Torts

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come of a multistate financial organization is constitutionally ap-
portioned to the states in which the business is transacted and from
which the income is derived is presently being considered by the
Department. The extreme complexity of the task, as illustrated by
Transamerica, is evident.

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TORTS
I. PRODUCTS LIABILITY

The Wisconsin Supreme Court with two major decisions this
term, has continued a trend to expand the products liability field
which began with its decision in Dippel v. Sciano. The Dippel case
adopted the rule of strict liability in tort as set forth in the Restate-
ment (2d) of Torts, sec. 402A stating that privity of contract
should not be used to defeat a claim based on a defective product
unreasonably dangerous to a nonprivity consumer. However, the
court's decision in Dippel limited its holding to the black letter rule
of the Restatement. The court reasoned that while the comments
of the Restatement reporters may be helpful in construing the
section, the comments were not adopted in order to allow the
concept of strict liability to develop within the context of existing
law in this state. The court was called upon this term to consider
the applicability of strict liability in a suit by an injured bystander
against the manufacturer of the allegedly defective product in the
case of Howes v. Hanson. In addition the court considered the
liability of a component part maker and the method of apportion-
ing damages among parties in the distributive chain of a product
in City of Franklin v. Badger Ford Truck Sales.

1. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
2. Special Liability of Seller of Product for Physical Harm to User or Consumer
   (1) One who sells any product in a defective condition unreasonably dangerous
to the user or consumer or to his property is subject to liability for physical harm
   thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without sub-
   substantial change in the condition in which it is sold.
   (2) The rule stated in Subsection (1) applies although
   (a) The seller has exercised all possible care in the preparation and sale
   of his product, and
   (b) the user or consumer has not bought the product from or entered into
      any contractual relation with the seller.
3. 56 Wis. 2d 247, 201 N.W.2d 825 (1972).
4. 58 Wis. 2d 641, 207 N.W.2d 866 (1973).
In Howes a two year old boy had his foot come into contact with the blade of a riding lawn mower resulting in serious injuries including amputation of his foot. The mower involved was manufactured by Deere & Co., owned by the adult son of the landlord, and operated at the time of the injury by a twelve year old neighbor boy hired to do the lawn work. The case squarely presented the issue: “Should an action based on strict liability be extended to injured bystanders?” The issue was raised on demurrer by Deere & Co. on the basis of plaintiff's failure to state a cause of action sounding in strict liability in tort since the complaint failed to allege the injured boy to be a user or consumer of the product. The trial court overruled the demurrer and on appeal the Wisconsin Supreme Court held:

The same reasons that prompted us in Dippel to adopt the concept of strict liability to users or consumers cause us now to extend that concept to bystanders.*** There is no essential difference between the injured user or consumer and the injured bystander.6

In arriving at its decision the Wisconsin court relied on the classic opinion by Justice Traynor of California in Greenman v. Yuba Power Products, Inc.7 stating that:

. . . A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.8

The Howes decision changed the emphasis in the quoted language so as to accord the words “human being” their full meaning without qualification. As first construed in Dippel strict liability was limited to users or consumers.9 The court further stated in Howes that the reasoning which caused the court to adopt strict liability initially is equally applicable to its extension to protect bystanders. Concluding that there was no essential difference between users and consumers and bystanders, the court considered: concern must be for the just claims of the injured, the seller is in the best position to distribute the costs of risks created by his defective products, the

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5. Howes v. Hanson, 56 Wis. 2d 247, 252, 201 N.W.2d 825, 827 (1972).
6. Id. at 254-255, 201 N.W.2d at 828.
8. Howes v. Hanson, 56 Wis. 2d 247, 252, 201 N.W.2d 825, 827 (1972).
manufacturer has the greatest ability to control the risk created by his product, and the seller may pass the cost on to the consumer by increased prices or may purchase insurance for protection.10

Appellant made several arguments urging the court not to extend strict liability. It was contended that the concept of cost spreading or distribution does not apply to bystanders since they are not in the distributive chain. The court in rejecting this contention stated that the theory of compensation in strict liability is one of tort and the cost distribution concept runs counter to basic tort theory by urging that the injured party should share in paying for the recovery he seeks. Another argument offered was that implied representation by the manufacturer of safety and quality was not intended for the bystander. Warranty theory cannot be relied on to deny recovery under strict liability since Dippel abrogated the privity requirement and an attempt to avoid liability based on representations of safety and reliability disregards the fact that "users" and "consumers" are not necessarily those customers to whom the representations have been made. The appellant-manufacturer further contended that an extension of strict liability would expose sellers to liability to an unlimited and unforeseeable class of nonusers and bystanders. The court pointed out that such a contention was simply untrue and emphasized the elements of proof required by the plaintiff. While the plaintiff is not required to prove specific acts of negligence, proof must be had to establish: (1) that a defective condition existed when the product left the manufacturer; (2) that it was unreasonably dangerous; (3) that the defect was a cause of plaintiff's injuries; (4) that seller engaged in the business of selling; and (5) that the product reached the plaintiff without substantial change in condition.12 The seller further has the defense of contributory negligence available as the plaintiff has the duty to use ordinary care to protect himself from a known or readily apparent danger.13 Also conduct which may have been termed as assumption of risk prior to McConville v. State Farm Automobile Insurance Co.14 may constitute a second type of contributory negligence.

11. Restatement (Second) of Torts § 402A, Comment (1) at 354 (1965).
13. Defenses available under contributory negligence might include misuse of the product, abuse or alteration of the product, natural wear, use of the product coupled with inherent danger.
14. 15 Wis. 2d 374, 113 N.W.2d 14 (1962).
The *Howes* decision reiterated the *Dippel* principles as the Wisconsin strict liability doctrine. It must be noted that this approach is at odds with the Restatement sec. 402A. The Restatement takes the approach that "(s)ince the liability . . . is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases applies." Wisconsin has rejected the Restatement in this respect in order to implement strict liability under the comparative negligence statute. The court has stated:

It might be contended that strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se **Comparison of the failure to exercise ordinary care and negligence per se is so common and widely approved in our jurisdiction as to need no citation.**

The problems of terminology and semantic difficulty surrounding the adoption of strict liability as negligence per se caused then Justice Hallows to concur in *Dippel* and clarify a somewhat misleading stance of the court:

The Restatement is in terms of liability, but if we are to keep the doctrine of comparative negligence, which is one of the bulwarks against strict liability in Wisconsin jurisprudence, our statement of the first step in the solution of product liability cases must clearly be in terms of negligence and not liability. It is a plainly misleading statement to say we adopt the strict liability rule but we do not mean it.

What we mean is that a seller who meets the conditions of sec. 402A, Restatement, Torts 2d, in Wisconsin is guilty of negligence as a matter of law and such negligence is subject to the ordinary rules of causation and the defense applicable to negligence. While the Restatement, Torts 2d, sec. 402A, imposes a strict or absolute liability regardless of the negligence of the seller, we do not.

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15. *Restatement (Second) of Torts* § 402A, Comment (n) at 356 (1965).
16. Wis. Stat. § 895.045 (1971): Contributory Negligence. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.
18. *Id.* at 464, 155 N.W.2d at 65-66.
The Wisconsin approach to strict liability as negligence per se, gave rise to the question of the appropriate means for apportioning negligence between parties in the distributive chain of the product where each party is strictly liable or negligent per se. In City of Franklin v. Badger Ford Truck Sales,19 the plaintiff city brought suit against the seller, the chassis maker, and the wheel maker under strict liability for the sale to the city of a fire truck with a defective wheel. The fire truck was damaged when it tipped over while turning a corner responding to a fire alarm.

