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The Aggravation of a Personal Injury in Wisconsin

Robert Slattery

THE AGGRAVATION OF A PERSONAL INJURY IN WISCONSIN

The problem of aggravation is one of dual causation. Assume that *A* negligently injures *P*. Subsequent thereto, *B* negligently aggravates the initial injury. Two problems are inextricably interwoven in this fact situation. First, in determining B's liability, what is the significance of the fact that *P* was in an enfeebled condition at the time when *B* inflicted injury? Second, in ascertaining the extent of *A*'s liability, of what significance is the fact that the initial injury inflicted by him has subsequently been aggravated by *B*? This is an over-simplification of the issues involved. *A* and *B* are hypothesized as human agents, from whom full recovery can be had by a simple process of joinder. This is not necessarily the case. The initial "injury" may consist of a simple predisposition to a particular disease on the part of *P*, for which he can seek no recovery. The question of the extent of the aggravator's liability then becomes extremely important. Similarly, although the initial injury may be caused by a responsible human agent, the aggravation may be brought about by someone from whom the plaintiff cannot seek recovery, by someone whose negligence would be hard to establish, or even by the plaintiff himself. In such a case, the extent to which the original wrongdoer will be held responsible is of prime significance.

The law relating to the two general problems has developed along separate and distinct lines. The effect of the plaintiff's prior condition of enfeeblement upon the liability of the aggravator has evolved out of a strict theory of legal causation, involving a process of apportionment of damages by the jury. The effect of a subsequent aggravation of the initial injury upon the liability of the original wrongdoer is essentially determined as a matter of law by the court. This article will therefore be divided into two parts: (I) Of what significance is the fact that the plaintiff is peculiarly enfeebled or susceptible to injury at the time of the aggravation? (II) Of what pertinence is a subsequent and independent force that aggravates the original injury?

I. *The aggravation of a condition existing prior to the infliction of an injury by the defendant:*

This area involves a fact situation in which the plaintiff suffers from some form of pre-existing malady at the time the defendant negligently injures him. In so far as this section is concerned, the manner in which the pre-existing condition was brought about is utterly of no consequence. It may be a mere predisposition to a particular disease on the part of the plaintiff, or it may be a condition of enfeeblement caused by the tortious conduct of a responsible third party.

As a general proposition of law, it may be said that the plaintiff is allowed to recover damages for *any aggravation or increase in the existing disability* caused by the defendant's fault, but not for the pre-existing condition itself.[1] An attempt to express the rule has been made in *McNamara v. Village of Clintonville*,[2] in which it was said that the plaintiff can recover for such damages as a normal person would suffer from the injury in question, plus "such increased or additional damages" as result to the plaintiff due to his enfeebled condition. This is essentially a riteration of the familiar rule that the defendant must "take the plaintiff in the condition in which he finds him."[3]

As a matter of historical interest, it should be pointed out that the older Wisconsin cases, decided at a time when "forseeability" was considered an element of causation,[4] required the plaintiff to prove that the defendant should have foreseen that a person in the plaintiff's enfeebled condition might be injured by his negligent conduct. The courts often aided the plaintiff in this proof by imputing to the defendant such knowledge as a reasonable man would need to forsee such injury.[5]

Historically, there has been some dispute as to the policy justification for the above-stated allowance of recovery to the plaintiff for the additional or increased injuries, over and above those injuries which would be suffered by a person in good health. The argument for the rule of recovery follows a "humanitarian" approach.[6] The defendant is felt to have committed a more grievious wrong by injuring an enfeebled plaintiff. The more potent side of the argument is that the plaintiff should be compensated for the full injury he suffers. The allowance of such recovery is established law in the United States.[7]

The area of aggravation centers about the legal issue of causation. The question of causation takes a relatively simple form in a situation where the pre-existing condition lies in a dormant state prior to the infliction of injury by the defendant. That is, prior to the intervention of the defendant's misconduct, the plaintiff did not actively suffer from

[1] Brown v. Chicago, Milwaukee and St. Paul Ry. Co., 54 Wis. 342, 11 N.W. 356 (1882); McNamara v. Village of Clintonville, 62 Wis. 207, 22 N.W. 472 (1885); Woodward v. City of Boscobel, 84 Wis. 226, 54 N.W. 332 (1893); Culberstone v. Kieckhefer Container Co., 197 Wis. 349, 222 N.W. 249 (1928); Krantz v. Krantz, 211 Wis. 249, 248 N.W. 155 (1933); Chitek v. Horn, 257 Wis. 9, 42 N.W.2d 162 (1950).

[2] *Ibid.*

[3] See Colla v. Mandella, 1 Wis. 2d 594, 85 N.W. 2d 345 (1957).

[4] It was established in Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931) that forseeability was no longer an element to be considered by the jury in determining legal causation. This position was questioned in E. L. Chester Co. v. Wisconsin Power & Light Co., 211 Wis. 158, 247 N.W. 861 (1933). The Osborne rule was affirmed in Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W. 2d 29 (1952).

[5] Stewart v. City of Ripon, 38 Wis. 584 (1875).

[6] Brown v. Chicago, Milwaukee and St. Paul Ry. Co., see note 1 *supra*.....

[7] 15 AM. JUR., *Damages*, §80, p. 488, PROSSER, LAW OF TORTS, §45, p. 224 (2d ed. 1955).

any pain, disability, *etc.*[8] In so far as the jury is concerned, such a case involves only the ordinary law of causation, because the plaintiff's present state of disability, and his entire pain and suffering is attributable to the defendant's misconduct, with no problems of apportionment.

