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It seems to the author that the effect of the *Helgert* decision is to require attorneys to read section 310.045(2) to mean that *possible* legatees, and *possible* devisees, *possible* heirs, and any *possible* surviving spouse are persons interested. In any case where the attorney is not positive that he has given formal notice to all possible interested parties, it seems that he has little alternative but to publish notice of the hearing to probate a purported will.

THOMAS A. PLEIN

Damages for Pain and Suffering in Wisconsin—In *Rivera v. Wollin*[1] the jury awarded the plaintiff four thousand dollars for past pain and suffering and two thousand dollars for future pain and suffering arising out of an automobile accident. The trial court on motions after verdict concluded that the damages were above "reasonably debatable amounts" and held that a reasonable amount for past pain and suffering was three thousand dollars and one thousand dollars for future pain and suffering. The trial court in exercising its power of remittitur gave the plaintiff the option to accept the lower amount or take a new trial on the issue of damages. The plaintiff accepted the lower amount. However, the defendant appealed to the supreme court of Wisconsin contending there was no basis in the record for any award for future pain and suffering, and that the sum of three thousand dollars for past pain and suffering was still excessive. Thereupon the plaintiff served a "notice of review" upon the defendant, stating that the plaintiff would also seek a review by the supreme court of the actions taken by the trial court. The supreme court found that the award of three thousand dollars for past pain and suffering was not excessive. But, the court found no basis in the record for any award for future pain and suffering and therefore held that the lower court should have remitted the entire two thousand dollar award for future pain and suffering rather than merely reducing it by one thousand dollars. The court then gave the plaintiff the option to accept the three thousand dollar judgment for past pain and suffering or to request a new trial on the issue of damages.

The jury had originally awarded the plaintiff six thousand dollars for pain and suffering. The trial court reduced the award to four thousand dollars, and the supreme court finally lowered the judgment to three thousand dollars.

The expressed foundation for the supreme court's remittitur was the following rule issued in the landmark case of *Diemel v. Weirich:*

> [W]here the injury is subjective in character and of such a nature that a layman cannot with reasonable certainty know whether or not there will be future pain and suffering, the courts

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[1] 30 Wis. 2d 305, 140 N.W. 2d 748 (1966).

> generally require the introduction of competent expert opinion testimony bearing upon the permanancy of such injury or the likelihood that the injured person will endure future pain and suffering before allowing recovery therefor.[2]

While the court in *Rivera* determined that the *Diemel* rule was applicable,[3] it also found that the testimony of the plaintiff's expert medical witnesses was incompetent under the *Diemel* rule and did not afford a basis for awarding damages for future pain and suffering.

I. FUTURE PAIN AND SUFFERING AND THE *Diemel* RULE

Prior to discussing the effect of the *Diemel* rule on the future pain and suffering damages of this case, it should be pointed out that the *Diemel*[4] rule also applies to permanent injuries. However, in the *Rivera* case there is no allegation nor finding of any permanent injuries.

In *Rivera* the court held as a matter of law that an application of the *Diemel* rule foreclosed any award for future pain and suffering. The substance of the rule provides that to allow recovery for future pain and suffering caused by an injury that is subjective, that is, a type of injury which a layman cannot observe physically and know with reasonable certainty whether or not there will be pain and suffering, there must be competent expert testimony as to the likelihood of such future pain and suffering.[5]

The plaintiff had argued to the supreme court that the subcutaneous nodule discovered by his doctor's examination, was the source of the plaintiff's pain and suffering, and was an objective symptom and not within the *Diemel* rule. But, the court rejected the plaintiff's argument that in the *Diemel* rule the term "objective" referred to symptoms capable of being measured and "subjective" as mere expressions of the plaintiff. The distinction the plaintiff makes is a valid distinction,[6] but

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[2] 264 Wis. 265, 268, 58 N.W. 2d 651, 652 (1955). Many recent Wisconsin cases have cited with approval the rule declared in Diemel v. Weirich; Huss v. Vande Hey, 29 Wis. 2d 34, 138 N.W. 2d 192 (1965); Casimere v. Herman, 28 Wis. 2d 437, 137 N.W. 2d 73 (1965); Borowske v. Integrity Mut. Ins. Co., 20 Wis. 2d 93, 121 N.W. 2d 287 (1963); Rogers v. Adams, 19 Wis. 2d 141, 119 N.W. 2d 349 (1963); Bleyer v. Gross, 19 Wis. 2d 305, 120 N.W. 2d 156 (1963).

