

## Torts

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Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

The Wisconsin court did not address itself to the policy argument that the statute of limitations was enacted to provide a definite time after which a taxpayer need not be prepared to prove that his tax returns were proper. The court in its decision has even adopted the broadest possible definition of "transaction" which opens the entire year when a refund claim is filed rather than restricting the Department of Revenue to the narrow area covered by the refund claim.

This decision brings the Wisconsin and federal views in line with each other. This seems to be a desirable result from the standpoint of tax advisors as well as taxpayers. In addition, where setoff and recoupment<sup>33</sup> are both given similar treatment, it does not matter whether the government or the taxpayer is the first to sue.

SANDRA L. DEGRAW

## TORTS

### I. NEGLIGENCE LIABILITY

#### A. *Architects' Negligence*

In *A.E. Investment Corp. v. Link Builders, Inc.*<sup>1</sup> and *Rosenthal v. Kurtz*<sup>2</sup> the supreme court this term furnished a restatement of the law of architects' tort liability.

*A.E. Investment Corp.* involved a claim by a sublessee seeking damages for loss of past and future profits, loss of fixtures and merchandise, and loss of goodwill, all resulting from defendant architects' alleged negligence in designing and supervising construction of a commercial building. Defendants argued that plain-

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33. In the event the government has made an assessment for a year which is now barred by the statute of limitations, the taxpayer can raise his claim for refund under the recoupment theory. Thus the theory is the "mirror-image" of setoff. See, *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946).

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1. 62 Wis. 2d 479, 214 N.W.2d 764 (1974).

2. 62 Wis. 2d 1, 213 N.W.2d 741 (1974).

tiff's damages could not be recoverable because absent privity of contract, defendant owed no duty to the plaintiff.<sup>3</sup> The supreme court disagreed, holding that the issue of duty was relevant only to the determination of negligence.<sup>4</sup> Once negligence is established, liability goes hand in hand with the cause in fact, subject only to equitable limitation on policy grounds. The court further pointed out that absence of privity is not a defense in tort actions.<sup>5</sup>

On the issue of economic damages, the court stated that Wisconsin, a minority jurisdiction, allows recovery in tort for such loss,<sup>6</sup> subject to considerations of public policy.<sup>7</sup> These policy considerations include remoteness from the negligent conduct, disproportion of the conduct to its effect, and the unreasonableness of the burden of prevention which would be placed upon the defendant.<sup>9</sup>

The court went on to instruct on the special problems raised in negligence cases involving architects. Although A.E. Investment's complaint alleged exclusively latent defects, the court stated that future cases involving both latent and patent defects should be handled in the framework of comparative negligence since a plaintiff might be contributorily negligent in accepting the risk presented by patent defects.<sup>10</sup>

### B. *Wrongful Birth*

In *Slawek v. Stroh*<sup>11</sup> the supreme court was confronted for the first time with a claim for "wrongful birth." The action, raised by counterclaim, was prosecuted upon the theory that the plaintiff in seducing counterclaimant's mother, could reasonably foresee that his act would result in the birth of a child. Since plaintiff was married, he could also foresee that the child would suffer anguish by being born an "adulterine bastard." The court failed to discover precedent for the cause of action, but cited an Illinois case<sup>12</sup> which recognized the possibility of a tort for wrongful birth. The Illinois court nevertheless had affirmed a demurrer on policy considera-

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3. 62 Wis. 2d at 483, 214 N.W.2d at 766.

4. *Id.*

5. 62 Wis. 2d at 486, 487, 214 N.W.2d at 768.

6. *See Krueger v. Steffen*, 30 Wis. 2d 445, 450, 141 N.W.2d 200, 202 (1966).

7. 62 Wis. 2d at 490, 214 N.W.2d at 770.

8. *Id.* at 491, 214 N.W.2d at 770.

9. *Colla v. Mandella*, 1 Wis. 2d 594, 598-599, 85 N.W.2d 345 (1957).

10. 62 Wis. 2d at 490, 214 N.W.2d at 769.

11. 62 Wis. 2d 295, 316, 215 N.W.2d 9 (1974).

12. *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

tions. Both the Illinois and Wisconsin courts feared that recognition of such an action would unduly burden the courts.<sup>13</sup>

The court dealt with a similar issue in *Rieck v. Medical Protective Co.*<sup>14</sup> *Rieck* involved a negligence claim against an obstetrician for misdiagnosis of plaintiff wife's pregnancy, the plaintiff parents contending that they would have aborted the pregnancy had they known of it. They sought as damages the cost of raising the child. The supreme court reversed, again on public policy grounds, the trial court's overruling of defendant's demurrer. To do otherwise, the court stated, would be to create "a new category of surrogate parent" who would be required to bear all of the financial burden of raising the child, but who could enjoy none of the rewards of parenthood.<sup>15</sup> This result was found to be inequitable.<sup>16</sup> A "wrongful birth" action for negligent sterilization would meet with the same prohibition based on public policy.<sup>17</sup> The birth of a healthy child will not be viewed as injury in the eyes of the law.

### C. Governmental Immunity

Governmental tort liability in Wisconsin, which expanded when *Holytz v. Milwaukee*<sup>18</sup> abrogated substantive governmental immunity in 1962, was reviewed in this term's two *Cords*<sup>19</sup> cases with respect to procedural immunity.

*Cords v. Ehly* was a personal injury action stemming from a fall in a state park. Plaintiffs alleged that defendants, managers and administrators of the park, were negligent in failing to provide either warning or safeguards along a park footpath. Since the state cannot, by terms of article IV, sec. 27 of the Wisconsin Constitution,<sup>20</sup> be sued in tort absent its consent, defendants were amenable

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13. 62 Wis. 2d at 317, 318, 215 N.W.2d at 22.

14. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

15. *Id.* at 518, 219 N.W.2d at 244, 245.