The problem, however, is complicated by the fact that the pre-existing condition may have caused the plaintiff some pain, suffering or disability prior to the aggravation thereof by the defendant. The plaintiff is allowed to be compensated only for the increase under the above-stated rule. The jury, then, in making a determination on the fact question of causation, must divide or split-up the condition of the plaintiff as found at the time of trial. They must, in effect, allocate to what extent his present condition actively existed prior to the intervention of the defendant's injury, in view of the fact that the plaintiff can only recover for the increase in allowable items of damage. This problem was considered in *Bent v. Jonet.*[9] The jury awarded $200 to the plaintiff for pain and suffering, and $4,575 for the diminuation of his earning capacity. On appeal, the defendant urged that the disparity between the amounts of the two awards indicated a perverse jury. The Wisconsin supreme court upheld the verdict, pointing out that the jury correctly reasoned that the plaintiff was suffering a good deal of pain from prior injuries before the accident in question, although he was fully capable of working. The increase in pain and suffering was thus nominal, while the diminuation of earning capacity was much greater.

As a matter of procedure, the burden of proving damages rests upon the plaintiff.[10] As a general rule of damages, the plaintiff must prove both the fact that he has suffered damage, and the amount thereof to a reasonable certainty.[11] In a case where the jury must divide a single injury between two consecutive causes—a case of apportionment—of necessity the plaintiff's burden is substantially relaxed.[12] The jury is given unusual latitude in their apportionment finding, in the sense that general evidence as to the proportion in which separate causes contribute to the result will be sufficient to support a verdict. For example, a verdict awarding damages to the plaintiff for a "floating kidney" was upheld in the face of evidence (1) that there were causes in existence prior to the accident which were adequate to produce the disease; (2) that the symptoms of the plaintiff respecting the kidney condition were the same before and after the accident; (3) there was

[8] Colla v. Mandella, see note 3 *supra.* See also, 15 AM. JUR., *Damages,* §81, p. 490.

[9] Bent v. Jonet, 213 Wis. 635, 252 N.W. 290 (1934). See also, Krantz v. Krantz, note 1 *supra;* 15 AM. JUR., *Damages,* §80, p. 488; PROSSER, note 7 *supra,* §45, p. 224.

[10] McCORMICK, *Damages,* §26, p. 99 (1935).

[11] Maslow Cooperage Corp. v. Weeks Pickle Co., 270 Wis. 179, 70 N.W. 2d 577 (1955); McCORMICK, *ibid.*

[12] McCORMICK, *Id.,* §27, p. 101; PROSSER, note 7 *supra,* §45, at p. 229; Huggard v. Chicago, Milwaukee & St. Paul Ry. Co., 158 Wis. 1, 147 N.W. 1020 (1914).

medical testimony to the effect that the injury was of long standing.[13] There is much more weight given to the plaintiff's own "subjective symptom" testimony in cases involving aggravation. In *Chitek v. Horn*,[14] the plaintiff suffered from an arthritic condition prior to the accident, which, by her own testimony, in no way impaired her ability to perform her household duties, including the care of five children. Subsequent to the accident in question, she was unable to do heavy work, and suffered severe back pains. The plaintiff's doctor testified that her prior arthritic condition would account for her complaints. The Wisconsin supreme court sustained a jury award of damages for the present condition of disability of the plaintiff, stating that "(t)here is no reason to accept a litigant's testimony of subjective symptoms which establish results and reject such testimony from which a jury may infer cause."[15] The only evidence supporting the award was the subjective symptom testimony of the plaintiff. Contrast this approach with that taken in a case not involving an apportionment question. In *Meyer v. Fronimades*,[16] the plaintiff was attempting to establish that the headaches which he was suffering up to the time of trial were caused by the accident in question. The defendant had struck the plaintiff on the head with a table leg. There was no problem of apportionment between two consecutive causes. The plaintiff testified as to the severity of the headaches, and to the fact that they had commenced immediately after the accident. There was medical testimony that the headaches were "possibly" caused by the injury. The case was remanded on other grounds, with an indication by the court that they felt the evidence was insufficient to establish causation. This is in line with a statement in *Smee v. Checker Cab Co.*, that subjective symptom "statements are not entitled to great weight when unsupported by medical evidence."[17]

II. *The subsequent aggravation of the injury inflicted, and the plaintiff's duty to minimize his injuries:*

This section deals with a fact situation in which the original injury caused by the defendant is subjected to a subsequent aggravation, either by the plaintiff himself, by some third party, or by a completely fortuitous event. This segment of the overall problem of aggravation is much more involved than that dealing with the aggravation of a pre-

[13] Kinziger v. Chicago and N.W. Ry. Co., 156 Wis. 497, 146 N.W. 518 (1914).
[14] See note 1 *supra*. Note the *plaintiff's* subjective symptom testimony is to be distinguished from a *doctor's* testimony as to what the plaintiff told him concerning the accident. The latter is admissable as an exception to the hearsay rule of evidence, but will not sustain an award. Salo v. Dorau, 191 Wis. 618, 211 N.W. 762 (1927); Bridge v. The City of Oshkosh, 71 Wis. 363, 37 N.W. 409 (1888).
[15] Chitek v. Horn, see note 1 *supra*, at p. 12.
[16] 2 Wis. 2d 89, 86 N.W. 2d 25 (1957).
[17] 1 Wis. 2d 202, 83 N.W. 2d 492 (1957).

existing condition, both because of the recent clarification of the law of intervening cause, and because of the multiplicity of possible fact situations. The discussion of the problem involved will be divided into three parts: (1) The location of the problem. (2) The effect of a subsequent aggravation by the plaintiff. (3) The effect of a subsequent aggravation by third parties, including doctors and non-medical third parties.

