Additionally the trial court found the victim "is still in need of dental care." With no expert dental or medical testimony offered, this finding rests solely on the testimony of the victim—a lay person. The jury was not required to accept such testimony as establishing need for future dental or medical treatment.[22] In accepting the testimony of the victim as to the precise nature and exact extent of the injuries sustained, the trial court here was making a credibility judgment as to such testimony.

We hold that the credibility and weight to be given such testimony in establishing "great bodily harm" was for the jury, not the court, to decide. Accordingly on this record we hold that it was a matter of fact for the jury to determine whether the injuries inflicted constituted "bodily harm" or "great bodily harm."[23]

[9]

Thus there is an issue of fact for the jury to determine. That is, whether the testimony concerning the extent of injury supported only a conviction for the crime of battery, or for the more serious offense of aggravated battery. We conclude that it was error, on this record,

basically one of credibility. Credibility of witnesses is a determination for the jury." Citing *Tobar v. State,* 32 Wis.2d 398, 145 N.W.2d 782 (1966), cert. denied 390 U.S. 960 (1968); *State v. Hunt,* 53 Wis.2d 734, 193 N.W.2d 858 (1972); *Lemerond v. State,* 44 Wis.2d 158, 170 N.W.2d 700 (1969); *State v. Stevens,* 26 Wis.2d 451, 132 N.W.2d 502 (1965).

[22] *See: Irby v. State, supra,* n. 20, at 618, 182 N.W.2d at 254, this court holding: "Under the facts of this case the doctor's testimony was necessary to determine the seriousness of the wounds, and it was within the province of the jury to determine whether, as a matter of fact, these wounds caused great bodily harm."

[23] *Sykes v. State,* 69 Wis.2d 616, 620, 230 N.W.2d 760, 763 (1975), this court holding: "The credibility of witnesses and the weight to be given their testimony is, of course, for the trier of fact." Citing *Bautista v. State,* 53 Wis.2d 218, 223, 191 N.W.2d 725 (1971).

for the trial court to refuse defendant's request for the submission of battery as a lesser-included offense to this jury and to deny defendant's request that the jury be instructed on such lesser-included offense.

Since the case must be remanded for a new trial, it is not necessary to reach the order denying modification of sentence.

By the Court.—Order denying new trial and judgment of conviction reversed, and cause remanded for a new trial consistent with this opinion.

CITY OF BELOIT, Petitioner-Respondent, v. KALLAS, and others, Intervenors-Appellants: DEPARTMENT OF NATURAL RESOURCES, Respondent.

No. 75-374. Argued January 4, 1977.—
Decided February 15, 1977.
(Also reported in 250 N. W. 2d 342.)

1. **Municipal Corporations §52*—urban development—consolidation—annexation—status as legitimate concerns of state.**
Urban development and consolidation and annexation of towns and cities are legitimate concerns of state.

2. **Constitutional Law §36*—constitutionality of statutes—legislative balancing of interests—reluctance of court to interfere.**
Where legislature enacted statute in attempt to balance state's interest in public health against state's interest in urban development, review court will be reluctant to interfere with such legislative balancing of competing public policies.

3. **Municipal Corporations §52*—sewer system connection ordered by administrative agency—commencement of proceedings to annex town area—rejection of annexation by town electors—statute as not violating any constitutional provision.**
Statute providing that where connection of town area to city sewer system is ordered by administrative agency, city

*** See Callaghan's Wisconsin Digest, same topic and section number.**

may commence annexation proceedings to annex town area but that if town electors reject annexation to city, connection order may be voided, violated no constitutional proscription since provision for voiding of connection order did not permit town to make decision conflicting with state interests since legislature, in drafting statute, balanced state's interest in both public health and urban development. (Stats §144.07 (1m)).

4. **Municipal Corporations §52*—sewer system connection ordered by administrative agency—commencement of proceedings to annex town area—rejection of annexation by town electors —contention as to absence of knowledge by electors as to their power—absence of merit in contention.**
City's contention that town's electors were unaware that negative vote on proposed annexation with city would void administrative agency's sewer connection order was without merit since nothing in record supported such conclusion, proceedings leading to connection order and annexation petition were open to public and numerous public meetings were held.

APPEAL from a judgment of the circuit court for Dane county: NORRIS MALONEY, Circuit Judge. *Affirmed.*

FACTS.