16. *Id.* at 519, 219 N.W.2d at 245.

17. *Id.*, citing *Shaheen v. Knight*, 11 Pa. D. & C. 2d 41 (Lycoming County 1957).

18. *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), which abrogated substantive governmental immunity as to "all public bodies" in Wisconsin. *Id.* at 40, 115 N.W.2d at 625. The decision did not affect the "procedural" immunity afforded the state by article IV, section 27, Wisconsin Constitution. See note 20, *infra*.

19. *Cords v. Ehly*, 62 Wis. 2d 31, 214 N.W.2d 432 (1974); *Cords v. State*, 62 Wis. 2d 42, 214 N.W.2d 405 (1974).

20. Wis. Const. art. IV, § 27 reads as follows: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

to suit only if their management of the park was distinguishable from an act of the state. Stated in another way, defendants were within the state's sovereign procedural immunity if they were performing discretionary, delegable acts as opposed to ministerial, non-delegable acts.<sup>21</sup> Plaintiffs claimed that even if defendants' actions were discretionary, Wisconsin Statute section 270.58 creates a statutory cause of action against the state.<sup>22</sup> Under this statute, the state indemnifies its employees against tort judgments arising out of their employment.<sup>23</sup> The court disagreed, holding that the statute merely pays off judgments obtained at common law. The court went on to hold that plaintiffs had alleged facts sufficient to permit them to prove that the management of the park was the responsibility of the defendants personally, rather than that of the state.<sup>25</sup> Therefore, the defendants' act of omission might

21. [Discretionary acts are] decisions [which] involve the exercise of judgment or discretion rather than the mere performance of a prescribed task. *Meyer v. Carmen*, 271 Wis. 329, 332, 73 N.W.2d 514, 515 (1955). Official action . . . is ministerial when it is absolute, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion. *Id.* at 332, 73 N.W.2d at 516.

E. MCQUILLEN, MUNICIPAL CORPORATIONS 225 § 53.33 (3d ed. 1949).

22. Wis. STAT. § 270.58(1) reads in pertinent part:

Where the defendant in any action of special proceeding is a public officer or employe and is proceeded against in his official capacity or is proceeded against as an individual because of acts committed while carrying out his duties as an officer or employee and the jury or the court finds that he acted in good faith the judgment as to damages and costs entered against the officer or employe shall be paid by the state or political subdivision of which he is an officer or employe.

23. 62 Wis. 2d at 35, 214 N.W.2d at 434.

24. *Id.*

25. *Id.* at 40, 214 N.W.2d at 437. The application of the discretionary/ministerial distinction where the same persons may be either is seen in the following excerpt from this term's *Naker v. Town of Trenton*, 62 Wis. 2d 654, 660a, 213 N.W.2d 38, 217 N.W.2d 665, 666:

Under *Firkus v. Rombalski*, 25 Wis. 2d 352, 358, 130 N.W.2d 835, we held that whether a town chose to erect a traffic sign was a legislative matter - and there was governmental immunity in respect to the locating of the sign [within department guidelines. *Chart v. Dvorak*, 57 Wis. 2d 92, 102, 203 N.W.2d 673 (1973)].

Once the decision is made and the sign is erected, the legislative function is terminated and the doctrine of *Holytz* that imposes liability for want of ordinary care takes over.

Thus in *Meyer v. Carmen*, *supra* note 21, a school board was held not subject to suit for failure to place a fence on a dangerous school ground precipice, the decision being discretionary. *Meyer* is rather weakly distinguished on its facts in *Cords v. Ehly* as the court bases its holding on *Chart v. Dvorak*, 57 Wis. 2d 92, 96, 203 N.W.2d 673 (1973), wherein district highway directors claimed that the duty to use due care in placement of a road sign had been delegated to those state employees, members of the sign crew, who actually dug the

be found ministerial.<sup>26</sup>

The second *Cords* case,<sup>27</sup> arising out of the same facts, was an all-out assault by plaintiffs on the procedural state immunity afforded by article IV, sec. 27. Due process and equal protection arguments, also raised in earlier cases<sup>28</sup> were quickly, although reluctantly, disposed of by the court.<sup>29</sup> The requirements of due process were found to be satisfied by chapter 16 of the Wisconsin Statutes, which provides for quasi-judicial redress through an administrative claims board, and by the availability of private legislative bills.<sup>30</sup> Likewise, consent to suit was not arbitrarily denied plaintiffs by the legislative decision to permit suits against the state only for negligence in the operation of state-owned and operated motor vehicles and airplanes.<sup>31</sup> The court found the classification to be a reasonable one, based upon the consideration that such operation involves exclusively ministerial acts.<sup>32</sup>

The new argument advanced in *Cords v. State* against procedural immunity sounds in contract. It is that section 270.58 makes the state the liability insurer of state employees and thereby subjects the state to Wisconsin's direct action statute. The court found, however, that section 270.58 raises a purely statutory, as opposed to contractual, obligation for the state to pay its agents' tort judgments. The performance of this obligation may be compelled, if at all, only by an action in mandamus.<sup>33</sup> Section 260.11(1) provides for joinder on the basis of insurers' contractual obligation to pay defendants' damages. Thus, although the function of the statute and the alleged contract is the same, the court refused to adopt

hole and implanted the sign pole. The rule being propounded with respect to the evolution of ministerial liability from discretionary acts is similar to the rule governing the negligent performance of a gratuitous act (*see* RESTATEMENT (SECOND) OF TORTS § 323 [1965]). That is, in the words of Justice Robert Hansen, there is a duty "to keep up what one did not have to put up." *Naker v. Town of Trenton*, 62 Wis. 2d at 658, 215 N.W.2d 40 (concerning road signs).

26. 62 Wis. 2d at 41, 214 N.W.2d at 437. For limitations on such state employee liability, see new WIS. STAT. § 895.45, created by Wis. Laws 1973, ch. 333, § 182c.

