Marquette Law Review

Volume 17
Issue 4 *June 1933*

Article 8

1933

Comparative Negligence - Reduction of Damages

Richard F. Mooney

In the principal case, the recording act protected attaching creditors. The mortgage therein was given to secure an antecedent debt. It was executed more than four months prior to the filing of the petition, when the bankrupt was in fact insolvent; and, as the court found, the creditor had reason to know he was insolvent. It was recorded within the four months period. It is suggested that the court may well deny protection to creditors situated as the plaintiff therein since the security was never bargained for when the loan was made. Had the creditor filed his mortgage immediately, he would have been protected. His failure to record until within the four months period, gives the court an opportunity to deny protection to one who did not originally bargain for the security. See *In re Skepoka,* 32 F. (2d) 1012 (D.C. Neb., 1929).

RICHARD A. MCDERMOTT.

COMPARATIVE NEGLIGENCE—REDUCTION OF DAMAGES.—Plaintiff sued to recover damages for injuries caused by defendant's negligence. The jury returned a special verdict finding that defendant was negligent and that such negligence was the proximate cause of plaintiff's injuries; that plaintiff was also negligent and that his negligence also contributed to his injuries; that the total amount of plaintiff's damages were $4,220; that the proportion of negligence attributable to plaintiff was 25%. Judgment was entered in favor of plaintiff for 75% of the total injury; appeal. *Held,* judgment affirmed. *Engebrecht* v. *Bradley,* (Wis. 1933) 247 N.W. 451.

The instant case was decided under the Comparative Negligence Law, section 331.045, Wis. Stats. When the jury finds that the negligence of the defendant proximately causing the injury is greater than the negligence of the plaintiff proximately causing the injury, the correct method of determining the damages due plaintiff is (1) to find the total damages suffered by the plaintiff, and (2) to reduce such damages by the proportion which plaintiff's negligence bears to the combined negligence of plaintiff and defendant. [This was the method suggested by Professor Campbell in "Wisconsin's Comparative Negligence Law, 7 Wis. Law Rev. 223 at 228, 243 (1932), before any decision had been made by the Supreme Court. The same construction has been given to statutes with similar provisions regarding the reduction of damages, in other jurisdictions. *Norfolk & W. Ry Co.* v. *Ernest,* 229 U.S. 114, 33 Sup. Ct. 654, 57 L.Ed. 1097 (1913); *Tendall* v. *Davis,* 129 Miss. 30, 91 So. 701 (1922).] In *Paluczak* v. *Jones,* (Wis. 1932) 245 N.W. 655 the court states that "one of the parties may recover when there is a finding that his negligence is less than that of the other, but his recovery must be reduced in such ratio as his negligence bears to the other's." This would mean that if plaintiff were 25% negligent and defendant 75%, and the total damages suffered by plaintiff were $1,000; the plaintiff could recover that proportion of $1,000 as 25% bears to 75%, or $666.66. This statement is withdrawn by the principal case, and the morrect method is indicated, as above, whereby plaintiff recovers that proportion of $1,000 as 25% bears to 25% plus 75% or $750.

The Court considered the new law for the first time in *Brown* v. *Haertel,* (Wis. 1932) 244 N.W. 630; although it found as a matter of law that the plaintiff was guilty of contributory negligence, the Court refused to find as a matter of law that such negligence was equal to or greater than defendant's negligence, holding that except for unusual cases where the negligence of both

parties is of precisely the same kind and character, it was properly the province of the jury to determine the proportion of negligence. In affirmance of this proposition the instant case states, "We cannot say that the respondent's negligence, as a matter of law, is equal to or greater than that of the appellant. Necessarily these acts differ in quality and the judgment of the jury under circumstances such as these is controlling." See also *Paluczak* v. *Jones,* supra; *McGuiggan* v. *Hiller Bros.,* (Wis. 1932) 245 N.W. 97.

The statute is not retroactive and in no way affects accidents happening before its passage. *Brewster* v. *Ludtke,* (Wis. 1933) 247 N.W. 449; see 4 Bulletin of the State Bar Ass'n. 232 (1931). If the defendant counterclaims, his case is determined in the same manner as if he were the plaintiff. *Paluczak* v. *Jones,* supra; 4 Bulletin of State Bar Ass'n. 234 (1931). Before the passage of the statute, the plaintiff, guilty of ordinary negligence, could recover full damages from the defendant guilty of gross negligence. *Tomasik* v. *Lanferman,* 206 Wis. 94, 238 N.W. 857 (1931); Professor Campbell in his well considered article, "Wisconsin's Comparative Negligence Law, op. cit., pp. 232-234, states that the statute will probably not change this rule, because gross negligence in Wisconsin, characterized by wanton, wilful misconduct, is not negligence under the terms of the statute. No proportionate reduction of damages then should be made where the defendant is guilty of gross negligence, and the plaintiff merely of ordinary negligence. In *Cox* v. *Chicago M. & St. P. R. Co.,* 159 Wis. 491, 149 N.W. 709 (1915), where the action was brought under section 192.50 (3), Wis. Stats. (the comparative negligence law applicable to actions between railroads and their employees), the court held that assumption of risk by the employee, in that he should have known of the condition and comprehend the danger, should be classed as contributory negligence, going to reduce his damages, and not as a complete defense to the action. (For a distinction between two types of assumption of risk, and a classification of one as contributory negligence under the statute, and the other as a complete bar to the action, see Campbell, "Wisconsin's Comparative Negligence Law," op. cit., at pp. 235-241.)

The use of the special verdict in cases under the statute, as in the principal case, to be the only practicable method. See Judge Werner's suggestions in 4 Bulletin of the State Bar Ass'n. 233 (1931); Wickham, *Proceedings of the Board of Circuit Judges,* 20 (Jan. 1932); *Report of the Committee of Circuit Judges,* (Feb. 1932).

RICHARD F. MOONEY.

CONSTITUTIONAL LAW—DECLARATORY JUDGMENTS.—Appellant brought suit in the chancery court of Davidson County, Tenn., under the Uniform Declaratory Judgments Act of that state to secure a judicial declaration that a state excise tax levied on the storage of gasoline is, as applied to appellant, invalid under the commerce clause and Fourteenth Amendment of the Federal Constitution. A decree for appellees was affirmed by the state court and the case was carried on appeal to the United States Supreme Court. The question presented was whether this case, instituted under the Declaratory Judgments Act, presented a case or controversy, within the constitutional provision. *Held,* judgment affirmed. A case or controversy was presented, sufficient to give the Supreme Court jurisdiction on appeal. *Nashville, C. & St. L. Ry.* v. *Wallace,* 53 Sup. Ct. 345, 77 L. Ed. 444 (1933).