The question of apportioning damages required initial consideration of whether a component part manufacturer may be strictly liable in tort. While the Restatement abstained from expressing an opinion on the matter, it did indicate that the question was essentially whether “responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes.”20 The court recognized that there is a split in authority among the jurisdictions as to the liability of component part manufacturers21 and then held that:

Where there is no change in the component part itself, but it is merely incorporated into something larger, and where the cause of harm or injury is found, as here, to be a defect in the component part, we hold that as to the ultimate user or consumer, the strict liability standard applies to the maker and supplier of the defective part.22

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20. RESTATEMENT (SECOND) OF TORTS § 402A, COMMENT (q) at 358 (1965).
   (q) Component parts. The same problem arises in cases of the sale of a component part of a product to be assembled by another, as for example a tire to be placed on a new automobile, a brake cylinder for the same purpose, or an instrument for the panel of an airplane. Again the question arises, whether the responsibility is not shifted to the assembler. It it is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer. But in the absence of a sufficient number of decisions on the matter to justify a conclusion, the Institute expresses no opinion on the matter.
In *obiter dicta* the court indicated that further processing or substantial change, or where the injury is not caused by a defect in the component part, might have yielded a different result. Thus the same policy considerations for loss distribution justifying imposition of strict liability on any manufacturer may be applied to a component part maker with a caveat as to the degree of change such part undergoes.

The question then turns to the mechanism for comparing negligence between parties in the distributive chain each of which is negligent per se under the requisite elements of *Dippel* and *Howes*. In the *City of Franklin* case the special verdict contained a comparative negligence question asking only what percentage of negligence was to be attributed to the city and what percentage to the defendants. The problem arises here in that while in a strict liability action it is sufficient for the plaintiff to establish liability against the seller, assembler and maker without regard to the exercise of due care of each of these defendants, it is insufficient in a case involving multiple defendants not to question the jury as to the allocation of negligence between such defendants in order to determine the rights of contribution between them. The court held that "(t)he failure to submit a question as to the comparative

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23. The special verdict used in this case [by the trial court], in pertinent part, reads as follows:

First question: Was the wheel in question, when it was delivered to W.S. Darley Company, constructed defectively so as to be unreasonably dangerous to a prospective user?

Second question: If you have answered 'Yes' to Question No. 1, then answer this question; otherwise do not answer it: Was such defective construction a cause of the accident in question?

Third question: Was the plaintiff, the City of Franklin, negligent with respect to

(a) The maintenance of the wheel?
(b) The operation of the vehicle?

Fourth question: If you have answered 'Yes' to any subdivision of Question No. 3, then answer the corresponding subdivision of this question: Was such negligence on the part of the plaintiff, the City of Franklin, a cause of the accident with respect to

(a) The maintenance of the wheel?
(b) The operation of the vehicle?

The special verdict, as to comparative causal negligence of the city and the defendants, reads as follows:

Fifth question: If you have answered both Question No. 1 and Question No. 2 'Yes', then such defect in construction constitutes causal negligence. If you have answered 'Yes' to Question No. 2 and 'Yes' to either or both subdivisions of Question No. 4, then answer this question; otherwise do not answer it: Taking 100 percent as a total, what percentage of negligence do you attribute to

(a) The defective condition of the wheel?
(b) The plaintiff, the City of Franklin?

*Id.* notes 9-10 at 651, 207 N.W.2d notes 9-10 at 870-871.
negligence of the individual defendants, on the issue of contribution between them, renders the verdict incomplete.°°

The question in Wisconsin is not whether a defendant is negligent in selling a defectively dangerous product, but, rather, did he sell it?°°° If the basic fact of sale is found, then the court must transpose the fact in terms of negligence for the purpose of comparison. Therefore, where the plaintiff establishes the elements of strict liability against a manufacturer, wholesaler, and retailer each party is causally negligent. This conclusion would preclude the shifting of total responsibility from one party in the distributive chain to another but allows sharing of responsibility between the parties. A proper jury verdict must then apportion some percentage of negligence to each of the parties defendant. The Wisconsin rule thereby precludes indemnity but allows contribution. This result creates a conceptual dilemma in that an innocent seller, wholesaler or assembler is forced to bear some of the burden for the defective product although their conduct may not be considered factually negligent, while to allow a party who is negligent as a matter of law to escape liability is incongruous with the philosophy of strict liability. The conclusion that indemnity is unavailable as a means of shifting the loss in its entirety in products litigation is strengthened by Wisconsin’s rejection of the distinction of active and passive negligence°°° which has traditionally been used as a criterion for granting indemnity between tortfeasors.

II. MEDICAL MALPRACTICE

The court was called on this term to make a number of decisions having a significant impact on medical malpractice litigation. Among its decisions the court refused to adopt the “discovery rule” with respect to the running of the statute of limitations; the “locality rule” was modified to make the geographic area in which a doctor practices only a factor to be considered in establishing his standard of care; the cause of action in situations involving the “informed consent” of the patient is now recognized under a negligence theory; and the rule respecting release of the initial tortfeasor in situations where there is subsequent malpractice will not operate to release the malpracticing doctor unless intent to release the

24. Id. at 654, 207 N.W.2d at 872.
25. Wis. J.I.-Civil 3920 (Comment).


A doctor is found in the instrument. The medical malpractice cases required the court to re-examine issues with long standing precedent, thus indicating the trend toward increased litigation in this area and the need to conform legal standards to present day medical practices.

A. The Locality Rule

Whether the "locality rule" in medical malpractice in Wisconsin should be abrogated both as to general practitioners and specialists tests a rule followed for over 80 years. A long line of Wisconsin cases requires that testimony of an expert must establish the standard of care of the allegedly malpracticing doctor in relation to the community where the defendant practices:

When a physician exercises that degree of care, judgment, and skill which physicians in good standing of the same school of medicine usually exercise in the same or similar localities under like or similar circumstances, having due regard to the advanced state of medical science at the time, he has discharged his legal duty to his patient.

Practitioners in medicine, surgery or osteopathy who were licensed in other states could testify as experts in Wisconsin whenever their testimony was necessary to establish the rights of Wisconsin citizens or residents in a judicial proceeding and whenever expert testimony of licensed practitioners in Wisconsin, sufficient for the purpose, was not available, by virtue of the terms of a special statute pertaining to medical testimony until 1953 when the statute was amended to delete the particular provision. Wisconsin has also recognized that a physician or surgeon is competent to testify where such testimony indicates familiarity with the practice of medicine and customs of the profession in the vicinity of the defendant's locality, or that the witness had knowledge of practice in

27. Gates v. Fleischer, 67 Wis. 504, 30 N.W. 674 (1886).
29. Wis. Stat. § 147.14(2) (1971). That portion of the statute applicable in this instance reads as follows:

Practitioners in medicine, surgery or osteopathy licensed in other states may testify as experts in this state when such testimony is necessary to establish the rights of citizens or residents of this state in a judicial proceeding and expert testimony of licensed practitioners of this state sufficient for the purpose are not available.

Also see Paulson v. Gunderson, 218 Wis. 578, 260 N.W. 488 (1935); Morrill v. Komasinski 256 Wis. 417, 41 N.W. 2d 620 (1950).
communities similar to the community in which the defendant practiced irrespective of the statute.\textsuperscript{31} However, the Wisconsin cases uniformly required testimony with respect to the standards in the area in which the defendant practiced, regardless of the method used to establish the competency of the witness.