27. 62 Wis. 2d at 42, 214 N.W.2d at 405.

28. *See Forseth v. Sweet*, 38 Wis. 2d 676, 158 N.W.2d 370 (1968); *Chart v. Gutmann*, 44 Wis. 2d 421, 171 N.W.2d 331 (1969).

29. Asked by appellants to abolish the state's procedural immunity the court responded that although "fairness required a change" and the legislature had had ample time to act, the court was powerless to abrogate a section of the constitution. 62 Wis. 2d at 50, 214 N.W.2d at 410.

30. 62 Wis. 2d at 52, 53, 214 N.W.2d at 411.

31. WIS. STAT. §§ 114.065 and 345.05 (1971).

32. 62 Wis. 2d at 52, 53, 214 N.W.2d at 411.

33. *Id.* at 56, 214 N.W.2d at 413.

appellants' argument on the ground that the drafters of the direct action statute probably did not envision as "insurance" non-contractual obligations to indemnify.<sup>34</sup>

The Wisconsin Supreme Court clearly favors the abolition of procedural immunity.<sup>35</sup> However, such abolition, absent the abrogation of the discretionary-ministerial dichotomy, would not necessarily increase state exposure to tort liability.<sup>36</sup> This is because a governmental body can be liable in tort only by means of the rule of *respondeat superior*, requiring an agency relationship. The doctrine of discretionary non-liability limits this relationship between the state and its officials.<sup>37</sup> Born of the necessity for flexibility in the making of judicial, legislative, and administrative decisions,<sup>38</sup> this doctrine appears to be based upon the theory that government officials by definition exercise due care in their good-faith deliberate acts.<sup>39</sup>

Had the *Cords* plaintiffs succeeded in breaching or abolishing article IV, section 27, what would have been the result? The discretionary-ministerial issue, a question of fact,<sup>40</sup> still remained. If the state park administrators could be shown to have functioned ministerially in their failure to provide warnings or safeguards for the injured plaintiffs, they would by that fact be shown to have acted as private individuals, and thereby be outside the scope of the hypothetically avoided section 27 prerogative. If, on the other hand, they were determined to have acted as discretionary state agents, they would be identified with the state and accorded immunity despite the ineffectuality of procedural immunity.

## II. STRICT AND STATUTORY LIABILITY

### A. Products Liability

Products liability was treated in several cases this term. *Jagmin v. Simonds Abrasive Co.*<sup>41</sup> held that "a *res ipsa [loquitur]* type of

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34. *Id.* at 56, 57, 214 N.W.2d at 413.

35. *Id.* at 50, 214 N.W.2d at 410.

36. *Id.*

37. "This decision [to abrogate the doctrine of governmental immunity] is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions." 17 Wis. 2d at 40, 115 N.W.2d at 625. See also *Appel v. Halvorsen*, 50 Wis. 2d 230, 235, 184 N.W.2d 99, 102 (1971).

38. See PROSSER, *LAW OF TORTS* 987 (4th ed. 1971).

39. "[H]enceforward, so far as governmental responsibility for torts is concerned, the rule is liability - the exception is immunity." 17 Wis. 2d at 40, 115 N.W.2d at 625.

40. 62 Wis. 2d at 41, 214 N.W.2d at 437.

41. 61 Wis. 2d 60, 211 N.W.2d 810 (1973).

inference is enough to establish a product defect if the plaintiff can show that he was properly using the product and can negative other possible causes of the product failure after it left the manufacturer's control."<sup>42</sup>

A comparison is made in *Powers v. Hunt-Wesson Foods, Inc.*<sup>43</sup> between the application of *res ipsa loquitur* to bursting bottle cases and the inferences allowed in products liability cases. In bursting bottle cases negligence is inferred by means of the *res ipsa loquitur* doctrine. In products cases in Wisconsin, a defendant-caused defect may be inferred and with it negligence *per se* is established.<sup>44</sup> The elements of the orthodox *res ipsa loquitur* doctrine in Wisconsin are that the accident is, first, best explained by negligence and, second, caused by an instrumentality controlled by the defendant at the time of the alleged negligent act.<sup>45</sup> In bursting bottle cases the second element is satisfied by showing that the condition of the bottle probably did not change after it left the defendant's control.<sup>46</sup> A similar element is proved in products liability cases by introducing evidence rebutting the probable existence of other causes, as in *Jagmin*.<sup>47</sup> Technically proof of the absence of other causes creates the inference that a defect arose in the product while in the hands of the defendant. This proof satisfies the requirement under strict products liability that no substantial change occurred in the product after it left the hands of the defendant.<sup>48</sup> There is, however, a difference in legal function, of the *res ipsa* element and the products liability requirement since the former goes to prove the actual negligence cause of action while the latter goes to the question of superseding cause.

The *Jagmin* case reveals how far one might go in a products liability case with the *res ipsa* type inference of a defendant-caused defect. *Jagmin* involved the unexplained disintegration of a grinding wheel which had seventy-five per cent of its useful life left. There was no evidence to suggest either a machine malfunction or improper use by the plaintiff. Stating that the case was "exceed-

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42. *Id.* at 73, 211 N.W.2d at 817.

43. 64 Wis. 2d 532, 219 N.W.2d 393 (1974).

44. *Id.* at 540, 219 N.W.2d 397. With respect to negligence *per se* see *Dippel v. Sciano*, 37 Wis. 2d 443, 461, 155 N.W.2d 55, 66 (1967).

45. *Zarling v. La Salle Coca-Cola Bottling Co.*, 2 Wis. 2d 596, 600, 87 N.W.2d 263, 266 (1958).

46. *Id.* at 601, 87 N.W.2d at 266.

