Torts

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resident shareholders which is realized at the expense of resident shareholders.

One solution suggested by the trial judge in the Simanco case would be to tax the gain in the hands of the corporation while giving a tax credit to the resident taxpayer. This would have the desirable effect of avoiding any unfair benefit to the nonresident while insuring the equal treatment of the resident and nonresident shareholder alike.

-EUGENE O. DUFFY

TORTS

The Wisconsin Supreme Court decided several tort cases which are worthy of special mention and have been subdivided into categories of releases, defamation, res ipsa loquitur, and strict liability. Several significant cases on “duty” in negligence actions have been omitted from this discussion in deference to a comprehensive article on duty in a later issue of volume 61. The significant cases on duty which the court decided this term are Padilla v. Bydalek,1 Coffey v. City of Milwaukee,2 Clark v. Corby3 and Buel v. LaCrosse Transit Co.4

I. RELEASES

Krezinski v. Hay5 dealt with the effectiveness of a release based on mutual mistake. In that case the trial court granted the defendant’s motion for summary judgment and dismissed the plaintiff’s complaint. The complaint alleged that the defendant was negligent in causing an automobile accident which resulted in numerous injuries to the plaintiff. The defendant denied negligence and asserted an affirmative defense, based on a release in which the plaintiff released the defendant from all claims and injuries “in any way growing out of, any and all known and unknown personal injuries, developed or undeveloped, including death and property damage resulting or to re-


1. 56 Wis. 2d 772, 203 N.W.2d 15 (1973); 74 Wis. 2d 46, 245 N.W.2d 915 (1976).
2. 74 Wis. 2d 526, 247 N.W.2d 132 (1976).
3. 75 Wis. 2d 292, 249 N.W.2d 567 (1977).
4. 77 Wis. 2d 480, 253 N.W.2d 232 (1977).
5. 77 Wis. 2d 569, 253 N.W.2d 522 (1977).
sult from an accident that occurred on or about the 28th day of September, 1968.”6 The plaintiff acknowledged the receipt of $2,300 in consideration for the release.

The plaintiff filed an amended complaint admitting the release, but claiming reliance upon a mutual mistake of fact, namely, mutual ignorance of a latent condition which existed at the time of the release and later manifested itself in grand mal epileptic seizures.

The defendant established a prima facie case for summary judgment, based on the release, and the trial court found that the plaintiff’s supporting affidavits failed to create a factual issue as to the existence of a mutual mistake.7

A release may be set aside on the ground of mistake, but the mistake must be mutual on the part of both parties and not unilateral. The mistake must also apply to a past or present condition since a future fact is within the contemplation of the parties in executing a release to cover all future injuries.8 In addition, consideration which is inadequate in light of the subsequently discovered injury is a factor to be considered in establishing the mutual mistake necessary to void the release.9

In Krezinski, the plaintiff’s affidavits raised issues of fact by stating that her doctor failed to discover or observe the neurological condition which later gave rise to the epileptic seizures. That mistake of fact, as to her neurological condition, was relied upon by the plaintiff and the defendants in negotiating and agreeing to the release. The court reversed the summary judgment, stating:

The nature and extent of a party’s reliance on a mutually accepted medical diagnosis is a question of fact. If the diagnosis failed to ascertain a then-existing but unknown condition caused by the incident which led to the suit, and the

6. Id. at 571, 253 N.W.2d at 523.
7. The standard for summary judgment is “whether the plaintiff’s affidavit and other proof reveal disputed material facts or undisputed material facts from which reasonable inferences may be drawn raising a triable issue concerning alleged mutual reliance upon a mistake of fact.” Id. at 573, 253 N.W.2d at 524.
8. Doyle v. Teasdale, 263 Wis. 328, 57 N.W.2d 381 (1953) and Kowalke v. Milwaukee Elec. Ry. & Light Co., 103 Wis. 472, 79 N.W. 762 (1899). Both of these cases involved the same type of factual situation with a general release.
9. Jandrt v. Milwaukee Auto. Ins. Co., 255 Wis. 618, 39 N.W.2d 698 (1949). Jandrt also required a standard of clear and convincing evidence, “beyond reasonable controversy” to overturn the release, but such a standard has never been followed.
parties relied on the diagnosis as the basis for settlement, the release may be set aside. 10

