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RECENT DEVELOPMENTS IN THE AREA OF TORTS*

THOMAS E. FAIRCHILD**

The supreme court has recently made some significant changes in tort law. The court and legislature have both made changes in procedure which are of interest to the negligence and personal injury lawyer.

In *McConville v. State Farm Mut. Auto. Ins. Co.*¹ and *Colson v. Rule*² the doctrine of assumption of risk (at least by implication from conduct) was abolished in automobile host-guest cases, and in farm labor cases. In *Bielski v. Schulze*³ the concept of gross negligence was abandoned and contribution between joint tort feorsors was placed on a proportionate, pro rata basis, according to the degree of fault attributable to each.

In *Kojis v. Doctors Hospital*⁴ the court abolished the doctrine rendering charitable hospitals immune from tort liability to paying patients.⁵ In *Holytz v. City of Milwaukee*⁶ the doctrine of governmental immunity was abolished.

By rule the court amended the special verdict statute.⁷ Now the court "may submit separate questions as to the negligence of each party, and whether such negligence was a cause without submitting separately any particular respect in which the party was allegedly negligent."

In June, 1961, the legislature amended sec. 326.12, Stats. Depositions may now be taken of any person, for discovery purposes, or for use as evidence, in any civil action or proceeding. A deponent may be examined regarding any matter, not privileged, which is relevant to the controversy. The new statute is taken almost verbatim from

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**Justice, Wisconsin Supreme Court. Prepared with the research assistance of David L. Walther, Member of the Wisconsin Bar, and former associate editor of the Marquette Law Review.

¹ 15 Wis. 2d 374, 113 N.W. 2d 14 (1962).

² 15 Wis. 2d 387, 113 N.W. 2d 21 (1962).

³ 16 Wis. 2d 1, 114 N.W. 2d 105 (1962).

⁴ 12 Wis. 2d 367, 107 N.W. 2d 131, 107 N.W. 2d 292 (1961).

⁵ See *Duncan v. Steeper*, dec. June 29, 1962, for comment with respect to the limitation to paying patients.

⁶ Dec. June 5, 1962.

⁷ 11 Wis 2d v. effective June 1, 1961.

Federal Rule 26.⁸ This statute has been construed in one decision. In *State ex rel. Reynolds v. Circuit Court*,⁹ the circuit court ordered two appraisers employed by the state in a condemnation proceeding to testify on examination before trial at the instance of the owner as to methods used and factors considered in arriving at their evaluation of the property. The supreme court denied a writ of prohibition, holding that the questions did not ask for privileged matter, that the information was not protected under the "work product of the lawyer" doctrine of the federal courts and that experts have no personal right to refuse to testify as experts in the situation presented in this case. The court stated:

In enacting sec. 326.12, Stats., in its present form, the legislature has decided to liberalize our discovery procedure. Such decision must be based upon the belief that trials will be more likely to accomplish justice between the parties, and may at times be avoided or shortened in the public interest as well, if material relevant testimony is made available to all parties before trial. In the light of this purpose we conclude that in the situation presented here the fact that the deponents are experts does not make the proposed examinations unauthorized by sec. 326.12.

In a memorandum on motion for rehearing, the court pointed out that an expert witness might apply to a trial court for compensation in excess of ordinary witness fees for time spent in giving a deposition, not to exceed \$25 per day.

The proximity with which the language of the Wisconsin statute parallels the federal rule makes it likely that the federal decisions will be of aid to the court in interpreting the statute. It also appears that the court has construed the statute liberally in the spirit of its enactment.

The doctrine of parent-child immunity has been abolished in several states in recent years. In 1959 we refused to abolish the doctrine in *Schwenkhoff v. Farmers Mut. Automobile Ins. Co.*¹⁰

In *Haumschild v. Continental Casualty Co.*¹¹ the court determined that inter spousal immunity lies within the sphere of family law rather than tort law, and that the law of the domicile rather than the law of place of injury should therefore govern the capacity of one spouse to sue the other in tort. In *Haynie v. Hanson*¹² the court declined to modify the Haumschild rule.

In *Haynie* there was a collision in Wisconsin between cars driven by a resident of Illinois and a resident of Wisconsin. The wife and passenger of the Illinois driver sued the Wisconsin driver and his insurer. The latter sought contribution from the insurer of the Illinois driver. The court rejected an argument that public policy required application

⁸ 28 USC.