[3] 30 Wis. 2d 305, 311, 140 N.W. 2d 748, 751 (1966).

[4] Diemel v. Weirich, 264 Wis. 265, 268, 58 N.W. 2d 651, 652 (1955).

[5] While the Diemel case and the cases supporting its principles presented the requirement of expert medical opinion testimony, they failed to define the form such testimony must take and only declared that it must be competent. In Shawnee-Tecumseh Traction Co. v. Griggs, 50 Okla. 566, 151 P. 230, 231 (1915) the Oklahoma court held that

> ". . . there must be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven."

[6] The definition proposed by the plaintiff is somewhat in accord with Corpus Juris Secundum:

83 C.J.S., *Subjective* (1953) — "Subjective Symptoms. — In medicine those symptoms which a physician or surgeon learns from what his patient tells

does not in fact appear to be the one which *Diemel* apparently contemplated.

The *Diemel* rule requires expert medical testimony as a condition for any recovery for future pain and suffering when the injury is of a subjective nature. An injury might best be defined as subjective in nature when it is a type of injury that is not capable of being observed and evaluated by a layman but can only be detected and measured by some type of medical expert. This definition is typical of the various definitions adopted by many courts.[7]

Although the court rejected the plaintiff's definition of "subjective injury," the court at the same time expressed dissatisfaction with the phraseology of the *Diemel* definition. The court in *Rivera* proceeded to rephrase the definition thus: "where the injury cannot be objectively determined or where it is of such nature that a layman cannot with reasonable certainty know whether or not there will be future pain and suffering."[8] It is doubtful whether this language clarifies the *Diemel* rule. It may in fact provide more difficulty.

The plaintiff's subcutaneous nodule was clearly a subjective symptom under the *Diemel*[9] rule as originally defined and as redefined in this case. The question that then presented itself was whether the plaintiff had sufficient competent expert opinion testimony bearing upon the likelihood of future pain and suffering so as to allow a recovery for future pain and suffering. Basically this question goes to the competency of the expert medical testimony as presented by the plaintiff.

How much medical proof is legally necessary so as to sustain an award for future pain and suffering? It would appear that there must be some proof as to the duration of the pain in the future and also the degree of pain. The basic requirement applicable to expert medical opinions generally should also be applicable under the *Diemel* rule. That is, the expert opinion must be expressed at least in terms of probabilities and not mere possibilities.[10] Such a requirement appears to have

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him; those which a physician learns from the expressions of the patient; those which a physician concludes exist because his patient says so; those which are related by the patient, that cannot be observed by the physician, but are learned by questioning the patient."

67 C.J.S., *Objective* (1950)—"Objective Symptoms. — In medicine those which a physician, by the ordinary use of his senses, discovers from a physical examination; those symptoms which a surgeon or physician discovers from an examination of his patient."

However it should be mentioned that the *Diemel* rule is in fact the Wisconsin court's adoption of 20 AM. JUR., *Evidence* §778 (1939) verbatim. Therefore the court adopts AM. JUR.S definition of the term, "subjective" and not that of C.J.S.

[7] See also Crye v. Mueller, 7 Wis. 2d 182, 197, 96 N.W. 2d 520, 529 (1959) and Kearney v. Massman Construction Co., 247 Wis. 56, 69, 18 N.W. 2d 481, 487 (1945).

[8] Rivera v. Wollin, 30 Wis. 2d 305, 313 N. 2, 140 N.W. 2d 748, 753 N. 2 (1966).

[9] Diemel v. Weirich, 264 Wis. 265, 268, 58 N.W. 2d 651, 652 (1955).

[10] See Bleyer v. Gross, 19 Wis. 2d 305, 312, 120 N.W. 2d 156, 160 (1963) and Diemel v. Weirich, 264 Wis. 2d 265, 268, 58 N.W. 2d 651 (1955).

been met in *Rivera* even though one of the plaintiff's examining doctor's testimony as to future pain and suffering was expressed as a feeling that the doctor had.[11] This did not violate the principle that a doctor must testify as to medical probabilities.[12]

Rather, the real foundation for the court's determination that the expert opinion elicited from the two expert medical witnesses was not competent so as to allow recovery for future pain and suffering under the *Diemel* rule is the fact that both doctors' testimony as to future pain and suffering was based upon examinations of the plaintiff made about a year prior to the actual trial. Commenting upon this fact the court declared:

