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Torts-Negligence: Recovery for Traumatic Neurosis

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The *Ford* case illustrates a fact situation offering strong possibilities of allowing the equitable principles of estoppel and recoupment to govern. Although the former was not sufficiently established, the court seems to have engaged in an independent analysis of recoupment, divorcing its equitable foundation from the consequences of their decision. By stringently enforcing the "single transaction" requirement, in effect the court permitted the plaintiffs to evade their estate tax liability under circumstances which place a greater degree of fault upon their executors than upon the Government. Chief Judge Jones in his dissenting opinion expressed a sounder solution to the dilemma:

> The correction is being made at the instance of plaintiffs. It seems fair that as a condition to the change in valuation they should be willing to surrender the advantage which had come to them by reason of the undervaluation they are seeking to change."[27]

This result would leave the parties in the financial position they would have assumed by a correct valuation of the stock.

MICHAEL WHERRY

Torts—Negligence: Recovery for Traumatic Neurosis—Plaintiff, the driver of an automobile struck by defendant's car, received a brain concussion during the collision and was thrown onto the pavement. Regaining consciousness and observing defendant lying on the pavement apparently dead, and bleeding, and his elderly wife standing there helpless and confused, plaintiff became hysterical, commenced crying, shaking, and complained of a headache. On appeal from an award to plaintiff for mental and physical injuries, the record indicated that plaintiff had experienced a traumatic neurosis—an anxiety reaction precipitated by a trauma. A psychiatrist testified that the brain concussion served as a "competent reducing cause" which weakened plaintiff's powers of repression. Plaintiff, having a repressed hatred for his father, associated

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against her for past due estate income taxes. Her claim of recoupment was granted on the grounds that the true net estate was greatly reduced by the liability for income taxes in 1949. With regard to the single taxable event theory, the court stated at 228 "The Government has received monies which in equity and good conscience belong to the taxpayer. . . . It is true that in the *Bull* case both claims grew out of the same transaction and were asserted against the same money in the hands of the executor; but that in practical effect, is the situation that prevails here. The Government has asserted two claims against the monies of the estate that came into the hands of the administratrix, one on account of past due income taxes, and the other on account of the estate tax due on the net estate, and it is impossible to determine the amount of the latter without making due allowance for the deduction caused by the former." Accord: Bowcutt v. U.S., 175 F. Supp. 218 (D. Mont., 1959).

[27] *Supra* note 9, at 23, 24.

him with the defendant, and being in a weakened mental state, this association "triggered" the reaction. The Court decided that the plaintiff could recover only for the physical injuries resulting from defendant's negligence. It reasoned that,

> The testimony of Dr. Smith establishes that the neurosis did not have its origin in the brain concussion, but was due to the plaintiff having seen Bergeson immediately after the accident lying on the pavement with his wife standing alongside. This requires that the same rule of damages be applied as in the cases in which recovery is allowed for emotional distress alone. Such rule precludes recovery in an action grounded upon negligence for emotional distress which is due to a pre-existing susceptibility to emotional disturbance not present in a normal individual, unless the actor had prior knowledge of such susceptibility.[1]

No such knowledge having been shown, judgment for mental damages was reversed, but the issue of physical damages was remanded for further disposition. *Mac Mahon v. Bergeson,* 9 Wis. 2d 256, 101 N.W. 2d 63 (1959).[2]

The above quotation constitutes the entire reasoning of the Court for denial of recovery.[3] Being susceptible to conflicting interpretations, the decision does not unequivocally express why plaintiff could not recover for his mental injuries. In fact it gives rise to at least three possible grounds for denial: 1. defendant was under no duty in the first instance to foresee the likelihood of plaintiff's mental injuries, 2. a duty did exist, but defendant's misfeasance was not the proximate cause of plaintiff's illness, 3. defendant's negligent conduct was a substantial factor in producing plaintiff's illness, but as a matter of law, recovery was denied on grounds of public policy.

The inference may be drawn that compensatory damages for mental injuries was denied because defendant had no duty to protect plaintiff

[1] MacMahon v. Bergeson, 9 Wis. 2d 256, 272, 101 N.W. 2d 63, 71 (1959).

