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THE APPORTIONMENT OF "INDIVISIBLE" INJURIES

ROBERT D. SCOTT

I. "INDIVISIBLE" INJURIES

The human body is a magnificently complex assemblage of organs, connective tissue and skeletal structure; the study and treatment of which has given rise to a proliferation of medical specialties and sub-specialties. Frequently the same organ, system or bodily function is subjected to the scrutiny of several specialists from different fields who lay claim to a high degree of diagnostic expertise. Despite this specialization, when a bodily dysfunction occurs through trauma or disease, the symptoms produced may in many cases defy precise explanation as to the dysfunction's etiology or source. The problem of discerning the cause of pain is further complicated when the same part of the body has been subjected to the repeated insults of trauma and/or disease. The patient himself is often indifferent to the causation issue unless he contemplates bringing a personal injury action against one of the causative agents of his physical problems.

Some conditions having multiple causes seem particularly resistant to an apportionment, and this may be attributable to both the nature of the pathology and the mechanics of the injuries. For instance, an elderly arthritis patient whose afflicted neck had progressively worsened for years may know that a rear-end accident and "whiplash" injury (hyperflexion/hyperextension) had exacerbated his pain, yet the increased amount of discomfort may be exceedingly difficult to measure to a reasonable degree of medical certainty. Similarly, a patient whose automobile is rear-ended, thus causing an accelerated hyperextension/hyperflexion and further injury when the patient's head and neck are slammed into a defective head restraint, confronts the virtual impossibility of apportioning his injuries between the driver of the other automobile and the manufacturer of the head restraint.¹ Moreover, there are some

¹. E.g., Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976).
conditions that would seem to defy apportionment—death being an obvious example.

This sort of multiple cause, indivisible injury case regularly occurs and the tort system is called upon to provide suitable compensation for that portion of an individual's pain, suffering and disability which is attributable to the particular cause giving rise to the litigation. Indeed, the guiding principle of tort law by which these damages are calculated is that a defendant's liability should be limited to that portion of the harm which he has in fact caused, as distinguished from the harm which has arisen from other causes.²

The Wisconsin system of comparative negligence represents a fine tuning of this tort principle. In Wisconsin, a defendant's liability, though joint and several, should ultimately result in an allocation of damages equivalent to the percentage of the plaintiff's injuries which the defendant has in fact caused. Though the Wisconsin equation promotes precision in the distribution of liability, it has the concomitant effect of making the plaintiff's burden of proof more difficult. In order to meet this higher burden, litigants have increasingly relied on expert testimony.³ In regard to the issues of negligence and causation, not only is expert testimony desirable, but in many situations it is required. It is now well established that the price of failing to adduce required expert testimony on critical issues can be a directed verdict or a preclusion from submitting a special verdict question to the jury.⁴ A plaintiff's inability to produce a medical witness who could apportion his injuries among separate causes would seem to jeopardize his recovery even in the simplest case.

In the past, when two causative wrongs produced successive, but indivisible injuries, a solution sometimes attempted was the joining of all wrongdoers in a single tort action. Despite the fact that this tactic was in defiance of the joinder statutes,

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³. See Novakofski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 154, 148 N.W.2d 714 (1967); McManus v. Donlin, 23 Wis. 2d 289, 127 N.W.2d 22 (1964); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963); Lubner v. Peerless Ins. Co., 19 Wis. 2d 364, 120 N.W.2d 54 (1963); Kreyer v. Farmer's Coop. Lumber Co., 18 Wis. 2d 67, 117 N.W.2d 646 (1962); Odya v. Quade, 4 Wis. 2d 63, 90 N.W.2d 96 (1958); Globe Steel Tubes Co. v. Industrial Comm'n, 251 Wis. 495, 29 N.W.2d 510 (1947).
the procedure was justified on the basis that the injury was apparently indivisible and unable to be apportioned.

Prior to 1971 several cases reached the Wisconsin Supreme Court whose resolution turned on how these practical difficulties were to be resolved. Some of these cases arose out of injuries produced by a combination of ordinary negligence and subsequent physician error, while another line of cases developed out of a combination of ordinary negligence committed by separate tortfeasors. In both situations the plaintiffs' practical difficulties in proving an allocation of what appeared to be inseparable injuries prompted improper joinders or the allegation of joint liability based on the inseparability of the injuries. Finally, in Butzow v. Wausau Memorial Hospital, the Wisconsin Supreme Court confronted these issues and ruled against making any adjustments in the law to accommodate the plaintiff's difficulties. In doing so the court adopted the "hardline" approach expressed in one of the earlier joinder cases to the effect that the increased potential of the plaintiff's nonrecovery was insufficient justification for making exceptions to the rules concerning joinder.

