the original defendant (for at least part of plaintiff's damages) would at least meet the second test quoted above.

[38] As pointed out earlier in the concurring opinion in *Bolick v. Gallagher,* even if the plaintiff's injuries are not divisible, there will be joint and several liability for some of his injuries. 268 Wis. at 428, 67 N.W.2d at 864 (1955).

the cases are factually distinguishable, in that in the first type there is no causal connection between the occurrences. On the basis of present Wisconsin substantive law, they are clearly distinguishable in that the court has refused to hold unrelated parties jointly and severally liable even though the consequences of their acts unite to produce a single or indivisible injury. Nevertheless, the Wisconsin court does permit an impleader and joint trial in malpractice cases *where the injuries are inseparable.*[39] If that is the court's reasoning, it should be applicable as well to cases in which the tortfeasors are unrelated, the only distinction being the presence or absence of a causal connection. Since it has been concluded that joinder of parties should be allowed in malpractice cases, it follows that there is at least some basis for permitting it in cases of indivisible injury where there is no causal connection.

OTHER JURISDICTIONS

Perhaps it is not fair to put the entire blame on the Wisconsin Supreme Court for the confusion which exists in the area of joinder of parties defendant. Wisconsin and some other jurisdictions are burdened by statutes which, without defiining the term "cause of action," place restrictions upon joinder of causes of action.[40] Less restrictive statutes, which permit joinder of parties defendant,[41] are left in the background while the court wrestles with the concept of a "cause of action."[42] It has been pointed out that such statutes may conflict.[43] Given a clearer rule, courts find little difficulty in permitting joinder in cases in which it is desirable. A few cases which are similar to the Wisconsin cases which have been discussed herein should serve as an illustration.

Rule 20(a) of the Federal Rules of Civil Procedure,[44] insofar as it relates to joinder of parties defendant, provides:

> All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

In *Lucas v. City of Juneau*[45] the plaintiff was injured when he slipped and fell in defendant's store. After he had spent some 18 days in a local hospital, it apparently became necessary to transport him to another hospital. In the process the defendant city's ambulance went out of control and the plaintiff's original injury was aggravated. The court

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[39] Caygill v. Ipsen, 27 Wis. 2d 578, 586, 135 N.W.2d 284, 288 (1965).
[40] *See* WIS. STAT. § 263.04 (1967).
[41] *See* WIS. STAT. § 260.11 (1967).
[42] Fitzwilliams v. O'Shaughnessy, 40 Wis. 2d 123, 127, 161 N.W.2d 242, 244-45 (1968).
[43] Rogers v. City of Oconomowoc, 16 Wis. 2d 621, 115 N.W.2d 635 (1962).
[44] FED. R. CIV. P. 20(a).
[45] 127 F. Supp. 730 (D. Alaska 1955).

held that the injuries were separable and that the store owner was liable for all the injuries but the defendant city was liable only for the aggravation attributable to it. The court further held that both defendants could be joined in one action under Rule 20(a),[46] because the liability of both defendants for part of the injuries arose out of a single occurrence, namely, the ambulance accident.

The case of *Tanbro Fabrics Corp. v. Beaunit Mills, Inc.*[47] contains what is perhaps the most complete discussion of a liberal joinder statute. In that case the New York Supreme Court, Appellate Division, held that the plaintiff was entitled to a single trial against a seller and a processor of goods. The court based its decision on a statute which was at that time practically identical to Rule 20(a) of the Federal Rules.[48] The case of *Ader v. Blau*[49] was an earlier New York case which held that a person who caused an accident resulting in injuries could not be joined with a treating physician whose malpractice resulted in the decedent's death. Referring to the *Ader* case, the court in *Tanbro Fabrics* stated:

> [T]he Court of Appeals expressed doubt whether the joinder statute contemplated joinder in such a case, even if the section were given a liberal interpretation. It went on, however, to hold that Section 258 . . . a restriction on joinder of causes of action in pleading, was a limiting factor in permitting joinder of parties.
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> The full effect of the repealer of old Section 258 has, how-however, not been left to speculation. . . . [The Court of Appeals held that the Ader case, supra, was a result of the pleading limitation [as to joinder of causes of action] in the old, and now repealed, Section 258.
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> . . . The emphasis in the legislative and decisional history is that the joinder statute is to be accorded broad liberality and interpretation in order to avoid multiplicity of suits and inconsistencies in determination.[50]

It is clear that the New York statute permits joinder when there is a causal connection between the occurrences, and a trial court has so held

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[46] For a more recent case permitting joinder based on a rule identical to Federal Rule 20(a) and facts practically identical to those in *Fitzwilliams, see* State *ex rel.* Smith v. Weinstein, 398 S.W.2d 41 (Mo. Cit. App. 1965).

[47] 4 App. Div. 2d 519, 167 N.Y.S.2d 387 (1957).

[48] N.Y. Civil Practice Act of 1920, *as amended,* Laws, 1949, ch. 147 (now CONSOL. LAWS OF N.Y. § 1002(b) (McKinney 1963)).

[49] 241 N.Y. 7, 148 N.E. 771 (1925).

[50] 167 N.Y.S.2d at 390-391. In *Knapp v. Creston Elevator, Inc.,* an Ohio court, in permitting joinder of parties defendant in an action arising out of two separate collisions, recognized "that there is some significance to the fact that the Legislature has repealed [a provision which provided that causes of action must affect all parties].