[2] See, 64 A.L.R. 2d 100, 1959, for an alignment of the various jurisdictions in the field of recovery for emotional disturbance.

[3] *Supra* note 1. The following authorities are cited, without discussion, in support of the doctrine announced by the Court: RESTATEMENT, TORTS §313 (1934); PROSSER, TORTS §37, 179-80 (2d ed. 1955); Mc Niece, *Psychic Injury and Tort Liability in New York.* 24 ST. JOHN'S L. REV. 1, 77 (1949); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli,* 30 VIRGINIA L. REV. 193, 282 (1944).
Restatement of Torts §313, entitled *Emotional Distress Unintended,* reads as follows: (1) If the actor unintentionally causes emotional distress to another, he is liable to the other for illness or bodily harm of which the distress is a legal cause if the actor: (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm. The following statement is found under comment b; ". . . one who unintentionally but negligently subjects another to such an emotional distress does not take the risk of any exceptional physical sensitiveness to emotion which the other may have unless the circumstances known to the actor should appraise him thereof."

from this type of harm. Before actionable negligence may be predicated upon the conduct of the defendant, an existent duty must appear combined with a co-existent breach thereof. A duty is said to arise to protect others from a wrongful invasion of their rights when the actor, as an ordinarily prudent and intelligent person, should reasonably foresee that his conduct is likely to create an unreasonable risk of harm to others.[4] Further, it is not necessary, for the actor's conduct to constitute negligence, that he foresee the *particular* type or degree of injury, but only that he foresee the risk of *some* injury.[5] If this case holds that no duty arose to protect plaintiff from mental injury because the defendant could not anticipate that *particular form* of resultant injury, then it would appear inconsistent with existing case law. It is at least arguable that defendant's duty toward plaintiff's emotional tranquillity was conditioned upon his ability to foresee the occurrence of a particular type of injury to the libellant. With this interpretation of the rationale in the *Mac Mahon* case, the rule is diametrically opposed to the principles announced in *Koehler v. Waukesha Milk Co.*[6] and in *Osborne v. Montgomery.*[7]

Recovery has been allowed for actionable negligence where a plaintiff suffers combinations of physical and mental injuries,[8] but

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[4] Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).

[5] Koehler v. Waukesha Milk Co., 190 Wis. 52, 208 N.W. 901 (1926). *Accord,* Le Beau v. M.St.P. & S.S.R.Co., 164 Wis. 30, 159 N.W. 577 (1916); Crouse v. C. & N.W.Co., 104 Wis. 473, 483, 80 N.W. 752, 755 (1899), "It is not necessary to a recovery that the defendant should have foreseen the exact injury shown. It is sufficient if the damage claimed legitimately flows directly from the negligent act, whether such damages might have been foreseen by the wrongdoer or not."; For the same reasoning in an intentional tort case *cf.* Vosburg v. Putney, 80 Wis. 523, 530, 50 N.W. 403, 404 (1891), ". . . the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him."

[6] *Supra* note 5.

[7] *Supra* note 4, at 236, 234 N.W. at 377, "This court . . . [commenting on Koehler v. Waukesha Milk Co.] adopted the rule that given a negligent act creating liability, the extent of that liability is for all consequent damages naturally following the injuries whether such resulting damages were reasonable to be anticipated or not . . . . This leaves out the element of probability or reasonable anticipation or foreseeability as a factor, operating to limit the extent of the defendant's liability."

[8] *E.g.,* Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909), where, in allowing recovery for plaintiff's miscarriage due to severe fright, negligently occasioned, the Court held that physical injury flowing directly from extreme fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow; Sundquist v. Madison Rys. Co., 197 Wis. 83, 221 N.W. 392 (1928), where plaintiff recovered for hysterical paralysis, suffered more than two-months after defendant's actionable negligence, when she was frightened by the clanging-bell of a passing streetcar, the Court held that there is no need of foreseeability of the particular injury as long as damage legitimately flows directly from the negligent act; *cf.* Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W. 2d 397 (1955). For treatment of this proposition in other jurisdictions see 64 A.L.R. 2d 100 (1959); 15 AM. JUR. DAMAGES §§176, 188 (1938).

apparently not for pure mental injuries without some physical injuries.[9] In the *Mac Mahon* case, the Court may be suggesting that even where physical injuries accompany mental injuries, a duty may arise to protect plaintiff from physical injury, but not from mental injury; and the controlling determinant is defendant's prior knowledge of plaintiff's mental peculiarities. Therefore, sufficient evidence to impose a duty to protect another from mental injury, would necessarily require affirmative answers to the following two questions: did the actor know of the person's susceptibility to particular injuries, and did he foresee that his conduct could cause that particular type of injury to that person?