47. See also *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 186 N.W.2d 258 (1971).

48. See RESTATEMENT (SECOND) OF TORTS, § 402A(1)(b).



ingly close,"<sup>49</sup> the supreme court affirmed the lower court's ruling for the plaintiff citing an Illinois case<sup>50</sup> in which a chip broke off a hammer and caused an injury. The hammer had been in use for eleven months. Our court applied the case as follows:

. . . [A] new hammer is unlikely to chip but . . . after some period of use work hardening might make chipping a reasonable expectation and part of the hammer's likely performance. The [Jagmin trial] court realized that problems arise in the middle range. How long should a manufacturer be liable for his product? The Illinois court decided the answer was for the jury.<sup>51</sup>

What is at issue is not a policy-limitation of cause, which would be for the court. What is at issue is a factual inference of a product defect in the hands of the defendant.

To defeat the inference the defendant must show that the defect was probably caused after his relinquishment of control by product use, misuse or mishandling. Wisconsin cases show that this defense is not an easy one to prove. Normal rigors of handling must be anticipated,<sup>52</sup> as must, per *Jagmin*, a substantial amount of normal wear. *Schuh v. Fox River Tractor Co.*,<sup>53</sup> another term case, holds that the defendant must also anticipate misuse where it is reasonably foreseeable.<sup>54</sup> Thus defendant may not reduce his exposure to products liability by means of arbitrarily narrow intended-use instructions.<sup>55</sup> But neither dare he make the warning over-broad because warned-against misuse is conclusively foreseeable misuse.<sup>56</sup>

### B. Public Nuisance

There were two public nuisance cases this term. *State v. H. Samuels Co.*<sup>57</sup> involved an action to enjoin the operation of a junkyard in violation of a City of Portage ordinance regulating noise and vibrations. Defendant junkyard had operated at the same location from the beginning of the century and had been processing

49. 61 Wis. 2d at 77, 211 N.W.2d at 815.

50. *Dunham v. Vaughan & Bushnell Mfg. Co.*, 41 Ill. 2d 339, 247 N.E. 2d 401 (1969).

51. 61 Wis. 2d at 70, 211 N.W.2d at 815.

52. *Weggeman v. Seven-Up Bottling Co.*, 5 Wis. 2d 503, 514, 93 N.W.2d 467, 475 (1958).

53. 63 Wis. 2d 728, 218 N.W.2d 279 (1974).

54. *Id.* at 738, 741-742, 218 N.W.2d at 287. *Schuh* also held that effective warning of foreseeable misuse is a condition precedent to contributory negligence by such misuse. *Id.*

55. *Id.*

56. *Id.* at 743, 218 N.W.2d at 298.

57. 60 Wis. 2d 631, 211 N.W.2d 417 (1973).

derelict automobiles since 1948. When the city refused to enforce its ordinances against defendant, nearby residents sought relief from the state, which was empowered by section 280.02, Wisconsin Statutes, to enjoin public nuisances. The trial court refused to enjoin, however, stating that the ordinances had not been demonstrated to be inadequate as a means of curtailing the problem.

The supreme court reversed, preferring the "modern concept of injunctive relief" which states that the superior remedy is the appropriate remedy.<sup>58</sup> To arrive at this result the court reasoned as follows. Equity cannot enforce the criminal law by enjoining the commission of a crime. If a criminal statute applies, resort must be had to it to administer criminal justice. Equity can, however, enjoin a nuisance, as such, which may also fall within a criminal statute.<sup>59</sup> Finally, open and intentional violations of a criminal statute constitute a public nuisance per se regardless of whether the conduct in question would otherwise create a public nuisance.<sup>60</sup> Moreover repeated public violations of any statute constitute a public nuisance.<sup>61</sup> Thus usury<sup>62</sup> or employment of unlicensed opticians can be a public nuisance.<sup>63</sup> As there is no difference between a statute and an ordinance in this respect, repeated violations of an ordinance are a nuisance per se and subject to the modern concept of injunctive relief.<sup>64</sup>

A public nuisance is an injury in any substantial degree to public property, civil rights or health.<sup>65</sup> This term's *State v. Michaels Pipeline Construction, Inc.*,<sup>66</sup> stands for the proposition that such injury need not affect the whole community but may reach persons generally in a local neighborhood or such part of the public as come in contact with the nuisance.<sup>67</sup> *Michaels Pipeline* involved a lowering of the watertable along the route of a sewer construction

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58. *Id.* at 637, 211 N.W.2d at 420. See *State ex rel. Fairchild v. Wisconsin Automotive Trades Ass'n*, 254 Wis. 398, 403, 37 N.W.2d 98 (1949).

59. 60 Wis. 2d at 636, 211 N.W.2d at 419.

60. *Id.*

61. "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated, is a public nuisance." *State ex rel. Abott v. House of Vision*, 259 Wis. 87, 91, 47 N.W.2d 321, 323 (1951).

62. *State v. J. C. Penney Co.*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

63. 259 Wis. 87, 47 N.W.2d 321 (1951).

64. 60 Wis. 2d at 639, 211 N.W.2d at 421.

65. 60 Wis. 2d at 638, 211 N.W.2d at 420.

