The Subject Index

Marvin B. Rosenberry

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol7/iss2/3

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
THE SUBJECT INDEX

By Marvin B. Rosenberry,
Justice of the Wisconsin Supreme Court

(Every brief shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with reference to the pages where the cases are cited. Rule 9, Rules of Practice in the Supreme Court of Wisconsin; Subdivision 8 Rule XXI, Rules of Practice of the Supreme Court of the United States.)

In Weinhagen vs. Hayes, 174 Wis. 233, decided July 3, 1920, the court in commenting upon briefs of counsel in that case said:

We are furnished with a printed case, the index to the exhibits gives a short statement as to what the exhibit is; an index which simply says that exhibit so and so may be found on page so and so, requires us to look at a large number of exhibits before the one which we seek may be found. A short statement, as “Letters Remeeus to Carrow, June 3, 1916,” indicates in a general way the character of the exhibits and saves much time and search here. Each of the briefs is arranged in an orderly way, and at the beginning of the brief is a subject index which refers in detail to the matters set out in the brief, contains an outline of the argument, and authorities presented, with references to the pages of the brief on which the various topics are discussed. Such an index or outline is very helpful in our study and consideration of the cases here, and requires but comparatively little time for preparation on the part of attorneys. Such an index or outline is required under the rules of the United States Supreme Court. While up to the present time we have not felt warranted in adopting such a rule here, our labors would be greatly lightened, and we should be able to give more time to important matters, if in cases involving many points such an outline were made and printed at the beginning of the brief.

Thereafter many briefs filed complied with the suggestion made in the Weinhagen case. Prior to the Weinhagen case many lawyers had furnished such a subject index to their brief. Following the suggestion in the Weinhagen case a very much larger percentage of the briefs presented contained a subject index. The continued use of the subject index brought the court to the conclusion that it was a very valuable aid to the work of the Justices in the study and consideration of cases.

Under date of August 9, 1921, the following amendment to Rule 9 was promulgated:

Every brief shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases
referred to, alphabetically arranged, together with references to pages where the cases are cited.

This amendment to Rule 9 is an exact copy of Subdivision 8 Rule XXI of the Rules of Practice of the United States Supreme Court, which was promulgated April 1, 1912, except that Subdivision 8 contained after the word "brief" the words "of more than twenty pages."

Since the promulgation of the amendment to Rule 9, there has been on the part of the bar a consistent effort to comply with the rule. The results produced, however, are so varied as to indicate that there is a considerable lack of appreciation of the purpose and scope of the rule and what constitutes a compliance with it.

In order to present the matter in concrete form, I have obtained permission of the attorneys to reproduce here the indexes of briefs recently submitted to the court in the case of *Matson vs. Dane County*. This case was before the Supreme Court on appeal from an order sustaining a demurrer and was reported in 172 Wis. 522, where a statement of facts may be found beginning on page 528. Upon the return of the record to the circuit court, the complaint was amended and the cause tried to a jury, being submitted upon a special verdict and upon the verdict found by the jury, judgment for the defendant was entered, from which the plaintiff appeals. The following brief statement of facts is taken from the syllabus:

A complaint by tenants occupying land along a highway that a culvert thereunder had been improperly constructed so as to erode a portion of the land occupied by plaintiffs and, create a water-hole, which appeared to be a mere pond but which was in fact a dangerous trap, especially attractive to children, and that plaintiff's children fell into the water-hole and were drowned, states a cause of action in favor of the plaintiffs for the alleged injury.

The subject index of the plaintiff and appellant's brief upon the second appeal is as follows:

**SUBJECT INDEX**

<table>
<thead>
<tr>
<th>Argument</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The court erred in overruling objection to misstatement of fact in argument of defendant's counsel</td>
<td>12</td>
</tr>
<tr>
<td>2. The court erred in denying plaintiff's motion for judgment on the verdict</td>
<td>13</td>
</tr>
<tr>
<td>A. Plaintiffs were under no duty to abate the nuisance</td>
<td>15</td>
</tr>
<tr>
<td>1. Plaintiffs were in no wise responsible for the nuisance, for</td>
<td></td>
</tr>
</tbody>
</table>
they neither created nor continued it, nor did any act
evidencing its adoption ........................................ 17
2. Plaintiffs would not have been responsible for the nuisance,
even had they continued it, for they received no notice to
abate it ...................................................... 19
3. Defendant having created and maintained the nuisance, it is
no defense that the plaintiffs might have abated it, even
could they have done so at small expense and with little
effort .......................................................... 23
4. The whole language of the opinion of this court in this case
is not res adjudicata ...................................... 28

