Process: Judgment: Payment: Sales Evidence: Hypothetical Questions

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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. In the case of Harper v. Holcomb, 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


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.

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

2161 Wis. 55.

3 146 Wis. 183.

1 Scott v. Price Bros. Co. et al. (Iowa) 217 N.W. 75.
“that there is no allegation in the petition that the damages suffered were unpaid and that there is no allegation of freedom from contributory negligence on the part of appellee.” The court held that the petition does allege freedom from contributory negligence and payment is an affirmative defense to be raised by the defendant. The motion was properly overruled as to these grounds.⁵

The court in one of its instructions told the jury that, if it had been proved by a preponderance of the evidence that the “National Hog Powder” for which the note was given, was without value and was worthless for the purpose sold, then in that case the appellants could not recover upon their counter-claim. Manifestly, the court held this instruction to be correct.⁴

The appellant complains because the court permitted experts to answer hypothetical questions before there was evidence substantiating all matters assumed therein. The appellee was absent during the first day or two of the trial, and this procedure was adopted in order to expedite the trial. Evidence is frequently admitted out of order and it does not constitute error. In Mucci v. Houghton, 89 Iowa, 608, 57 N.W. 305, it is held not to be error to allow hypothetical questions to be asked, based on facts not yet shown, provided such facts are subsequently shown in the progress of the trial.

Asking experts by propounding the following hypothetical question, “What, in your judgment caused the injury and death of the animals I have described?” held improper as a clear invasion of the province of the jury, and left nothing for the latter to determine. The answer of the witness would decide the whole question. Such a question has been repeatedly condemned by this court.⁴ The objection by the appellant that “the question was hypothetical, incompetent, irrelevant, immaterial and based upon no facts, or state of facts, in the record, or at least not founded upon a sufficient state of facts,” held too general to raise a question that it was improper as invading the province of the jury, therefore court held it was not reversible error.

The appellee offered evidence of certain witnesses who were farmers and hog raisers. They bought the powder from the appellants, but the results were different, also the powder was of different shades and they testified as to a difference in the coarseness or fineness of the powder. Proper objections were made to all this testimony. The objections were overruled. Court held that the objections were timely. The admission of this testimony was prejudicial to the appellants and violated well-established and well-recognized rules. In the first place, there is no showing whatever that the powder that the witness received was identical with the powder that was sold the appellee, except that the company used one formula.

But aside from this, there is no showing that the witness’ hogs were of the same kind or age or were in the same condition physically

⁴Howerton v. Augustine, 130 Iowa 389, 106 N.W. 941.
⁵Swift and Co. v. Redhead, 147 Iowa 94, 122 N.W. 140.
⁷Brier v. Davis, 122 Iowa 59, 96 N.W. 983.
as the hogs of the appellee. No showing that the hogs of the witnesses were fed and cared for in the same manner as the hogs of the appellee.

In order that there may be proof that similar causes produce like results there must also be proof of substantial similarity of all the conditions that might enter in or affect the result. Unless these are shown the matter necessarily becomes one of conjecture and speculation. The court has held repeatedly that such evidence is not admissible.6

For the error pointed out, the case must be reversed.

ALBERT A. MAYER

Workman’s Compensation Act: Township Road Superintendent; Master and Servant.

A recent case worthy of note is found in the advance sheets of the North Western Reporter4 and decided by the Supreme Court of Iowa. A township road superintendent in Iowa received injuries in the course of his official duties, and sought to hold the township liable, under the provisions of the Workmen’s Compensation Act of that state.

The court decided that the township was not liable, for a two-fold reason: first of all, the township, in the state of Iowa, does not fall within the definition of “employer” within the Workmen’s Compensation Statute;2 secondly, a township road superintendent is an “official,” and not an “employee” within the terms of the statute there.3

The statutes of Wisconsin exclude, likewise, a township road superintendent from participation in the effects of the operation of the Workmen’s Compensation Act, not for a two-fold, but for a single reason. The reason is found in our statute, which defines “employee,” within the meaning of the aforesaid act.4 That section, in clear and unmistakable terms, delimits and defines “employee” as “Every person in the service of the state or of any county, city, town, village or school district therein under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, town, city, village or school district therein.” The road superintendent is a representative of the town, and his duties are official and supervisory in character, and so he comes within the last clause of the statute, and is therefore barred from partaking of the benefits of the statute.

Wisconsin, unlike Iowa, does not exclude the township from its definition of “employer” within the purview of the statute.6

The Iowa case is valuable also so far as it summarizes, within a narrow compass, the functions of the township, the smallest unit of our government.

RAYMOND FORD


1 Hope v. Brink, Supreme Ct. of Ia. 217 N.W. 551.

3 Code of Ia. 1924 Sec. 1421, 136 Ia. 709.

2 Code 1924 Secs. 1421, 4788, 4789, 4791, 4807, 4811, 4815, 4816.

4 Sec. 102.07 Wis. Stats. of 1923.

6 Sec. 60.01 and 102.04, Wis. Stats. of 1923.