1. *Location of the problem:*

It has often been said that the problem involved is one of causation. The area involved is termed "intervening and superseding cause." This is apparently a misnomer in view of the present state of Wisconsin law. It is established beyond question that the fault of the defendant will not render him legally responsible unless that fault is the "legal cause" of an injury.[18] The "substantial factor" test of legal causation is firmly rooted in Wisconsin law.[19] These general issues of causation are questions of fact to be determined by the jury.[20] Having established negligence, the theory of legal causation dictates that the defendant shall be held liable for all such injuries as his negligence was a substantial factor in producing.[21] This rule is subject to one limitation. The court may, as a matter of law, determine that the imposition of liability on the defendant in the particular case at hand would "shock the conscience of society," and therefore deny recovery on policy grounds.[22] The rules applicable to the wrongdoer's liability for the subsequent aggravation of the initial injury which he caused lie within this policy limitation. It should be noted that the application of the policy limitation upon liabliity is broader than the scope of this article. The policy limitation is considered in all cases where the injury suffered is unusual or extraordinary.[23] Its application is not restricted

[18] PROSSER, note 7 *supra*, §44, p. 218; RESTATEMENT, TORTS, §430 (1948).

[19] Osborne v. Montgomery, see note 4 *supra;* Pfeifer v. Standard Gateway Theater, Inc., see note 4 *supra.* See also, RESTATEMENT, TORTS, §431 (1948).

[20] *Ibid.*

[21] Osborne v. Montgomery, see note 4 *supra.*

[22] Osborne v. Montgomery, see note 4 *supra,* at p. 237: "Any rule which operates to limit liability for a wrongful act must be derived from judicial policy and its limits cannot be defined by any formula capable of automatic application but must rest in the sound discretion of the court." Pfeifer v. Standard Gateway Theater, Inc. See note 4 *supra,* at pp. 239, 240: "It would seem to be preferable to submit these hard cases to the jury in so far as determining the issues of negligence and causation in the same manner as in the ordinary case. If the jury does determine that there was negligence, and that such negligence was a substantial factor in producing the injury, it is then for the court to decide as a matter of law whether or not consideration of public policy require that there be no liability." Colla v. Mandella, 1 Wis. 2d 594, 599, 85 N.W. 2d 345 (1957): "In such cases it is sometimes said that the actor owed no 'duty' to the injured party; but that terminology has been criticized as begging the question. The determination to deny liability is essentially one of public policy rather than of duty or causation." Schultz v. Brogan, 251 Wis. 390, 29 N.W. 2d 719 (1947).

[23] In addition to the area of "intervening" and "superseding" cause, this rule of policy determination is peculiarly applicable to the fact situation in which

to cases in which the remoteness of the injury is due to the intervention of an aggravating force not attributable to the defendant.

For discussion purposes, it must be assumed that both the negligence of the the defendant and the aggravating force are legal causes of the final injury for which recovery is sought. Once this is established by jury determination, it is then for the court to decide whether public policy requires that the original wrongdoer's liability be cut off because of the intervention of the independent aggravating force. Such a determinaiton is completely beyond the function of the jury. This position has been repeatedly espoused by the Wisconsin supreme court, in its treatment of legal causation in general.[24] In cases involving "intervening" and "superseding" cause—cases of aggravation—the court will envoke the principles of §447 of the *Restatement of Torts* in making their policy discrimination:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
> (a) The actor at the time of his negligent conduct should have realized that a third person might so act, or
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
> (c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.[25]

This position is unquestionably adopted in the fairly recent case of *Ryan v. Cameron,*[26] in which it is said:

> Where intervening cause of another is interposed as a defense by a defendant charged with negligence who was the first actor,

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the plaintiff asserts that mental suffering can serve as a link in the chain of causation between the negligence of the defendent and a subsequent physical injury. See such cases as Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909); Sundquist v. Madison Railways Co., 197 Wis. 83, 221 N.W. 392 (1928). See also, Koerber v. Patek, 123 Wis. 453, 102 N.W. 40 (1905); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W. 2d 397 (1955); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900).

[24] See note 22 *supra.*

[25] RESTATEMENT, TORTS, §447 (1948). This section of the RESTATEMENT has been specifically endorsed by the Wisconsin supreme court on repeated occasions: Dombrowski v. Albrent Freight and Storage Corp., 264 Wis. 440, 59 N.W. 2d 465 (1953); McFee v. Harker, 261 Wis. 213, 52 N.W. 2d 381 (1952). Note that in Ryan v. Cameron, 270 Wis. 325, 71 N.W. 2d 408 (1955), the court applies the section to an intervening force brought about by the plaintiff himself, although by its terms the section is applicable only to third party intervention. See also, RESTATEMENT, TORTS, §§439-453 (1948).