66. 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

67. The latter alternative obtained in *Boden v. Milwaukee*, 8 Wis. 2d 318, 99 N.W.2d 156 (1957).

project. This dewatering caused dry or diminished wells and land subsidence on residential properties contiguous to the sewer line. Efforts, no matter how zealously pursued, to prevent or reduce damage were regarded by the court as irrelevant to the question of whether a nuisance existed<sup>68</sup> as were considerations of social benefits flowing from defendant's business operations or length of time the business has endured.<sup>69</sup>

The test of whether a public nuisance should be enjoined is a balancing test. The amount of damages caused to the public by the nuisance is weighed against the harm an injunction would cause the defendant.<sup>70</sup> The balance is not between the damage caused to the public and the social or economic benefit derived from the complained-of activity.<sup>71</sup>

### C. *Workmen's Compensation*

May a corporate officer be sued in negligence by an employee for a work-related injury in Wisconsin? The 1936 case of *Hoeverman v. Fedlman*<sup>72</sup> held that he could be. The principles underlying this holding were explained in this term's *Kruse v. Shieve*.<sup>73</sup>

It was there held that a supervisory employee owes a duty of care to his employer, but not to his fellow employees.<sup>74</sup> The employer's duty to care for his employee's safety is, of course, governed by the Safe Place Law.<sup>75</sup> Thus common-law third-party actions may not be maintained against supervisory employees as such.<sup>76</sup> Third-party actions may be maintained against a corporate officer (or other supervisory employee) "only when such officer has doffed the cap of corporate officer, and donned the cap of a co-employee."<sup>77</sup> The switch takes place when the officer acts affirmatively to increase the risk to the employees, as opposed to merely

68. 60 Wis. 2d at 635, 211 N.W.2d at 419.

69. *Id.*

70. *Id.* at 637, 638, 211 N.W.2d at 420. Damages is an alternative remedy where a nuisance is not enjoined. *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969).

71. 60 Wis. 2d at 638, 211 N.W.2d at 420. See *Dolata v. Berthelet Fuel & Supply Co.*, 254 Wis. 194, 36 N.W.2d 97 (1949).

72. 220 Wis. 557, 265 N.W. 580 (1936).

73. 61 Wis. 2d 421, 213 N.W.2d 64 (1973).

74. *Id.* at 429, 213 N.W.2d at 67.

75. WIS. STAT. § 101.11 (1971).

76. *Wasley v. Kosmatka*, 50 Wis. 2d 738, 184 N.W.2d 882 (1971).

77. 61 Wis. 2d at 425, 213 N.W.2d at 66.

defaulting in his duty of maintaining the employer's safe place standards.<sup>78</sup> Examples of such affirmative negligence include negligently directing a particular act in a particular manner,<sup>79</sup> and driving a truck negligently.<sup>80</sup>

While the general intention of Wisconsin Statute section 102.03 is to avoid dual employer liability for work-related injuries to employees,<sup>81</sup> the two-hat theory of *Kruse* supports an argument for third-party employer liability. A duty of care in performance of supervisory duties is owed the employer and goes to his safe place responsibilities. Non-supervisory employees arguably owe their employer a similar employment-based duty to follow instructions aimed at establishing a safe place of employment. But these employees have a concomitant common-law duty of ordinary care for their co-employees' safety. Supervisory employees are under the same duty when they engage in "affirmative" action, as stated in *Kruse*. Does not then, an employer have a common-law duty of ordinary care for his employees safety when he engages in affirmative action? An employer who works in production alongside his employees would be a reckless production-worker indeed if his care were restricted to following whatever administrative instructions he might have laid down. By itself employer-superintendence lacks both the detail and the flexibility to provide adequate safety in places of employment. The preservation of common-law negligence liability by means of section 102.29 third-party actions constitutes legislative recognition of the indispensability of common-law tort liability in preserving employee safety. The question is, despite section 102.03, does section 102.29 contemplate the employer sometimes wearing the third-party hat?<sup>82</sup> *Kruse* suggests that it might.

78. *Id.* at 428, 213 N.W.2d at 67, 68.

79. 220 Wis. 557, 265 N.W. 580 (1936).

80. 50 Wis. 2d 738, 184 N.W.2d 882 (1971).

81. See *Hunker v. Royal Indemnity Co.*, 57 Wis. 2d 588, 607, 608, 204 N.W.2d 897, 907, 908 (1973).

82. The argument contra is based upon *Kerner v. Employers Mut. Ins. of Wausau*, 35 Wis. 2d 391, 151 N.W.2d 72 (1966), wherein the defendant was both the workman's compensation and public liability carrier of the employer. The plaintiffs recovered under the Act and sued defendant for negligence in a safety inspection. The supreme court held:

The dual roles of the compensation carrier are so intertwined that the exclusive remedy means no cause of action against the carrier in its capacity of public liability carrier.

*Id.* at 400, 151 N.W.2d at 77. Are not the roles of employer-coemployee, where they coexist, even more intertwined?

The court also this term fashioned a test for compensability under the act of nontraumatic mental injuries. In *School District No. 1 v. ILHR*<sup>83</sup> a high-school student counselor suffered acute anxiety and nervousness after discovering a student recommendation that she be replaced. Concerned to avoid spurious claims and to implement the statutory requirement of accidental cause,<sup>84</sup> the court adapted to the employer context the rule as expressed in *Alsteen v. Gehl*, for compensability in tort for the intentional infliction of emotional distress.<sup>85</sup> That rule requires outrageous conduct on the part of the defendant. Thus *School District No. 1* requires that a cause be "out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury"<sup>86</sup> before liability will be found under Wisconsin Statute chapter 102. Therefore in an action for purely mental injuries, one does not take the plaintiff as one finds him. The counselor's "accident" was found wanting as measured by this standard.

### III. INTENTIONAL TORT LIABILITY

#### A. Libel

As it is defined by *Rosenbloom v. Metromedia, Inc.*<sup>87</sup> the *Times-Sullivan* rule<sup>88</sup> of partial immunity of defendants in defamation suits brought by public figures or private persons involved in public controversies was modified by the recent United States Supreme Court case of *Gertz v. Welch*.<sup>89</sup> That case vitiated *Rosenbloom* to the extent that *Rosenbloom* extended the *Times-Sullivan* rule to private persons who do not intentionally call public attention to themselves.<sup>90</sup>

In *Richards v. Gruen*,<sup>91</sup> the plaintiff, a private person, went before the Glendale city council and there made a severe personal attack on Glendale Alderman Gruen. At a later date Gruen responded before the same body with a false defamatory statement. The supreme court held that Gruen was entitled to a *Times-*

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83. 62 Wis. 2d 370, 215 N.W.2d 373 (1974).