There is considerable support for the proposition that a defendant who is negligent takes the plaintiff in the condition that he finds him,[10] such as pregnancy, latent disease, susceptibility to disease, and weakened physical or mental conditions.[11] The Wisconsin Court gave tacit recognition to this principle in *Osborne v. Montgomery,* where the Court said:

> If it be kept in mind that foreseeability under our law as it now stands applies only to the question of negligence or the failure to exercise ordinary care and not to limit the liability for the consequences of the wrongful act, much confusion should be done away with.[12]

Thus, a holding that the defendant in the principal case should be required to foresee a particular injury to the plaintiff, just because he was afflicted with a mental impairment, contravenes prior Wisconsin case law. It may be difficult to say that the Court has now departed from well-established principles controlling the "duty" element of negligence, but such an interpretation is logical.

Assuming that the *Mac Mahon* decision was grounded upon proximate causation, a clear expression thereof does not appear. Causation, as defined in the case of *Pfieffer v. Standard Gateway Theaters, Inc.,* is as follows:

> An instruction on proximate cause would be proper which informs the jury that by proximate cause, legal cause, or cause . . . is meant such efficient cause of the accident as to lead the jurors, as reasonable men and women, to conclude that the negligence of A (A having been found negligent . . .) was a *substantial factor* in causing the injury. (Emphasis supplied by the court).[13]

[9] *E.g.,* Summerfield v. Western Union Telegraph Co., 87 Wis. 1, 57 N.W. 973 (1894), where recovery was denied for pure emotional injury allegedly received because of defendant's negligent delay in transmitting a telegram from plaintiff's dying mother; Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900), citing the Summerfield case with approval.

[10] PROSSER, TORTS §48, at 260 (2d ed. 1955).

[11] *Infra* note 20 for cases therein cited.

[12] *Supra* note 4 ,at 242, 234 N.W. at 379.

[13] Pfieffer v. Standard Gateway Theaters, Inc., 262 Wis. 229, 236, 55 N.W. 2d

In the *Mac Mahon* case, the majority opinion agreed with the jury-finding that Bergeson's negligence was a substantial factor in producing plaintiff's physical injuries but disagreed with the triers of fact as to any consequential mental damage. If this reasoning means that there was no causal connection between defendant's negligence and plaintiff's mental injuries, in a *legal* sense, it would contradict the "substantial factor" doctrine adopted in the *Pfieffer* case.

Recovery in the instant case was not sought on the grounds of institution of a neurosis but for the precipitation and aggravation of a pre-existing condition peculiar to this plaintiff.[14] This is quite a different thing. "Medically, trauma is not considered the primary cause of such a neurosis."[15] A neurotic individual exists with mental imbalances that have causal origins extending into the past.[16]

In the metaphysical sense, many factors concur to cause a given event, and the same is true in the medical sense of causality. However, a court is faced with the issue of who is *legally* responsible for plaintiff's alleged injuries. In the *Mac Mahon* case, without defendant's negligence in the first instance, it is unlikely that plaintiff would have suffered a traumatic neurosis.[17] Nevertheless, as stated by the dissentors, "it is clear that Bergeson's negligence caused plaintiff's illness."[18] Hence, did the Wisconsin Court deny recovery because defendant did not *medically* cause plaintiff's mental injuries?

In a traumatic neurosis suffered under such circumstances as existed in this case, defendant's conduct,

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29, 33 (1952). In reversing the earlier case of E. L. Chester Co. v. Wisconsin Power & Light Co., 211 Wis. 158, 247 N.W. 861 (1933), the Court stated, at 240, 55 N.W. 2d at 34, "The effect of the decision in E. L. Chester, . . . [is that] in the unusual or 'hard' case the inquiry as to reasonable anticipation should be limited to the particular type of injury which actually occurred. We no longer consider this to be the proper solution . . . . It would seem to be preferable to submit these hard cases to the jury in so far as determining the issues of negligence and causation in the same manner as in the ordinary case."