> Had Dr. Zupnik's opinion [as to future pain and suffering] been based on observations which were reasonably current at the time of trial, we would have no difficulty in finding that it fulfilled the *Diemel* rule. His opinion spoke, however, as of fourteen months before trial, and asserted, as of then, that the pain would continue for an indefinite period, until healing was complete. . . . It is arguable, of course, as a matter of logic, that Dr. Zupnik's opinion fulfills the *Diemel* rule because an indefinite period commencing November, 1963, may well include an indefinite period commencing in January, 1965. We consider, however, that the purpose of the *Diemel* rule is to introduce as much certainty as reasonably feasible into a fact finding process that is highly uncertain at best, that is, what is fair compensation for such pain as will probably be endured in the future. Bearing in mind this purpose, and the particular circumstances here present, the majority of the court conclude that Dr. Zupnik's opinion (as well as Dr. Coles') were simply too remote to be a foundation for an award for future pain.[13]

The court in effect held that as a matter of law the expert medical testimony as presented by the plaintiff's medical witnesses, was not sufficient to meet the *Diemel* requirement of "competent expert opinion testimony."

It is obvious that in order to allow a judicial award for damages for future pain and suffering, there cannot be a total physical recovery at the time of the trial. In the present case, neither of the two testifying doctors had examined the plaintiff at any time within eleven months of the trial. In such a case, it is indeed difficult to visualize how they could testify to a reasonable medical certainty as to the question of the plaintiff's pain at the time of the trial, let alone to a future time beyond the trial.

The dissenting opinion, however, does present a strong argument for holding that the majority erred in rejecting as a matter of law the

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[11] Rivera v. Wollin, 30 Wis. 2d 305, 311, 140 N.W. 2d 748, 752 (1966).
[12] Rogers v. Adams, 19 Wis. 2d 141, 146, 119 N.W. 2d 349, 351 (1963).
[13] Rivera v. Wollin, 30 Wis. 2d 305, 311, 312, 140 N.W. 2d 748, 752 (1966).

testimony of the plaintiff's medical expert witnesses as to the future pain and suffering:

> I believe that this satisfies the legal requirement of *Diemel v. Weirich* (1953), 264 Wis. 265, 58 N.W. (2d) 651, as recently examined by this court in *Huss v. Vande Hey* [citation omitted]. In my view, this is true even though Dr. Zupnik's testimony related to a physical examination that was held about a year earlier. The date of the doctor's examination might very well affect the weight to be given to his opinion, but it would not render the evaluation incompetent. Indeed, no claim is made that the opinion was inadmissible. The majority opinion does not declare that Dr. Zupnik's opinion was inadmissible, but, nevertheless, the doctor's opinion is ruled to be insufficient as a matter of law. As I read the record there was sufficient evidence to have enabled the jury to conclude that there would in fact be future pain and suffering; this conclusion was approved by the trial court.[14]

The majority of the court had found in passing upon the trial court's exercise of remittitur that the trial judge had come "very close to invading the province of the jury in weighing credibility" of the plaintiff as a witness.[15] The question which the dissent here aptly presented, was whether the supreme court had *itself* "usurped the jury's function of weighing the evidence."[16]

Another problem left unsolved by *Rivera* is that if an examination eleven months prior to trial is too remote as a matter of law to sustain an award for future pain and suffering under the *Diemel*[17] rule, then at what time less than eleven months is the line of "remoteness" to be drawn as a matter of law? Would an *ad hoc* determination based upon the facts of each individual case, as to the nature of testimony, be necessary, rather than creating a definite time line? Such a determination might well impair the jury's right to determine the credibility and weight to be given to an expert's opinion testimony.

In an attempt to discover how other decisions have dealt with the time lag between the doctor's last professional contact with the plaintiff and the time of the doctor's testimony as to future pain and suffering, the author has found that most court decisions have not considered this factor at all in applying rules similar to that of *Diemel*. In the usual case the plaintiff has actually visited the testifying physician a few days prior to the trial.[18] Also, many of the appellate decisions do not mention either the last date the doctor professionally viewed the plaintiff or the date upon which the doctor testifies in the trial.[19] Without such

[14] *Id.* at 316, 140 N.W. 2d at 754.
[15] *Id.* at 315.
[16] Rivera v. Wollin, 30 Wis. 2d 305, 316, 140 N.W. 2d 748, 755 (1966).
[17] Diemel v. Weirich, 264 Wis. 265, 58 N.W. 2d 651 (1955).
[18] See Borowske v. Integrity Mut. Ins. Co. 20 Wis. 2d 93, 121 N.W. 2d 287 (1963); Albers v. Herman Mut. Ins. Co., 17 Wis. 2d 385, 117 N.W. 2d 364 (1962); Crye v. Mueller, 7 Wis. 2d 182, 96 N.W. 2d 520 (1959).
[19] See Peterson v. Western Casualty and Surety Co., 5 Wis. 2d 535, 93 N.W. 2d 433

information it is impossible to know whether the court considered the time lapse factor mentioned above.