84. See Wis. STAT. § 102.01(2)(d).

85. 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

86. 62 Wis. 2d at 378, 215 N.W.2d 377 (1974).

87. 403 U.S. 29 (1971).

88. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

89. \_\_\_ U.S. \_\_\_, 94 S. Ct. 2997 (1974).

90. *Id.* at \_\_\_, 94 S. Ct. at 3008-3010.

91. 62 Wis. 2d 99, 214 N.W.2d 309 (1974).

*Sullivan* instruction to the effect that a verdict for plaintiff required clear and convincing proof of a reckless disregard for the truth of the statement. Two grounds for this holding were given: first that Richards fell within the "event of public or general concern"<sup>92</sup> test laid down in *Rosenbloom*, and second, that in appearing before the city council and challenging an alderman, Richards "placed himself in an area of matters of public or general interest."<sup>93</sup> The court was obviously depending upon *Rosenbloom*. However, while the first stated ground stems exclusively from *Rosenbloom*, the second stated ground is capable of being read as satisfying the more stringent *Gertz* formulation of the *Times-Sullivan* rule. That is, by entering a public arena and initiating a controversy there, Richards although remaining a private person intentionally attracted public notice to himself.<sup>94</sup> In doing so he became a public figure and discarded the protection afforded him as a private individual.

### B. *Intentional Infliction of Emotional Distress*

Wisconsin does not recognize a cause of action for invasion of privacy,<sup>95</sup> but facts which would support such an action will often also support an action for intentional infliction of emotional distress, so long as *Alsteen v. Gehl*<sup>96</sup> requirements are met. These requirements are (1) intentional conduct for the purpose of causing mental harm; (2) such conduct is extreme and outrageous; (3) such conduct caused the injury; and (4) the injury is totally disabling, at least temporarily.<sup>97</sup>

*Slawek v. Stroh*<sup>98</sup> discussed *supra* in connection with the wrongful birth cause of action is an example of a claim pleaded as invasion of privacy but which survived demurrer by alleging facts stating a cause of action under *Alsteen v. Gehl*. Defendant-mother had alleged by way of counterclaim that the plaintiff telephoned her at her family's home at all hours of the day and night, used trick voices, disguises, false names and wild ruses to insinuate himself

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92. *Id.* at 109, 214 N.W.2d at 314.

93. *Id.* at 110, 214 N.W.2d at 314.

94. In *Polzin v. Helmbrecht*, 54 Wis. 2d 578, 196 N.W.2d 685 (1971), a false defamatory letter-to-the-editor published in a newspaper was viewed as the entry of a private person into the public arena so as to trigger *Times-Sullivan* immunity.

95. *Judevine v. Benzies-Montanyne Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 259 (1936); *Yoeckel v. Samonig*, 272 Wis. 430, 75 N.W.2d 925 (1956).

96. 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

97. *Id.* at 359, 360, 361, 124 N.W.2d at 318.

98. 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

into her company and that plaintiff thereby caused defendant great mental anguish and distress and held her up to public and private ridicule.<sup>99</sup>

### C. False Imprisonment

*Harris v. Kelly*<sup>100</sup> deals with the question of potential exposure to joint liability for wrongful arrest which is involved in summoning the police to deal with a disorderly person. In that case plaintiff Harris went to the offices of the Milwaukee Medical Society to request an investigation into the death of her husband. She became loud and abusive and after four hours of unsuccessful attempts to convince her to leave, the police were called and told that an emotionally upset woman was disrupting operations of the office. Two officers responded and took plaintiff to a hospital for temporary commitment under Wisconsin Statute section 51.04(1).<sup>101</sup> Plaintiff brought an action for false imprisonment.

Addressing itself to the issue of whether by calling the police defendant medical society employees could have participated in plaintiff's wrongful imprisonment the supreme court adopted the rule:

One who participates in an unlawful arrest, or procures or instigates the making of one without proper authority, will be liable for the consequences; but the defendant must have taken some active part in bringing about the unlawful arrest itself, by some "affirmative direction, persuasion, request or voluntary participation." There is no liability for merely giving information to legal authorities who are left entirely free to use their own judgment.<sup>102</sup>

By calling police and stating that plaintiff was upset and disruptive, defendants did not take an active part in or procure plaintiff's commitment in the court's view.<sup>103</sup> The police officers' own observations were the basis of their action. Had defendants urged commitment or assisted in any way in its accomplishment the affirmative participation test might well have been met. Lack of knowledge of the invalidity of the arrest would not be a defense.<sup>104</sup>

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99. *Id.* at 314, 215 N.W.2d at 17, 18.

100. 63 Wis. 2d 664, 218 N.W.2d 360 (1974).

101. WIS. STAT. § 51.04(1) provides that a police officer may take a violent person into custody and further provides for temporary hospitalization of such persons.

102. 62 Wis. 2d at 667, 668, 218 N.W.2d at 362, quoting from PROSSER, LAW OF TORTS 47 (4th ed. 1971).

103. 63 Wis. 2d at 669, 218 N.W.2d at 363.

104. *Lemke v. Anders*, 261 Wis. 555, 563, 53 N.W.2d 436, 439 (1952).

## IV. CAUSATION

A. *Successive and Concurrent Tortfeasors*

*Johnson v. Heintz*<sup>105</sup> raised once again the question of successive and concurrent tortfeasors. Johnson was injured while a passenger in Heintz's car when it stalled in a blizzard and was rear-ended by Bruhn. Twenty minutes later Thomas struck Bruhn's disabled automobile and drove it into the Heintz car, thereby causing additional injuries to Johnson who was pinned inside as a result of the first accident. Johnson commenced suit against Heintz and Bruhn. Bruhn settled and Heintz impleaded Thomas for contribution. Thomas appealed on the ground that the right to contribution exists only among joint tortfeasors.