This is a challenge by appellants, eleven electors of the town of Beloit (and the public intervenor for the state of Wisconsin) to the constitutionality of sec. 144.07 (1m), Stats. This section provides that where connection of a town area to a city sewer system is ordered by the state department of natural resources (DNR) the city may commence an annexation proceeding under sec. 66.024, Stats., to annex the town area. The statute further provides that if the town electors reject annexation to the city, the connection order is voided.

The facts are undisputed. On March 2, 1973, six residents of Rock county filed a complaint with the DNR pursuant to sec. 144.537, Stats., alleging residents in the

* See Callaghan's Wisconsin Digest, same topic and section number.

town of Beloit operated septic systems, cesspools, privies and outflows in soil unsuitable for such purposes, thereby polluting surface waters and creating a public health hazard. On November 16, 1973, following hearings and pursuant to sec. 144.07(1), Stats., the DNR ordered the city of Beloit to connect the town of Beloit to its sewage transport and treatment system.

On December 12, 1973, the city council of Beloit adopted a resolution, pursuant to sec. 144.07(1m), Stats., to petition the circuit court for Rock county, pursuant to sec. 66.024, Stats., for an order authorizing holding of an annexation referendum seeking to annex the town of Beloit to the city of Beloit. On December 14, 1973, the city filed a petition in the circuit court for Dane county, pursuant to ch. 227, Stats., seeking review of the DNR connection order of November 16, 1973. On April 9, 1974, the circuit court for Rock county (Circuit Judge ARTHUR L. LUEBKE) denied the city's petition for annexation, citing petitions signed by 523 of the town's 841 electors (62%) opposing the city's application for annexation.

On July 12, 1974, the city petitioned the circuit court for Dane county to declare the DNR connection order void, pursuant to sec. 144.07(1m), Stats. and to dismiss the prior petition for review filed pursuant to ch. 227, Stats. (On August 16, 1974, a stipulation of all interested parties was filed, permitting any persons affected by the pollution problem to file a statement and challenge the constitutionality of sec. 144.07(1m), Stats.) On October 9, 1974, the circuit court for Dane county, pursuant to sec. 227.16(1), Stats., named eleven persons, appellants on this appeal, as proper parties to challenge the constitutionality of sec. 144.07(1m), Stats.

On August 5, 1975, following submission of briefs by interested parties, the circuit court for Dane county (Circuit Judge NORRIS MALONEY) held sec. 144.07 (1m), Stats., to be constitutional, thus voiding the DNR

connection order of November 16, 1973. On August 12, 1975, judgment was entered to that effect. Appellants appeal from that judgment.

For the appellants there were briefs and oral argument by *Melvin L. Goldberg* of Madison.

For the respondent there was a brief by *Daniel T. Kelley* and *Hansen, Eggers, Berres & Kelley, S. C.* and oral argument by *Daniel T. Kelley,* all of Beloit. A brief amicus curiae was filed by *Jean G. Setterholm,* legal counsel, and *Paul J. Swain,* assistant legal counsel, of Madison, for League of Wisconsin Municipalities.

ROBERT W. HANSEN, J. The challenge here is to the constitutionality of sec. 144.07(1m), Stats., which provides:

"*(1m)* An order by the department for the connection of unincorporated territory to a city or village system or plant [NOTE: Reference is to a sewerage system or sewage or refuse disposal plant.] under this section shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under s. 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under s. 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum is denied under s. 66.024(2) or the referendum under s. 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective."

The constitutional challenge here raised is not to the conferring of power on a city or village to attempt annexation where in the absence of a connection order of

the DNR there would be no such power.[1] Rather the challenge raised is to the provision in the statute which voids the connection order if the electors in the town area affected by the order reject annexation to the city.[2] Appellants contend this provision permits local units of government to make decisions which may conflict with state interests.

Specifically, appellants contend the voiding-by-referendum provision permits local electors or local units of government to exercise too much control over ground water pollution by voiding the DNR connection order. Appellants claim such pollution is a matter of statewide, not local concern, or, if both, paramountly of statewide concern. Under our state constitution, the power to make laws is vested in the state legislature.[3] Counties are constitutionally empowered to exercise powers of "local, legislative and administrative character."[4] Cities and villages are empowered to "determine their local affairs and government,"[5] subject, however, "to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village."[6] Thus, as to such matters of statewide concern, the power of cities and villages is constitutionally made subservient to legislative enactments.