As a result, the Krezinski case adopts the Doyle v. Teasdale11 definition at a mutual mistake. Doyle stressed that a release was not a bar to an action for unknown injuries if they were not within the parties' contemplation of the time of the release. However, the release is binding if the parties intentionally and purposefully agreed to release all unknown injuries. Whether the language and intent of the parties in any given release covers unknown injuries is a question of fact which must be decided at trial. 12

Prior to Doyle, Kowalke v. Milwaukee Electric Railway and Light, Co. 13 had distinguished a legal mistake from a mere ignorance of the existing facts:

Where a party executes a release either ignorant of a fact or meaning to waive all inquiry into it, or waives an investigation or inquiry after his attention has been called to it or its possibility, he does not make a mistake in a legal sense and there is no mutual mistake of fact. 14

Therefore, the plaintiff must have an unconscious ignorance of the existence of the fact, rather than a lack of knowledge due to an insufficient inquiry in searching for the fact. In Kowalke the later injuries arose because the plaintiff was pregnant at the time of the accident. During treatment after the accident, the doctor suggested to the plaintiff that she might be pregnant but the plaintiff did not believe the diagnosis and made no further inquiry at the time. As a result, the plaintiff was later barred from recovery by the release, since her lack of knowledge was due to insufficient inquiry into the possibility of her pregnancy, rather than to the requisite unconscious ignorance.

Bryan v. Noble, 15 distinguished Kowalke and Doyle and held that the Kowalke requirement of unconscious ignorance was not affected by the Doyle decision on mutual mistake.

In Krezinski, the defendants argued, using both Kowalke

10. 77 Wis. 2d at 574, 253 N.W.2d at 525.
11. 263 Wis. 328, 57 N.W.2d 381 (1953).
12. Id. at 345-46, 57 N.W.2d at 389-90.
13. 103 Wis. 472, 79 N.W. 762 (1899).
15. 5 Wis. 2d 48, 92 N.W.2d 226 (1958).
and Doyle, that the plaintiff meant to waive all inquiry into the injuries by the release and she was alerted to the neurological condition by virtue of her past medical history. The court felt that the existence of such previous knowledge and the contractual intent to cover those aggravated conditions were purely questions of fact which could not be decided on summary judgment.  

Therefore, where a plaintiff has executed a release for unknown injuries, the plaintiff need only allege reliance upon a mistaken medical diagnosis to withstand a motion to dismiss or summary judgment. Issues of intent, mutual mistake, actual reliance and causation must be decided at trial. Krezinski has the effect of making it easier for the releasing plaintiff to get to trial and avoid a dismissal by alleging a mistaken medical diagnosis, but once at trial, the requirements to overturn the release remain the same. Nevertheless, the decision raises doubts about the effectiveness of releasing future injuries and exposes the releasing party to later claims which the release was designed to prevent.

II. Defamation

A. The Constitutional Privilege

Schaefer v. State Bar involved a suit in which the plaintiff alleged the publication of defamatory matter by the Wisconsin State Bar Association. Considerable litigation had arisen out of the probate proceedings of the plaintiff's deceased husband, and a series of newspaper articles recounted the plaintiff's legal difficulties in probating the estate, specifically alleging that legal fees had swallowed up one-half of the 1.4 million dollar estate. The State Bar Association published a pamphlet in response, explaining the plaintiff's legal difficulties and emphasizing that probate reform would not solve these particular types of legal problems. The plaintiff sued, alleging three specific defamatory statements were contained in the pamphlet, but the trial court sustained the defendant's demurrer to the complaint.

The court cited the Restatement of Torts, section 559, for the definition of defamation: "A communication is defamatory if it tends so to harm the reputation of another as to lower him
in the estimation of the community or to deter third persons from associating or dealing with him."\(^{18}\)

In determining whether a communication is defamatory, the court must first decide, as a matter of law, if the communication is actually capable of a defamatory meaning, thereby requiring a jury determination as to whether it was construed as defamatory by the recipient of the communication.\(^{19}\) Here, two of the three alleged defamatory statements, relating to the disparity in age between the plaintiff and her husband and the retention of seven sets of attorneys by the plaintiff were held to at least present a factual issue as to their defamatory content. More importantly, however, the court stated, in dicta, "[b]ecause Mrs. Schaefer has made this a public issue or matter of public concern, she must prove actual malice or a reckless or careless disregard for the truth."\(^{20}\)