[14] See, Goodrich, *Emotional Disturbances as Legal Damages,* 20 MICH. L. REV. 497 (1921-22), for an excellent discussion of the relationships between physical and mental injuries peculiar to the field of tort liability. See generally, Magruder, *Mental and Emotional Disturbances in the Law of Torts,* 49 HARV. LAW REV. 1033 (1935-36).

[15] STRECKER, PRACTICAL CLINICAL PSYCHIATRY (7th ed. 1951).

[16] Lubitz, *Traumatic Neurosis,* 41 MAR. L. REV. 421, 429 (1958).

[17] *Supra* note 1, at 267, 269, 101 N.W. 2d at 69, 70. On direct examination the psychiatrist testified, in part, that ". . . in a traumatic neurosis we say that there is a pre-existing emotional state or readiness for this neurosis, and it takes some precipitating event to cause the neurosis to show itself." (All italicized in original) . . . On cross examination he stated that, "Prior to the accident his [plaintiff's] feelings about his father had been pushed down and repressed. His powers of repression were weakened by the accident itself and the mental trauma that he received at that particular time. The accident weakened these powers of repression. After the powers of repression had been weakened, he then saw Mr. and Mrs. Bergeson."

[18] *Supra* note 1, at 273, 101 N.W. 2d at 73 (dissenting opinion).

> . . . may be responsible for the onset of an already existing impairment. Medicine attributes the cause of this impairment to emotional conflict antedating the trauma brought about by the tortious conduct and considers the trauma merely a precipitating factor of but a part of the course of the disorder.[19]

However, the concept of legal causation in fact, requires only that but for the commission of the tort, the harm would not have been sustained by the plaintiff. This requirement has meant such efficient cause as to lead reasonable men to conclude that a defendant's conduct was *a* substantial factor in producing the injury:

> . . . where . . . defendant's negligence has brought about bodily injury through physical trauma or impact, the law freely allows recovery for many kinds of emotional disturbances that result from the injury. Such damages have amply been called 'parasitic.' They include fright, mental anguish, and the like, and also suffering and disability caused by traumatic neurosis.[20]

Though the Court, in denying relief, adopted the view that Mac Mahon's neurosis did not have its *medical* origin in the brain concussion, (a finding substantiated by voluminous medical testimony), the jury found that defendant's negligence was the *legal* cause—a substantial factor—precipitating a chain of causal events that unwillingly thrust plaintiff into a weakened mental state and created a combination of unique circumstances that "triggered" the anxiety reaction. When determining legal causality, the tort, and not the psychic injury is the foundation of the cause of action. There is indication that the Court failed to differentiate the medical cause of plaintiff's anxiety reaction resulting from the actionable injury, and the legal cause creating the actionable injury. It remains that defendant's negligent conduct precipitated the actionable injury.

A third possible interpretation of the rule announced in the *Mac Mahon* decision is that the Court recognized defendant's duty and legal causation, but denied recovery for plaintiff's mental injuries as a matter of law, i.e. to avoid shocking the public conscience. If this was

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[19] *Supra* note 16, at 440.

[20] 2 HARPER & JAMES, TORTS §18.4, at 1032 (1956). Where a complainant is not an "ordinary" person, but has a pre-existing susceptibility to injury, this has not prevented a finding of proximate causation in prior cases involving various impairments. *E.g.*, Pankopf v. Hinkley, *supra* note 8 (pregnancy); Brown v. C.M.St.P.Ry.Co., 54 Wis. 342, 11 N.W. 356 (1882) (pregnancy); Sundquist v. Madison Rys. Co., *supra* note 8 (hysterical paralysis); Colla v. Mandella, *infra* note 23 (heart disease); McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911) (alcoholic disease—delirium tremens); Flood v. Smith, Brown v. Same, 126 Conn. 644, 13 A. 2d 677 (1940) (diseased thyroid gland) (nervous disorder); Offensend v. Atlantic Refining Co., 322 Pa. 339, 185 A. 745 (1936) (tubercular infection); Louisville & N.R. Co. v. Wright, 183 Ky. 634, 210 S.W. 184 (1919) (susceptible to creosote poisoning); Kenney v. Wong Len, 81 N.H. 427, 128 A. 343 (1925) (unusual fear of mice—dead mouse in soup).