⁹ 15 Wis. 2d 311, 324, 113 N.W. 2d 537 (1961).

¹⁰ 6 Wis. 2d 44, 93 N.W. 2d 867 (1959).

¹¹ 7 Wis. 2d 130, 95 N.W. 2d 814 (1959).

¹² 16 Wis. 2d 299, 114 N.W. 2d 443 (1962).

of Wisconsin law, permitting tort liability of husband to wife, in order to afford the right of contribution to the Wisconsin driver. Such application by the forum state of its own substantive law would fulfill the requirements of the doctrine of choice of law propounded by Professor Brainerd Currie,¹³ although it would not conform with more generally accepted rules.

If a generalization be appropriate, many of these changes represent a movement away from absolute defenses to liability and toward broader determinations by juries of the rights of litigants, in the light of their respective faults or their departures from standards of reasonableness as recognized by society.

Occasionally we hear of advocates of legislation creating a system of compensation for injury caused by automobiles, without regard to negligence or fault. Perhaps judicial willingness to change old doctrines which produce injustice when applied to present day situations provides an answer to such proposals. The impetus for workmen's compensation statutes resulted in some degree from rigid rules of tort law, which denied compensation to the injured and which the courts declined to liberalize.

The court has frequently heard the argument that certain doctrines could not be changed or developed by the court because of common law origins. Sec. 13, Art. XIV, of the Wisconsin Constitution provides:

Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

This provision appears in the part of the Constitution denominated "Schedule."

In *State v. Esser*¹⁴ and in *Bielski v. Schulze*¹⁵ the court held that this provision does not prevent the court from developing or changing the common law. The further adaptation and development of common law principles is part of the judicial power. The court held that to construe sec. 13, Art. XIV, as prohibiting courts from modifying the common law would be a limitation by a schedule provision of the grant of judicial power not so limited in the body of the constitution.

Another argument frequently used in opposing a change has been that the legislature approved a rule announced by the court by failing to change it. Up to now this argument has been persuasive in the matter of parent-child immunity¹⁶ and until the *Holytz* decision was persuasive in the matter of governmental immunity. The concept of legislative

¹³ *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE LAW JOURNAL 171, 178.

¹⁴ 16 Wis. 2d 567, 115 N.W. 2d 505 (1962).

¹⁵ 16 Wis. 2d 1, 114 N.W. 2d 105 (1962).

¹⁶ *Schwenkhoff v. Farmers Mut. Automobile Ins. Co.*, *supra*, footnote 10.

acquiescence by silence has been considered by several writers. Professor Henry M. Hart, Jr., of Harvard University Law School, in an article in the Centennial volume of the Columbia Law School,¹⁷ argues that legislative silence should have no effect on the law. He is joined in this opinion by Justice Traynor of the California Supreme Court, writing a companion article in the same volume. A legislature can create law only by complying with certain procedures, resulting in the passage of a bill. Failure to enact a law cannot be the enactment of a law. In the *Esser Case*,¹⁸ the court quoted Professor Hart as follows:

If we value this process of growth as highly as I have urged that we ought, then we should always be reluctant to conclude that the legislature, in relation to any matter, has tried to paralyze the process. We should welcome a doctrine which says that the legislature can do this, if it can do it at all, not by silence but only by unmistakable words. Only by adherence to such a doctrine can the resources of the judicial process for the infusion of reason into the law be fully utilized.

*Holytz v. City of Milwaukee*¹⁹ indicates that the court feels free to change doctrines established by the courts, even where proposals addressed to the legislature have been defeated. Mr. Justice Currie, in a concurring opinion in that case, stated:

I concur fully in the foregoing opinion by Mr. Justice Gordon. However, I deem it necessary to explain the rationale behind our reversal of position on the effect to be accorded legislative action in defeating bills which would have abrogated a rule of law previously established by this court. Heretofore, this court has adhered to the view that rejection by the legislature of a bill of this character constituted a clear expression of legislative intent that the court made rule was to be retained. Up to now this court has felt that, under our three department system of government, comity required that courts yield to any determination of policy falling within the competence of the legislature, and that the court's hands were tied to change a court made rule which the legislature had plainly indicated was to be retained.