The statement creates some confusion as to the status of Wisconsin defamation law in light of several recent United States Supreme Court cases. In *New York Times v. Sullivan*\(^ {21}\) the Supreme Court established a constitutional privilege protecting the criticism of public officials which required a public official to prove actual malice on the part of a publisher to recover damages. Actual malice was defined as a publication "with knowledge that it was false or with reckless disregard of whether it was false or not."\(^ {22}\) In *Curtis Publishing Co. v. Butts*,\(^ {23}\) the privilege was extended to public figures. The plurality decision in *Rosenbloom v. Metromedia*\(^ {24}\) further expanded the privilege to include private persons involved in matters of general or public interest.

Two recent cases, *Gertz v. Robert Welch, Inc.*\(^ {25}\) and *Time, Inc. v. Firestone,*\(^ {26}\) restricted this expansion of the *Times* doctrine. *Gertz* concluded that an attorney representing a family

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\(^{18}\) Id. at 123, 252 N.W.2d at 345.

\(^{19}\) Polzin v. Helmbrecht, 54 Wis. 2d 578, 196 N.W.2d 685 (1972).


\(^{21}\) 376 U.S. 254 (1964).

\(^{22}\) Id. at 279-80.

\(^{23}\) 388 U.S. 130 (1967).

\(^{24}\) 403 U.S. 29 (1971).


\(^{26}\) 424 U.S. 448 (1976).
in a civil suit against a police officer who had killed their son was not a public figure, despite the public notoriety of the case. In *Firestone*, the plaintiff alleged defamation by Time magazine for its publication of a short article about the grounds of the plaintiff's divorce. *Firestone* intimated that *Gertz* had, in effect, overruled the *Rosenbloom* public issue extension, and refocused upon the status of the plaintiff as a public figure to justify the imposition of the *Times* rule. The *Firestone* Court specifically refused to extend the constitutional protection to reports of judicial proceedings simply because of the public interest in those judicial proceedings:

Presumptively erecting the *New York Times* barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment. . . . There appears little reason why these individuals [involved in judicial proceedings] should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom.27

In *Polzin v. Helmbrecht*,28 Wisconsin adopted the *Rosenbloom* extension of the constitutional privilege to private individuals involved in matters of public or general concern. *Polzin* concerned the applicability of the constitutional privilege to a plaintiff who wrote a letter to the editor of a local newspaper criticizing a reporter's coverage of a local political controversy. The court applied the *Times* standard, noting, "We think critics of the media, like appellant here, are entitled to the same protections as were provided for the media in the *New York Times* and *Rosenbloom* cases. The defendant's letter discusses a matter of public concern. . . ."29

However, a later case, *Calero v. Del Chemical Corp.*30 discussed *Polzin* and determined that the key to the distinction between constitutional and nonconstitutional privileges was the focus of the court on the "media" and the "matter of public

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27. *Id.* at 456-57.
28. 54 Wis. 2d 578, 196 N.W.2d 685 (1972). *Rosenbloom* was also followed in *Richards v. Gruen*, 62 Wis. 2d 97, 214 N.W.2d 309 (1974).
29. 54 Wis. 2d at 586, 196 N.W.2d at 690.
30. 68 Wis. 2d 487, 228 N.W.2d 737 (1975).
concern." Calero also explained the distinction between applying the constitutional standard and simply following common law standards of proof. Under the *Times* constitutional privilege, the plaintiff must prove actual malice by clear and convincing evidence. However, at common law, where the constitutional standard is not applied, the express malice necessary to recover punitive damages need only be shown by a preponderance of the evidence.

Calero involved a suit by the plaintiff against his former employer for defamatory remarks made in several job reference forms to prospective employers of the plaintiff. The court determined that this case between private individuals did not involve the *Times* constitutional standard and that therefore the minimal burden of proof was proper. The court adopted the *Gertz* rationale, which limits the extension of the *Times* privilege because private individuals are unable to effectively rebut defamatory statements and have not voluntarily exposed themselves to public attention, comment and criticism. Since the constitutional standard was not to be applied in these instances, *Gertz* declared that, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." This rule avoided what was considered by the Court to be an abridgement created by the *Rosenbloom* public interest test of the states' legitimate interest in protecting private individuals.