The so-called "locality rule" was challenged by \textit{Shier v. Freedman}\textsuperscript{32} where a 21 year old construction worker was injured when a 20 to 30 pound clump of dirt fell on his back fracturing two vertabrae in the lumbar spine. After initially conservative treatment, surgery was first performed by Dr. Richard Oudenhoven, a neurosurgeon, to alleviate persistent pain in the low back and right leg. The back pain remained and plaintiff consulted Dr. Albert Freedman, an orthopedic surgeon, who performed a spinal fusion. During recovery the plaintiff first complained of numbness in the right buttock and then loss of feeling throughout the saddle area, anal area, penis and testicles. Dr. Oudenhoven, who was called in as a consultant by Dr. Freedman and who then performed exploratory surgery to determine what the problem was and how it could be rectified, testified at trial that in his opinion, to a reasonable degree of medical certainty, Dr. Freedman failed to meet the standard of medical practice in Brown County or the same or similar surrounding localities. A number of medical experts were called and testified that Dr. Freedman was not negligent. At the close of testimony plaintiff's counsel submitted as a requested instruction Wisconsin J.I.-Civil, Part I, sec. 1023 on malpractice with the locality rule deleted. The requested instruction was rejected and the instruction was given in standard form. On appeal the question presented is, in essence, whether a physician, surgeon or dentist from one locality is competent to testify as to the standard of care required of a practitioner from another locality.

The Wisconsin Court in \textit{Shier} rejected the locality rule and stated the new rule as follows:

\begin{quote}
Henceforth, in instructing juries in medical malpractice cases, the jury should be told in substance that a qualified medical (or dental) practitioner, be he a general practitioner or a specialist, should be subject to liability in an action for negligence if he fails to exercise that degree of care and skill which is exercised by the average practitioner in the class to which he belongs, acting in
\end{quote}

\textsuperscript{31} Morrill v. Komasinski, 256 Wis. 417, 41 N.W.2d 620 (1950).
\textsuperscript{32} 58 Wis. 2d 269, 206 N.W.2d 166 (1973).
the same or similar circumstances. Geographical area and its attendant lack of facilities are circumstances that can be considered if appropriate.\textsuperscript{33}

In rejecting the locality rule the Court pointed out that the rationale formerly used to justify the standard is inappropriate in our advanced technical society. At the time the rule originated it simply was unfair to hold a physician from a small town who lacked the opportunity to become acquainted with technical advances and who did not have modern facilities for care and treatment to the same standard of care as physicians from the urban centers. The Court relied on the Washington case of Pederson v. Dumonche\textsuperscript{34} in adopting the trend away from a standard of care based on geographical localities now recognized by a number of jurisdictions.\textsuperscript{35} The reasoning behind this trend is essentially that the old rule has outlived its usefulness with the passage of time and the disappearance of the "country doctor" from the profession, availability of programs of continuing education, regulation of the medical profession by standardized certification procedures, and a tendency to recognize the degree of care of the average, competent practitioner.

The decision has left a number of questions unanswered. First, the scope of the opinion was limited to medical and dental practitioners. One must then question the effect of Shier respecting familiarity with local practices for witnesses testifying in medically related professions such as technicians, hygienists and also chiropractors, physical therapists, and the like. The standard of care for hospitals is also established by the care given in similar circumstances by hospitals in the geographic area.\textsuperscript{36} Whether Shier will be extended to include hospitals and medically related professions is left to future litigation. Secondly, the effect of the decision on the statutes relating to expert medical testimony is uncertain. Wisconsin Statute sec. 448.02(2) allows an out of state practitioner to

\textsuperscript{33} Id. at 283-284, 206 N.W.2d at 174.
\textsuperscript{34} 72 Wash. 2d 73, 431 P.2d 973 (1967).
\textsuperscript{36} See Cramer v. Theda Clark Memorial Hospital, 45 Wis. 2d 147, 172 N.W.2d 427 (1969).
testify where he is the examining or attending physician and also provides that expert status is granted in the discretion of the trial court.\textsuperscript{37} This section must be read in conjunction with Wisconsin Statute sec. 907.02 of the new Wisconsin Rules of Evidence relating to expert testimony.\textsuperscript{38} The statutes indicate that recognition of a medical expert is within the ambit of the trial court's discretion. The expert medical witness is called upon to establish the standard of care, that the standard was breached, and that the breach caused the injury. In accomplishing this \textit{Shier} holds that geographic area is still a factor in establishing the standard of care and the competency of the witness to testify with respect to that standard. To preclude a medical expert from testifying it must now be shown that locality is a factor which must be considered in resolving the issue, and that the witness is not familiar with local practice. From the rationale of the decision it may be that locality will be a factor only where it involves availability of facilities.

\textbf{B. Statute of Limitations}

Litigation in the area of medical malpractice included three cases concerning the statutory limitations placed on commencing suit. \textit{Olsen v. St. Croix Valley Memorial Hospital}\textsuperscript{39} and \textit{Peterson v. Roloff}\textsuperscript{40} reexamined the issue of whether the statute of limitations should begin to run at the time of the injury or at the time of its discovery. \textit{Estate of Kohls}\textsuperscript{41} considered the appropriate limi-

\textsuperscript{37} \textit{Wis. Stat.} \textsuperscript{\textregistered} \textsuperscript{\textsection} 448.02(2)(a) (1971) provides that:
No person without a license or certificate of registration from the examining board shall have the right to testify in a professional capacity on a subject relating to medical treatment, as a medical or osteopathic physician or practitioner of any other form or system of treating the sick, as defined in s. 445.01. A medical or osteopathic physician, licensed to practice in another state, may testify as the attending or examining physician or surgeon to the care, treatment, examination or condition of sick or injured persons whom he has treated in the ordinary course of his professional practice for the sickness or injury which is the subject of the judicial inquiry in any action or proceeding in which he is called as a witness.
(b) A court may permit any person to testify as an expert on a medical subject in any action or judicial proceeding where proof is offered satisfactory to the court that such person is qualified as such expert.

\textsuperscript{38} Sec. 907.02 Wisconsin Rules of Evidence, 59 Wis. 2d R1, 207 N.W.2d — (1973)

\textit{(Testimony by Experts)}:
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

\textsuperscript{39} 55 Wis. 2d 628, 201 N.W.2d 63 (1972).
\textsuperscript{40} 57 Wis. 2d 1, 203 N.W.2d 699 (1973).
\textsuperscript{41} 57 Wis. 2d 141, 203 N.W.2d 666 (1973).
tation on a malpractice action brought on a contract theory. The Court in these cases relied on past precedent and deferred to the legislature any changes that may be deemed necessary.

The Olson case was appealed from the trial court ruling sustaining a demurrer to a complaint alleging malpractice against a hospital for injuries sustained as a result of a transfusion of improperly typed blood. The transfusion was administered in 1962. Plaintiff, in 1966, gave birth to a child who died shortly after birth, and, in 1969, delivered a stillborn child. At the time of the second delivery it was discovered that the wrong blood was given in the 1962 transfusion. The complaint alleged the negligent mistyping and administering of the blood was the direct and proximate cause of the loss of plaintiff's children. The demurrer was sustained based on the running of the three year statute of limitations.\(^2\)

The supreme court affirmed on the ground that the statute of limitations barred the suit and cited Holifield v. Setco Industries, Inc.\(^3\) as authority for its position that the period commences to run at the time the cause of action accrues. The cause accrues at the time the plaintiff is injured; injury is not necessarily simultaneous with the negligent act. The court held that the plaintiff was injured in 1962 at the time of the transfusion and action brought in 1969 was barred. The Olson case was determined to be factually inappropriate for re-examination of the "discovery rule" previously rejected in Wisconsin.\(^4\)