B. Contributory negligence is not a defense to nuisance .......... 35
C. If the answers to questions 11 and 12, or either of them, es-
tablished a delict, it is not found that the delict existed upon the
part of the father, and it is not found that it existed upon the
part of the mother, and the right of either one to recover
cannot be defeated by the delict of the other .................. 43
D. Even though the liability of the defendant was grounded in
negligence, so that contributory negligence would be a defense,
the contributory negligence of the plaintiffs is not here a
defense, for it is not found that the children failed to exercise
ordinary care ................................................. 55
E. Even though the failure to abate found in the answer to ques-
tion 11, or the negligence found in the answer to question 12,
were a defense if it was a proximate cause of the injury, the
verdict, contains no finding that either was a proximate cause.. 57
F. Even though contributory negligence were a defense, question
12 does not find negligence in the case of children of the age,
experience, and intelligence of those drowned .................. 59

3. The court severally erred in denying plaintiffs' alternative motions
to change answers in the verdict and for judgment upon the verdict
as so changed ......................................................... 60
A. The finding that the plaintiffs should have known of the nuisance
in time to abate is unsupported ................................ 60
B. The finding that plaintiffs did not exercise ordinary care on the
day of the drowning is unsupported ........................... 63
C. The finding of proximate cause is unsupported ................ 73

4. The court erred in denying plaintiffs' alternative motions for a
new trial .......................................................... 74
A. The answers to questions 11, 12, 13 and 14 are contrary to the
clear preponderance of the evidence ............................ 74
B. The verdict is defective in not finding a delict upon the part
of both or a certain one of the plaintiffs ......................... 74
C. The verdict is defective in not finding proximate cause as to
the acts relied upon as defenses ................................ 74
D. The court erred in not submitting the question on damages
separately as to each plaintiff, as requested ..................... 75
E. The damages found are inadequate and the verdict perverse .... 81
5. The court erred in ordering judgment for defendant on the verdict .................................................. 82

The subject index of the defendant and respondent's brief on the second appeal is as follows:

SUBJECT INDEX

I. THE OPINION OF THIS COURT ON FORMER APPEAL (172 W. 522)
   DETERMINES THE LAW OF THIS CASE TO BE:............... 4
   A. Constructive notice of the defect by plaintiffs will bar their recovery ........................................... 4
   B. Negligence on their part in caring for the children is also a bar, and ........................................... 4
   C. These determinations were not obiter .................................................. 7

II. NOTICE ACTUAL OR CONSTRUCTIVE ON THE PART OF PLAINTIFFS OF THE DEFECT OR NUISANCE WILL BAR RECOVERY.
   A. Even where the defendant has created the nuisance, ............ 11
      a. Although there are cases in Wisconsin holding liability after actual knowledge, there is no Wisconsin case (except the present one) involving constructive notice, but
      b. Authority (what little there is) supports this view, and, ... 12
      c. Cases as to nuisances created on defendants (cited by plaintiffs) are distinguishable, as are .................... 14
      d. Cases of private nuisance not in themselves unlawful ...... 15
   B. In this case a lawful act of defendant performed in a proper manner caused the defect, because .................... 15
      a. The gravemen of the complaint is negligence, and........... 16
      b. The jury found that the culvert was properly constructed 16

III. NEGLIGENCE ON THE PART OF THE PLAINTIFFS IN REGARD TO THE CARE OF THE CHILDREN CONTRIBUTING TO THE DEATH OF THE CHILDREN WILL BAR RECOVERY ON THE PARENTS' PART, because.. 17
   A. The gist of the action is negligence, and .................. 18
   B. The doctrine of "attractive nuisance" is a branch of the law of negligence .............................................. 20

IV. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE FINDING THAT: 21
   A. Plaintiffs had constructive knowledge of the defect.......... 22
      a. Evidence as to Chris Matson analyzed ...................... 22
      b. As to Lena Matson .......................................... 25
   B. Plaintiffs were negligent in the care of the children ....... 26

V. THERE IS NO ERROR IN THAT QUESTIONS AS TO NOTICE, NEGLIGENCE OR DAMAGE OF EACH PLAINTIFF WAS NOT INDIVIDUATED, because .......................................................... 27
   A. Plaintiffs filed a joint claim before the county board, and... 28
   B. Their complaint stated a joint cause of action, and .......... 29
   C. They have until after verdict proceeded on a joint cause of action, never raising objection to the form of verdict ...... 31
VI. No Error Was Committed as to Damages, as................. 32
   A. They are adequate, and ...................................... 32
   B. Need not be apportioned because ......................... 34
      a. The statute does not authorize it, and .............. 34
      b. Plaintiffs brought a joint action .................... 35