However, we deem that the fallacy in the rationale of our former position is that legislative action defeating a proposed change of a court made rule is a *per se* expression of legislative acquiescence in the rule. If there were any way of determining with certitude that all votes cast to defeat a bill of this character were intended as a legislative endorsement on the merits of the correctness of the court made rule, it would be the duty of this court to yield to this expression of the legislative will. However, there is always present the possibility that some undeterminable number of legislators voted as they did because, inasmuch as the rule sought to be abrogated had been adopted by this court, they

¹⁷ *The Courts and Law Making*—Comment, LEGAL INSTITUTIONS TODAY AND TOMORROW, pp. 40-48, Columbia University Law School (1959).

¹⁸ *Supra*, footnote 14.

¹⁹ *Supra*, footnote 6.

deferred to the supposed wisdom of the court, or else determined that the court should correct its own mistakes. Because of this possibility, I have reversed my hitherto held and expressed views, and have come to the conclusion that this court must face up to the responsibility of changing a court made rule of law, which we deem the interests of justice require be changed, even though the legislature, by positive action short of codification has refused to make the change. The legislature still has the last word and may restore the court-abolished rule if it determines public policy so requires.

One should not, of course, conclude that this court will probably change every old rule brought under attack. In *State v. Esser*,²⁰ it was said: ". . . that established common-law rules will be followed unless after thorough consideration the court is convinced that new circumstances and needs of our society require a change. . . ."

1. *Assumption of risk.*

In *McConville v. State Farm Mut. Auto. Ins. Co.*²¹ and *Colson v. Rule*²² the court abolished the defense of assumption of risk at least where the assumption is implied from conduct. The court pointed out that one's unreasonable exposure of himself to a particular hazard is negligence, and subject to the comparative negligence statute. The court adopted the principle in *McConville* that the driver of an automobile owes his guest the same duty of ordinary care that he owes to others.

The court was, of course, making judgments as to the policy which would be more consonant with justice. The new rule was presaged in concurring opinions in *Baird v. Cornelius*.²³ Two recent cases were mentioned there as illustrations of injustice worked by the old rule.

In *Schinke v. Hartford Accident & Indemnity Co.*,²⁴ passenger-wife sought to recover damages from her husband for injuries caused by driving at an excessive speed. The jury found that the wife assumed the risk. She testified that she had protested against the speed, but the court found justification for the jury's verdict in the fact that the jury might have inferred that her "protests were not as vigorously made as they might have been," could have decided that she should have left the car when the husband made a stop 20 miles before they reached home, or that she should have demanded that he let her out at some other point before the accident.

Even if we guess that the same jury would have found that under the circumstances the wife was negligent in continuing to ride with her husband, it would have been improbable that it would have found her negligence equal to or greater than his. We would be more assured that

²⁰ *Supra*, footnote 14.

²¹ *Supra*, footnote 1.

²² *Supra*, footnote 2.

²³ 2 Wis. 2d 284, 297, 303, 107 N.W. 2d 278 (1961).

²⁴ 10 Wis. 2d 251, 103 N.W. 2d 73 (1960).

justice had been done if the jury had been asked to find whether she was negligent, and to compare her negligence with that of her husband.

In *Severson v. Hauck*,²⁵ plaintiff, a 15-year old girl, was injured when a passenger in a vehicle driven by a 19-year old friend, the defendant. They and others had attended a party and had consumed some beer. Plaintiff was in the back seat of the car with other girls, and they were "fooling around, tickling, giggling, and jumping." Somehow plaintiff suffered a cut on the back of her head and was dazed. When this was discovered one of the girls yelled to defendant to turn around and look at plaintiff's head. He slowed the car, turned to look at plaintiff for several seconds, and as a result ran into a bridge.

The jury found that plaintiff assumed the risk of excessive speed and negligent management and control. They also found plaintiff causally negligent and attributed 25 per cent of all the causal negligence to her. The court held that plaintiff's knowledge of the defendant's drinking before she entered the car, and her failure to protest afterward when she was aware of his speed and certain difficulty he had in controlling the car before the accident were sufficient bases for the finding of assumption of risk.