The Peterson case arose out of allegedly negligent surgery for the removal of plaintiff's gallbladder in 1954. In January of 1971 plaintiff experienced pains in her abdomen diagnosed as pancreatitis due to the failure of the defendant doctor to completely remove the gallbladder. The question considered on appeal was at what time did the cause of action ripen so as to start the running of the statute of limitations. The plaintiff-appellant contended that Wisconsin should adopt the "discovery rule" so that the period of limitation would not commence until the injury resulting from the alleged negligence was discovered. The court retained the present rule that a medical "malpractice action accrues at the time the negligent act occurs with accompanying injury."\(^5\) The court went

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43. 42 Wis. 2d 750, 168 N.W.2d 177 (1969).
44. Reistad v. Manz, 11 Wis. 2d 155, 125 N.W.2d 324 (1960), McCluskey v. Thranow, 31 Wis. 2d 245, 142 N.W.2d 787 (1969); Volk v. McCormick, 41 Wis. 2d 654, 165 N.W.2d 185 (1969).
45. Peterson v. Roloff, 57 Wis. 2d 1, 4, 203 N.W.2d 699, 700-01.
on to state that a change of the statute of limitations is one of public policy which should be left to the legislature. Noting that statute of limitations questions present the conflicting policies of discouraging stale and fraudulent claims and allowing valid claimants an opportunity to seek redress when diligently pursued, the court concluded:

Because of the numerous cases in which the present three-year requirement for commencing an action by a party who is the victim of medical malpractice is too short, we strongly recommend to the legislature that the basic three-year statute for negligence actions due to medical malpractice be amended.46

Chief Justice Hollows wrote a strong dissent in Peterson chastising the majority for placing the discovery rule in Wisconsin "in the limbo of jurisprudence . . . to be saved, if at all, by the legislature."47 The dissent characterized the issue as one of statutory construction significant enough to be decided by the court.

The statute of limitations for medical malpractice in Wisconsin depends on when a cause of action is said to "accrue."48 The term "cause of action" is not statutorily defined. "A cause of action accrues when there exists a claim capable of present enforcement, a suitable party against whom it may be enforced, and a party who has a present right to enforce it."49 Since a cause of action requires the elements of a duty, breach, cause and damage to be present before it can be said to have accrued, it is inappropriate to force an aggrieved party to initiate a cause of action when that party is unaware of its existence. The "discovery rule" attempts to avoid the inequities in just such a situation. Under this doctrine, the cause of action does not accrue until the victim knows or should have known of the injury. A number of jurisdictions have adopted the rule through interpretation of existing statutes framed in terms of when a cause of action "accrued."50

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46. Id. at 7, 203 N.W.2d at 702.
47. Id. at 15-16, 203 N.W.2d at 707.
on two previous occasions\textsuperscript{51} refused to adopt the discovery rule and in \textit{McCluskey v. Thranow} stated that "this question is not open to new adjudication in Wisconsin."\textsuperscript{52} While the court has retreated somewhat from its position in \textit{McCluskey} it has refused to take the necessary steps to effectuate a needed change that could be accomplished by statutory construction.\textsuperscript{53}

The \textit{Estate of Kohls} presented the issue of whether the three-year statute of limitations\textsuperscript{54} or the six-year statute of limitations\textsuperscript{55} applies where the complaint alleged that a result of treatment by two dentists the deceased developed aplastic anemia which caused her death. Plaintiff contended the theory of the action was based on contract and the six-year statute was applicable. The court relied on \textit{Klingbeil v. Sauceman}\textsuperscript{56} in holding that:

> While a malpractice action can be brought either in tort or in contract, it is an action to recover damages for injuries to person. . . . The appellant has an option as to remedies, but, whichever route he chooses, the "action for injuries" statute of limitations (sec. 893.205, the three-year statute) applies.\textsuperscript{57}

In so holding, the court rejected another theory by which the time for commencing malpractice suits may have been extended, thus committing the issue to the will of the legislature.

\section*{C. Informed Consent}

In \textit{Trogun v. Fruchtman},\textsuperscript{58} the court discarded the doctrine of "implied consent" based upon a theory of assault and battery. The plaintiff was a patient of Dr. Robert Fruchtman, a specialist in internal medicine. The doctor prescribed a certain drug, isoniazid hydrazate (INH) for treatment of an inactive tuberculosis condition. After taking the INH, plaintiff became jaundiced and con-

\begin{itemize}
\item \textsuperscript{51} Reistad v. Manz, 11 Wis. 2d 155, 125 N.W.2d 324 (1960); McCluskey v. Thranow, 31 Wis. 2d 245, 142 N.W.2d 787 (1966).
\item \textsuperscript{52} McCluskey v. Thranow, 31 Wis. 2d 245, 142 N.W.2d 787 (1966).
\item \textsuperscript{53} See, Hallows dissent in Peterson v. Roloff, 57 Wis. 2d 1, 14, 203 N.W.2d 699, 706 (1973).
\item \textsuperscript{54} Wis. Stat. § 893.205 (1971):
> Within 3 years: (1) An action to recover damages for injuries to the person for such injuries sustained on and after July 1, 1955. . . .
\item \textsuperscript{55} Wis. Stat. § 893.19 (1971):
> Within 6 years: (3) An action upon any other contract, obligation or liability, express or implied . . . .
\item \textsuperscript{56} 165 Wis. 60, 160 N.W.2d 1051 (1917).
\item \textsuperscript{57} Estate of Kohls, 57 Wis. 2d 141, 144, 203 N.W.2d 666, 667-668 (1973).
\item \textsuperscript{58} 58 Wis. 2d 569, 207 N.W.2d 297 (1973).
\end{itemize}
tracted hepatitis which required surgery. The plaintiff alleged as a second cause of action that the doctor failed to advise him of possible side effects of the drugs prescribed and therefore plaintiff could not make an informed consent to such treatment.

On appeal the crux of plaintiff-appellant's request to the court was a modification of the existing law which has become known as the doctrine of "informed consent." Informed consent concerns the duty of the physician or surgeon to inform the patient of the risk which may be involved. The Wisconsin Supreme Court has adopted a theory in the consent cases based on the traditional intentional tort of battery which is defined as the unauthorized touching of another. The battery rule was adopted in two early cases. 

Throne v. Wandell held a person in possession of his faculties and in sufficient physical health to be consulted about his condition must be so consulted in non-emergency situations and failure to do so is technically a battery. Paulson v. Gunderson held, in essence, that the plaintiff has the burden of proving by a clear preponderance of the evidence that an operation was performed without consent and if it was, the physician committed a battery.

The court pointed to several reasons why the assault and battery theory is inadequate in the informed consent situations:

(1) the act complained of "does not fit comfortably within the traditional concepts of battery;"
(2) failure to inform is probably not an intentional act within the traditional intentional tort concept;
(3) the act complained of is not "contact" or "touching," i.e., drug treatment;
(4) whether the physician's malpractice insurance covers "liability for an arguably 'criminal act';"
(5) these cases do not present situations where punitive damages can be awarded.

Thus, the court concluded that the action is in reality one for negligent failure to conform to the proper standard of disclosure.

