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Code Practice - Directed Verdicts Under Comparative Negligence Statute

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RECENT DECISIONS

Code Practice—Directed Verdicts Under the Comparative Negligence Statute.—Action was brought by the plaintiff against the defendant Transport Company for personal injuries sustained from a collision between a truck driven by the plaintiff and defendant's trolley bus. Plaintiff's truck was east-bound on East Knapp street and defendant's trolley bus was north-bound on North Milwaukee street in the city of Milwaukee. The collision occurred at the intersection of these streets. A stop sign governs traffic of vehicles running east and west on East Knapp street. The jury found the operator of the trolley bus guilty of negligence as to the rate of speed at which he entered the intersection and as to the manner in which he controlled the movement of the trolley bus after it entered the intersection. Plaintiff was found negligent as to the manner in which he controlled his truck after he entered the intersection. The proportion of the plaintiff's causal negligence was set at 33 1-3 per cent, defendant's at 66 2-3 per cent. Upon appeal the defendant Transport Company claimed that the plaintiff's causal negligence was, as a matter of law, equal to or greater than that of the defendant's operator. The Supreme Court *held* that no rule of thumb can be laid down with respect to the apportionment of neglignece between a plaintiff and a defendant and that in this case the court could not hold, under the evidence, that the plaintiff's negligence was as a matter of law equal to that of the defendant. *Campanelli* v. *Milwaukee Electric Ry. & Transport Co.* 8 N. W. (2d) 390 (1943).

The rule set down by the court in the instant case is consistent with every decision handed down since the passage of the Comparative Negligence Statute Sec. 330.045 Wis. Stats. in 1931. The general rule with respect to directed verdicts under this statute is, perhaps, best stated in the language of the court in *Hansbury* v. *Dunn*, 230 Wis. 626, 284 N. W. 556 (1939): "It is true that the court may be able to determine from the record that two items of negligence of the same character are equal in quality or that as a matter of law one of them is greater than the other. This is more apt to be possible in cases where speed, lookout, or violation of some particular rule of the road is involved. It is less apt to be possible in cases involving findings of negligence with respect to management and control. In any event, it must be possible from all the circumstances of the case as disclosed by the record for this court to be able to say that the negligences are equal in quality and that is why this court has said that it can rarely come to this conclusion. We are satisfied, however, that the court may not adopt a rule of thumb that will check off automatically lookout against lookout, control against control, etc., holding these items equal in every case."

While it is certainly clear from the language quoted above that each case must rest upon its own facts and circumstances, the cases, looked upon as units, point to a few general rules. The first, and, perhaps, the broadest of these is that whenever the character and quality of the negligence of the plaintiff and defendant are different it is a matter for the jury alone. In the case of *Honore* v. *Ludwig*, 211 Wis. 354, 247 N. W. 335 (1933), the defendant was found negligent as to speed, lookout, and control, and the plaintiff as to lookout, control and disregard for other users of the highway. The court held that although the charges of negligence were equal in number, the character of the charges were different and the matter should, in such cases, be left for the jury. The same conclusion was reached in the following cases: *Brown* v. *Haertel*, 210 Wis. 345, 244 N. W. 630, (1932); *Steidle* v. *Caliebe*, 215 Wis. 582, 254 (1934); *McGuiggan* v. *Hiller Brothers* 209 Wis. 402, 245 N. W. 97, (1931); *Bent* v. *Jonet*, 213 Wis. 635, 252 N. W. 290; *Doepke* v. *Reimer*, 217 Wis. 49, 258 N. W. 345 (1935).