Plaintiff's conduct in the back seat may have been, as found by the jury, negligence which caused the collision. In theory, other guests who didn't participate in the horseplay to the same extent, may have had a cause of action against plaintiff. The same jury might have found plaintiff negligent in riding with defendant, and that such negligence plus the negligent horseplay was equal to at least 50 per cent of all the causal negligence. But, as in the *Schinke Case*,²⁶ we would be more assured that a just result had been reached if the jury had been permitted to answer the appropriate questions in terms of negligence rather than assumption of risk.

It was pointed out in the concurring opinion in *Baird*²⁷ that the defense of assumption of risk often produces an injustice to a third party defendant. Where two or more drivers are involved, and the negligence of one has been assumed by the guest, the whole burden of liability is placed on the other, even though all may be equally at fault. In many cases, including *Baird*, the host driver is more at fault.

The cases just mentioned are illustrations of the tendency of the defense of assumption of risk to produce injustice in automobile host-guest cases. As a generalization, the court said that the evaluation, policy judgment and concepts underlying the defense of assumption of risk "do not appear sufficiently valid under present-day customs and community attitude toward the use of automobiles."

²⁵ 11 Wis. 2d 192, 105 N.W. 2d 369, 106 N.W. 2d 404 (1960).

²⁶ *Supra*, footnote 24.

²⁷ *Supra*, footnote 23.

Another field in which the defense of assumption of risk was causing difficulty was that of injuries to farm laborers. Where a farm employe was injured by farm machinery and claimed that his employer was negligent, it might be claimed that his exposure of himself to danger was assumption of risk or contributory negligence or both. The result of establishing one defense might be quite different from the other, but distinction between them was difficult and often seemed artificial.²⁸

In *Colson v. Rule*,²⁹ the court abolished the defense of assumption of risk in farm labor cases, at least where there has been no express consent. Several policy reasons for this change were set forth: (1) It is unrealistic to hold that a farm laborer has assumed the risk of a dangerous situation arising from his use of a defective tool or piece of equipment supplied by his employer. (2) The defense of assumption of risk tends to immunize the employers who are the greatest transgressors in providing safe conditions of work. (3) The difficult and highly technical distinction mentioned above. (4) It is unjust to bar recovery where the employe passively accepts an unsafe condition and grant a partial recovery to an actively careless employee to whom a jury attributes less than 50 per cent of the causal negligence.

Several questions have been raised as to the extent and meaning of the *McConville* and *Colson* decisions. In a recent case, *Huntley v. Donlevy*,³⁰ argument was made suggesting that where plaintiff's voluntary exposure of himself to a known hazard was sufficient to be deemed assumption of risk, it was sufficient to constitute at least 50 per cent of the causal negligence as a matter of law. A similar argument was made in *McConville*. It is clear from both cases that the court does not consider conduct upon which a finding of assumption of risk could be grounded under the old rule as necessarily the equivalent of contributory negligence equal to the negligence of the host. To hold otherwise would allow the disfavored doctrine back into the law, through a rear entrance.

Another question raised is whether the defense has been abolished in all instances of its former application. The *McConville* and *Colson Cases* dealt with the relationship of host to guest in an automobile and employer to employe on a farm. The policy questions germane to this defense in other situations have not yet been re-examined by the court.

The opinions in *McConville* and *Colson* do not say that an express agreement to assume a particular risk will not be a defense where injury results from that risk. Whether and under what circumstances a clear and specific assumption of a particular risk will still be treated

²⁸ See *Venden v. Meisel*, 2 Wis. 2d 253, 85 N.W. 2d 766 (1957), *Haile v. Ellis*, 5 Wis. 2d 221, 92 N.W. 2d 863, 93 N.W. 2d 857 (1958), and cases referred to therein.

²⁹ *Supra*, footnote 2.

³⁰ 16 Wis. 2d 412, 114 N.W. 2d 848 (1962).

as a complete defense, rather than as contributory negligence if unreasonable, remains to be decided as the cases arise.

2. *Contribution*. In *Bielski v. Schulze*,³¹ the court modified the rule of contribution between concurrent tort feasons which previously applied. It was said at page 6:

we conclude the amount of liability for contribution of tort-feasons who sustain a common liability by reason of causal negligence should be determined in proportion to the percentage of causal negligence attributable to each. . . .