The new Wisconsin informed consent rule is summarized as follows:

We conclude that the burden of proof is on the plaintiff to estab-

60. 176 Wis. 97, 186 N.W. 146 (1922).
61. 218 Wis. 578, 260 N.W. 448 (1935).
62. Trogun v. Fruchtman, 58 Wis. 2d 569, 599-600, 207 N.W.2d 297, 313 (1973).]
lish a physician's failure to disclose particular risk information in connection with contemplated treatment, the patient's lack of knowledge of that risk and the adverse effects upon him which followed that treatment. Experts are unnecessary to establish the materiality of the risk to a patient's decision to undergo treatment or to the "reasonably expectable effect of risk disclosure on the decision." Once the plaintiff has established a prima facie showing of a failure of the physician to inform the patient, the physician must come forward with his explanation of the reasons for not so informing the patient, including evidence that such advice was not customarily given.63

In arriving at this conclusion, the court relied on the rationale of three cases from other jurisdictions, Canterbury v. Spence,64 Cobbs v. Grant,65 and Wilkinson v. Vesey.66 The court noted that the Canterbury case recognized exceptions to the duty to disclose where the patient is incapable of consenting, where an emergency situation is presented, and where the risk of disclosure poses a threat to the patient such that it is unfeasible from a medical standpoint. Wilkinson indicates that there is no need for a physician to disclose well-known risks or to disclose all possible risks to the patient. Other factors affecting the duty to disclose are: what information is customarily disclosed; the nature of the explanation and its understanding by the patient; and the proof in the hands of the physician such as an authorization. Essentially a doctor must give his patient an opportunity to make an informed judgment based on the facts of each situation.

D. Releases

The court was called upon this term to reconsider an apparently well settled aspect of the law affecting medical malpractice, that being whether a release by an injured party of the original tortfeasor for his injury will bar an action by the injured party for later negligent diagnosis and treatment by a physician or surgeon. This issue was presented in both Krenz v. Medical Protective Co.,67 and Westphal v. Cantwell-Peterson Clinic.68 The Krenz case also involved the propriety of amending an executed release.

63. Id. at 604, 207 N.W.2d at 315.
64. 464 F.2d 772 (D.C. Cir. 1972).
67. 57 Wis. 2d 387, 204 N.W.2d 663 (1973).
68. 57 Wis. 2d 402, 204 N.W.2d 491 (1973).
In *Krenz*, plaintiff was injured in a fall down a flight of stairs, suit was brought against the owners of the premises and a year later suit was also commenced against the treating physician and his insurer. Subsequent to commencing the malpractice action a general release was executed and the suit against the building owners was dismissed. Upon learning of the release, the defendant doctor and his insurer moved for summary judgment based on the general release. The trial court denied the motion.

*Westphal* involved treatment following an automobile accident where the plaintiff, a 17 year old, suffered complete and permanent paraplegia. A minor settlement was negotiated with the driver of the automobile in which plaintiff was a passenger, and general releases were executed. The malpractice action was commenced and the defendant doctors answered setting forth the general release as an affirmative defense. The trial court granted the defendant's motion for summary judgment.

The initial consideration in the *Krenz* case was the effect of an attempt to amend the executed general release. The amendment procedure was instituted by plaintiff upon discovery that by operation of law a general release also released the malpractice cause of action. The court held that the intent of the parties controlled:

> A release is a unilateral contract and the intention of the parties as to its scope and effect is relevant [citations omitted]. . . We think the parties to a release can agree to amend their intention or more precisely in the context of this case to exclude an effect they did not intend. . . The original release in effect gave him [the doctor] a free ride without his knowledge, consent, or any consideration as far as the Krenz's are concerned.69

The "free ride" given the doctor by barring the malpractice action as a result of a general release executed to the original tortfeasor, as well as the policy of encouraging settlement in proper cases, seem to be the motivating factors for reconsideration of the effect of releases in a case where medical malpractice aggravates an original injury.

The Wisconsin rule of long standing has been that "the enhancement of an injury resulting from malpractice is a direct result of the original injury and consequently the tortfeasor causing the original injury is liable, not only for the original injury but also for subsequent aggravation by malpractice."70

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A general release given to the tortfeasor responsible for the original injury, in the absence of express language in the release reserving a cause of action, precludes a malpractice action for negligent treatment of the injury. However, in Pierringer v. Hoger, Wisconsin recognized a limited release in situations involving joint tortfeasors. The agreement utilized to effectuate settlement and to prevent its being precluded by a nonsettling defendant provided essentially that the plaintiffs would release all of their causes of action and credit and satisfy all of their damages in any judgments which might ultimately be attributed to the settling parties, reserving to the plaintiffs only the portion of their cause of action and damages which might be held to be attributable to the nonsettling party. Although the original tortfeasor and the doctor are not joint tortfeasors, the principles of a Pierringer type release would have been the appropriate means of protecting the plaintiff's cause of action against the malpracticing doctor.

The Wisconsin rule respecting a release of the original tortfeasor where there is subsequent malpractice originated in Hooyman v. Reeve, where the general release was deemed to have included the damages for malpractice. In Retelle v. Sullivan, the language of the general release was broad enough to release the doctor, and the court justified its conclusion by stating that the first tortfeasor received a subrogation right from the injured party against the doctor to indemnify the first tortfeasor for the payment of damages caused by the doctor—thus double recovery was avoided. The implied release was further developed in Noll v. Nugent. The court stated that there is a presumption that in releasing the original tortfeasor the settlement includes compensation for the injury occasioned by the malpractice, and the presumption is conclusive unless the injured party saves his cause of action by an appropriate provision in the release or covenant not to sue. Thereafter Green v. Waters, and Hartley v. St. Francis Hospital firmly estab-

71. Fisher v. Milwaukee Electric Railway & Light Co., 173 Wis. 57, 180 N.W. 269 (1920); Retelle v. Sullivan, 191 Wis. 576, 211 N.W. 756 (1927); Noll v. Nugent, 214 Wis. 204, 252 N.W. 574 (1934); Green v. Waters, 260 Wis. 40, 49 N.W.2d 919 (1951); Hartley v. St. Francis Hospital, 24 Wis. 2d 396, 129 N.W.2d 235, (1964).
72. 21 Wis. 2d 182, 124 N.W.2d 106 (1963); also see McComas, Tort Releases in Wisconsin, 49 Marq. L. Rev. 533 (1966).
73. 168 Wis. 420, 170 N.W. 282 (1919).
75. 214 Wis. 2d 204, 252 N.W. 574 (1934).
76. Green v. Waters, 260 Wis. 40, 49 N.W.2d 919 (1951).
77. Hartley v. St. Francis Hospital, 24 Wis. 2d 396, 129 N.W.2d 235 (1964).
lished the reservation of rights and concept of subrogation. It must be noted that since the first tortfeasor and the doctor are not joint tortfeasors there is no common liability giving rise to a right of contribution. The first tortfeasor by settling acquires the right of the injured party to sue the doctor.

The court in this term has enunciated a change in Wisconsin law, the new rule respecting releases in cases where there is subsequent malpractice is now:

A rebuttable presumption that a general release of the original tortfeasor does not release the malpractice cause of action against the doctor for damages which might be recovered against the original tortfeasor, unless the intention to do so is clearly and expressly stated in the release.\(^8\)

The rationale of the rule is that the intent of the parties should control. The effect of this decision is to place the burden of proof on the doctor, who claims the benefit of the release, that he was to be included in the release of the original tortfeasor.

Wisconsin is now added to the list of twelve jurisdictions\(^9\) which have adopted a release rule similar to that of *Krenz*. The case law of these jurisdictions, cited by the court in its opinion, generally considered the effect of the release based on two factors: 1) whether the injured party intended to release the physician by releasing the original tortfeasor, and 2) whether the settlement in fact compensated the injured party for the malpractice damage. Wisconsin does not seem to have adopted the intent-to-release-plus-full-compensation rule, but has created a presumption which must be overcome by the doctor using the language of the instrument. The question arises as to what evidence is sufficient to rebut the presumption.