In determining the constitutionally apportioned powers between state and local units of government, appellants

[1] App. Reply Brief, page 9, stating: "To the extent that sec. 144.07(1m), Stats., confers power to attempt annexation where otherwise there would be no power, we have no quarrels or arguments."

[2] *Id.* at page 9, stating: "It is only to the extent that the statute permits the voiding of lawful orders issued by the executive branch of the state government by local electors that we have challenged this law."

[3] Art. IV, sec. 1, Wis. Const.

[4] Art. IV, sec. 22, Wis. Const.

[5] Art. XI, sec. 3, Wis. Const.

[6] *Id.*

concede it is constitutional for local units of government to exercise power, pursuant to defined procedures, over matters of statewide concern where there is no potential conflict between the two levels. For example, our court has held it constitutional for local units of government to (1) engage in industrial development projects;[7] (2) to establish and enforce shoreland zoning ordinances;[8] and (3) to establish and enforce safety ordinances dealing with the use of navigable waters.[9]

However, appellants contend that, under sec. 144.07 (1m), there is a potential conflict between local interests, such as preservation of a viable tax base, and statewide concerns, such as public health, and the quality of navigable and other surface waters and ground water. Thus locating the local interests and statewide interest affected by sec. 144.07(1m), appellants see the test to be applied in determining the validity of delegation of legislative power to be that of which interest is paramount.[10] Under that approach, the narrow question left to be resolved would be whether the voiding-by-rejection-of-annexation provision was "assigning a right to block advance of paramount interests."[11]

Following this reasoning pollution control is clearly a matter of statewide concern[12] and the interests on the

[7] *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 205 N.W.2d 784 (1973).

[8] *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972).

[9] *City of Madison v. Tolzmann*, 7 Wis.2d 570, 97 N.W.2d 513 (1959).

[10] *Muench v. Public Service Comm.*, 261 Wis. 492, 515g, 53 N.W.2d 514, 55 N.W.2d 40, 43 (1952).

[11] *Menzer v. Elkhart Lake*, 51 Wis.2d 70, 78, 186 N.W.2d 290, 294 (1971).

[12] See: Sec. 144.025(1), Stats., in part providing: ". . . Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether

other side of the scale are matters of purely local concern relating to the tax base. As such, it would not be difficult to find that voiding of a sewerage connection order to serve such purely local concerns "blocked" advancement of the paramount interest involved.

[1]

However, more is involved in the enactment of sec. 144.07(1m) than a legislative effort to harmonize a single matter of statewide concern with matters of purely local concern. Also to be put on the scales in reviewing this statute is a second matter of statewide concern, to wit, urban development or expansion via annexation. The statute deals with and provides for annexation by approval of electors of the affected area as well as with the sewerage system connection order to aid pollution control. Our court has held that "Consolidation, as annexation, is a matter of state-wide concern."[13]

[2]

We thus have in the challenged statute, not one matter of statewide concern, but two such matters. It is two competing public policies in areas of statewide concern which the legislature sought to weigh, balance and harmonize. Speaking generally, our court has indicated a judicial reluctance to interfere with such legislative balancing of competing public policies, stating: "We are

home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this act is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this act and all rules and orders promulgated pursuant thereto shall be liberally construed in favor of the policy objectives set forth in this act. . . ."

[13] *Milwaukee v. Sewerage Comm.*, 268 Wis. 342, 355, 67 N.W.2d 624, 631 (1954).

uneasy with this balancing and weighing concept of the judicial role in testing the constitutionality of a police power statute."[14] The connection order of the DNR and the statute under which it was issued, sec. 144.07 (1m), are within the area of proper exercise of police power. Once within this area our court has held ". . . it is for the legislature to determine what regulations, restraints or prohibitions are reasonably required to protect the public safety, . . ."[15] and adding, "'. . . such questions [as to the justice, wisdom, policy, necessity or expediency of a law which is within its power to enact] are not open to inquiry by the courts. . . .'"[16]

Our court has dealt specifically with the crunch between these two matters of statewide concern—urban development and pollution control. It did so in 1969 in the case of *In re City of Fond du Lac.*[17] That was an action on behalf of a town by minority electors residing outside of a populous city to establish, pursuant to sec. 66.20, Stats., a metropolitan sewerage district to include the entire territory of both municipalities bordering on a lake. We found in that case an unlawful delegation of legislative authority to the judiciary.[18]

This court there discussed the balancing of the urban development matter with the competing matter of making available services such as water supply or sewage treatment, stating:

"All of the major cities and most of the smaller cities and villages in Wisconsin are surrounded by fringe areas with population densities at or near the normal city level. Even though these fringe areas appear to be a part of

[14] *Bisenius v. Karns,* 42 Wis.2d 42, 54, 165 N.W.2d 377, 383 (1969), appeal dismissed 395 U.S. 709 (1969).