The exception to the ordinary situation mentioned above is presented by *Casimere v. Herman,* in which the Wisconsin court in finding the evidence insufficient to sustain an award for future pain and suffering did rely somewhat upon the fact that the testifying medical expert had not seen the plaintiff for a long period prior to trial, except for a chance meeting, as to which meeting the expert testified: " 'I was not able to assess whether she [the plaintiff] suffers from emotional disturbance at the present time.' "[20] That case was in fact only a preview of the present *Rivera* case, although *Rivera* made no mention of the *Casimere* case.

There is therefore a definite lack of case history to guide one through this area. The courts have in the past imposed the burden on the plaintiff to establish his damages by a reasonable certainty. The *Diemel* rule as applied by the court in *Rivera* seems to be an expression of such theory as applied to future pain and suffering. But, *Diemel* has defined the plaintiff's task of establishing his damages as to future pain and suffering as one that absolutely requires competent expert opinion testimony concerning such damages when the injury of the plaintiff is subjective in nature. Whether the courts apply the *Diemel* rule or the rule that damages for future pain and suffering must be established to a reasonable certainty, the final results will often be the same. Under either rule, introduction by the plaintiff of competent expert medical opinion as to future pain and suffering would appear necessary to properly sustain an award for such damages. The court in *Rivera* repeated the declaration made in *Diemel:*

> It is a rare personal injury case indeed in which the injured party at time of trial does not claim to have some residual pain from the accident. Not being a medical expert, such witness is incompetent to express an opinion as to how long such pain is going to continue in the future. The members of juries also being laymen should not be permitted to speculate how long, in their opinion, they think such pain will continue in the future, and fix damages therefor accordingly. Only a medical expert is qualified to express an opinion to a medical certainty, or based on medical probabilities (not mere possibilities), as to whether the pain will continue in the future, and, if so, how long a period it will so continue. In the absence of such expert testimony (which was the situation in the instant case) the jury should be instructed that no damages may be allowed for future pain and suffering. [Citation omitted.][21]

(1958); Bleyer v. Gross 19 Wis. 2d 305, 120 N.W. 2d 156 (1963); Lucas v. State Farm Mut. Auto Ins. Co., 17 Wis. 2d 568, 117 N.W. 2d 660 (1962).

[20] Casimere v. Herman, 28 Wis. 2d 437, 137 N.W. 2d 73 (1965)—Appellant's Brief and Appendix, Appendix—p. 116.

[21] Rivera v. Wollin, 30 Wis. 2d 305, 310, 140 N.W. 2d 748, 751.

II. Exercise of Remittitur

The majority of the court[22] found that the trial court could properly determine that the four thousand dollar award for past pain and suffering was "beyond the range of reasonably debatable amounts," and thus exercise remittitur, that is, present the plaintiff with the choice of accepting a lower award which the trial court fixed as reasonable or taking a new trial on the issue of damages. While affirming this part of the trial court's actions, the majority of the court found that the trial court came dangerously close to invading the province of the jury.[23]

Wisconsin appears to be definitely committed to the theory of remittitur as provided in *Powers v. Allstate Insurance Company.*[24] In abolishing the old system of remittitur, the court in *Powers* declared:

> We are firmly of the opinion that if the plaintiff were granted the option of accepting a reasonable amount as determined by the trial or appellate court, instead of the least amount that an unprejudiced jury properly instructed might award, the number of instances in which plaintiff would be likely to refuse such option and elect a new trial would be greatly reduced. Furthermore, such alternative is one which appeals to our sense of justice, and is widely used in other jurisdictions.[25]