The *Krenz* case did not incorporate adequacy of consideration

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80. Westphal v. Cantwell-Peterson Clinic, 57 Wis. 2d 402, 204 N.W.2d 491 (1973).
in its holding, but the amount of settlement was examined in *Westphal*. Relying on *Krenz*, the court in *Westphal* indicated that "intent" includes both an intention to release and full compensation:

> It would be ridiculous to argue that paying out $16,000 in return for a general release and approved court settlement, given the severity of plaintiff's injuries [the case involved injuries resulting in quadriplegia], could in any way lead to the possibility of a double recovery in malpractice litigation. We think there was no intent to release the malpractice cause of action. . . .

In spite of these decisions the effectiveness of any release will still depend on the terms of the instrument as defining the rights and liabilities of the parties involved. Protection of the injured party can best be accomplished by saving the malpractice cause of action through use of a *Pierringer* type release.

### III. NEGLIGENCE

The court was called upon to decide a number of cases affecting development of the Wisconsin doctrine of comparative negligence. Among the major issues were the problems of apportionment of negligence, jury enlightenment, active-passive negligence, negligent arrest and third party actions aginst co-employees. Generically speaking, the court relied on precedent, however the cases raise a number of issues which may meet acceptance in the future.

*Smith v. St. Paul Fire & Marine Ins. Co.*, considered the ability of the court to change the apportionment of negligence determined by the jury. The case involved an automobile intersection collision where the jury apportioned 65 percent of the causal negligence to the plaintiff. Plaintiff's auto struck defendant's auto in an intersection controlled by flashing lights—plaintiff proceeded through the yellow caution light and struck defendant. The court concluded that the defendant was negligent as to lookout and right-of-way, but the plaintiff was negligent as to speed and lookout.

Plaintiff contended on appeal that the jury's verdict was grossly out of line with the facts of the case. In rejecting plaintiff's contention, the court quoted *Sailing v. Wallestad* as follows:

> In the great majority of automobile accident cases the compari-

81. *Id.* at 407, 204 N.W.2d at 494.
82. 56 Wis. 2d 725, 203 N.W.2d 34 (1973).
83. 32 Wis. 2d 435, 145 N.W.2d 725 (1966).
son of negligence is for the jury, and the instances in which a
court can rule as a matter of law that the negligence of a plaintiff
equaled or exceeded that of a defendant are extremely rare.\(^\text{84}\)

Review by the appellate court is considerably restricted where the
trial court specifically approves the jury apportionment in ruling
on motions after verdict. While the \textit{Smith} case did not deal with
the specific issue, it causes one to question the ability of the trial
court to alter the jury's apportionment. The trial court may change
the answer to the apportionment question only if the court can find
as a matter of law that one party is not negligent or that the parties
are equally negligent. The court may also affect the apportionment
by granting a new trial where the verdict is grossly disproport-
tionate or contrary to the preponderance of the evidence. Whether
the supreme court would allow the trial court or itself to undertake
to determine a reasonable comparison of causal negligence when
the jury's determination is found to be excessive with respect to one
of the parties is not certain. Such a procedure would amount to a
\textit{Powers} rule applied to the jury apportionment as advocated by
then Justice Hallows in his concurring opinion in \textit{Lawver v. Park
Falls}.\(^\text{85}\) While the approach the court will take on alteration of the
apportionment must be left to speculation, where the trial court
approves the apportionment the court has reiterated its "hands-
off" attitude.

A somewhat related problem is whether the jury should be
informed of the effect of its answers to the special verdict questions
as to ultimate recovery of the parties. The question arose out of
counsel's remarks during closing argument to the effect that the
jury should not consider a 50-50 apportionment because that kind
of verdict would do a grave injustice (note that the case was tried
under the "greater than" comparative negligence statute\(^\text{86}\) which
would preclude recovery under a 50-50 negligence apportionment).
In \textit{Kobelinski v. Milwaukee & Suburban Transport Corp.},\(^\text{87}\) the

\(^{84}\) Smith v. St. Paul Fire & Marine Ins. Co., 56 Wis. 2d 752, 755, 203 N.W.2d 34,
36-37 (1973).

\(^{85}\) 35 Wis. 2d 308, 151 N.W.2d 68 (1967).

\(^{86}\) \textit{Wis. Stat.} § 895.045 (1969):
Contributory negligence shall not bar recovery in an action by any person or his legal
representative to recover damages for negligence resulting in death or in injury to
person or property, if such negligence was not as great as the negligence of the person
against whom recovery is sought, but any damages allowed shall be diminished in
proportion to the amount of negligence attributable to the person recovering.

\(^{87}\) 56 Wis. 2d 504, 202 N.W.2d 415 (1972).
court indicated its disapproval of the remarks but held that the statements did not constitute prejudicial error.

The Wisconsin Supreme Court has repeatedly held that it is reversible error to inform the jury of the effect of its answers to special verdict questions upon the ultimate right of recovery, either expressly or by necessary implication. It is improper to inform them of the effect of its answers either by argument of counsel or by instruction of the court.\(^8\) The court has gone so far as to hold that it is error to read the comparative negligence statute to the jury because of the prejudicial effect of informing the jurors of the effect of their answers.\(^9\) In spite of the line of precedent, Chief Justice Hallows dissented in *Kobelinski* stating:

I think the rule should be changed so that a jury can be told the meaning of their verdict. . . . The court should be allowed to instruct the jury, not only of the effect of their apportionment answer, but that if it is not sustained by the evidence it may be set aside or modified by the court. If the jury knew the full extent and the limitation of its role and the role of the court in the trial of a lawsuit, their verdicts would be more realistic and just.\(^{10}\)

The rationale against "jury enlightenment" is that the purpose of the special verdict is to secure a direct answer to the question submitted to the jury free from bias or prejudice in favor of or against either party. Concern for jury enlightenment has developed under the doctrine of comparative negligence, especially where the percentage of causal negligence attributed to each party approaches 50 percent. It is felt that justice would be better served if the jury were informed that a party 49 percent negligent will recover 51 percent of the damage awarded while the other party is barred from recovery. However, the special verdict was developed to focus the attention of the jury on ultimate facts and to move away from this view amounts to reverting to a general verdict procedure. To accept the reasoning of Chief Justice Hallows' dissent is the first step in appraising the jury of the ultimate effect of recovery. Taken to its logical conclusion, if the jury is to be advised of the effect of its apportionment, by necessary implication it

\(^{8}\) Banderob v. Wisconsin Central R. Co., 133 Wis. 249, 113 N.W. 738 (1907); Anderson v. Seelow, 224 Wis. 230, 271 N.W. 844 (1937); Pecor v. Home Indemnity Co., 234 Wis. 407, 291 N.W. 313 (1940); Erb v. Mutual Service Casualty Co., 20 Wis. 2d 530, 123 N.W.2d 493 (1963).

\(^{9}\) De Groot v. Van Akken, 225 Wis. 105, 273 N.W. 725 (1937).

\(^{10}\) *Kobelinski* v. Milwaukee & S. Transport Corp., 56 Wis. 2d 504, 526, 202 N.W.2d 415, 428 (1972).
should be appraised of all interests which will affect a party's "take-home" verdict, i.e., attorney's fees, subrogation rights, workman's compensation claims, set-offs, etc. At least for the present, in light of Kobelinski, Wisconsin juries will not be informed of the effect of their answers to special verdict questions.

Another case affecting the comparison of negligence is Pachowitz v. Milwaukee & Suburban Transport Corp., where the court abolished the distinction of active and passive negligence. The plaintiff was injured when alighting from defendant's bus, stopped at an uneven and defective curb. Plaintiff brought suit against the Transport Company who in turn brought a third party action against the City of Milwaukee for contribution, or in the alternative, indemnity based on the defective curb and sidewalk. The trial court sustained the city's demurrer.