[26] Ryan v. Cameron, *Id.*, at p. 331. Note that there is a different though similar expression of the factors to be considered in ascertaining policy in Morey v. Lake Superior T. and T. Co., 125 Wis. 148, 155, 103 N.W. 271 (1905):

> the jury is first required to find whether the found negligence of such first actor was a substantial factor in causing the accident on which liability is sought to be predicated. *Pfeifer v. Standard Gateway Theatre, Inc.* (1952), 262 Wis. 229, 55 N.W. (2d) 29. If a jury does find that the negligence of the first actor was a substantial factor in causing the accident, then the defense of intervening cause is unavailing unless the court determines as a matter of law that there are policy factors which should relieve the first actor from liability. Ibid. As Professor Richard V. Campbell points out in his recent article in January, 1955 Wisconsin Law Review, 5, at page 40, it is at this point that the principles of Restatement, 2 Torts, p. 1196, sec. 447, should be used by the court as an aid in deciding such policy factors.

It is essential to distinguish between cases which fall within the general area of intervening cause, and those which involve the more limited area of aggravation. An intervening cause is any cause which operates subsequent to the *negligence* of the original wrongdoer, and concurs in producing the ultimate result.[27] A cause which aggravates the injury must obviously occur subsequent to the infliction of the initial *injury*. Those forces which come into operation in the interim between the defendant's negligent act and the infliction of injury are intervening causes, but they do not present questions of aggravation. An example may serve to clarify this distinction. Assume that two cars driven by *A* and *B* collide, solely due to the negligence of *A*. *B* suffers a severely bruised arm as a result of this accident. Subsequent thereto, *C* approaches the accident at a negligent rate of speed, and crashes into the debris. As a result of this second accident, *B*'s previously bruised arm becomes completely and permanently incapacitated. In addition, *C* also suffers some injury. This fact situation presents two distinct problems with respect to questions of intervening cause. (1) In *B*'s action against *A*, a question of aggravation of the initial injury is presented. *A* will argue that he is not liable for the permanent mutilated condition of the arm, because the negligence of *C* superseded his own negligence in producing that result. He will argue that the court should limit the extent of his liability as a matter of policy. (2) In *C*'s action against *A*, a question of intervening cause is presented, but no problem of aggravation is involved. *C* suffered no initial injury which is subsequently aggravated by his own misconduct. *A* will argue that he should

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"Whenever a new cause (independent intervening circumstance) intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been forseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action."

[27] "An intervening cause is one which comes into active operation in producing the result *after the negligence* of the defendant." PROSSER, note 7 *supra*, §49, p. 226. Accord, RESTATEMENT, TORTS, §441 (1948).

be exonerated from liability altogether, as a matter of policy, because of the superseding negligence of the plaintiff himself in producing the injury. A distinction between the plaintiff's contributory negligence, and his negligent conduct as a superseding cause between the original wrongdoer's negligence and the *initial* injury is irrelevant to the discussion of aggravation.[28] Aggravation does not deal with a concurrent force producing the initial injury.

In this area of subsequent aggravation of the original injury inflicted by the wrongdoer, the question involved is one of policy. The purpose of this policy limitation on legal causation is to deny recovery to the plaintiff where his injury is too remote, unusual, or extraordinary to force the defendant to bear the burden of loss.[29] It is not applicable to the so-called "mine run" or "ordinary" case. Thus, as a general proposition of law, it may be said that the original wrongdoer will be held liable for the full aggravated injury. It is within this superstructure that the law of aggravation is framed. It must be remembered that once the supreme court has expressed a policy determination applicable to a given state of facts, that policy is distilled into a rule of law. There are three general types of intervening cause which may aggravate the initial injury caused by the defendant: (1) an aggravation by the plaintiff; (2) an aggravation by a doctor; (3) an aggravation by a non-medical third party. As to the first two of these areas, the policy of the court has been expressed, and exists today as a rule of law.

Where the policy limitation is applied to terminate the liability of the original wrongdoer, the question of apportionment of damages comes into play,[30] just as it did in the case of a pre-existing enfeeble-

[28] The distinction between the contributory negligence of the plaintiff, and his negligence as an intervening force between the defendant's negligence, and the *initial* injury the plaintiff suffers is often factually indistinguishable. In several cases, both defenses have been interposed. See such cases as Scheibe v. Town of Lincoln, 223 Wis. 417, 271 N.W. 43 (1937); Hatch v. Smail, 249 Wis. 183, 23 N.W. 2d 460 (1946); Hadjenian v. Sears, Roebuck and Co., 4 Wis. 2d 298, 90 N.W. 2d 786 (1958).

[29] Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 238, 55 N.W. 2d 29 (1952): "It may be urged that the elimination of any test of forseeability, such as 'natural and probable result,' from an instruction on causation in negligence cases, might result in imposing liability in extreme cases in which a negligent act may have set in motion a long chain of events resulting in harm to another at the remote end of the chain. . . . (I)n cases so extreme that it would shock the conscience of society to impose liability, the courts may step in and hold as a matter of law that there is no liability."

[30] PROSSER, note 7 *supra*, §45, 224: "Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes. The question is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes." Note that the rule of apportionment is equally applicable to a situation where the "other cause" is the conduct of the plaintiff himself. PROSSER, note 7 *supra*, §51, p. 287.

ment of the plaintiff which actively caused him pain, disability, *etc.* There are now, by hypothesis, two causes to which the aggravated injury is attributable. The original wrongdoer is liable only for that portion of the total injury which is attributable to him. The aggravating force must also accept a portion of the responsibility. If the final aggravated injury is divisible, it will be apportioned between these two causes.[31] The plaintiff can recover for the aggravation only if a third party has caused the aggravation by his tortious conduct. Distinctions will subsequently be drawn between a case of intervening cause, and one of contributory negligence, or of joint torts, pointing out the necessity for the apportionment.