II. State of the Law Pre-Johnson v. Heintz

The combination of an injury-producing trauma and a subsequent physician error in the treatment frequently has provided our tort system with one of the more difficult problems in apportioning responsibility for an apparently "indivisible" injury. The first time the Wisconsin Supreme Court definitively reckoned with the problems inherent in this situation was in Butzow v. Wausau Memorial Hospital. Butzow occurred in 1969 when plaintiff Butzow fell and injured her hip on an icy sidewalk in front of a grocery store located in Price County, Wisconsin. While hospitalized at the Wausau Memorial Hospital in Marathon County, plaintiff fell out of bed twice and reinjured her hip. In a suit to recover for

6. Fitzwilliams v. O'Shaughnessy, 40 Wis. 2d 123, 161 N.W.2d 242 (1968); Caygill v. Ipsen, 27 Wis. 2d 578, 135 N.W.2d 284 (1965).
7. 51 Wis. 2d 281, 187 N.W.2d 349 (1971).
9. 61 Wis. 2d 585, 213 N.W.2d 85 (1973).
10. 51 Wis. 2d 281, 187 N.W.2d 349 (1971).
what were alleged to be "inseparable" injuries, plaintiff stated a cause of action against the parties responsible for the maintenance of the sidewalk\(^{11}\) and a cause of action against the Wausau Memorial Hospital. Plaintiff joined these two causes of action in a single lawsuit in Marathon County.

The venue statutes and section 263.04 of the Wisconsin Statutes\(^{12}\) were invoked to force a change of venue to Price County for the cause of action against the parties responsible for the maintenance of the sidewalk. When the trial judge ordered this change of venue, plaintiff appealed and argued that the venue statutes were inapplicable to her particular joinder because all the defendants had joint liability for the totality of injuries she sustained. She argued that as long as the tortfeasors had visited upon her successive traumas which resulted in a single indivisible injury, the product of their tortious actions justified the defendants' treatment as joint tortfeasors and their joinder in a single action.

Chief Justice Hallows authored the majority opinion and addressed this argument directly. He began by pointing out that while the parties responsible for the sidewalk might also be liable for the malpractice of Wausau Memorial Hospital and, in that sense, there may be a joint liability, this did not render the two defendants joint tortfeasors. Though there was co-extensive liability between the original tortfeasor and the subsequently negligent medical personnel, such liability only extended to the aggravated damages. The negligent medical defendant who aggravated the original injury was not liable for the damage directly caused by the original tortfeasor.\(^{13}\)

In the course of disposing with plaintiff's argument, the court was forced to confront its own earlier decisions which gave every appearance of justifying the concept that nonconcurrent tortfeasors were jointly liable for an entire injury where it was impossible to separate the harm caused by each defendant.\(^{14}\) Additionally, these decisions had given rise to a standard jury instruction published by the Wisconsin Board of Circuit Judges. This instruction was Wisconsin Jury Instructions-

\(^{11}\) The city of Phillips as owner of the building and the Great Atlantic and Pacific Tea Company as lessee were joined as defendants.
\(^{12}\) Wis. Stat. § 263.04 (1969) (relating to the uniting of causes of actions).
\(^{13}\) 51 Wis. 2d at 285, 187 N.W.2d at 351.
\(^{14}\) 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).
Civil Number 1721 which applied to a situation where (a) the plaintiff sustained damages from both an accident and medical malpractice and (b) the plaintiff's injuries could not be divided or apportioned. In this situation the jury was instructed to answer the damage question by determining a figure which would compensate the plaintiff for all the damages sustained from both the accident and the malpractice.¹⁵

The idea that a plaintiff could parlay an "indivisible" injury into joint liability for separate, nonconcurrent tortfeasors had far-reaching importance beyond the typical accident-and-subsequent-physician-error situation. If the "joint liability" of the ordinary tortfeasor and negligent physician, implemented by Jury Instruction Number 1721, was justified by the practical difficulties the plaintiff had in separating his damages, then little reason would exist to refuse to apply the same rationale to an indivisible injury caused by two joint tortfeasors, neither of whom was a physician.

The answer which came in Butzw was that the inseparability of the plaintiff's damages was emphatically unavailable as a basis for either improper joinder or joint liability. The court took great pains to distinguish the "joint liability" shared by an ordinary tortfeasor and a subsequent tortfeasor doctor from that of the liability shared by ordinary joint tortfeasors. In the first situation, the original tortfeasor's liability for the consequence of the physician's negligence was said to be based upon the fact that the additional harm was: One, a part of the original injury; two, the natural and probable consequence of

¹⁵. The jury instruction read as follows:

There is evidence in the case that (the plaintiff, (name)__) (plaintiff's decedent (name)__) sustained further injury or damages from (an accident in which defendant, (name)__, was not involved) (malpractice of attending physician who treated (the plaintiff) (plaintiff's decedent) after the accident in which the defendant (name)__ was involved).

You are instructed that (the injuries to plaintiff are of such a nature) (the causes of plaintiff's death cannot be separated so) that the damages arising therefore cannot be divided or apportioned.