Joint tort liability cannot be based upon indivisible injuries caused by successive tortfeasors.<sup>106</sup> To establish joint liability independent torts must concur in time to inflict a single injury.<sup>107</sup> Applying these principles the court held that damages, albeit indivisible in fact, must be allocated by the jury as between the two accidents. Since Thomas could neither foresee nor avoid the injuries caused by the first accident she was not subject to liability for them. However Heintz could foresee that her car, driven in blizzard conditions, might stall, and in stalling might be rear-ended, so as to pin her passenger inside. Heintz could also foresee that this situation might cause a second accident, further injuring Johnson. Thus Heintz's negligence in driving in the blizzard contributed to the first accident as well as becoming a substantial factor, concurrent with Thomas' negligence, of the second accident. Heintz and Thomas were, then, joint tortfeasors only with respect to those injuries Johnson received in the second collision.<sup>108</sup> This result conforms to those cases where injuries caused by one tortfeasor are negligently treated by a second tortfeasor,<sup>109</sup> or where the plaintiff is injured in a second collision while being conveyed by ambulance from the accident scene.<sup>110</sup> In each of these situations the jury must determine the plaintiff's total damages, allocate those damages as

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105. 61 Wis. 2d 585, 213 N.W.2d 85 (1973).

106. *Butzow v. Wausau Memorial Hospital*, 51 Wis. 2d 281, 290, 187 N.W.2d 349, 353 (1971), reversing *Heims v. Hanke*, 5 Wis. 2d 465, 93 N.W.2d 455 (1958) and *Balick v. Gallagher*, 268 Wis. 421, 67 N.W.2d 860 (1955).

107. 51 Wis. 2d at 288, 289, 187 N.W.2d at 353.

108. 61 Wis. 2d at 601, 213 N.W.2d at 93.

109. 51 Wis. 2d 281; *Selleck v. City of Janesville*, 100 Wis. 157, 75 N.W. 975 (1898).

110. *Fitzwilliams v. O'Shaughnessy*, 40 Wis. 2d 123, 161 N.W.2d 242 (1968).



between the two accidents, and then make separate comparisons of negligence for each accident.

### B. Policy Limitations of Tort Liability

By a policy decision, the court in *A. E. Investment* discussed the defendant's duty of due care to an unforeseeable plaintiff. Given an act and its relation as cause-in-fact of a plaintiff's injury, tort liability could theoretically be limited in terms of legal duty, *i.e.*, of legally protectable plaintiff-interest,<sup>111</sup> or in terms of legal cause.<sup>112</sup> Since defendant architects were negligent with respect to some foreseeable person, the court reasoned that their liability for subsequent harm was potentially unlimited and held that it was the role of the court to determine those unforeseeable plaintiffs who should not be allowed to recover for reasons of public policy.<sup>113</sup> In this case the court found that the plaintiff sublessee was within the defendant architects' duty of ordinary care.

However, the court refused to allow recovery to an unforeseeable plaintiff in *Reshan v. Harvey*.<sup>114</sup> Therein an automobile in which plaintiffs were passengers went out of control while travelling northbound on a divided highway, crossed the median, and entered the inside southbound lane where it was struck broadside by defendant's car. Defendant was found to have maintained proper speed, management and control but to have been negligent with respect to lookout. The supreme court held that defendant was not under a duty to maintain any lookout with respect to the northbound lanes but was under such a duty with respect to the median.<sup>115</sup> However the court excused the negligence on the basis of public policy.

An example of limited tort liability on the basis of remoteness of cause was seen in *Howard v. Mt. Sinai Hospital, Inc.*<sup>116</sup> An intern in defendant hospital inserted a catheter in plaintiff's shoulder in such a way that the catheter broke into four pieces. Two pieces could not be recovered and plaintiff developed a "phobia" that they would cause cancer. The supreme court held that although the intern's negligence was a substantial factor or cause-

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111. *Osborne v. Montgomery*, 203 Wis. 223, 234, 234 N.W. 372, 376 (1931).

112. *Id.* at 239, 234 N.W. at 378.

113. 62 Wis. 2d at 484, 214 N.W.2d at 766. *Cf. Hass v. Chicago and Northwestern Ry. Co.*, 48 Wis. 2d 321, 179 N.W.2d 885, 888 (1970).

114. 63 Wis. 2d 524, 217 N.W.2d 302 (1974).

115. *Brown v. Travelers Indemnity Co.*, 251 Wis. 188, 192, 28 N.W.2d 306, 308 (1947).

116. 63 Wis. 2d 515, 217 N.W.2d 383 (1974).

in-fact of the phobia, it was too remote an injury for recovery to be allowed.<sup>117</sup> Cause-in-fact and legal cause were held not to be identical.

## V. DAMAGES

### A. Collateral Source Rule

Although dealing primarily with procedural issues, the recent decision of *Heifetz v. Johnson*<sup>118</sup> appears to have abrogated the collateral source rule as applied to insurance payments. The collateral source rule reflects the punitive aspect of tort damages<sup>119</sup> and provides that a plaintiff's independent sources of compensation will not inure to the benefit of the tortfeasor and reduce his liability. The circumstances in *Heifetz* produced a collision between the collateral source rule and the rule of subrogation.