the Court's reasoning, such position would find adequate support in Wisconsin case law:

> It is recognized by this and other courts that even where the chain of causation is complete and direct, recovery against the negligent tortfeasor may sometimes be denied on grounds of public policy because the injury is too remote from the negligence . . . or in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, . . . or be too likely to open the way to fraudulent claims, or would enter a field that has no sensible or just stopping point.[21]

The instant case falls "three-square"[22] onto the decision of *Colla v. Mandella,*[23] a recent case brought for plaintiff's wrongful death flowing from fright-induced physical injuries. Colla, an elderly man suffering from a mild heart condition, was napping on his bed when defendant's runaway truck crashed into the wall adjacent to Colla's bedroom. Plaintiff was severly frightened and died ten days later. In awarding a new trial the Court held, that:

> If Mandella was negligent in the premises, his negligence was a proximate cause of Colla's damage and death. The chain of causation was direct. . . .[24]
> The fact that a normal man in Colla's position without heart trouble would have suffered no substantial injury, does not prevent recovery.'[25]

The Court decided that the aggravation of Colla's pre-existing physical impairment which made him susceptible to injury (where a "normal" individual would receive nothing more than a good scare),[26] constituted a good cause of action. Moreover, to hold defendant liable for the wrongful death would be a result not too remote to be unconscionable and against public policy.

Juxtaposition of the *Colla* and *Mac Mahon* cases forms a tenuous, but diametric distinction, viz. *pre-existing physical subnormality opposed to pre-existing mental subnormality.* The two cases cogently suggest the distinction that where there is a pre-existing physical im-

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[21] *Infra* note 23, at 598, 85 N.W. 2d at 348. *Accord,* Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935); Pfieffer v. Standard Gateway Theaters, Inc., *supra* note 13, at 240, 55 N.W. 2d at 35; Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 183, 77 N.W. 2d 397, 401 (1955); See generally, Osborne v. Montgomery, *supra* note 4; RESTATEMENT, TORTS §435(2) (1948 Suppl.); PROSSER, TORTS §48, at 265 (2d ed. 1955); Prosser, *Palsgraff Revisited,* 52 MICH. L. REV. 1 (1953-54).

[22] The essential difference is that in Colla v. Mandella, *infra* note 23, plaintiff's pre-existing impairment was a subnormal physical condition.

[23] 1 Wis. 2d 594, 85 N.W. 2d 345, 64 A.L.R. 2d 95 (1957).

[24] *Id.* at 597, 85 N.W. 2d at 347.

[25] *Id.* at 600, 85 N.W. 2d at 349. See RESTATEMENT, TORTS §461 (1934); PROSSER, TORTS §48, at 260 (2d ed. 1955). *supra* note 10.

[26] *Id.* at 596, 85 N.W. 2d at 347, "There was no evidence that the noise or shock of the accident would have been likely to cause any harm to a person in normal good health."

pairment reparation will be allowed, but where there is a pre-existing mental impairment reparation will be denied. That is to say, public policy may sanction recovery in the former case, but proscribe recovery in the latter.

The dissentors in *Mac Mahon v. Bergeson* held, *inter alia,* that the instant case fell squarely within *Colla v. Mandella,* and that there were no unusual grounds for denying recovery on the basis of public policy.[27] They recognized that plaintiff's neurotic condition, *per se,* was due to stresses in his background and did not have its primary *medical* origin in the brain concussion. However, they contend that it should have made no difference whether the plaintiff's subnormal response was due to a physical or mental condition, and defendant's innocense of any pre-existing condition should not have controlled recovery. It was clear that plaintiff's physical and mental injuries were both *legally* caused by defendant's misfeasance. Legal causation and liability did not suddenly stop with the brain concussion. Defendant's actionable negligence ". . . made plaintiff vulnerable to an anxiety reaction. . .,"[28] by creating the circumstances that triggered his traumatic neurosis. Moreover, it was uncontroverted that ". . . plaintiff experiences substantial suffering. . . ."[29] Therefore, recovery should not have been denied merely because it was plaintiff's misfortune to have had a pre-existing mental impairment.