In answering this question, therefore, it is your duty to insert as damages such sum as will compensate the plaintiff for all of the injuries which were sustained both from the accident in which the defendant (name)__ was involved, and also from the latter (accident) (treatment of the injuries) in which defendant (name)__ was not involved and (and which resulted in the death of the plaintiff (name)__'s decedent (name)__).
tortfeasor's original negligence; or three, the normal incidence of medical care necessitated by the tortfeasor's original negligence. Obviously, this rationale did not support joint liability on the part of the doctor for the total amount of damages suffered by a plaintiff. To the extent that Bolick v. Gallagher seemed to support this latter proposition, any such language in Bolick was specifically withdrawn.

Having disposed of the question of whether nonconcurrent negligent acts could give rise to joint liability on the basis of a single, indivisible injury, the court turned to the question of whether such an injury could be the basis for an otherwise improper joinder. Here too the argument that a plaintiff might fail to recover anything if he were strapped with the well-nigh impossible burden of allocating damages to specific causes was of no avail before the court. In the course of rejecting joinder based on the supposed inseparability of the plaintiff's damages, the court acknowledged there might be difficult, but not insuperable, burdens of proof:

We see no more difficulty in allocating damages to the respective negligence of two tortfeasors than we do in allocating the contribution of negligence of two tortfeasors to the injury and damages. While the problems are not identical, they are similar. It is quite true in some cases the proof is difficult but the law does not demand the impossible. This problem was discussed in Caygill and the hardship recognized but rejected as the basis for joinder of separate causes of action in violation of Sec. 263.04.

The reference to Caygill v. Ipsen provides an excellent gauge of the court's true attitude on this issue since that case contained a complete exposition of the conflicting policy considerations that a multiple but inseparable injuries case presents. Caygill was a joinder case concerning allegedly "indivisible" injuries arising out of two automobile accidents that occurred five months apart and involved two drivers who were residents of different counties. When plaintiff Caygill attempted to join these two defendants in the same lawsuit, the

16. 22 Am. Jur. 2d Damages § 113, at 165 (1965); see also Restatement (Second) of Torts § 457 (1965).
17. 268 Wis. 421, 67 N.W.2d 860 (1955). See note 5 and accompanying text supra.
18. 51 Wis. 2d at 288, 187 N.W.2d at 353.
19. Id. at 290-91, 187 N.W.2d at 354.
20. 27 Wis. 2d 578, 135 N.W.2d 284 (1965).
supreme court dismissed the action against one of the defendants on the basis of misjoinder. The supreme court acknowledged that the decision represented a "harsh rule" since the plaintiff might well fail to prove either of the defendants liable in successive lawsuits. The court, however, explained its decision saying:

   In any cause of action where the plaintiff cannot sustain . . . [his] burden, he is doomed to failure. Damages must be proved with reasonable certainty . . . . Nor does mere difficulty of proof exonerate a plaintiff from this burden . . . .

   Under our present adversary system, there is always a possibility that an injured party may go uncompensated.21

This language from Caygill and the decision in Butzow unequivocally rejects the indivisibility of damages rationale as justifying an otherwise improper joinder or the treatment of consecutive wrongdoers as joint tortfeasors. Therefore, it seemed clear from these cases that, insofar as this rationale was relied upon in Jury Instruction Number 1721, that instruction was superceded pro tanto. Despite this clear inference, however, two years later in Johnson v. Heintz I,22 the Wisconsin Supreme Court found the jury instruction had survived intact.

III. Johnson v. Heintz I

Plaintiff Johnson was a passenger in a car driven by defendant Heintz when their vehicle became involved in two independent collisions. The first occurred when the Heintz vehicle rear-ended a stalled car on the highway; the second collision occurred when the stalled vehicle was forced back into the Heintz auto by an oncoming car. Plaintiff sustained various injuries and was treated by orthopedic specialists for an injury to her right knee. Five years later plaintiff sustained additional injury to the knee which she attributed to the previous automobile accidents. In her suit against Heintz, Johnson impleaded the driver of the stalled car, Bruhn, and her insurer and the insurance carrier of the driver of the oncoming auto. At trial plaintiff was not found to be causally negligent, Heintz was found eighty-five percent causally negligent and the driver of the oncoming car, Thomas, was found fifteen percent causally

21. Id. at 589-90, 135 N.W.2d at 290 (citations omitted).
22. 61 Wis. 2d 585, 213 N.W.2d 85 (1973).
Upon this finding the court then awarded contribution to Heintz against the insurer of Thomas' auto for all sums paid in excess of eighty-five percent of the judgment. It is this latter aspect of the case that gives rise to the issue central to this article.