*Heifetz* involved an auto accident insurer's payment of \$2,000 to its insured for medical expenses arising from a collision. The insured commenced suit against the defendant but did not join his own insurer. The statute of limitations ran against plaintiff's insurer and defendants raised the \$2,000 payment as mitigation of damages. The supreme court held that via subrogation the plaintiff had assigned to the insurer that part of his claim, and thus, the statute of limitations having run, that part of the cause of action against the defendants had been extinguished.<sup>120</sup>

The court reasoned that to allow the plaintiff to recover the \$2,000 as trustee for his insurer would defeat the purpose of the statute of limitations.<sup>121</sup> The court also placed strong emphasis upon the operation of subrogation:

The acceptance of payment by an insurer [Heritage here] operates as a virtual assignment of the cause of action to the insurer and a part payment operates as an assignment pro tanto. The insurance company may bring suit against the tort-feasor in its own name by virtue of this assignment.<sup>122</sup>

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117. *Id.* at 518, 217 N.W.2d at 385. Justice Robert Hansen, concurring, made a persuasive argument that an unreasonable present fear of future harm is not an interest protected by tort law. *Id.* at 523, 217 N.W.2d at 387. Thus Justice Hansen would limit liability in this case by applying policy to duty rather than cause. For similar policy limitations see this term's wrongful birth cases, *Slawek v. Stroh*, *supra* and *Rieck v. Medical Protective Co.*, *supra*.

118. 61 Wis. 2d 111, 211 N.W.2d 834 (1973).

119. *Denhart v. Waukesha Brewing Co.*, 21 Wis. 2d 583, 595, 124 N.W.2d 664 (1963).

120. 61 Wis. 2d at 124, 211 N.W.2d at 841.

121. *Id.*

122. 61 Wis. 2d at 114, 115, 211 N.W.2d at 836. By ignoring the indemnifica-

Thus, in Wisconsin the operation of the collateral source rule as applied to insurance payments seems to have been severely limited.

## VI. STATUTE OF LIMITATIONS

### A. Actions Against Architects

*Rosenthal v. Kurz*, discussed *supra*, raises the issue of when the statute of limitations commences to run on architects' negligent liability. Wisconsin Statute section 893.155 provides that with respect to negligent design, construction or supervision of construction of improvements to land no action shall be brought "more than 6 years after the performance or furnishing of such services and construction." The period of limitation runs from the accrual of the cause of action, which is to say the time when the damage occurred. But mistakes by architects, like mistakes by physicians, may result in damage that remains latent for the period during which an action may be brought. In cases of medical malpractice, the court in *Olson v. St. Croix Valley Memorial Hospital*,<sup>123</sup> had ruled that the period of limitation begins to run with the incurring of latent injuries caused by defendant's negligence. For architects, however, the *Rosenthal* court adopted the rationale of *Peterson v. Roloff*<sup>124</sup> opposing the *Olson* rule. There Justice Hallows argued that a cause of action has not accrued until there is "an injury which is recognizable in money damages."<sup>125</sup>

### B. Wrongful Death Actions

If a person is wrongfully injured on December 15th and dies as a result on the following January 15th when does the period of limitations for a wrongful death action begin to run?<sup>126</sup> This question was raised and answered in *Bradley v. Knutson*.<sup>127</sup> Therein

tion/investment insurance distinction of *Gatzweiler v. Milwaukee E. R. & L. Co.*, 136 Wis. 34, 116 N.W. 633 (1908), the court in this excerpt nominally extends subrogation to all insurance payments. Restricted to its facts, however, *Heifetz* is not significantly broader with respect to subrogation than *Patitucci v. Gerhardt*, 206 Wis. 358, 240 N.W. 385 (1932).

123. 55 Wis. 2d 628, 210 N.W.2d 63 (1972).

124. 57 Wis. 2d 1, 8, 203 N.W.2d 699, 703 (1973).

125. Since the language of § 893.155, WIS. STAT., does not admit of a construction directly implementing this rule the court adopted, as a stopgap measure pending legislative revision, an interpretation which is as close as possible to the desired results. This is that the period of limitation for negligent architectural services commences with the completion of construction. *Rosenthal v. Kurtz*, *supra* at 13, 213 N.W.2d at 747.

126. WIS. STAT. § 893.205(2) provides that the period of limitations for a wrongful death action is 3 years.

127. 62 Wis. 2d 432, 215 N.W.2d 369 (1974).

defendant-appellant Madison Newspapers, Inc. was sued in negligence for alleged failure to timely promulgate, by publication in the Wisconsin State Journal, an amendment to the wrongful death act<sup>128</sup> which raised the maximum recoverable amount from \$22,000 to \$35,000.<sup>129</sup> The decedent was injured two days after the amendment was signed into law and died eight days after he was injured. The amendment was promulgated and thereby became effective five days after decedent's death. At trial and on appeal plaintiff-respondent claimed that her cause of action did not accrue until decedent's death, and that but for the State Journal's dilatoriness the higher limit on recovery would have applied at that time.

The supreme court held that the amendment created a new cause of action for the additional \$10,000 of potential recovery.<sup>130</sup> The determinative issue of whether the wrongful death cause of action attaches at the time of the injury or the time of death<sup>131</sup> was controlled by *Quinn v. Chicago, M. & St. P. Ry. Co.*<sup>132</sup> In that case a brother and sister commenced a wrongful death action as a result of the death of their brother. Between the time of the injury to the decedent and commencement of the action the legislature amended the statute to include brothers and sisters among those who may maintain wrongful death actions. The court held that while the cause of action does not arise until the death of the decedent, it exists inchoately from the time of the injury and that its legal status is fixed at that earlier time for purposes of who may sue as plaintiff.<sup>133</sup> Applying this relation-back approach to *Bradley* the court held that the amount of maximum recovery was established at \$22,000 at the time of the injury.<sup>134</sup>

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128. WIS. STAT. § 895.03 (1971).

129. WIS. STAT. § 895.04(4) (1971). Subsequent amendment in 1971 eliminated the ceiling for total recovery. Laws of 1971, ch. 59.

130. See *Keely v. Great Northern Ry. Co.*, 139 Wis. 448, 454, 121 N.W. 167 (1909).

131. 62 Wis. 2d at 435, 213 N.W.2d at 370.

132. 141 Wis. 497, 124 N.W. 653 (1910).

133. *Id.* at 499, 500, 124 N.W. at 655.

134. 62 Wis. 2d at 439, 215 N.W.2d at 372.