2. *Substquent aggravation of the injury by the plaintiff:*

The plaintiff has *a duty not to negligently increase his injuries.* Stated in another way, if the plaintiff himself is negligent in increasing his injuries, it is established judicial policy that the original wrongdoer shall not be held liable for the aggravation. This is simply an unusual or "hard" case in which the judicial policy has been promulgated often enough to establish a rule of law. To say that the original wrongdoer's negligence is not a substantial factor in producing the full aggravated injury would be erroneous.

Several distinctions must be drawn to clarify this rule. (1) It must be distinguished from contributory negligence both in nature and effect. (2) It must be distinguished in scope from the general rule of avoidable consequences.

The rule that the plaintiff cannot recover for an aggravation of the original injury caused by his own negligence is to be distinguished from contributory negligence. "Both rest upon the same fundamental policy of making recovery depend upon the plaintiff's proper care for the protection of his own interests, and both require of him only the standard of the reasonable man under the circumstances."[32] As to the nature of their operation, they are distinguished in point of time.[33] Contributory negligence operates in producing the initial injury, as a concurring cause, and bars recovery altogether, subject to the rules of comparative negligence. Negligence of the plaintiff in increasing his injuries operates subsequent to the inflition of the initial injury by the wrongdoer, and operates to bar recovery only for the aggravation.[34]

[31] *Ibid.*

[32] PROSSER, note 7 *supra,* §51, p. 287.

[33] *Id.* Schmidt v. Town of Franklin, 164 Wis. 128, 130, 159 N.W. 724 (1916): "Contributory negligence is a defense which must be affirmatively established, and ordinarily is a question for the jury." In Le Beau v. Minn. St. P. & S.S.M. R. Co., 164 Wis. 30, 159 N.W. 577 (1916) a clear distinction is made between conduct of the plaintiff which serves to break the chain of causation, and that which constitutes contributory negligence. See also, Oliver v. Town of LaValle, 36 Wis. 592 (1875).

[34] See note 32 *supra.* Patry v. Chicago, Saint Paul, Minneapolis and Omaha R. Co., 82 Wis. 408, 415, 52 N.W. 312 (1892): "If she aggravated her injury after

As contrasted with contributory negligence, this rule diminishes recovery for injuries inflicted by the intentional and reckless conduct of the defendant, as well as for those caused by his negligence.[35] As pointed out above, negligence in increasing the injury is subjected to the rule of apportionment, but the plaintiff cannot take advantage of the comparative negligence statute.[36]

The plaintiff's duty not to negligently increase his injuries must be distinguished in scope from the general rule of avoidable consequences. The plaintiff has a general duty not to unreasonably increase the results of his injury.[37] This general duty has a dual aspect: (1) The plaintiff has the duty not to unreasonably increase his expenditures from a given injury.[38] (2) He also has the duty not to negligently increase the injury itself. The first of these duties deals directly with the amount of damages to be recovered by the plaintiff. He can recover only such expenses as are reasonable in amount. The duty not to negligently increase the injury, on the other hand, deals with the amount of recoverable damages only by indirection, in the sense that if the injury is increased unreasonably, the amount of compensatory damages to be recovered should be decreased proportionately. This article deals only with the aggravation of the injury itself, thus the plaintiff's duty to minimize his expenses is not treated herein.

A further examination into the scope of the plaintiff's duty not to negligently increase injuries is necessary. It has been stated that:

> 'it was the duty of the plaintiff, after the accident, to take reasonable care of herself, and to avoid, as far as was reasonably possible, doing anything which would tend to increase, prolong, or render permanent her injuries, sufferings, or disability.'[39]

Further,

> (t)he doing of any act which prevented or retarded her recovery is not of itself a ground for reduction of damages. To have that effect it must have been a negligent act, and whether an act is or is not negligent is a question for the jury, and not

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the expulsion, by failing to take ordinary care of herself, she could not, of course, recover for such sufferings so caused, and so the court charged the jury. This would not be contributory negligence, but negligence subsequent to the injury, tending to increase the damage."

[35] Patry v. Chicago, Saint Paul, Minneapolis and Omaha R. Co., *Id.*

[36] By its very terms, Wis. Stat. 331.045 applies only to the contributory negligence of the plaintiff.

[37] 15 AM. JUR., *Damages,* §36, p. 434. Note that this general duty to minimize damages does not require that the plaintiff's be reduced by insurance payments, or by wages voluntarily continued by the plaintiff's employer during the period of disability. Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927); Prunty v. Vandenberg, 257 Wis. 469, 44 N.W. 2d 246 (1950); Kincannon v. National Indemnity Co., 5 Wis. 2d 231, 92 N.W. 2d 884 (1958).

[38] Nimlos v. Bakke, 223 Wis. 473, 271 N.W. 33 (1937); 15 AM. JUR., *Damages,* §29, p. 425.

[39] Salladay v. Town of Dodgeville, 85 Wis. 318, 323, 55 N.W. 696 (1893).

> of law for the court, if different minds may properly draw different inferences, even from the same established facts.[40]

This is the familiar "reasonable man" standard; the plaintiff must use such care as would a reasonable man under the same or similar circumstances, in pursuing recovery from the injury. Within such a flexible standard, multiple fact questions to be decided by the jury always pose a problem.