It was the principal contention of Thomas and her insurance carrier that Thomas and Heintz were not joint tortfeasors but successive wrongdoers, and thus there was no right of contribution despite the apparent indivisibility of plaintiff's injuries. In reviewing the facts of this complicated multi-impact accident, the Wisconsin Supreme Court came to the conclusion that as to the second impact, Heintz and Thomas were joint tortfeasors. According to the court, the failure of Heintz to attempt to free the trapped passengers and prevent subsequent collisions constituted continuing negligence. Thus, when the second collision arose, it could be said that factually the negligence of the two defendants concurred in time to produce the aggravated injuries. It was the continuing negligence of Heintz and the coalescence of this negligence with the negligence of Thomas which allowed a finding of joint liability as to the second collision.

To the extent that contribution was permitted against Thomas for injuries which might have arisen from the first impact, the judgment below was in error. The court noted that this error was possibly provoked by the trial judge's reliance on Jury Instruction Number 1721. Stating that the instruction was drawn from cases holding that consecutive wrongdoers could be treated as joint tortfeasors when their conduct produced a single indivisible injury, the supreme court reiterated that those cases had been rejected in Butzow.

The case was thus remanded for a retrial in order to differ-

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23. Bruhn and her insurance carrier reached a settlement with the plaintiff before trial and thus were neither parties to the trial nor to the appeal. Id. at 589, 213 N.W.2d at 88.
24. Id. at 599, 213 N.W.2d at 92.
25. Id. at 601, 213 N.W.2d at 94.
26. Reliance on Jury Instruction Number 1721 was improper because the instruction involved damages arising from indivisible injuries from nonconcurrent or successive torts. As explained in the text, the second collision was in fact concurrent. Id. at 602, 213 N.W.2d at 94.
27. Heims v. Hanke, 5 Wis. 2d 465, 93 N.W.2d 455 (1958); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 880 (1955).
28. 61 Wis. 2d at 602, 213 N.W.2d at 94.
entiate the injuries that arose from the original impact from those suffered in the second impact. As to the former, Heintz alone was answerable in damages, and as to the latter, both defendants would be considered joint tortfeasors making them jointly and severally liable to the plaintiff. Moreover, as joint tortfeasors in reference to the second accident, contribution would be appropriate if one defendant assumed a disproportionate share of the damages.29

IV. Johnson v. Heintz II30

Upon the confirmation in Johnson v. Heintz I that an "indivisible" injury could not give rise to the joint liability of successive tortfeasors, the prospective burden of proof presented to the plaintiff must have appeared insuperable. The problem of determining which portion of the damages was attributable to each of two automobile accidents occurring twenty minutes apart was obvious. Plaintiff, however, escaped this problem by entering into a settlement agreement with the impleaded insurance carrier of the driver of the oncoming car before the retrial. Thus, the problem and issue were never addressed.

The second Heintz trial proceeded to a verdict which inquired into the negligence of defendant Heintz and plaintiff as a cause of the latter's injuries in the first collision. Another series of questions was submitted concerning the responsibility of the various parties for Mrs. Johnson's injuries arising out of the second impact. Plaintiff was found free of negligence in regard to both accidents.31

When the damages were allotted as between the two collisions, $65,000 was allocated for the first collision; unfortunately, however, the jury did not answer that portion of the special verdict regarding injuries received in the second collision. As it turned out, the jury found that though the driver of the oncoming car was negligent, her negligence was not a cause of the plaintiff's aggravated injuries. This left only defendant Heintz as a causative agent, and for this reason, the trial court in post-trial motions struck the answers to the questions on causal negligence and removed the comparative negligence

29. Id. at 603, 213 N.W.2d at 94.
30. 73 Wis. 2d 286, 243 N.W.2d 815 (1976).
31. Id. at 291-92, 243 N.W.2d at 821.
question as to the second collision.  
Several issues were preserved on appeal, one of which was the defendant’s contention that plaintiff had defaulted on her burden of proof in that she failed to separate her injuries as between the two collisions. The supreme court’s treatment of the issue is somewhat confusing. Because of several new concepts expressed in *Heintz II*, there is reason to believe that the court is now considering new directions for personal injury compensation in Wisconsin. On the other hand, the result in *Heintz II* is altogether consistent with existing lines of authority and these new concepts may simply have been provoked by the unusual procedures in the case.

At the second trial, plaintiff made no attempt to prove the extent to which, if at all, the injuries she suffered were a result of the second impact. Indeed, plaintiff’s motivation to do so was diminished by the fact that a settlement had already been procured from the oncoming automobile driver’s insurance carrier and thus only Heintz remained as a target for the damages sustained in the first accident. At the retrial, it was in the plaintiff’s interest to concentrate all her efforts on Heintz in order to recover the maximum award. When the retrial resulted in a verdict attributing all the damages to the first accident, for which Heintz alone was responsible, Heintz understandably complained that the plaintiff had unfairly singled her out as the sole contributing factor to the accident. It was unlikely that the totality of plaintiff’s injuries resulted solely from the first impact. Therefore, on appeal the defendant argued that plaintiff had the burden of establishing a causal nexus between each injury and its respective impact.