In Schaefer, Wisconsin apparently took advantage of the autonomy reposed in the states by *Gertz* to define standards of liability in suits by private individuals. It appears that Wisconsin adopts the supposedly discarded *Rosenbloom* standard since the court applied the *Times* rule of actual malice "[b]ecause Mrs. Schaefer had made this a public issue or matter of public concern." Both *Gertz* and *Rosenbloom* were cited in support of applying the constitutional standard, while *Firestone* was not cited.

There are two ways to interpret this holding. Either the

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31. Express malice (at common law) is defined as "a defamatory statement motivated by ill will, spite, envy, revenge, or other bad or corrupt motives." *Id.* at 506, 228 N.W.2d at 748.
32. *Id.* at 500, 228 N.W.2d at 745.
33. 418 U.S. at 347.
34. 77 Wis. 2d at 125, 252 N.W.2d at 346.
court has chosen to maintain its own standard for defamation cases, as per Gertz, by continuing to apply the Rosenbloom public interest test to any statements arising out of judicial proceedings initiated by the plaintiff, or, since this case arose on demurrer, the imposition of the Times standard was dicta, and the court actually requires a full factual determination of a public figure or public controversy before requiring the constitutional standard of actual malice. The second interpretation appears to be in harmony with the Supreme Court position, while the first apparently ignores the Firestone language pertaining to judicial proceedings.

B. Civil Conspiracy

Radue v. Dill35 was a rare civil conspiracy action. The plaintiff alleged that the defendants conspired to give state prosecuting authorities false information by attributing a check illegally paid to a public official to the plaintiff. The plaintiff claimed damage to his reputation and profession as a result of the false testimony by defendants.

A civil conspiracy is "a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful."36 In Wisconsin there is no tort action specifically for a civil conspiracy, but rather an action for damages caused by the acts pursuant to the conspiracy.

In this case defendants demurred to the complaint, claiming an absolute privilege for the statements which were made during judicial proceedings. Generally, as a result of that absolute privilege, there is no civil action for perjury. However, if the perjury is only a step in the larger conspiracy then an action may be maintained for damages if there are additional acts in furtherance of the conspiracy, or if the action is based upon fraud and deceit as well as conspiracy.37 In addition, the acts constituting the conspiracy itself need not themselves be civilly actionable, because it is the existence of the overt acts of the conspiracy causing damage which are crucial to the claim for relief.38

35. 74 Wis. 2d 239, 246 N.W.2d 507 (1976).
36. Id. at 241, 246 N.W.2d at 509.
37. Id. at 242, 246 N.W.2d at 509-10.
38. Id. at 244, 246 N.W.2d at 510-11.
In Radue, the plaintiff established a claim for relief in his complaint by alleging that the conspiracy existed to damage his reputation, trade and profession. Such a conspiracy is a criminal violation under section 134.01, and civil damages are available for injury caused by the violation of a criminal statute. The conspiracy must have existed specifically for the purpose of so harming the plaintiff: "A conspiracy [solely] for the purpose of committing perjury is an offense against the public only, but a conspiracy for the purpose of injuring another, if it results in damage to the other, is an offense for which there may be recovery."

III. Res Ipsa Loquitur

The application of the evidentiary doctrine of res ipsa loquitur was examined in the context of both products liability and medical malpractice.

The plaintiff-mechanic in Gierach v. Snap-On Tools Corp. was injured when a ratchet wrench produced by the defendant slipped, striking him in the face and teeth. Later, a salesman for the defendant disassembled the wrench in the presence of the plaintiff's co-employees and pointed out the sheared gear tooth which had caused the wrench to slip. The plaintiff claimed the gear tooth in the wrench was not properly hardened, while the defendant argued that accumulated grease and debris in the gear housing prevented the gear teeth from fully engaging, thereby shearing off one tooth.