Note the peculiarity of the procedural situation involved. The superstructure of the law of aggravation—the law of intervening cause in general—was not developed clearly until as late as 1952,[41] or possibly even 1955.[42] This superstructure dictates that the liability of the original wrongdoer will be terminated, assuming substantial factor causation, only upon a court policy determination, as a matter of law. The specific law on the question of the aggravation of an injury by the plaintiff himself was established as early as 1875.[43] This law dictates that the liability of the plaintiff may be terminated by a jury determination that the plaintiff was negligent in increasing his injuries. It would be an unlikely assumption that the question of the plaintiff's negligence will now be removed from the jury, and subjected to a court determination, merely to conform to the procedure set forth in the *Ryan* case. Any reconciliation of the two positions is a bit strained. It may be said that the court has made a policy determination, the basis of which is a question of fact, *i.e.*, a question of the plaintiff's negligence. The jury must determine this question of fact, not as a segment of their finding on causation, but as a basis for the court's now-established policy of cutting off liability where the plaintiff is negligent in increasing his injuries.[44]

Perhaps the most significant and perplexing of these fact questions is as to what extent a reasonable man is required to seek and submit to medical treatment. It is clear that the injured plaintiff, if he does procure medical aid, must use reasonable care in the selection of a competent physician, if available, under pain of being denied recovery from

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[40] *Id.* at p. 328.
[41] Pfeifer v. Standard Gateway Theater, Inc., see note 4 *supra.*
[42] Ryan v. Cameron, see note 25 *supra.*
[43] Oliver v. Town of La Valle, 36 Wis. 592 (1875). See also Wieting v. Town of Millston, 77 Wis. 523, 46 N.W. 897 (1890).
[44] Note that this is not the procedure followed in the area of intervening cause in general. In the recent case of Hadjenian v. Sears, Roebuck & Co., 4 Wis. 2d 298, 90 N.W. 2d 786 (1958), the jury made findings as to negligence, causation, comparative negligence and the amount of damages. On appeal, the defendant raised the defense of superseding cause. Of this, the supreme court said at p. 303: "The jury has found the negligence of (the defendant's employee) was a substantial factor in causing the accident . . ." The court then states that the intervening force was forseeable, thus was not a superseding cause. The point is that the court, and not the jury, considered the fact question of forseeability in reaching its policy determination that the intervening force was not superseding.

the principal defendant for any mistreatment by the doctor.[45] As to the plaintiff's duty to seek medical care in the first instance, and his duty to submit to recommended medical or surgical treatment, it has been said:

> The cases are agreed that one injured by another's tort is required to exercise ordinary care to seek medical or surgical treatment so as to effect a cure and minimize damages, on pain of not being allowed to recover from the defendant for consequences of the injury which could have been averted by such care. The obligation in question includes the seeking of medical care as well as the following advice of the physician or surgeon consulted.
>
> It has been generally recognized that the plaintiff's duty of reasonable care to seek a cure does not require him to submit to treatment which involves substantial hazard of death or injury, nor even unduly painful treatments, and also that he need not pursue methods which offer only a possibility of cure.
>
> The cases are not altogether clear on the question whether the expense or effort involved in securing treatment may excuse the plaintiff's failure to obtain a cure, although most of the courts which have considered the question treat this as at least an element to be considered in determining whether due care was exercised.
>
> Whether the injured plaintiff has exercised due care in seeking a cure in a particular case depends, of course, upon the evidence presented as to the relevant circumstances, primarily as to the dangers and possibility of success of the treatment. In such cases the courts have held, or have sustained findings, that the plaintiff was or was not negligent in failing to follow medical advice to rest; to submit to hernia operations, treatments for fractures, dislocations, injuries to internal organs, or eye injuries; or to submit to amputations, treatments requiring anesthesia, or various miscellaneous treatments advanced by defendant as offering a cure.[46]

This same "reasonable man" standard governs the conduct of the plaintiff outside the area of medical care. Established Wisconsin law is also quite limited in the non-medical field. It has been held that the plaintiff's negligence was a question of fact for the jury, where she became pregnant eight weeks after the injury, in view of the fact that

[45] Selleck v. City of Janesville, 100 Wis. 157, 75 N.W. 975 (1898).

[46] *"Duty of injured person to minimize tort damages by medical or surgical treatment,"* 48 A.L.R. (2d) 346, 349. This annotation provides excellent and detailed treatment of an area in which Wisconsin law is relatively scarce. It is stated in Salladay v. Town of Dodgeville, 85 Wis. 318, 328, 55 N.W. 696 (1893) that the plaintiff has a duty "to take reasonable care of himself," implying that she could be guilty of nonfeasance, as well as misfeasance. In Nelson v. Chicago and N.W. Ry. Co., 130 Wis. 214, 109 N.W. 933 (1906), it was held that the plaintiff was excused from a duty to seek medical aid by reason of the fact that he did not realize the gravity of his condition. See also, 12 N.C.C.A. 591; 24 N.C.C.A. 691; 22 N.C.C.A. 455; 15 AM. JUR., *Damages,* sec. 37, 38, 39, pp. 436-439; Baldwin v. Lincoln County, 29 Wash. 509, 69 P. 1081 (1902).

her doctor had not instructed her to refrain from intercourse;[47] that it was a question of fact for the jury as to whether the plaintiff, who has sustained a broken leg and was still on crutches, was negligent in riding in a carriage driven by a third party;[48] that a plaintiff, who was four months pregnant, but did not know of that fact, could not be said to be negligent as a matter of law in engaging in excessive physical exertion due to a situation of emergency caused by the defendant's negligence;[49] that the plaintiff upon being ejected from a train, was negligent as a matter of law in walking seven miles through a storm, where a reasonable means of transportation was available,[50] but in a situation where no reasonable means of transportation was accessible, the negligence of the plaintiff was held to be a question for the jury.[51]

3. *The effect of a subsequent aggravation of the initial injury by a third party.*

This section deals with a situation in which the precipitating force causing the aggravation of the initial injury is a third party. The issue is whether the plaintiff can recover compensation for the full aggravated injury from the original wrongdoer.