In treating this issue the court followed a two-stage procedure. First, it was conceded that when separate, successive torts occur and a plaintiff seeks to charge a later actor with the aggravated or additional injuries, the plaintiff carries the burden of proof to show that he has indeed sustained some damage, in a particular amount, as a direct result of the defendant’s misconduct. This was elementary tort law. In essence, the plaintiff retained a duty to prove that he had been injured by the particular conduct of the defendant. Though this was espoused as the general rule, in the case *sub judice*, the court

32. Id. at 292, 243 N.W.2d at 821.
33. Id. at 304, 243 N.W.2d at 826-27.
observed: “The Johnsons here met their burden by presenting adequate evidence that the injuries of Mrs. Johnson arose from the multiple impacts and that Mrs. Heintz was negligently responsible for both of them.”

The second question, as to who had the duty of allocating the injuries between the multiple impacts, the court resolved by referring to the party who first raised the issue. In *Heintz II* that issue had been raised by the defendant when she impleaded the driver of the oncoming vehicle and made a claim for contribution. The court saw no reason why the defendant should not carry the burden of adducing the evidence as to the allocation of damages. The court explained this distribution of proof by saying:

The plaintiffs have pledged to satisfy the portion of negligence (and by implication the amount of damages) attributable to State Farm’s insured, but the liability of that insured existed as an issue at that point only because of the appellant’s claim. The original *Johnson v. Heintz Case* asserted that an allocation of damages as to the two impacts was necessary, but the opinion never stated that the responsibility for this allocation was on the plaintiff.

Up to this point the opinion in *Heintz II* had not changed the existing Wisconsin case law. Although Heintz ultimately had to pay the entire amount of damages sustained by Johnson, the “indivisibility” of plaintiff’s injuries was not the basis for this result. Rather, it was the result of the court’s decision to assign the burden of proof for allocating damages to the defendant. Since the defendant had an opportunity to adduce proof as to which portion of plaintiff’s injuries were attributable to the first accident, and which attributable to the second, the defendant was without ground to claim prejudice or error. Finally, because the jury verdict attributing all of the damages to the first impact was supported by the evidence, a reversal of the case would have been improper.

Upon deciding that the burden of proof for allocating dam-

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34. Id.
35. Id. at 305, 243 N.W.2d at 827. This solution was consistent with the Restatement (Second) of Torts § 433B(2) (1965):

(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.
ages rested with the defendant, *Heintz II* was essentially resolved. It is important to note that these results had been reached without impinging in any way on the position proposed in *Heintz I* that the liabilities of tortfeasors should not be determined on the grounds that the injuries were indivisible.\(^3\)

The seminal aspects of *Heintz II* made their way into the opinion as dictum in response to suggestions made by defense counsel who proposed that the damages be equally allocated between the two impacts as a matter of law because of the difficulty of proof. The supreme court, though not directly responding with approval or disapproval, did state that there was authority for the proposition that in multiple impact cases, the burden of proof should shift to the defendants.\(^3\) It was at the next step in the court's response to the defendant's suggestion that a creative impulse briefly took hold of the *Heintz* court. The concept of the indivisibility of damages was seemingly resurrected as a means by which a party might be relieved of an impossible burden of proof in multiple-impact cases. The court hypothesized that this concept might be implemented by the use of expert testimony:

Initially there should be some showing that the damages are indeed impossible of allocation before such rules could even be considered. There was no expert testimony here by engineers capable of accident reconstruction that would support the contention that the injuries of Mrs. Johnson were equally as likely to have occurred in either impact.\(^8\)

This portion of the opinion gives rise to a refurbished indivisibility theory which, although not recognized in Wisconsin, has gained some currency in legal thought elsewhere.\(^3\) In essence, the theory proceeds as such:

1. Some damages from multiple sources should be regarded as absolutely resistant to allocation.
2. A party wishing to establish this is required to adduce evidence showing that the damages are impossible to allocate.
3. If the party wants the damages allocated on a pro rata basis as a matter of law, there should be expert testimony,

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36. 61 Wis. 2d at 603, 213 N.W.2d at 94.
37. See *Prosser*, supra note 2, § 52, at 319.
38. 73 Wis. 2d at 305, 243 N.W.2d at 827.
by engineers capable of accident reconstruction, tending to show that the damages are as likely to have been caused by one impact as another.