On appeal the Transport Company urged the court to recognize the active-passive distinction and thereby create a right to full indemnity for the tortfeasor whose negligence contributed to the injury but was "passive." "Active" negligence denotes some positive act or some failure in a duty of operation equivalent to a positive act, whereas "passive" negligence denotes something that should have been done. The court indicated that it was difficult to see how the distinction would apply to the facts presented and further stated that the all-or-nothing basis of indemnity would be contrary to the policy of contribution between tortfeasors based on comparative negligence. In Bielski v. Schulze the distinction between gross and ordinary negligence was discarded because the distinction worked inequitably in the field of contribution and indemnity, and only by treating the conduct in terms of degree can a fair and equitable result be reached through comparison. "For the same reasons that the distinction between 'gross' and 'ordinary' negligence was abolished in Bielski, [the court] . . . now reject[s] . . . a distinction between 'passive' and 'active' negligence as a basis for indemnity between co-tort-feasors."

A number of cases decided this term considered the liability of co-employees in third-party actions where the plaintiff had already recovered under workman's compensation. The cases presenting

92. 65 C.J.S., Negligence sec. 1 (14) at 460.
93. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

The court in *Pitrowski v. Taylor*, supra, reiterated its position stated in *Wasley v. Kosmatka*99 that the standard of care under the safe-place statute100 applies to employers through its agents but the statutory language does not recognize that supervisory personnel may be held personally liable. In *Pitrowski*, the plaintiff was injured when struck by steel falling from a fork lift operated by a co-employee. After receiving workman’s compensation benefits, a third-party suit was commenced against Taylor, the fork lift operator, Cullen, the president of the employer corporation, and Larsen, the plaintiff’s supervisor. The trial court found that all three defendants were engaged in the operation by which plaintiff was injured, and reasoned that the duty of Larsen and Cullen was to furnish a safe place of employment. Holding that the trial court erred in determining the standard of care, the court stated that the duty complying with the safe-place statute is on the employer and this duty cannot be delegated to officers or employees.

Their [officers and employees] liability must rest upon common-law failure to exercise ordinary care toward an employee to whom, under the circumstances, they owed a duty—not upon the increased standard of care that the safe-place law imposes on an employer.101

The plaintiff in *Anderson v. Green Bay Hockey Inc.*, supra, lost an eye and suffered extensive injuries to his cheekbone, mouth and teeth when struck by a hockey puck propelled out of the rink by Bobby Hull. Hull’s team, the Chicago Blackhawks, was playing an exhibition game in the Brown County Arena where plaintiff Anderson was tending the doors as a civil defense employee of Brown County. After collecting workman’s compensation benefits, a third-party suit was brought against Green Bay Hockey who had leased the arena from the county, the arena manager, and the members of the Brown County Board’s arena committee. The plaintiff relied on two theories: violation of the safe-place statute

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95. 55 Wis. 2d 615, 201 N.W.2d 52 (1972).
96. 56 Wis. 2d 763, 203 N.W.2d 79 (1973).
97. 58 Wis. 2d 315, 206 N.W.2d 138 (1973).
98. 57 Wis. 2d 85, 203 N.W.2d 659 (1973).
99. 50 Wis. 2d 738, 184 N.W.2d 821 (1971).
100. Wis. STAT. § 101.11(1) (a) (1971).
and common-law negligence. Appeal was taken from the trial court's overruling of a demurrer. The supreme court held that it was clear from Wesley and Pitrowski that the complaint could not state a cause of action under the safe-place law, and it is equally clear from Pitrowski that the complaint does state a common-law cause of action. As in Pitrowski the case was remanded to the trial court from determination of whether the supervisory employees failed to exercise ordinary care toward a fellow employee under common-law negligence principles.

Closely related to these questions is whether the "exclusive remedy" provision of the workman's compensation statute \(^{102}\) prohibits an employee from bringing an action for personal injuries against a supervisory co-employee. In Lampada v. State Sand & Gravel Co., supra, the opinion stated that the "exclusive remedy" provision applies only to employers and their insurance carriers and that a supervisory co-employee may be joined as a third party defendant rather than a defendant in the original action. The court concluded that the "exclusive remedy" section does not bar suits against supervisory co-employees based on common-law negligence, \(^{103}\) however, the section does bar actions for indemnity \(^{104}\) or contribution \(^{105}\) against a third-party defendant-employer.

Candler v. Hardware Mut. Ins., supra, another case involving a third party suit, deserves mention. The issue was whether a member of a partnership is an employer of the employees of the partnership or a co-employee for purposes of third-party suits brought under section 102.29(1) \(^{106}\) of the workmen's compensation act. The

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102. Wis. Stat. § 102.03(2) (1971) providing:
Where such conditions (conditions imposing liability under the workmen's compensation statute) exist the right to recovery of compensation pursuant to this chapter shall be the exclusive remedy against the employer and the workmen's compensation insurance carrier.

103. See Haeverman v. Feldman, 220 Wis. 557, 265 N.W. 580 (1936); Wasley v. Kommatka, 50 Wis. 2d 738, 184 N.W.2d 827 (1971); Pitrowski v. Taylor, 55 Wis. 2d 615, 201 N.W.2d 52 (1972); Anderson v. Green Bay Hockey, Inc., 56 Wis. 2d 763, 203 N.W.2d 79 (1973).


105. Wisconsin Power & Light Co. v. Dean, 275 Wis. 236, 81 N.W.2d 486 (1957).

The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employee shall not affect the right of the employee, his personal representative, or other person entitled to bring action, to make claim or maintain an action, in tort against any other party for such injury or death, hereinafter referred to as a third party . . . .
plaintiff, an employee of the partnership, after receiving workmen's compensation for his injuries, brought a third-party suit against one of the partners for damages resulting from that partner's negligence. The court held the member of a partnership was an employer and therefore when the employee recovered workmen's compensation benefits from his employer under section 102.03(2) the partner as one of his employers is not subject to further third-party liability. The court founded its decision on the aggregate as distinct from the entity theory of partnership. Under the aggregate theory a partnership is an association of individuals, rather than a distinct legal entity. All partners are co-owners of the business with equal rights in its management and control. Thus the court found "no incident of the employer-employee relationship lacking, and under the partnership act members of the partnership are, therefore, the employers of the employees of the partnership."

As to members of a partnership workman's compensation is the exclusive remedy of their employees.

Also in the negligence field, the court considered the "degree of control test" as related to the safe-place standard of care in Berger v. Metropolitan Sewage Comm. Two workmen died from asphyxiation and drowning while working for a construction firm under contract to the Milwaukee County Sewerage Commission for the construction of sewers. A third-party suit was initiated by the widows of the deceased workmen for wrongful death, alleging that the sewerage commission violated the safe-place statute in that it owned the place where the accident occurred thereby being owners of a place of employment, and further, that decedents were frequenters within the contemplation of the statute. The trial court granted defendant's motion for summary judgment and plaintiffs appealed.

The issue which determined the outcome of the appeal was whether the independent contractor retained complete control and custody of a safe place. Although the sewerage commission maintained a field office at the construction site for the purpose of having its employee-engineers conduct inspections to see that

108. Id. at 88, 203 N.W.2d at 661.
109. 56 Wis. 2d 741, 203 N.W.2d 87 (1973).
the work proceeded according to contract specifications, the court held that inspection alone did not constitute such control as to subject the commission to liability and hence did not raise a triable issue. For this portion the court considered *Potter v. Kenosha*¹¹¹ which presented a fact situation similar to that of the present case, which held:

... that when an owner turns over to an independent contractor the complete control and custody of a safe place, whereon or whereunder the contractor creates a place of employment for the purpose of filling the terms of the contract, the owner reserving no right of supervision or control of the work excepting that of inspection or to change the plan with reference to the construction to be furnished, if thereafter in the performance of the work under the contract the premises are changed by the contractor and as a result a hazardous condition is created, the owner does not become liable to the contractor's employee injured as a consequence of such hazardous condition while acting in the scope of his employment.¹¹²

In explaining the rule in *Potter* the court stated that the purpose of determining who is in control of the construction, there is a distinction between restrictions or specifications placed on the end result and the manner in which the work is actually accomplished.