[15] *Id.* at 54, 165 N.W.2d at 383.

[16] *Id.* at 54, n. 21, 165 N.W.2d at 383, n. 21, quoting 16 C.J.S., *Constitutional Law,* pages 775, 776, sec. 154.

[17] 42 Wis.2d 323, 166 N.W.2d 225 (1969).

[18] *Id.* at 333, 166 N.W.2d at 229.

the city, they are governed, taxed and provided services by the town. No populated fringe area may become part of the city until the majority of the electors and/or property owners in a particular area desire to annex. Cities and villages invariably offer a higher level of services to their citizens as compared to the surrounding town, and almost without exception it follows that costs of municipal services are correspondingly higher. The argument of the cities is that if the surrounding areas can attain the desired city services without becoming a part of the city, the growth of the cities is likely to be forever stifled, and the residents of metropolitan areas will be forever carrying an inequitable percentage of the tax load."[19]

We recognized in the *Fond du Lac Case* the coexistence of two matters of statewide concern: (1) The providing of a single vital public service, such as water or sewage disposal, to the area surrounding a city or village, and (2) the growth or expansion of cities or villages, via annexation, bringing all municipal services to areas annexed. This court did not apply the test of paramountcy in that case, *i.e.,* we did not find one of the matters involved to be paramount and blocking consideration given the other.

Of what we there termed "the hidden problem presented" balancing the two competing statewide interests —we held: "It is not to be solved by judicial determination."[20] Noting the legislature had already stated that a metropolitan sewerage district is a legitimate solution to an areawide pollution problem, we concluded: "Thus the court is foreclosed from making any judgment as to how the formation of a sewerage district will affect the expansion of municipalities in the future."[21]

In the *Fond du Lac Case* the matter of accommodating or providing for either or both of the two matters of

[19] *Id.* at 333, 166 N.W.2d at 229.

[20] *Id.* at 333, 166 N.W.2d at 229.

[21] *Id.* at 333, 166 N.W.2d at 229.

statewide concern involved—providing sewage disposal service and providing for municipality expansion—was left to the legislature, not the courts, to resolve. The legislature was invited to decide the appropriate public policy as to the coexistence of the two matters of statewide concern.

Given this invitation to act, the legislature took steps that led to the enactment of the present sec. 144.07(1m), Stats. In the 1969 legislative session, Senate Bill 758 was introduced dealing with this exact problem. While it was not enacted into law at that session, it was assigned to the local government committee of the state senate for study. Following public hearings in 1970, that committee directed the legislative council to draft an alternative measure for consideration. The alternate proposal submitted by the council became Senate Bill 50 which was enacted into law, becoming ch. 89, Laws of 1971, creating the present sec. 144.07(1m), Stats.

Thus it was at the invitation of this court that the legislature acted to balance and accommodate two matters of statewide concern in a single piece of legislation. Inviting the effort to be made does not assure the constitutional validity of the result reached. However, we find no constitutional infirmity in the response of the legislature to the invitation to act. We need not and do not comment on whether the accommodation of two conflicting matters of statewide concern, contained in sec. 144.07(1m), is the best of all possible accommodations or compromises.

[3]

We do hold that no constitutional proscription was violated in the state legislature providing that an administrative agency could order the providing of a sewage disposal service to an area outside a city or village by such city or village, with such connection order to be voided if the residents of the area affected voted not to be annexed to the city or village ordered to provide the single service.

Alternatively, appellants submit that, even if constitutional in other senses, sec. 144.07(1m) "would have to fall since it does not guarantee that electors will be apprised of the consequence of their decision when exercising their power thereunder."[22] In effect, appellants are contending the town's electors did not know that a "No" vote cast against annexation with the city had the effect of voiding the DNR connection order. There is nothing in this record to support such conclusion, and no legal authority we can locate for indulging such assumption. In fact, the presumption is that required publicity was given to a referendum measure before the election was held.[23] (In the case before us, that would be before the signed petitions were received.)