In other words, if the defendants' suggestion in *Heintz II* was adopted as law in Wisconsin, then a party's liability would turn on proof that the damages were impossible to allocate and expert testimony to the effect that the damages were as likely to have been caused by one accident as the other. The difficulties these ideas present to Wisconsin case law is clear. These ideas lend new respectability to the theory that a party's liability might be determined on the basis of the inseparability of the damages suffered by the plaintiff. This idea, however, was specifically rejected in *Heintz I*.40

In the earlier Wisconsin case law the issue of successive tortfeasors and inseparability of damages arose in the context of improper joinder objections. Contrariwise, in *Heintz I* and *II* it was the difficulty in proof which triggered the inseparability of damages issue. The dictum in *Heintz II* which discussed this concept appeared to outline a sequence of proof by which the concept might be implemented through the use of expert testimony. The Wisconsin judges and practitioners encountering this portion of the decision might sense that the supreme court is anticipating a change in cases where the damages seem impossible to allocate. Such a forecast seems supported by the fact that the Wisconsin Board of Circuit Judges has already proposed a new jury instruction which implements the essence of the *Heintz II* dictum.

V. **Wisconsin Jury Instructions—Civil Number 1721 Reborn**

A committee composed of three Wisconsin circuit court judges has drafted a modified Jury Instruction Number 1721 which was approved for publication in the following form:

1721—Indivisible Injuries Arising From Nonconcurrent (Successive) Torts (Expert Testimony Necessary).

The general rule is that where a person is injured because of the negligence of another, the negligent party is responsible only for the damages caused by (his/her) negligence. There is no dispute in this case that the defendant, (name), was involved in an accident resulting in a claim for damages. There is evidence in this case, however, that the plaintiff claims to

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40. 61 Wis. 2d at 602, 213 N.W.2d at 94.
have sustained further injuries or damages as a result of another accident (or impact) which did not involve defendant (name) but which involved the plaintiff and defendant, (name).

Because there has been uncontroverted expert testimony to the effect that it is impossible for anyone to divide and apportion plaintiff's injuries and damages resulting from this successive accident (impact), you are instructed that in answering question No. ___ it is your duty to insert as damages such sum as will fairly and reasonably compensate the plaintiff for all of the injuries and damages which the plaintiff sustained from both accidents (impacts).

Comment:
This instruction should only be used where the court has determined as a matter of law that the defendants are not joint tortfeasors, that the accidents or impacts are successive, and there is uncontroverted expert testimony introduced establishing to a reasonable degree of medical (engineering) certainty that the plaintiff's injuries are not divisible and therefore not apportionable. See Johnson v. Heintz, 73 Wis. 2d 286 at 305.41

This instruction is basically the former Jury Instruction Number 1721 with the following changes:

(a) The instruction is no longer limited to injuries arising out of a combination of accidents and medical malpractice and

(b) the necessity of uncontroverted expert testimony that it is impossible to divide the plaintiff's injuries between the separate causes.

The proposed instruction retains the concept that all of the plaintiff's damages from the separate causes are to be included in the damage portion of the special verdict. In doing so, the proposed instruction revitalizes the idea that the inseparability of damages can determine the liability of multiple successive tortfeasors. In effect, whenever the plaintiff is able to adduce uncontroverted expert testimony that his damages are impossible to divide, each causally negligent defendant, regardless of whether his negligence pertains to the first or second impact, is liable for the totality of plaintiff's damage.42
This new instruction cannot be justified by the decision in Heintz II; furthermore, it directly offends the authorities expressed in Heintz I. The instruction creates a new breed of joint tortfeasor, the extent of whose liability is determined by the nature of plaintiff's injury (an "indivisible" injury) rather than by the defendant's negligence. It is impossible to base the instruction on the decision in Heintz II since that decision was essentially to sustain the allocation of the plaintiff's damages. This allocation was approved in the face of arguments by the defense counsel that consecutive tortfeasors be allotted equal shares of the liability as a matter of law where damages were difficult to apportion.\(^\text{43}\) The jury's task of making the apportionment had been mandated by Heintz I with the specific rejection of the idea that consecutive tortfeasors could be treated as joint tortfeasors because their conduct had produced an indivisible injury.\(^\text{44}\)

The supreme court's continuing disapproval of the indivisible injury rationale was recently demonstrated in Voight v. Aetna Casualty & Surety Company\(^\text{45}\) where once again a plaintiff alleging only a single injury from multiple causes attempted to justify an improper joinder. Citing Caygill and Butzow, the court sustained a dismissal of the action on the basis of improper joinder and reiterated that those cases "firmly establish that the law of this state does not recognize any concept of 'joint but successive' tortfeasors."\(^\text{46}\)

The new Jury Instruction Number 1721 stands alone without authority in Wisconsin law and is in contravention of an uninterrupted line of authority culminating in Heintz I. Al-

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\(^{43}\) Appellant's Brief at 28-29, Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

\(^{44}\) 61 Wis. 2d at 602, 213 N.W.2d at 94.

\(^{45}\) 80 Wis. 2d 376, 259 N.W.2d 85 (1977).

\(^{46}\) Id. at 385, 259 N.W.2d at 89.
though it appears from the dictum in *Heintz II* that the supreme court is beginning to rethink its position on the problems inherent in the "indivisible" injury situation, it is just as apparent that as of this date the law has not changed. For these reasons, the new instruction should be withdrawn.

