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Article 10

# Practice: Special Verdict: Contributory Negligence

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and after hearing testimony in open court, he made an order on May 9, 1925, wherein he purported to set aside the judgment that had been affirmed by the circuit court of appeals. Petitioners thereupon applied to the circuit court of appeals for a writ of mandamus to reinstate the judgment but that court held that it had no jurisdiction in the case.[4]

The Supreme Court of the United States reversed the holding of the circuit court of appeals and held that the writ prayed for should issue. The court says:

> However strong may have been the convictions of the district judge that injustice would be done by inforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. The power of the court to set aside its judgment on this ground ended with the term.

The court cites *Re Metropolitan Trust Company*,[5] wherein it was held that mandamus is the proper remedy where a Federal circuit court has exceeded its power by vacating a judgment after the term. The court, in the case under discussion, held that the District Court was without jurisdiction to vacate the judgment and that mandamus was the proper remedy and that the circuit court of appeals had power to issue such a writ. The court said that the Circuit Court of Appeals was an appellate court and as such had the power to require its judgment to be enforced. *Re Potts*.[6] In *McClelland* v. *Carland*[7] it was held that mandamus may be issued by a circuit court of appeals in aid of its appellate jurisdiction. The court concluded the decision by saying again that the District Court "made an unwarranted attempt to set aside a judgment which it had no jurisdiction to touch."

SAM GOLDENBERG

**Practice: Special Verdict: Contributory Negligence.**

A decision of great importance and interest has been recently handed down by the Supreme Court of the State of Wisconsin in reviewing the case of *Berrafato* v. *Exner*.[1] There were two separate and distinct actions brought by two plaintiffs against the defendant Exner, to recover damages sustained as a result of an automobile collision on a highway. The plaintiff Berrafato was riding in the automobile which was then and there owned and operated by the Plaintiff Harvey, and sustained personal injuries by reason of the collision. The cases were tried together and one verdict was returned covering the issues in both cases.

The jury found in answering the questions in the special verdict, that the defendant's excessive speed and failure to yield one-half of the roadway constituted the proximate cause of the collision. However, there was a manifest inconsistency in the verdict relating to the negligence of the two plaintiffs. The jury found that Berrafato, who was a passenger and had nothing to do with the driving or managing of the car, was guilty of negligence in his failure to keep a proper look-

[4] 15 F. (2d) 137.

[5] 218 U.S. 312, 321, 54 L. ed. 1051, 1055, 31 Sup. Ct. Rep. 18.

[6] 166 U.S. 263 41 L. ed. 994, 17 Sup. Ct. Rep. 520.

[7] 217 U.S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501.

[1] *Berrafato* v. *Exner*, 216 N.W. 165; *Harvey* v. *Exner*, 216 N.W. 165.

out, and such failure was found to proximately contribute to his injury. The jury also found that the driver of the car failed to keep a proper lookout, but that such failure did not constitute a proximate cause of the collision.

There was an obvious inconsistency in these findings, because the jury found that the failure of the driver to keep a proper lookout did not constitute a proximate cause of the collision, whereas, it found that the failure of Berrafato to keep a proper lookout did constitute a proximate cause of the collision. The trial court felt there was not sufficient evidence upon which to find either of the plaintiffs guilty of negligence and that the jury did not intend to find Berrafato guilty of contributory negligence, so he changed the answer relating to Berrafato's negligence from "yes" to "no," and rendered judgment in favor of both plaintiffs. The defendant appealed from the judgment so rendered, whereupon the Supreme Court reversed the decision of the lower court with instructions to render judgment in favor of the defendant.

Upon appeal the Supreme Court, after a thorough consideration of the testimony in the case arrived at the conclusion that there was ample evidence in the case to support a finding of negligence on the part of both plaintiffs proximately contributing to the collision, and explained the failure of the jury to make finding of such negligence against the plaintiff Harvey because the trial court in his charge had nowhere instructed the jury that there might be more than one proximate cause of a collision, and the jury therefore believed that having found the defendant guilty of negligence which was the proximate cause of the collision, they could not then find that the plaintiff was guilty of negligence which was also the proximate cause of the collision.