As indicated in the opinion, the doctrine of contribution is equitable in nature, and the rule will accomplish its equitable purpose more completely if the ultimate distribution of the burden is based on the proportion of causal negligence of each tort feason.

The argument that the new rule would complicate litigation was accorded little weight because of the experience lawyers, courts and juries have had in this state in comparing negligence. The adjustment in special verdicts required by the new rule is that there must be a comparison of the causal negligence of concurring tort feasons even though plaintiff be found not negligent. Ordinarily no more than one comparison question would be required. If, for example, plaintiff and two defendants be each found causally negligent, and 20 per cent of the total be attributed to plaintiff, 35 per cent to one defendant and 45 per cent to the second, plaintiff can recover 80 per cent of his damages from either defendant or both. The first defendant's share of the burden is 35/80 of plaintiff's recovery and the share of the second defendant is 45/80. If either defendant pays more than his share, he is entitled to contribution for the difference.

It is doubtless too early to say whether the new rule will make settlements more difficult. It certainly changes certain factors in appraising the possible results of going to trial.

As indicated in the opinion of the court, releases can be drawn under the new rule which sufficiently protect the settling tort-feason from a claim of contribution, if plaintiff agrees to satisfy such percentage of the judgment he ultimately recovers, as the settling tort-feason's causal negligence is determined to be of all the causal negligence of all the co-tort-feasons liable to plaintiff.

Bielski v. Schulze also abolished the concept of gross negligence. Mr. Justice Hallows, writing for the court, pointed out changes which had occurred from time to time in the history of this concept, and stated that one of the main reasons for its growth was to ameliorate the hardships of the common law doctrine of contributory negligence, modified in 1931 by our comparative negligence statute. "The doctrine

³¹ *Supra*, footnote 3.

of gross negligence as a vehicle of social policy no longer fulfills a purpose in comparative negligence. . . ."³² Inequities resulting from the concept of gross negligence in the field of contribution and indemnity were pointed out, and reasons for retaining this concept were found to have little merit.

The new rules announced in *Bielski* (decided March 6, 1962) were applied retroactively except for three situations described as follows: (1) Where a judgment based upon the old rules has been entered and no motion to vacate it has been made or appeal taken before this date; (2) where verdicts have been rendered sufficient to dispose of the case under the former rules but where application of the new rules would require a new trial not required for other reasons; (3) when settlements have been effected with one co-tort-feasor in such manner as would sufficiently protect him from liability for contribution under the former rules.

3. *Negligence comparisons under McConville and Bielski.* As previously suggested the *Bielski* rule on contribution will require no fundamental change in framing a special verdict, although in some cases where no comparison between defendants would have been required before *Bielski* such comparison will now be necessary. Under *McConville*, however, it is recognized that a new problem may exist where a plaintiff guest is allegedly negligent in riding with her host, there has been a collision between two allegedly negligent drivers, and either driver claims damages from the other.

Assume that plaintiff Guest has unreasonably exposed herself to known hazards in riding with defendant Host. A collision was caused by Host's negligence and negligence of defendant Other Driver. All were injured. Before *McConville*, a finding that Guest assumed the risk would ordinarily have disposed of her claim against Host, assuming that Host's negligence was within the risk assumed, and the recovery of one driver against the other would have been determined on the basis of the comparison of their causal negligence, made by the jury.

After *McConville*, the jury will not be asked whether Guest assumed the risk, but whether she was negligent and whether her negligence caused her injuries. If the only issue as to Guest's negligence is whether she was negligent in riding with Host, the problem is not difficult. Assume 20 per cent of all the negligence causing her injuries is attributed to her, 45 per cent to Host and 35 per cent to Other Driver. Guest recovers 80 per cent of her damages from Host and Other Driver, jointly and severally. But only 80 per cent of the found negligence caused the collision and the injuries to Host and Other Driver. Should not Other Driver be given judgment against Host for 45/80 of Other

³² *Supra*, footnote 3, p. 17.

Driver's damages? He will be awarded contribution of any amount he pays Guest in excess of 35/80 of her recovery.