[4]

A township vote on becoming annexed to a contiguous populous community does not recommend itself as the type of referendum vote in which those voting would likely be unconcerned or uninformed of the consequences of their vote. The thirty-day limit on commencement of annexation proceedings by the city following issuance of a connection order, as provided in sec. 144.07(1m) and here complied with, insures a temporal proximity that makes evident the connection between the DNR order and the annexation proceeding. Moreover, the proceedings leading to both connection order and annexation petition were not conducted in secret or behind closed doors. There were numerous hearings and notices to the public, the town and the affected residents.[24] No authority at law and no basis in fact is here suggested for a requirement, on constitutional grounds, of greater notice of or closer association between the two procedures—one for securing the completion order and the

[22] App. Brief at page 23.

[23] *See:* 82 C.J.S., *Statutes*, sec. 135, page 236.

[24] As required by secs. 144.07(1m), 66.024(1)(b), 144.537, 227.13 and 227.14, Stats.

other for voting on annexation—than was here required and provided.

For the foregoing reasons, the constitutionality of sec. 144.07 (1m), Stats., is therefore upheld.

By the Court.—Judgment affirmed.

SANFORD, Plaintiff in error, v. STATE, Defendant in error.

No. 75-861-CR. Argued January 6, 1977.—
Decided February 15, 1977.
(Also reported in 250 N. W. 2d 348.)

1. **Criminal Law and Procedure §304*—evidence of prior crimes—admissibility for identification purposes—showing method of operation.**
Evidence of other crimes may be admitted for the limited purpose of identifying defendant by means of the method of operation as the person who committed particular crime charged (Stats §904.04(2)).

2. **Criminal Law and Procedure §304*—evidence of prior crimes—admissibility.**
Evidence of prior crimes is admissible when such evidence is particularly probative in showing elements of specific crime charged, intent, identity, system of criminal activity, and to impeach credibility.

3. **Criminal Law and Procedure §304*—evidence of prior crimes—admissibility for identification purposes—proof as to other like occurrences.**
With respect to rule that evidence of prior crimes is admissible when such evidence is particularly probative in showing, inter alia, elements of specific crime charged, intent, identity or system of criminal activity, a greater latitude of proof as to other like occurrences is allowed in cases of sexual crimes.

4. **Criminal Law and Procedure §304*—evidence of prior crimes—rape prosecution—evidence as to prior sexual assault—propriety of admission—prior offense of like or unique nature.**
Where, in rape case, similarities between rape alleged and prior incident involving defendant included both victims

* See Callaghan's Wisconsin Digest, same topic and section number.

emerging from bus at night and walking toward their homes, innocuous questions asked of each victim by her attacker to stop and hold her attention, each victim grabbed from behind and an object stuck in her back which assailant said was a gun, a garage selected as place for assault, a threat to kill or shoot in order to insure silence, both victims ordered to disrobe and both required to lie down on a jacket, supreme court would reject defense argument that evidence as to prior sexual assault was improperly admitted because it lacked probativeness in not being similar enough in character to crime charged and would hold that prior incident met test of probativeness as a "prior offense of a like or unique nature."

5. **Criminal Law and Procedure §304*—evidence of prior crimes—probative value—elements involved.**
With respect to admissibility in criminal case of prior offense, probative value of prior incident depends in part upon its nearness in time, place, and circumstances to alleged crime or element sought to be proved.

6. **Criminal Law and Procedure §275*—evidence—relevancy—remoteness in time—effect.**
While remoteness in point of time does not necessarily render evidence irrelevant, it may do so where lapsed time is so great as to negative all rational or logical connection between fact sought to be proved and remote evidence offered in proof thereof.

7. **Criminal Law and Procedure §275*—evidence—relevancy—remoteness in time—discretion as to admission of evidence.**
Whether or not evidence is to be rejected because of remoteness rests in trial court's discretion, and in exercising such discretion court must balance element of remoteness against uniqueness of prior act of which evidence is offered.

8. **Criminal Law and Procedure §304*—evidence of prior crimes—rape prosecution—evidence as to prior sexual assault—propriety of admission—remoteness in time—one and one-half year period—effect.**
Supreme court would agree with trial court finding in rape case that evidence of prior sexual assault occurring one and one-half years earlier was not so remote in time as to render it without probative value, especially since any issue as to remoteness of prior incident was almost completely defused

* See Callaghan's Wisconsin Digest, same topic and section number.