Another group of cases indicate that where the plaintiff and the defendant are negligent in an equal number of respects, the negligence of one will be held equal to that of the other so long as the quality of the one does not outweigh the other. In the case of *Peters V. Chicago, Milwaukee, St. Paul & Pacific RR. Co.*, 230 Wis. 299, 283 N. W. 803, (1939), the plaintiff was found negligent in failing to look out before entering upon a railroad crossing, and the defendant was found negligent in failing to give a signal. The court held the negligence of both equal as a matter of law. Again, in *Geyer* v. *Milwaukee E. R. & L. Co.*, 230 Wis. 347, 284 N. W. 1, (1939), the negligence of the plaintiff in failing to yield the right of way was held equal to that of the defendant who failed to keep a proper lookout. Decisions to like effect are: *Sikora* v. *Great Northern RR. Co.*, 230 Wis. 283, 282 N. W. 588, (1939); *Evanich* v. *Milwaukee E. R. & L. Co.* 237 Wis. 111, 295 N. W. 44, (1941); *DuBois* v. *Johnson*, 238 Wis. 161, 298 N. W. 590, (1941). In cases where the charges of negligence are equal in number but where the particular kind of negligence on the part of one outweighs that of the other, the courts will hold such negligence to be greater as a matter of law. Such was the case of *Beatti* v. *Strosser*, 240 Wis. 65, 2 N. W. 2nd 713 (1942), in which the plaintiff, a minor child, ran out between parked cars and was struck by the defendant's car. Both parties were found negligent as to lookout but the negligence of the plaintiff because of its peculiar character was held greater as a matter of law.

Still another group of cases may be viewed as a unit to discover that even though one party may be found negligent in the greater number of respects, yet his total negligence will be held less as a matter of law than one who is guilty of the fewer charges of negligence but whose negli-

gence is of such outrageous character as to completely outweigh all the charges against the other. A good example within this class of cases is *Hustad* v. *Evetts*, 230 Wis. 292, 282 N. W. 595, (1939). In this case, the plaintiff was an experienced milk man. He stepped from his wagon without looking for traffic and was found negligent in this respect. The defendant whose automobile struck the plaintiff as he did so step off his wagon was found negligent as to speed, lookout and management. The court held that the plaintiff's negligence, by its very character, was as a matter of law greater than that of the defendant. The following cases are similar in effect: *Wedecky* v. *Grimes* 229 Wis. 448, 282 N. W. 593, (1938); *Noyes* v. *Milwaukee E. R. & L. Co.*, 237 Wis. 141, 294 N. W. 63, (1941).

Lastly there are a few cases which stand as individual holdings and do not, from the point of their outcome, fall into any of the groups of cases indicated herein. In *Patterson* v. *Chicago, St. Pa., Milwaukee & O. R. Co.* 236 Wis. 205, 294 N. W. 63, (1940), the plaintiff was at a place to board the defendant's train. In order to do so he had to cross certain tracks. He was struck and injured. Plaintiff was found negligent with respect to lookout. The defendant was found negligent in failing to keep a proper guard for the protection of the defendant. The court held that the negligence of the plaintiff was as a matter of law equal to that of the defendant. There was a strong dissent by three judges in this case. A like decision with a dissent is *Hoskins* v. *Thenell*, 232 Wis. 97, 286 N. W. 555, (1939).

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Federal Jurisdiction—Common Law Crimes Against the United States.—In *United States* v. *Jerome*, 87 L. Ed. 433 (1943),—U.S.—, S. Ct. —, the defendant was charged with violating section 2(a) of the bank robbery act (May 18, 1934) 48 Stat. 783 c. 304 (August 24, 1937) 50 stat. 749, c. 747, 12 U.S.C.A. 588b which provides in part that "whoever shall enter or attempt to enter any bank or any building used in whole or in part as a bank with intent to ocmmit in such bank or building or part thereof, so used, any felony or larceny shall be fined not more than $5,000.00 or imprisoned for more than twenty years or both." The defendant was an army officer who while attempting to borrow money from a National Bank was informed that he would be required to obtain the signature of an officer of at least equal rank as surety upon his note. The defendant forged the signature of an officer of superior rank. The United States Supreme Court reversed the decision of the United States Circuit Court of Appeals and quashed the indictment on the grounds that the crime of forgery, although a felony under the laws of Vermont,