A more difficult problem will arise if Guest is also accused of negligent conduct which caused the collision, e.g. creating a disturbance in the car, as plaintiff did in *Severson v. Hauck*.³³ Guest's negligence in riding with Host caused her injury, but did not cause the collision. Guest's negligence in interfering with Host's lookout or management helped cause the collision as well as her own injury.

This problem was discussed in *McConville* as follows:

Active negligence of a guest may be a cause of the collision and consequently a cause of his injuries. In the instant case, for instance, McConville's inadequate lookout, and presumably his failure to warn Mrs. Licht, were found by the jury to be a cause of the collision. A guest's negligence in riding with a host-driver whose known habits or lack of skill present a hazard would not be a cause of a collision, but would be a cause of the guest's injury resulting from that hazard. Here the second driver, Mr. Peterson, has been eliminated from the case, and if McConville should be found causally negligent as to lookout and as to riding with Mrs. Licht, both types of negligence should be taken together and compared with Mrs. Licht's causal negligence. If there were still an issue with respect to negligence of a second driver causing the collision, and if there were claims of one driver against the other for damages, it would be necessary to have *more than one comparison question*. The guest's negligence with respect to riding with the host would affect the guest's right to recover from the host or the other driver or both, and would enter into the comparison of the guest's causal negligence with that of each driver but would be immaterial with respect to the right of one driver to recover from the other.³⁴ (Italics supplied)

This problem and the statement above quoted have caused considerable discussion among trial lawyers and judges. There does not appear to be much question but that a guest may be guilty of conduct which is so actively a cause of a collision that it would affect the rights of others, but it has been earnestly urged that a guest's inattention and failure to warn should be classified along with her negligence in riding with the host, perhaps under the phrase "negligence with respect to her own safety;" that a guest has no duty to others to maintain a lookout and to warn of danger; or that a failure in that respect is, as a matter of policy, not a sufficient ground for liability of the guest; and that in any event we have in past decisions recognized an unrealistic standard of care with respect to lookout on the part of a guest in an automobile.

It is safe to assume that cases will arise in which the court will be asked to modify or clarify the reference to guest's lack of lookout as "active negligence" in the portion of *McConville* above quoted.

³³ *Supra*, footnote 25.

³⁴ *Supra*, footnote 1, p. 385.

It has also been suggested that it may not be necessary to include more than one comparison *question* in a verdict, even where a guest's "active" negligence be claimed. It has been suggested that a verdict might be so framed as to call separate findings on a guest's negligence with respect to riding with the host and her negligence in some other respect, causing the collision, and to include but one comparison question, which would nevertheless be a basis for a proper judgment.

Assume that in answer to the comparison question, the jury attributes 10 per cent of all the negligence causing Guest's injuries to Guest's negligence with respect to riding with Host, 15 per cent to Guest's negligence with respect to interfering with Host's proper lookout, 45 per cent to Host's negligence, and 30 per cent to Other Driver's negligence. Guest will be given judgment for 75 per cent of her damages. Should not Other Driver have judgment against Host for 30/90 of his damages? The denominator 90 is the total of Guest's active negligence (15) plus Host's negligence (45) plus Other Driver's negligence (30). A single comparison question will reduce claims of inconsistency between answers. Won't the single comparison question, so framed, be adequate in most cases, notwithstanding the reference in *McConville* to "more than one comparison question?"

Answers to the questions just posed, and to the variations of them which will arise as the circumstances vary, will necessarily await decisions of the court in future cases.

4. *Governmental immunity*. In *Holytz v. City of Milwaukee*,³⁵ the doctrine of governmental immunity was abrogated. Several statements in the opinion, written by Mr. Justice Gordon, significantly outline the scope of the change.

The abrogation applies "broadly to torts, whether they be by commission or omission."

Perhaps clarity will be afforded by our expression that henceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity. In determining the tort liability of a municipality it is no longer necessary to divide its operations into those which are proprietary and those which are governmental. Our decision does not broaden the government's obligation so as to make it responsible for all harms to others; it is only as to those harms which are torts that governmental bodies are to be liable by reason of this decision.

Although the case at bar related specifically to a city, the court stated that the

abrogation of the doctrine applies to all public bodies within the state: the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivisions of the state—whether they be incorporated or not. By

³⁵ *Supra*, footnote 6.

reason of the rule of *respondeat superior* a public body shall be liable for damages for the torts of its officers, agents and employees occurring in the course of the business of such public body.

This decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions.

With respect to liability of the state, the court said:

Henceforward, there will be substantive liability on the part of the state, but the right to sue the state is subject to sec. 27, Art. IV of the Wisconsin Constitution which provides: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." The decision in the case at bar removes the state's defense of nonliability for torts, but it has no effect upon the state's sovereign right under the Constitution to be sued only upon its consent.

The court noted that sec. 285.01, Stats., authorizing commencement of suit against the state has been construed to apply only to those claims which render the state a debtor, but stated that no opinion was expressed upon the effect of the abolition of tort immunity upon the construction of this section.

The court applied the new rule to the case before it, but postponed its effect in all other cases until July 15, 1962, noting that public bodies might need to make financial arrangements to meet new liabilities.

A list of municipal functions out of which new types of claims might be expected to arise is set forth in *Municipal Immunity From Tort Claims Abolished*.³⁶ It should be noted, however, that governmental bodies already were liable in many areas. Sec. 345.05, Stats., imposed liability for damages caused by the negligent operation of a motor vehicle owned and operated by governmental bodies. In other tort areas, liability was imposed upon municipalities for damages incurred while engaging in proprietary rather than governmental functions.³⁷ There was also liability for nuisance, where the relationship of governor-governed did not exist.³⁸ Governmental bodies were also liable for all damages awarded against public officers, who caused damage in their official capacity, while acting in good faith.³⁹ There was also limited liability for highway defects⁴⁰ and liability for violation of the safe-place statute. The impact of the abolition of governmental immunity can be softened if governmental bodies procure liability insurance, as they are authorized to do.⁴¹

³⁶ THE MUNICIPALITY, Vol. 57, July 1962, No. 7, p. 171.

³⁷ *Christian v. New London*, 234 Wis. 123, 290 N.W. 621 (1940); *Highway Trailer Co. v. Janesville Elec. Co.*, 187 Wis. 161, 204 N.W. 773 (1925).

³⁸ See Comment, 45 MARQUETTE LAW REVIEW 90 (1961).

³⁹ Sec. 270.58, STATS.

⁴⁰ Sec. 81.15, STATS.

⁴¹ Sec. 66.18, STATS.

The court recognized that the legislature is free to determine public policy with respect to governmental immunity. It was said:

If the legislature deems it better public policy, it is, of course, free to reinstate immunity. The legislature may also impose ceilings on the amount of damages or set up administrative requirements which may be preliminary to the commencement of judicial proceedings for an alleged tort. See, for example, the notice provisions and the limitation of the amount of damages, in sec. 81.15, Stats.

In this connection it is interesting to compare the liability for torts of a Wisconsin governmental body beginning July 15, 1962, with the liability of the United States under the Federal Tort Claims Act.

The effect of the *Holytz Case* is similar in some instances and dissimilar in others to recoveries under the Federal Tort Claims Act. The United States is liable in the same manner as a private individual, except there is no liability for interest prior to judgment or for punitive damages.⁴² The Tort Claims Act excepts among other things acts or omissions in the execution of a statute or regulation, or damages caused in the performance of a discretionary duty.⁴³

The federal act is dissimilar in that a judgment against the United States is a bar to an action by the claimant against the employe.⁴⁴ The federal act provides an exclusive remedy where damages are caused by the negligent operation of a motor vehicle by an employe.⁴⁵ If an action is brought against an employe for acts colorably within the scope of his employ, the case is deemed one against the United States.⁴⁶ Attorneys' fees in suits against the United States are limited to 20 per cent of the recovery.⁴⁷ No recovery may be had for certain listed intentional torts.⁴⁸ In Wisconsin the only limitation on such recovery for intentional torts would be those inherent in the doctrine of *respondeat superior*.

5. *Prospective overruling, or "sunbursting."* Traditionally, when a court overruled a previous decision, it was the theory that the older decision had never been a correct statement of the law, and constituted only an error made in the particular case. The new pronouncement was, accordingly, completely retroactive, except to the extent that a principle such as *res judicata* or a statute of limitation might prevent application to a particular situation.

Obvious difficulties arise from completely retroactive application of a changed rule. A court may become convinced that a particular rule is wrong in principle although widely relied on in the conduct of business

⁴² 28 U.S.C. sec. 2674.