Most of the cases dealing with third party aggravation involve some form of negligent treatment of the injury by a doctor. If the plaintiff himself procures the doctor, and is not negligent in seeking the aid of a known incompetent, the cases uniformly hold that the plaintiff can recover for the full aggravated injury from the original wrongdoer.[52] The reason for the rule is set forth in *Selleck v. City of Janesville*:[53]

> The wrongdoer may well anticipate that the person injured will employ a physician or surgeon, and in doing so will exercise ordinary care in making the selection; but, where that is done, such person cannot be expected to assume the responsibility of the very highest degree of skill.

It is thus established judicial policy that the aggravation of an injury by incompetent medical treatment is not so unforseeable, extraordinary or unusual as to justify termination of the original wrongdoer's liability. This rule of recovery from the original wrongdoer applies regardless of the fact that the doctor's treatment may, speculatively, have

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[47] Salladay v. Town of Dodgeville, note 39 *supra*.
[48] Wieting v. Town of Millston, note 43 *supra*.
[49] Oliver v. Town of La Valle, note 43 *supra*.
[50] Le Beau v. Minneapolis, St. P. and S.S.M.R. R. Co., 164 Wis. 30, 159 N.W. 577 (1916).
[51] Brown v. Chicago, Milwaukee and St. P. Ry. Co., 54 Wis. 342, 11 N.W. 577 (1882).
[52] Selleck v. City of Janesville, 100 Wis. 157, 75 N.W. 975 (1898); Fisher v. Milwaukee Electric Ry. and Light Co., 173 Wis. 57, 180 N.W. 269 (1920); *Contra*, Stewart v. City of Ripon, 38 Wis. 584 (1875).
[53] *Id.*, at p. 164.

been negligent, and thus serve as the basis of an action directly against him.[54]

A different case is said to arise where the doctor who eventually aggravates the injury is employed by the wrongdoer to treat the plaintiff's injuries. The wrongdoer is exonerated from liability for the aggravation by the fact that he procures the medical aid, assuming that he is not negligent in hiring an incompetent man. The basis for this rule is said to be ". . . that the physician or surgeon whose negligence caused the damages is not an agent or servant of the original tort-feasor, but is an independent contractor, and is personally liable for his own wrong."[55]

This distinction will not be drawn in Wisconsin for two reasons. (1) The existing structure of Wisconsin law dictates that any limitation on the original wrongdoer's liability must evolve out of a determination of judicial policy, based upon the remoteness of the injury. Neither principles of agency, nor the fact that the aggravator may himself be liable are relevant in determining a question or remoteness. (2) Where medical aid is procured by the plaintiff himself, it is established judicial policy that an aggravation caused by the doctor's negligence is not such an unusual and extraordinary injury that the liability of the original wrongdoer will be limited. It would be a peculiar process of reasoning that would hold the aggravation more remote and unlikely simply because the medical aid was procured by the original wrongdoer. In *Fisher v. Milwaukee Electric Railway and Light Co.*,[56] a situation was presented in which the original wrongdoer offered to provide medical aid, which offer was refused. The plaintiff employed his own doctor, and suffered an aggravated injury as a result of negligent treatment. He was allowed to recover full damages from the original wrongdoer, with no comment by the court concerning the defendant's tender of medical services.

Where the third party aggravator is not a doctor, the policy of the Wisconsin supreme court is not so clearly spelled out. If the third party is negligent in caring for the injured plaintiff, or in failing to follow a doctor's instructions as to treatment, the original wrongdoer is generally held liable for the full aggravated injury caused thereby.[57] These cases usually involve the negligent care of an injured child by his parents,[58]

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[54] See cases cited at note 52 *supra*.

[55] Null v. Alabama Utilities Co., 224 Ala. 33, 138 So. 411 (1931). This position is substantiated in, *Liability of One Causing Personal Injuries for Consequence of Negligence, Mistake, or Lack of Skill of Physician or Surgeon*, 126 A.L.R. 912.

[56] See note 52 *supra*.

[57] *Negligence of a third person, other than a physician, in caring for an injured person or in failing to follow instructions in that regard as affecting the damages recoverable against person causing the injury*, 101 A.L.R. 559.

[58] See, for example, Ewing v. Duncan, 209 Ind. 33, 197 N.E. 901 (1935) in which the plaintiff, a fourteen year old boy, suffered a leg injury involving a prob-

because of the requisite that the plaintiff must be so dependent upon the third party that he has no control over the care to which he is subjected.