A glaring problem left unsolved by the *Powers* case is concerned with the scope of the trial court's inquiry in its determination of the reasonability of the jury award. In particular the problem is concerned with the balancing of the rights and duties of the court and the jury. In the instant case, *Rivera v. Wollin,*[26] the court took notice of the fact that the trial judge had remarked about the plaintiff: "he was not honest in the description of his injuries at trial" and pointed out that his credibility "was substantially and frequently effectively shaken." In so acting the trial court was found to have come "very close" to invading the province of the jury in weighing the credibility of the plaintiff.[27] The temptation of the court to take over the jury's function

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[22] Justice Fairchild who wrote the majority decision in effect declared that he did not agree with the majority in holding that the judge could properly determine that the $4,000 award was beyond a reasonably debatable amount. It appears by implication that Justice Fairchild may have thought the judge did invade the province of the jury in weighing the credibility of the plaintiff as a witness as to his past pain and suffering. If that is so his presence as part of the majority is somewhat anomalous. See Rivera v. Wollin, 30 Wis. 2d 305, 315, 140 N.W. 2d 748, 754 (1966).

[23] Rivera v. Wollin, 30 Wis. 2d 305, 315, 140 N.W. 2d 748, 754 (1966).

[24] 10 Wis. 2d 78, 88, 102 N.W. 2d 393, 398 (1960). Powers v. Allstate Insurance Company has been recently modified by Spleas v. Milwaukee & Suburban Transport Corporation, 21 Wis. 2d 635, 646, 124 N.W. 2d 593, 598 (1963) which provided, ". . . even though the excessive verdict may be the result of a prejudicial error committed during the course of the trial, the *Powers* rule may nevertheless be employed where such error directly relates to damages."

[25] 10 Wis. 2d 78, 88, 102 N.W. 2d 393 (1960).

[26] 30 Wis. 2d 305, 140 N.W. 2d 748 (1966).

[27] *Id.* at 314, 315, 140 N.W. 2d 754.

of weighing the evidence and passing upon the credibility of witnesses is especially acute in cases involving past pain and suffering damages. The reason for such tendency is that the plaintiff's testimony as to past pain and suffering is a legally sufficient foundation for a jury award, even though no medical testimony is presented by the plaintiff to substantiate his past suffering. Even in cases such as *Rivera,* where there is medical testimony concerning past pain and suffering, the plaintiff's testimony as to the pain that he experienced is often a decisive factor in the jury's award to the plaintiff. Therefore, in such cases the credibility of the plaintiff is a vital question. A court must, even under the *Powers*[28] rule of remittitur, restrain itself and keep in mind the rule laid down in *Reddich v. Reddich*:

> The general rule governing the trial judge or appellate court in determining whether damages are excessive is that since it is for the jury, and not for the court, to fix the amount of damages, their verdict will not be set aside merely because it is large or because the reviewing court would have awarded less. The court relies upon the good sense of jurors to determine the amount of damages and all that the court can do is to see that the jury approximates a fair estimate. Where the question is a close one, it should be resolved in favor of the jury verdict.[29]

The extent to which a judge may base his exercise of remittitur upon his estimation that a witness is not truthful is left somewhat doubtful under *Rivera.*[30] It is arguable that the trial court did go beyond its prerogative in this case and did invade the province of the jury.

III. Notice of Review Under Section 274.12.

Near the end of the opinion the court discussed the merits of the plaintiff's "notice of review." The court found that the plaintiff had failed to serve timely "notice of review" under Sec. 274.12(1) Stats. and was too late to seek a modification of the judgment which was *more favorable* to him.

The little publicized appellate device which the plaintiff attempted to use, the "notice of review" is created by section 274.12(1):

> A respondent adverse to the appellant upon the latter's appeal may have a review of any rulings prejudicial to him by serving upon the appellant at any time before the case is set for hearing in the supreme court a notice stating in what respect he asks for a reversal or modification of the judgment or order or portion thereof appealed from.[31]

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[28] Powers v. Allstate Insurance Company, 10 Wis. 2d 78, 102 N.W. 2d 393 (1960).
[29] 15 Wis. 2d 37, 43, 112 N.W. 2d 131, 134 (1961).
[30] Rivera v. Wollin, 30 Wis. 2d 305, 314, 315, 140 N.W. 2d 748, 754 (1966).
[31] Wis. Stat. §274.12 (1) (1963).