Notwithstanding the *form* of prior infirmity, the *Mac Mahon* case should have been controlled by the established precedents followed in *Colla v. Mandella.*[30] Then if recovery was still to have been denied as a matter of law, the grounds for reversal would have been public policy—not any absence of defendant's "duty" or "legal causation." This would have been in accord with prior Wisconsin case law.[31] Furthermore, if expressly stated as such, the real grounds for the decision would not have been left to the inferences. The complete absence of any case law supporting the decision invites the conclusion that prior case law

[27] *Supra* note 1, at 273, 101 N.W. 2d at 72 (dissenting opinion), "The majority of the court rely upon the rule which would apply if plaintiff were a bystander whose emotional peculiarities were triggered by witnessing the injury of people who chanced to resemble his parents." If the majority means that as plaintiff observed the Bergesons at the accident-scene, he, at that time, was no different than a mere bystander who happened to come along, such position would have little support in the facts as presented.

[28] *Supra* note 27.

[29] *Ibid.*

[30] *Supra* note 23, at 599, 85 N.W. 2d at 348, "In such cases it is sometimes said that the actor owed no 'duty' to the injured party; but that terminology has been criticized as begging the question. The determination to deny liability is essentially one of public policy rather than of duty or causation."

[31] *E.g.,* Pfieffer v. Standard Gateway Theaters, Inc., *supra* note 13, at 240, 55 N.W. 2d at 34, "If the jury does determine that there was negligence, and that such negligence was a substantial factor in producing the injury, it is then for the court to decide as a matter of law whether or not considerations of public policy require that there be no liability."

was inapplicable, and that *Mac Mahon v. Bergeson* constitutes "new" law. Would this mean that recovery, within the field of ordinary negligence, is dependent upon whether plaintiff's pre-existing impairment is physical or mental? Does this case support the proposition that liability may attach to defendant's ordinary negligence toward "physically" subnormal plaintiff *A*, but "mentally" subnormal plaintiff *B* is *damnum absque injuria?* "The utter relativity of the suggested norms would seem to augur considerable uncertainty for future cases of this kind in Wisconsin."[32]

FREDERIC N. SPIDELL

Practice: Option to Plaintiff to Take Reasonable Verdict as Alternative to New Trial for Excessive Damages—Plaintiff, appellant, was a passenger in one of two automobiles involved in an accident. The jury found the drivers of both automobiles causally negligent and fixed damages at $1,500 for pain and suffering and $5,000 for permanent injuries. The trial court found that there was not proper medical testimony to support a finding of permanent injury and changed the jury's answer to the question relating to permanent injury from "yes" to "no." Judgment was entered in favor of the plaintiff for $1,500. The Supreme Court, in *Powers v. Allstate Insurance Co.*,[1] held that it was error on the part of the trial court to change the jury's verdict and that there was sufficient medical testimony to support a finding of permanent injury but that the damages assessed were excessive. The Supreme Court then stated:

> Heretofore, in such a situation it has been customary to fix the lowest amount an unprejudiced jury, properly instructed, might award for damages, and then grant to the plaintiff the option of taking such amount or having a new trial.[2]

The Supreme Court now adopts the rule that, "where an excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of the trial, the plaintiff should be granted the option of remitting the excess over and above such sum as the court shall determine is the reasonable amount of plaintiff's damages, or of having a new trial on the issue of damages."[3] The court thus overruled *Heimlich v. Tabor*[4] and *Campbell v. Sutliff*[5] in so far as they held that such a rule violated defendant's constitutional right to a trial by jury. The court granted to the plaintiff the option of taking either $3,000 for permanent injury or a new trial on the issue of damages.

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[32] GHIARDI, AIKEN & CORMAN, PERSONAL INJURY COMMENTATOR, 1958 Annual, ed. note p. 88.
[1] 10 Wis. 2d 78 (1960).
[2] *Id.* at 87.
[3] *Id.* at 91.
[4] 123 Wis. 525, 102 N.W. 10 (1905).
[5] 193 Wis. 307, 214 N.W. 374, 53 A.L.R. 771 (1927).