The trial court gave a res ipsa loquitur instruction to the jury, which allowed the jury to infer the defendant's negligence without any direct testimony regarding the defendant's conduct at the time of the allegedly negligent act, the production

39. Wis. Stat. § 134.01 (1975) reads:
   Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500.
40. 74 Wis. 2d at 245, 246 N.W.2d at 511.
41. Id. at 246, 246 N.W.2d at 511.
42. 79 Wis. 2d 47, 255 N.W.2d 465 (1977).
43. The defendant also established that a properly hardened gear tooth could withstand 6000 pounds of pressure, while the most pressure that could be applied by a worker was approximately 1000 pounds.
of the wrench. The two elements required to sustain a res ipsa
inference are that: 1. The occurrence was of the kind which
does not ordinarily occur in the absence of negligence; and 2.
the agency or instrumentality which caused the harm must
have been within the exclusive control of the defendant.\textsuperscript{44}

The defendant objected on appeal rather than at trial to
linking res ipsa instructions with an alleged breach of the duty
to warn in a products liability action. Such objections must be
made at the trial court level to be valid, but, even though the
objections were raised too late, the court nevertheless discussed
the issue: "a res ipsa inference is permissible in respect to any
tort which occasions unintentional personal injuries if the ele-
ments necessary for instructing on that inference are placed in
evidence."\textsuperscript{45}

In this instance all the evidentiary preconditions were satis-
ified by the plaintiff; the gears could not have slipped in the
absence of negligence and the defendant was in exclusive con-
trol of the product. The court said control need only be control
of the factors which caused the injury. Even though the wrench
was not in the defendant's physical possession at the time of
the accident, the defendant was in control at the time of the
negligent act, manufacturing a defective product.

Although it is not cited, the \textit{Gierach} decision adopts the
rule of \textit{Jagmin v. Simonds Abrasive Co.,}\textsuperscript{46} in which the court
analyzed and permitted the application of res ipsa loquitur in
strict liability cases to establish a defective product:

\begin{quote}
[A] res ipsa type of inference is enough to establish a defect
if the plaintiff can show that he was properly using the prod-
uct and can negative other possible causes of the product
failure since it left the manufacturer's control. . . . The plain-
tiffs only have to introduce evidence which affords a reasona-
able basis for the conclusion that it was more likely than not
that conduct of the defendant manufacturer was a substan-
tial factor in the injury.\textsuperscript{47}
\end{quote}

Finally, the defendant was trapped by its own allegation of
contributory negligence on the part of the plaintiff for allowing

\textsuperscript{44} See \textit{Utica Mutual Ins. Co. v. Ripon Co-operative, 50 Wis. 2d 431, 436, 184
N.W.2d 65, 67 (1971); Turk v. H.C. Prange Co., 18
Wis. 2d 547, 553, 119 N.W.2d 365, 369 (1963).}
\textsuperscript{45} 79 Wis. 2d at 53, 255 N.W.2d at 467.
\textsuperscript{46} 61 Wis. 2d 69, 211 N.W.2d 810 (1973).
\textsuperscript{47} Id. at 73-74, 211 N.W.2d at 817.
grease and debris to accumulate in the gear housing. Since the defendant indicated an awareness of the possibility of such an accumulation and failed to warn of the danger, the manufacturer's duty to warn had been breached, which further supported the jury finding of liability.

In *Hoven v. Kelble*, the court considered both the use of res ipsa and the proposed adoption of strict liability in medical malpractice cases. The strict liability issue is analyzed in the following section.

*Hoven* arose from the defendant's appeal of an overruled demurrer to the inclusion of res ipsa in the complaint. The complaint sufficiently alleged negligence against the defendant hospital, doctor and anesthesiologist for injuries resulting from a heart attack plaintiff suffered during a lung biopsy. The complaint also alleged a separate cause of action against each defendant based on the permissive inference of negligence allowed by res ipsa loquitur.

Res ipsa has previously been allowed in Wisconsin medical malpractice cases. However, in such cases it is generally held that the doctrine may be invoked only where a lay person is able to say as a matter of common knowledge that the injuries caused by the medical treatment would not have resulted in the absence of negligence. In complicated medical malpractice cases, the plaintiff may use expert testimony to "educate" the jury and provide the common knowledge basis upon which to make the inference. However, res ipsa may not be applied where specific acts of negligence are proven by the plaintiff, since such proof defeats the purpose of the permissive inference.