⁴³ 28 U.S.C. sec. 280.

⁴⁴ 28 U.S.C. sec. 2676.

⁴⁵ 28 U.S.C. sec. 2679.

⁴⁶ 28 U.S.C. sec. 2679.

⁴⁷ 28 U.S.C. sec. 2678.

⁴⁸ 28 U.S.C. sec. 2680.

or other affairs. If so, a change in the rule with prospective effect only will be desirable. A rule may have served well under conditions at an earlier time, but be discarded because it is out of tune with present day customs and relationships.

In several of the recent cases where rules of tort law have been changed, the changed rule is to be given prospective effect only, except for the case at hand, or some other limited class of cases. This technique is sometimes dubbed "sunbursting." The name comes from *Great Northern Railway Co. v. Sunburst Oil Co.*⁴⁹ where the supreme court of the United States held that a state court violated no federal rights by applying the doctrine announced in an earlier case to the litigant before it, although deciding that the earlier doctrine was erroneous and would not be followed in the future. Mr. Justice Cardozo, writing for the court, said:

We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly . . . that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. . . . The alternative is the same whether the subject of the new decision is common law . . . or statute. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmation and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in

⁴⁹ 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932).

the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process. (pp. 364-366)⁵⁰

In *McConville*⁵¹ and *Colson*,⁵² abrogating the defense of assumption of risk, the court did not limit the application of the change in law. The existence of the defense becomes important to most people only in retrospect. A prospective host probably does not consciously rely upon it, either in offering an automobile ride to his guest or deciding whether or not to carry liability insurance. The degree to which the existence of the defense might affect the premiums charged by insurance companies is not clear. Nor is it clear that a farmer would rely on the doctrine in deciding against insurance. In any event, the concurring opinions in *Baird v. Cornelius*,⁵³ decided one year before *McConville*, had very clearly signalled the probability that the defense was likely to be abrogated.

In *Bielski*⁵⁴ the court limited the retrospective application of the change in law with respect to contribution and gross negligence. Here again were elements of law which are ordinarily not relied upon by people who are about to engage in tortious conduct. Yet the court was mindful of the fact that if full retrospective application were given, burdens of further litigation would probably be imposed on litigants and the public in cases where claims had been substantially disposed of by litigation or settlement. Such burdens would seem to be wasteful. The limitations on retrospective application of the new rule of law with respect to contribution and gross negligence have already been stated.

In *Kojis*⁵⁵ abrogating certain charitable immunity, and in *Holytz*⁵⁶ abrogating governmental immunity, the change was applied prospectively only, except for the case at bar. Hospitals may well have relied upon the old rule of immunity in deciding not to insure against some types of liability. Municipalities might well have concluded that they were not authorized to insure against liability from which they were considered immune. In *Holytz*, the court delayed the applicable date for the new rule for more than a month after announcing the decision.

In each case where the change in law was not made retroactive, an exception was made of the case before the court. As indicated in *Kojis*, the principal reason for the exception is that the litigant who has attacked the old rule should be entitled to the benefit of its demise. It is

⁵⁰ See *Kojis v. Doctors Hospital*, *supra*, footnote 4, p. 373, supplemental opinion, for citation of authorities discussing limitation of changed doctrine to prospective application.

⁵¹ *Supra*, footnote 1.

⁵² *Supra*, footnote 2.

⁵³ *Supra*, footnote 23.

⁵⁴ *Supra*, footnote 3.

⁵⁵ *Supra*, footnote 4.

⁵⁶ *Supra*, footnote 6.

a reward to him for his effort and expense in convincing the court that the old rule is erroneous, and the opposite rule would deprive appellants of incentive to challenge other precedent if deemed erroneous.

CONCLUSION

The most significant recent changes in tort law in Wisconsin have been abrogation of certain defenses which are no longer thought to serve good public policy. Claims which formerly were cut off when one of these defenses was made to appear, will now be adjudicated upon jury verdicts determining negligence, causal relationships of negligence to injuries, and comparison of negligence. The court has been willing in these instances to re-examine doctrines operating as absolute so that responsibility for injuries and damage can be determined case by case upon examination of all the circumstances.