"It is a fair inference that when the Legislature repealed this section they intended to liberalize the joinder of causes of action and such repeal implemented the joinder of parties." 13 Ohio Misc. 188, 234 N.E.2d 326, 328 (Ct. Com. Pl. 1967).

in a case in which the plaintiff was injured in an automobile collision and subsequently injured in an ambulance accident. The court stated:

> Assuming defendant [in the second accident] is liable to plaintiffs, his liability is only for the injuries arising from or aggravated by the collision in which [he] was involved. The same is true for the defendants involved in the first collision. A common question of fact exists to be determined at the trial as to the extent of the damages suffered by plaintiffs in the first collision and those suffered by them in the second collision.[51]

Based upon the above reasoning, it would seem that the joinder statute should permit joinder whenever there is a common damage question even when there is no causal connection between the accidents. Nevertheless, another New York trial court held that a plaintiff could not join defendants in two accidents which occurred about 13 months apart, even though he alleged that the injuries received in the first accident were aggravated.[52] The reason for the court's holding is not clear, however. At one point the court said of the 13 months' interval: "In that time interval between the accidents there can be no doubt that a clear cut determination of the injuries sustained as a result of each accident can be made."[53] Such a statement would seem to indicate that if the damages were in fact indivisible, joinder would have been permitted. Nevertheless, the court emphasized the fact that the two accidents did not arise out of the same transaction or occurrence or series of transactions or occurrences as required by the statute.

An examination of the reasoning used in cases from other jurisdictions will serve to illustrate the differing interpretations given the joinder statute in order to permit a joinder of parties. In *Watts v. Smith,*[54] the plaintiff was a passenger in an automobile which was struck from the rear in both the morning and afternoon of the same day in unrelated occurrences as a result of which he suffered allegedly inseparable neck and back injuries. The court held that the defendants in both the morning and the afternoon accidents could be joined in one lawsuit. Justice Black of the Michigan Supreme Court stated in a concurring opinion:

> GCR 206.1 permits the plaintiff to join defendants when, as pleaded here, there is asserted a right to relief in respect of or arising out of the same *series of occurrences,* and if a question of law or fact common to them will arise in the action.[55]

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[51] Wilson v. Algeria, 5 Misc. 2d 520, 165 N.Y.S.2d 190, 191-92 (Sup. Ct. 1957).
[52] Cipolla v. LaFranco, 202 N.Y.S.2d 337 (Sup. Ct. 1960).
[53] *Id.* at 338.
[54] 375 Mich. 220, 134 N.W.2d 194 (1965).
[55] 134 N.W.2d at 196 (emphasis added). In *Ryan v. Mackolin,* the Ohio Court of Appeals, in permitting joinder of defendants in accidents which occurred about five months apart, held that the two collisions constituted a "series of occurrences" within the meaning of the statute. 9 Ohio App. 2d 74, 222 N.E.2d 842 (1967).

The gist of this concurring opinion was that the court should not attempt to decide any substantive question (with the necessary implication that it was not necessary to decide any substantive question to declare that the plaintiff had a right to join both defendants).

In *Sutterfield v. District Court*,[56] the plaintiff was involved in two collisions which were unrelated and separated by about nine months. The Supreme Court of Colorado held joinder proper, basing its decision on the state's joinder statute which is the same as that contained in Rule 20(a) of the Federal Rules of Civil Procedure.[57] The court used a unique approach in bringing the case within the provision of the statute requiring the right to relief to arise out of the same transaction, occurrence, or series of transactions or occurrences. The court stated:

> In determining the question, we point out that the claims for relief asserted here arise out of a single injury which resuted from the two accidents. Thus it is the injury which is the "occurrence" giving rise to the claim for relief. Accordingly, in the instant case, the right to relief asserted against all four defendants arises out of the same occurrence, namely, the single permanent injury which allegedly resulted here from the two accidents.[58]

The foregoing cases seem to indicate that courts are willing to go as far as is necessary to give the modern joinder statute its intended liberal interpretation. While criticism may be leveled at the reasoning of opinions such as the one in the case last cited, the weight of public policy supports the decision. On the one hand there is a policy against over-complicating lawsuits, but on the other hand there is the policy that related claims should be disposed of in one lawsuit in order that inconsistent decisions not be rendered and that an injured plaintiff not be denied recovery because he cannot prove which defendant caused what damages. It seems that the question of whether a lawsuit will be too complicated is best left to the trial court which has discretion to grant a severance,[59] rather than being decided as a matter of law by the supreme court. A decision to that effect would be further beneficial in that it would tend to expedite litigation and perhaps relieve to a limited extent the overcrowding of court calendars.

CONCLUSION

Since the Wisconsin Supreme Court has seen fit to give present joinder statutes a restrictive interpretation, a decision to liberalize joinder rules in Wisconsin, if one is to be made, will probably have to be made by the legislature. As the cases cited from other states illustrates, the desired result has been accomplished by a repeal of statutes

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[56] 438 P.2d 236 (Colo. 1968).
[57] COLO. REV. STAT. Rule 20(a) (1953).
[58] 438 P.2d at 239.
[59] WIS. STAT. § 270.08 (1967).

which place restrictions upon joinder of causes of action and substitution of rules similar to Federal Rule 20(a)[60] which permit joinder of parties in most circumstances in which it is desirable.

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[60] FED. R. CIV. P. 20(a).