In reviewing the case the Supreme Court suggests that the better practice for the trial courts to pursue, would be to so frame the questions in the special verdict as to require the jury to find as matters of fact, the essential elements necessary to constitute legal negligence, rather to give a technical definition upon the point and say no more.

They suggest that the first question may ask the jury to find whether the defendant failed to exercise such care as the great mass of mankind ordinarily exercises under the same or similar circumstances, with reference to the particular conduct complained of; question two can inquire as to whether the plaintiff's injury was the natural and probable result of such want of ordinary care on the part of the defendant; and question three may inquire whether the defendant ought, as a person of ordinary intelligence and prudence reasonably to have foreseen that injury to a traveler upon the highway in question may probably result from such want of care on his part. In splitting up the verdict in this manner the court may avoid the trouble of defining the technical expression of proximate cause. Where there are numerous grounds of negligence alleged and litigated the verdict will be very long, but it will be a verdict easily understood and followed by the jury, and it will greatly facilitate their labors.

The court commends this form of verdict to the trial judges, because throughout such a verdict, the jury are dealing solely with matters of fact, and they are not called upon to dispute among themselves questions of law. The court recommends that the same method be

adopted in the matter of submitting the question of contributory negligence.

In recommending that the questions in the special verdict on the plaintiff's contributory negligence be split up, the Supreme Court makes a departure from the long practiced method of submitting but one question in the verdict on that point. Heretofore, the Wisconsin courts had regarded the correct practice to be the submission of but one question in the special verdict on the plaintiff's contributory negligence.[2] In the case of *Harper* v. *Holcomb*,[3] the court said, "contributory negligence has been uniformly treated as a single fact which may be covered in a special verdict by a single question, and this practice has been followed so long as to become in effect a part of the special verdict statute."

This departure from the old practice is probably due to the fact that the Supreme Court has seen the great possibilities of a jury misconstruing a general question on contributory negligence. Where the matter is split up into several questions in the special verdict, the jury is bound to come to a more accurate decision after deliberating upon and deciding questions which relate to particular specific acts or omissions on the part of the plaintiff which are allegedly negligent.

In conforming with the opinion in this case, there is no doubt but what trial courts will find that better results are obtained, and that the results thus obtained are more favorable to both plaintiff and defendant.

ALEXANDER H. HURLEY

**Process: Judgment: Payment: Sales Evidence: Hypothetical Questions.**

Action for damages for injury claimed to be caused to hogs by feeding a produce purchased from defendant. Trial to a jury. Verdict and judgment for plaintiff. The defendants appeal.

The appellant H. C. Moorman is engaged in the business of manufacturing livestock remedies under the name and style of "National Live Stock Remedy Co. (not Inc.)." The principal place of business is Chicago. Said company sold its products directly to the consumer, through agents, and one L. A. (Lute) Meyers, of Webster City, Iowa, was such a salesman.

Service of the original notice in this cause was had upon Meyers, he being described in the return of service as "agent of said corporation." The appellants entered a special appearance and by motion attacked the jurisdiction of the court, contending that Meyers was not such an agent upon whom service can be had and that the appellants never had an office or agency in Webster City. Appellants asked that motion be quashed. The court overruled the motion. Thereafter the appellants filed answer and trial was had. It is contended that there was an error as to this matter. Court held that error, if any, was waived by the subsequent actions of the appellants.[1]

After verdict the appellants filed motion in arrest of judgment, and for judgment not withstanding the verdict, based upon the grounds

[2] 161 Wis. 55.

[3] 146 Wis. 183.

[1] *Scott* v. *Price Bros. Co. et al.* (Iowa) 217 N.W. 75.