The Wisconsin Supreme Court has held inspection duties may amount to the requisite degree of control if such duties amount to the ability to direct how the job is to be done.¹¹³ However, where the employees, as in *Berger*, merely enforced the terms of the contract by inspecting the work product of the contractor, a finding that such inspection manifested the requisite degree of control would be tantamount to holding that detailed specifications themselves indicate a degree of supervision or control which would impose liability under *Potter*. In recognizing a distinction in control over end results by means of inspection and actual direction of work performance, the court seems to have created a factual distinction. The standard applied in *Berger* is somewhat confusing since the case was decided on a motion for summary judgment indicating that no question of fact remained to be tried. It must be concluded that for a plaintiff to get this question to the jury, more than mere inspection must be alleged, but the question of

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¹¹¹. 268 Wis. 361, 68 N.W.2d 4 (1955).
¹¹². *Id.* at 372, 68 N.W.2d at 10.
when "inspection" becomes "direction" is left to future litigation.

In one of the most interesting cases this term, by a 4-3 decision the court in Clemer v. Quarberg found a cause of action for "negligent arrest." The plaintiff commenced an action to recover damages sustained arising out of an attempted arrest by the defendant an undercover police officer for the city of Racine. The plaintiff went to an abandoned farm to release his racing pigeons. This farm was under observation at the time by the Racine police as a storage site for a large quantity of marijuana. The officer's appearance was such as to blend with the subculture generally associated with the use of narcotics, and as a result, when the defendant confronted plaintiff returning to his car, plaintiff believed the officer to be a "crazed farmer". Thus, plaintiff refused to follow defendant's direction to put his hands on the car. Defendant then struck the plaintiff with the butt of his pistol, at which time the plaintiff jumped into his car and drove off. The plaintiff proceeded home on two flat tires which resulted from defendant's pistol shots.

The court sustained a jury finding that the defendant disguised as he was so as to conceal his identity as an officer, failed to make a reasonable effort to inform the plaintiff of his identity. Defendant was negligent not in his use of force but in his failure to take the steps necessary to prevent the use of such force in the first instance. The action here was one for negligence. The holding in Clemer must be distinguished from cases dealing with "excessive use of force" by police officers since in those cases the injured party was aware of the identity of the other party as a police officer. Answering the question of whether "a police officer, operating in a disguise, although acting in the line of duty, who confronts a citizen who has no reason to know of the officer's official identity, should be held civilly liable for the failure to make a reasonable effort to inform the citizen of his identity," the court concluded that the officer is liable for the damages sustained by plaintiff.

The reasoning of the decision seems to hinge on the fact that police officers have certain rights and privileges in their dealings with the public. These rights and privileges do not attach to the officer as a private citizen, but have legal effect only when the

114. 56 Wis. 2d 581, 203 N.W.2d 45 (1973).
115. Schulze v. Kleeber, 10 Wis. 2d 540, 103 N.W.2d 560 (1960); Larson v. Lester, 259 Wis. 440, 49 N.W.2d 414 (1951); Matczak v. Mathews, 265 Wis. 1, 60 N.W.2d 414 (1953); Kalb v. Luce, 228 Wis. 519, 279 N.W. 685, 280 N.W. 725 (1938).
police officer makes known that he is acting within his capacity as a police officer. The court stated:

Quarberg (defendant) had the duty to make a reasonable effort to inform the plaintiff of his identity as a peace officer before Quarberg exercised the rights and privileges of that identity. No particular declaration is required; the test, being one for the jury, requiring the officer, where the person does not know or have any reason to know of his official identity, to make a reasonable attempt to convey that fact. When the officer fails to so inform, yet exercises his privileges flowing from such identity, the question of negligence arises.

A number of questions are raised by the Celmer decision as evidenced by the strong dissent of Justice Robert Hansen, who was joined by Justices Beilfuss and Hanley. Initially, a problem arises from the mixture of negligent and intentional torts presented in the case. "The plaintiff alleged in his complaint that the arresting officer 'negligently used excessive force' in making the arrest." While the court distinguished the "excessive force" cases on the basis of knowledge of the officer's identity, the striking of the plaintiff under facts such as these amounts to the intentional tort of battery. It follows that when a peace officer fails to make his identity known while attempting to arrest an individual, his use of force under those circumstances would be "excessive." This reasoning would also be more compatible with the holding of Schulze v. Kleeber that a police officer, in making a lawful arrest, is civilly liable only for battery or use of excessive force. However, in Celmer, the trial court as a matter of law held that excessive force was not used.

The trial court also considered the question of contributory negligence, concluding that it would be improper under these facts to submit a question of contributory negligence to the jury. The supreme court left open the question of whether the contributory negligence of the plaintiff would be available as a defense in subsequent suits brought under this "negligent arrest" theory. If the theory of suit is one of negligence, the Wisconsin policy favoring apportionment of negligence by comparison would seem to favor the availability of the defense of an appropriate instruction if so requested.

117. Id. at 590, 203 N.W.2d at 50.
118. Id. at 597, 203 N.W.2d at 54.
119. Schulze v. Kleeber, 10 Wis. 2d 540, 103 N.W.2d 560 (1960).
Essentially, the court has balanced the right of the individual to know he is being confronted by a police officer, with the need for disguised, under-cover officers in crime prevention. It held that the officer has a duty to make reasonable efforts to inform the citizen of his identity before the officer takes further action. A reasonable attempt to inform does not amount to actual knowledge on the part of the citizen, but does require a showing by the officer that the citizen had reason to know or that a reasonable attempt to so inform was made.

Later in the term *Nelson v. Milwaukee*\textsuperscript{120} seemed to indicate that *Celmer* should be viewed as an unusual case and strictly limited to its facts. In *Nelson* an amended complaint in an action against the City of Milwaukee alleged that the plaintiff was "negligently" confined by city police. The trial court found the allegation that the plaintiff was "arrested and imprisoned" demonstrated that the cause of action was essentially one for the intentional tort of false imprisonment. This finding was approved on appeal relying on *Strong v. Milwaukee*\textsuperscript{121} which held that section 895.43(3)\textsuperscript{122} precluded the bringing of a suit against a political corporation for the intentional torts of its officers and employees, thus making a complaint containing such allegations demurrable. It seems doubtful that a different result would have been reached on the negligence allegations if the suit had been brought against the police officers, individually, rather than the city. The combination of *Celmer* and *Nelson* in the same court term would seem to indicate that the liability of police officers for negligent arrest has not been significantly expanded, and such liability will result only under unique circumstances.

**William R. Wick**

**TRUSTS AND ESTATES**

In *Zimmerman v. Brennan*,\textsuperscript{1} the court dealt with the growing

\textsuperscript{120} 57 Wis. 2d 166, 203 N.W.2d 684 (1973).

\textsuperscript{121} 38 Wis. 2d 564, 157 N.W.2d 619 (1968).

\textsuperscript{122} Wis. STAT. § 895.43(3) (1971):

No suit shall be brought against any political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor shall any suit be brought against such fire company, corporation, subdivision or agency or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

\textsuperscript{1} 56 Wis. 2d 623, 202 N.W.2d 923 (1973).