In *Plesko v. Milwaukee* the court held that a plaintiff who had accepted a reduced amount of damages upon the trial court's exercise of remittitur could not thereafter appeal such reduction. However if the "opposing party appeals, the party who has accepted the option to take judgment for such a reduced amount of damages may nevertheless have a review on appeal of the trial court's determination of the damage issue."[32] The purpose of not allowing a plaintiff to accept a reduced award upon the court's exercise of remittitur and then to appeal such action was to decrease the number of appeals. Once the defendant has appealed, the reason for prohibiting the plaintiff to appeal has vanished.[33]

The court held in *Rivera*[34] that the plaintiff could not seek a review under section 274.12(1) because the statutory requirement was not followed. The defendant was not given notice of the plaintiff's request for review until sometime after the case had been "set for hearing"[35] by the court. But, the court pointed out that "to the extent that the correction of the claimed error would merely support the judgment appealed from, a notice of review is unnecessary." This portion of the court's position is only a reiteration of section 274.12(2). The court then stated:

> Thus we may review the action of the court in setting aside the $4,000 award for past pain and suffering, because if that was error, our correction of it would merely support the judgment. If we determined the $4,000 award should be reinstated, the present judgment would be supported, even though we determine that the trial court was in error in including $1,000 for future pain and suffering.[36]

The court seemed to impliedly hold that while the plaintiff could not properly seek a recovery of the whole six thousand dollar jury verdict as provided for under section 274.12(1) because of lack of a timely notice of review to the defendant; the plaintiff could seek, without timely notice (or any notice at all), a review of the lower court's action of section 274.12(2) so long as the amount of the award sought to be reinstated does not cause the total recovery to exceed the amount of the trial court's judgment after remittitur, that is, four thousand dollars.

The court has in effect determined that because there is no proper basis under the *Diemel* rule for any damages for future pain and suffering, that that part of the plaintiff's request for review concerning the original jury award of two thousand dollars should be disregarded. Thus, his request would be limited to the amount of four

[32] 19 Wis. 2d 210, 220, 120 N.W. 2d 130, 135 (1963).
[33] *Ibid.*
[34] Rivera v. Wollin, 30 Wis. 2d 305, 314, 140 N.W. 2d 748, 753 (1966).
[35] Wis. Stat. §274.12 (1) (1963).
[36] Rivera v. Wollin, 30 Wis. 2d 305, 314, 140 N.W. 2d 748, 753, 754 (1966).

thousand dollars, which is not more favorable than the lower court's judgment and therefore is not subject to subsection (1)'s notice requirement.

The court is correct in holding that under 274.12(2) there need be no notice of review of any error if the correction of which would merely support the judgment or order appealed from.[37] But, prior to the court's finding that the trial court should have as a matter of law refused to allow any award for future pain and suffering, rather reducing that part of the award from two thousand to one thousand dollars, the request of the plaintiff for reinstatement of the original jury award, six thousand dollars, was in actuality a request for a correction which would be greater than the judgment granted by the trial court, four thousand dollars. The supreme court seemed to be acting with hindsight in its determination that subsection (2) applied. In actuality, the plaintiff had sought a correction which if made, would have been more favorable to him and would not have merely "support the judgment."[38] Thus, the court's application of section 274.12(2) under the facts seems to be questionable.

DAVID W. LEIFKER

Damages: The Declining Significance of the Ad Damnum Clause—The plaintiff in *Zelof v. Capital City Transfer, Inc.*[1] brought an action against the defendant moving company for damages resulting from its alleged negligence in packing and moving some of her household effects. The *ad damnum* clause in the complaint was in the sum of $1070.33. After finding the defendant liable the jury assessed plaintiff's damages at $3000.00. The trial court allowed the plaintiff to amend the *ad damnum* clause to $3000 in order to conform the pleading to the verdict, but subsequently held that the applicable law required that the amendment be allowed only if the defendant were granted a new trial on the issue of damages.

On appeal the Wisconsin Supreme Court held that:

> ". . . under sec. 270.57, Stats. and sec. 269.44, Stats. the court has the power after verdict and before judgment in furtherance of justice and upon such terms as may be just to allow an amendment to increase the amount of the *ad damnum* clause to the amount of the verdict so the pleadings and verdict will support a judgment of the amount awarded.
> What are just terms necessarily depends upon the facts of the case. When a defendant is in fact misled by the amount of the *ad damnum* clause, the court may well impose different terms than when the defendant cannot prove he has been misled. No mathematical rule of disparity between the amount of the verdict and the *ad damnum* clause can be formulated.

[37] WIS. STAT. §274.12 (2) (1963).
[1] 29 Wis. 2d 384, 139 N.W. 2d 1 (1966).