Since res ipsa is an evidentiary doctrine it is not necessary for the plaintiff to include the elements in the complaint. Nevertheless, it is well settled that res ipsa may be alleged in a complaint to withstand a demurrer or motion to dismiss. Sufficient facts must be alleged to show the essential elements

48. 79 Wis. 2d 444, 256 N.W.2d 379 (1977).
49. Fehrman v. Smirl, 20 Wis. 2d 1, 22, 121 N.W.2d 255, 266 (1963).
50. Trogun v. Fruchtman, 58 Wis. 2d 569, 590, 207 N.W.2d 297, 308 (1973). The *Fehrman* court also refused to adopt the "rarity test," i.e., using the happening of an unusual result or reaction to the administration of a drug or treatment by a physician as a basis for establishing a res ipsa inference. A similar result was reached in *Trogun*.
52. 79 Wis. 2d at 449, 256 N.W.2d at 382, citing Szafrański v. Radetzky, 31 Wis. 2d 119, 132-33, 141 N.W.2d 902, 909 (1966).
required to draw the inference.\textsuperscript{53} The res ipsa allegation may be made concurrently with or alternatively to allegations of specific negligent acts.\textsuperscript{54}

Actually, whether res ipsa is adequately pleaded is of little significance since the doctrine may be used by the plaintiff, if sufficiently established through the course of the trial, without any reference to it in the complaint.\textsuperscript{55} However, if the plaintiff's sole claim for relief is based on res ipsa, a proper pleading of the doctrine is crucial to withstand a motion to dismiss.

The defendants in \textit{Hoven} objected not only to the general res ipsa allegations in the complaint, but also to the individual allegations that the plaintiff was under the exclusive control of each defendant at the time of the negligent act. The defendants argued that such allegations of multiple control failed to meet the required standard of "exclusive control," one of the necessary elements of res ipsa.

The court refused to read the "exclusive control" requirement literally, but rather relied on the Restatement of Torts (Second) section 328D which creates a standard of "responsible causes" rather than exclusive control for res ipsa.\textsuperscript{56} The responsible cause is established by sufficiently eliminating any conduct of the plaintiff or other third parties as a cause, leaving only the actions of the principal defendant. The other elements of res ipsa are, of course, also necessary. The court cited Prosser's expanded theory in place of the stricter "exclusive control" requirement: "\textit{[I]t would be far better, and much confusion would be avoided, if the idea of 'control' were discarded altogether, and we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it.}''\textsuperscript{57}

Such an interpretation is consistent with several previous Wisconsin cases applying the res ipsa doctrine even though the agency or instrumentality causing harm was not in the "exclusive control" or physical possession of the defendant.\textsuperscript{58}

\textsuperscript{53} 79 Wis. 2d at 449, 256 N.W.2d at 382.
\textsuperscript{54} Id. at 451, 256 N.W.2d at 382.
\textsuperscript{56} 79 Wis. 2d at 452, 256 N.W.2d at 383.
\textsuperscript{58} Gierach v. Snap-On Tools Corp., 79 Wis. 2d 47, 53, 255 N.W.2d 465, 467 (1977); Powers v. Hunt-Wesson Foods, 64 Wis. 2d 532, 539-40, 219 N.W. 2d 393, 396-97 (1974);
In this instance, the allegation of exclusive control by all three individual defendants was not deemed to be a fatal defect in the res ipsa cause of action. The allegation of control over the anesthesized plaintiff was a sufficient allegation of each defendant's control over the instrumentalities which purportedly caused damage to the plaintiff. However, at the trial, the plaintiff would have to establish that a single defendant was actually in control of the instrumentalities which caused the harm. The court noted that the alternative pleadings were just for that purpose, i.e., "to anticipate the possibility that proof may be addressed sufficient to bring negligence home to one of the defendants by showing that at material times that defendant was in control and the others were not."\footnote{59}

Both of these cases serve to expand the exclusive control element of res ipsa, even though the court has not in the past required a much stricter reading. Nevertheless, the expanded definition will aid plaintiffs in utilizing the permissive inference, especially in products liability cases where control may be a substantial factor in the use of the doctrine to establish negligence.

IV. STRICT LIABILITY IN MEDICAL MALPRACTICE CASES

\textit{Hoven v. Kelble}\footnote{60} also dealt with an attempt to change the negligence standard of reasonable care under the circumstances traditionally used as the measure of conduct in negligence cases in general, and medical malpractice cases in particular. However, the court rejected the plaintiff's plea to extend a strict liability theory based on \textit{Dippel v. Sciano}\footnote{61} to doctors in medical malpractice actions.