Notwithstanding these criticisms, the problem remains that some injuries from multiple causes give every appearance of being absolutely inseparable and indivisible.\(^7\) There are a variety of solutions to the problem which will be discussed hereinafter. The solution embodied in the resurrected Jury Instruction Number 1721 represents one of the most radical departures from the current law. It makes a leap from the starting point that some damages may be impossible to allocate to a solution which lumps together all the damages in a suit which the plaintiff has brought against one of the causally negligent defendants. There are several intermediate solutions, some of which were alluded to in *Heintz II*.

Before any discussion of alternatives, however, it should be emphasized that without a clear directive from the Wisconsin Supreme Court, little change in the Wisconsin Jury Instruction can be adopted. The reliance on dictum for standard jury instructions seems hazardous and heavy with the risk that future jury verdicts will occur on the basis of concepts that the supreme court may ultimately disclaim.

VI. ALTERNATIVE APPROACHES TO "INDIVISIBLE" INJURIES

If the dictum in *Heintz II* truly signals that the Wisconsin Supreme Court is now considering how best to resolve the issues raised by a plaintiff with an "indivisible" injury, there are several alternatives to evaluate. Any such evaluation should recognize at the outset that there exists a basic dichotomy in the schools of thought concerning the nature of bodily injuries. One school argues that every injury is susceptible to apportionment as to both its causes and extent. The second school argues that some injuries are of a nature that their apportionment would only be arbitrary and speculative. Wisconsin aligns itself

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with the former. In Butzow v. Wausau Memorial Hospital, Chief Justice Hallows, in the course of disapproving of the concept of inseparability of damages, which he felt had crept into Wisconsin law "without notice," very nearly said that there was no such thing as an "indivisible" injury under Wisconsin's comparative negligence system. Nevertheless, there are some commentators who have given much thought to the problem and who conclude that certain injuries defy any logical or reasonable apportionment.

What follows is a description of a few of the alternative solutions to the "indivisible" injury problem and some of the considerations which bear upon their use.

A. Solutions Which Presuppose That All Injuries Are Susceptible to Apportionment

A first solution would be the requirement that the plaintiff prove the extent to which his damages were caused by each source and do so with expert testimony expressing an opinion to a reasonable degree of medical or engineering certainty. This confronts the plaintiff with his most difficult burden of proof but it is consistent with that principle of tort law which expresses preference for limiting a defendant’s liability to that part of the harm which he has in fact caused. Additionally, this first alternative is consistent with the theory of reparations for tortious conduct reflected in Wisconsin Jury Instructions—Civil Numbers 1715 and 1720. Jury Instruction Number 1720 contemplates a plaintiff with some pre-existing condition, injury or disability, which is aggravated by the tortious conduct giving rise to the lawsuit. The jury is advised that damages may be awarded only for that portion of the plaintiff's injuries which represent the aggravation caused by the defendant's actions. Damages for injuries which have resulted, or will result, from the natural progression of the pre-existing condition cannot be considered. When this instruction is coupled with Jury Instruction Number 1715 which deals with the aggravation of a prior injury, it seems logical that the plaintiff be required to put on expert testimony to apportion his injuries between the two independent causes.

48. 51 Wis. 2d 281, 290-91, 187 N.W.2d 349, 354.
49. E.g., Prosser, supra note 2, § 52, at 315.
50. Wis. J.I.—CIVIL No. 1720.
51. Wis. J.I.—CIVIL No. 1715.
Alternatively, if it is presupposed that all damages are susceptible of apportionment, then section 433B(2) of the Restatement of Torts would be an appropriate solution. Section 433B(2) effects a shift to the defendant of the burden of proof for apportioning damages between competing causes where the injury is found to be indivisible. The decision in Heintz II may be a harbinger of the adoption of Section 433B(2) in Wisconsin. There, the defendant Heintz, after objecting that the plaintiff had not carried her burden of proof on the issue of allocating damages, found herself liable for that burden, notwithstanding the absence of directions to that effect in Heintz I. The rationale offered in the Restatement for this "exceptional rule" is the injustice of allowing a tortfeasor who has caused harm to a plaintiff to escape liability merely because the plaintiff has an impossible burden of proof in making an apportionment. The rationale is succinctly summed up: "As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to extent of the harm caused should fall upon the former."

B. Solutions Which Concede That Some Injuries Are "Indivisible"

If the court is willing to conclude that there are some injuries arising from separate sources which are impossible to apportion between their respective causes and it further believes that the "indivisibility" of the plaintiff's injuries should not be an absolute bar to his recovery, then there are other alternatives available. The first alternative was proposed by the defendant's counsel in Heintz II to the effect that the supreme court should declare the plaintiff's damages impossible to apportion as a matter of law and decree a pro rata division of responsibility among the various tortfeasors who have been shown to have caused at least a part of the plaintiff's injuries. There is no direct authority in Wisconsin for such treatment and the underlying rationale for this solution was that it was "much preferable to a blind rush to the jury, necessitating it to engage in sheer speculation."

52. RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965).
53. Id. § 433B, Comment on subsection (2) at 444.
54. Appellant's Brief at 29, Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976).
An alternative to the pro rata treatment would be that embodied in Jury Instruction Number 1721, which as previously discussed, would impose total liability on all defendants where it is determined that the injuries are impossible to apportion. This solution is not justified by Wisconsin precedent and seems to differ greatly with the threshold principle that seeks to limit a negligent defendant's liability to that part of the harm which he has in fact caused.

VII. CONCLUSION

In looking over the alternatives, it is apparent that any selection will turn ultimately on priorities sought to be vindicated by the judicial or legislative body deciding the issue. Arriving at a solution to this problem will be no easy task because there exists a fundamental conflict in the public policy considerations underlying the issue. As Justice Heffernan in Caygill v. Ipsen so aptly said:

[A] question of social and judicial policy arises. Stated from a plaintiff's viewpoint, the problem is said to be whether the injured plaintiff shall recover nothing because he is unable to carry the "impossible burden" of proving the respective shares of harm caused by each tortfeasor, or whether a tortfeasor may be required to "pay more than his theoretical share of the damages accruing out of a confused situation which his wrong has helped to create."

Stated from a defendant's viewpoint, the question is whether the defendant "will be forced to pay damages for injuries not shown to have been caused by his own wrongful act or by the act of another under such circumstances as to be attributable to him." 55

In Caygill the Wisconsin Supreme Court unequivocally opted for the latter view, stating that an injured plaintiff should only recover those damages he is able to prove the defendants negligently caused. In doing so, the court acknowledged the Wigmore position that the escape of a tortfeasor without payment because of the plaintiff's inability to make an allocation was an example of the "law's callous dullness to innocent sufferers." 56

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55. 27 Wis. 2d 578, 589, 135 N.W.2d 284, 290 (1965) (quoting Annot., 100 A.L.R.2d 16, 32 (1965)).
56. 27 Wis. 2d at 589, 135 N.W.2d at 290; Wigmore, Joint Tortfeasors and Sever-
Despite Wigmore's powerful criticism, the law of this state has not moved away from the position staked out in Caygill. Repeated efforts to determine the defendants' liability through the plaintiff's inability to apportion damages have been rejected. This certainly was the teaching of both Butzow and Heintz I.

Heintz II was an anomaly since, by the time the issue came to trial, plaintiff was no longer concerned with the necessity for making an apportionment. The ameliorative effect of plaintiff's settlement with the third-party defendant on her burden of proof may not have been apparent even to her at the time of the second trial but it gave the Wisconsin Supreme Court, on appeal, the opportunity to shift that burden of proof for the apportionment to the tortfeasors for the purposes of determining contribution.

If there is to be any modification in the plaintiff's burden of proof in these situations, it is this writer's strong opinion that the opportunity for some party to make an apportionment be preserved, no matter how inseparable the injuries appear. Any other solution involves an arbitrary allocation of responsibility for the plaintiff's damages and carries with it the great likelihood that the injustice identified in Caygill will materialize: i.e. that parties will routinely be forced to pay for damages their actions have not caused. This potential for injustice is very real in both solutions proposed by Jury Instruction Number 1721 and the pro rata treatment proposed by the defendants in Heintz II. Additionally, at a time when people are becoming increasingly alarmed about their high insurance costs, these solutions seem certain to promote severe underwriting problems and increased insurance premiums.

Finally, if there are damages resulting from multiple causes which are truly impossible to apportion, it seems appropriate that the decision on inseparability be left open to the parties for an ad hoc resolution. The difficult countervailing policy considerations militate against any one fixed solution which would invariably work undue hardship and injustice in a good number of situations. The authorities, circumstances and policy considerations which would bear upon this decision are beyond the scope of this article.57

57. In reference to this problem Dean Prosser is willing to place the entire loss on the
If, however, the court wishes in any way to diminish the plaintiff’s difficult burden of proof in these cases of apportionment, there is a more suitable judicial environment in which to effect such a change since the passage of the Court Reorganization Act of 1977. With the adoption of the Reorganization Act, the court can exercise plenary discretion in granting certiorari to those cases and issues it wishes to decide. In this setting the court can accept those cases which provide the most propitious opportunity for the treatment of critical issues in Wisconsin case law. In this manner, if an important rule relating to the plaintiff’s burden of proof in a “hard case” is going to be reconsidered, the court now has the opportunity to select the case which is the best suited for such reconsideration. Hopefully, this process will precede any new jury instruction which attempts to describe the burdens of proof to be borne by the parties in the apportionment of “indivisible injuries.”

a single defendant, no matter how many other causes may have contributed to the plaintiff’s damages. Prosser, supra note 2, § 52, at 314.