Cases in the area of third party intervention are not too numerous, because of the liberal rules of joinder.[59] The plaintiff will generally join both the original wrongdoer and the negligent aggravator, thus presenting a question of apportionment of damages rather than one of intervening cause. There are two causes of the plaintiff's full aggravated condition, the fault of the original wrongdoer, and that of the responsible third party aggravator. If the plaintiff joins the two defendants, the question of intervening cause is intentionally obscured, in that the plaintiff is not seeking full recovery from the original wrongdoer alone. He is asking recovery from each defendant according to proportion of the full injury caused by each. As pointed out above, questions of apportionment are for the jury.[60] Possibly more cases have arisen where the aggravator is a doctor, because of the difficulty of proof under which the plaintiff would operate in a malpractice action.

Even if the plaintiff brings his action against the original wrongdoer only, that wrongdoer can implead and cross complain against the aggravator on a theory of subrogation.[61] The original wrongdoer and the third party aggravator are not joint tort feasors in the sense that each is to be held jointly and severally liable for the full aggravated injury, thus the question presented is not one of contribution.[62] For the sake of differentiation in terminology, they are "concurrent" tort feasors between whom damages will be apportioned. By bringing his action against the original wrongdoer alone, the plaintiff relieves himself of the burden of establishing a cause of action against the third party aggravator. He will receive full compensation from the original wrongdoer, assuming that the aggravation is not a superseding cause, and the wrongdoer will be forced to establish his rights against the aggravator in his position as subrogee.

The original wrongdoer may be subrogated to the rights of the plaintiff against the aggravator by procuring a general release, as well

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lem as to the knitting of the bone. His doctor prescribed a particular diet which his parents failed to follow, causing a prolongation of the healing period, and an increase in the pain and suffering of the plaintiff. On appeal, The Indiana court held that the evidence of the parents' failure to follow the medical advice was properly excluded in an action against the original wrongdoer, because the plaintiff himself was in no way negligent, nor was it shown that he had any knowledge of the medical instructions. The plaintiff was allowed full recovery.

[59] Wis. Stats. §260.11.

[60] See notes 9 and 30 *supra*.

[61] Wis. Stats. §263.15; Fisher v. Milwaukee Electric Ry. and Light Co., see note 52 *supra*. The original wrongdoer is said to be subrogated to any cause of action which the plaintiff may have against the third party aggravator.

[62] See PROSSER, note 7 *supra*, §46, for a differentiation of the various senses in which the term "joint tort feasor" is used.

as by taking an adverse judgment.[63] Because of this subrogation, the plaintiff's action against the aggravator is then barred, on the theory that the plaintiff has been fully compensated for his injuries, and should not be allowed to recover a second time from the aggravator. There is a presumption when the plaintiff executes a general release,[64] that he intends to release his rights against the third party aggravator to the wrongdoer,[65] by the process of subrogation. Since the plaintiff could recover for the aggravation from the wrongdoer, and the release is general, the release includes the plaintiff's rights against the aggravator. This presumption is conclusive unless in the release the plaintiff saves his rights against the aggravator by an express exception.[66] However, where the release is executed prior to the occurrence of the aggravation in question, the subrogation obviously cannot take place.[67]

SUMMARY

(1) The aggravator who negligently increases a pre-existing condition of enfeeblement in which the plaintiff is found at the time of the aggravation is liable only for the additional pain, suffering, disability, *etc.* which the plaintiff suffers as a result of the aggravation. The extent of this increase is determined by rules of apportionment.

(2) Where an injury caused by the original wrongdoer is subsequently aggravated by an independent force not attributable to that wrongdoer, the general area which the law terms intervening and superseding cause is involved. Procedurally, the original wrongdoer will be held liable for the full aggravated injury unless the court determines, as a matter of judicial policy, that the aggravation is too remote, unusual, or extraordinary to hold the original wrongdoer liable therefor.

(3) Where the initial injury is aggravated by the plaintiff's own conduct, it is established judicial policy that the original wrongdoer will be held liable for the full aggravated injury, unless the plaintiff was negligent in increasing his injuries.

(4) Where the initial injury is aggravated by the negligent treatment or care of a doctor, it is established judicial policy that the original

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[63] Retelle v. Sullivan, 191 Wis. 576, 211 N.W. 756 (1927); Hooyman v. Reeve, 168 Wis. 420, 170 N.W. 280 (1919); *Release of One Responsible for Injury as Affecting Liability of Physician or Surgeon for Negligent Treatment of Injury*, 50 A.L.R. 1108; 112 A.L.R. 553.

[64] The plaintiff executed a release running to the original wrongdoer and his insurer, discharging them "from all actions, causes of action and demands of every kind and nature which I now have, claim to have, or may hereafter claim to have against either or both of them arising out of or on account of said injury . . ." In Retelle v. Sullivan, *Id.*, at p. 577, this release was held to bar the plaintiff's action against the third party aggravator.

[65] Noll v. Nugent, 214 Wis. 204, 252 N.W. 574 (1934); Retelle v. Sullivan, see note 62 *supra*.

[66] Noll v. Nugent, *Ibid.*

[67] Pawlak v. Hayes, 162 Wis. 503, 156 N.W. 464 (1916); Noll v. Nugent, see note 64 *supra*.

wrongdoer is liable for the full aggravated injury regardless of who procured the doctor.

(5) Where the initial injury is aggravated by a third party other than a doctor, that third party and the original wrongdoer are usually joined as defendants, thereby obscuring questions as to the original wrongdoer's liability for the full aggravated injury.

ROBERT SLATTERY