The plaintiff argued to extend strict liability from products under the Restatement of Torts (Second) section 402A to medical services, requiring a defective medical service, which is defined as one which does not meet the "reasonable expectations of the consumer."\footnote{62} The basic tenet of this philosophy is the

\footnotesize{\begin{itemize}
  \item Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 70-71, 211 N.W.2d 810, 815-16 (1973);
  \item Zarling v. LaSalle Coca-Cola Bottling Co., 2 Wis. 2d 596, 600-02, 87 N.W.2d 263, 266 (1958);
  \item and Ryan v. Zweck-Wollenberg Co., 266 Wis. 630, 639-45, 64 N.W.2d 221, 231-33 (1964).
  \item 59. 79 Wis. 2d at 455, 256 N.W.2d at 384.
  \item 60. 79 Wis. 2d 444, 256 N.W.2d 379 (1977).
  \item 61. 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The \textit{Dippel} case adopted the strict liability rule in products liability cases.
  \item 62. Plaintiff in the \textit{Hoven} case relied on Greenfield, \textit{Consumer Protection in Servu-
possibility of cure by the doctor. If the cure or expected medical result is not impossible to attain, the consumer may reasonably expect to be cured. If the result is not achieved, the doctor or other health care personnel are strictly liable. Justice Abrahamson summarized the argument:

[T]he essence of plaintiffs’ position appears to be that if a plaintiff could show that a hypothetical virtually perfectly informed doctor, working in a perfectly equipped hospital, could have avoided the untoward result, the plaintiff could recover, notwithstanding that the defendants exercised reasonable care in all respects. If attainment of the goal, or avoidance of the malocurrence is possible, then failure to attain the goal or to avoid the malocurrence renders the service defective.53

The court refused to adopt this novel64 theory because to do so would substantially change the standard of ordinary care which has been consistently applied in Wisconsin to negligence actions.65 This decision is consistent with the court’s rejection of the similar “rarity of result” standard advanced by plaintiffs in other medical malpractice cases. The court has refused to allow a res ipsa loquitur inference of negligence simply because the medical care resulted in an untoward rare result.66 Finally, the plaintiffs’ theory would, in effect, make the doctor an insurer of the service but the intent of strict liability is not to make the seller of a product the insurer of that product, but rather to aid the plaintiff’s difficult burden of proof in products liability cases.67

However, the court did find some merit in the plaintiff’s theory, and stated in dicta:

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63. 79 Wis. 2d at 460, 256 N.W.2d at 387.
64. The court’s search of the authorities failed to disclose a single case applying strict liability to professional services. 79 Wis. 2d at 463-64, 256 N.W.2d at 388-89.
66. Fehrman v. Smirl, 20 Wis. 2d 1, 25-26, 121 N.W.2d 255, 267-68 (1963); Trogun v. Fruchtman, 58 Wis. 2d at 590-92, 207 N.W.2d at 308-09.
It may be admitted that many of the justifications for strict liability have force regarding professional medical services. The provider of medical services appears to stand in substantially the same position with respect to the patient as the seller of goods does with the consumer. The typical purchaser of medical services cannot evaluate the quality of care offered because medical services are complex and infrequently bought. The medical care market gives the purchaser little assistance in enabling the purchaser to evaluate what he or she is buying. It is generally the physician — not the patient — who determines the kind of services to be rendered and how often. It is the physician not the patient who prescribes other goods and services, e.g., drugs, therapy, and hospitalization, that should supplement the physician's services. The physician is in a better position than the patient to determine and improve the quality of the services, and the patient's reliance on the doctor's skill, care, and reputation is perhaps greater than the reliance of the consumer of goods. The difficulties faced by plaintiffs in carrying the burden of proving negligence on the part of a doctor are well known . . . . The hospital and doctor are in a better position than the patient to bear and distribute the risk of loss.8

Nevertheless, the effect of such a theory on medical malpractice insurance, the inherent differences between medical services and products, the need for readily available medical services, and the likelihood of increased medical costs from adopting such a theory presented strong enough public policy arguments to prevent the court from permitting such an extension of strict liability, at least at this time.

ROSS A. ANDERSON

TRUSTS AND ESTATES

I. INHERITANCE TAX RATES: SHARE OF SURVIVING SPOUSE

In re Estate of Walker1 dealt with the right of certain distributees to exempt from state inheritance tax a portion of the property received.2 The amounts exempted in Wisconsin Stat-

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1. 75 Wis. 2d 93, 248 N.W.2d 410 (1977).
2. There are four classifications of distributees: Class A: surviving spouse, lineal