VII. No Prejudicial Error Occurred by Reason of Counsel's Remarks in Argument ........................................ 36

A brief consideration of these indexes will give anyone at all skilled in the examination of cases, even with the very abbreviated statement of facts, a fairly clear conception of the points raised upon the appeal and point out to him exactly where in the briefs the various propositions are discussed. In the study and determination of cases, it becomes necessary to balance the propositions made upon one side against those made upon the other. A gradual process of elimination begins and as a rule the final determination of a case rests in large part at least upon the determination of one or two, perhaps three, fundamental propositions. With the aid of the subject index the examiner is able to turn to the place in the brief where the facts are stated and the authorities cited. If a brief has no subject index and particularly if it be not arranged in a logical and orderly manner, the various matters urged in support of or in opposition to a particular proposition may be lost sight of unless the examiner make what amounts to a subject index for himself, and this, under the old practice and now where inadequate indexes are presented, is necessary.

A properly prepared subject index makes the very best possible outline for an oral argument. It is very difficult, however, to properly index a brief which is not properly prepared and many indexes fail principally because the arrangement of the matter in the briefs makes a proper subject index impossible. It is not necessary to elaborate every possible proposition in a case. In order that an examiner may appreciate the force of an argument presented in a brief, the preliminary matter should be stated at least as propositions. The same thing is true of an oral argument. The oral argument is very helpful to the court when it presents in a clear orderly way a statement of the facts, the story of the case as it were, and calls attention to the claims made on behalf of the party presenting the argument. A long detailed argument either upon the law or the facts is as a rule less helpful than the shorter, more concise statement of the law and the facts for the reason that it is impossible for the ordinary person at least to
retain detailed arguments in thirty to forty cases heard continuously during the period of four or five days. The general outline, the story of the case, the principal claims of the parties, however, remain and are most helpful in the study of the case.

The subject indexes printed above are good examples and while perhaps not perfect, they answer every practical purpose in an admirable way. The statement of propositions is not too long; the whole argument is arranged in an orderly way; and the consideration of the various propositions is divided and subdivided so as to make every part of the brief easily and quickly accessible. Attention is called to the way the various heads and sub-heads are indented.

In contrast to this, a supposititious subject index is printed, which can be duplicated many times over in its essential features in briefs filed during the past year:

**SUBJECT INDEX**

<table>
<thead>
<tr>
<th>Nature of Action</th>
<th>Statement of Facts</th>
<th>Result of Trial in Lower Court</th>
<th>Assignments of Error</th>
<th>Argument</th>
</tr>
</thead>
<tbody>
<tr>
<td>Page</td>
<td>Page</td>
<td>Page</td>
<td>Page</td>
<td>Page</td>
</tr>
<tr>
<td>1</td>
<td>1</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
</tbody>
</table>

The subject index of respondent's brief is as follows:

**SUBJECT INDEX**

<table>
<thead>
<tr>
<th>Nature of Action</th>
<th>Statement of Facts</th>
<th>Result of Trial in Lower Court</th>
<th>Argument</th>
</tr>
</thead>
<tbody>
<tr>
<td>Page</td>
<td>Page</td>
<td>Page</td>
<td>Page</td>
</tr>
<tr>
<td>1</td>
<td>1-2</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

If a complete statement of facts were furnished, no one could gather from these subject indexes any notion as to the issues involved in the case. Such subject indexes are practically valueless.

More than 6,277 pages of briefs and cases were submitted at the June, 1922 assignment. The general public has in recent years exhibited much impatience because of the delay in the trial and determination of cases. In addition to examining the cases and briefs in all cases submitted, each Justice is required annually to write from forty to fifty opinions. A mere statement of the
matter discloses the formidable size of the task imposed upon the court. For many years the court has not adjourned without completing its work. Occasionally, cases have been held over vacation time for further study, but practically speaking, the court each year disposes of every case upon the calendar. In order to do this the work must be done under considerable pressure and is not always as well and thoroughly done as it should be, although it is as well done, I believe, as circumstances permit.

There can be no such thing as a great court that does not have the aid and support of a great bar. If cases are presented in a slovenly, unlawyerlike way it is impossible for the court to make a re-examination of 350 to 400 cases a year, and speaking broadly, the court must deal with the subject matter presented to it by the attorneys.

What has been said here is not said by way of criticism or complaint but simply by way of suggestion to the end that there may be a more complete understanding and a better co-operation in carrying on the work of the court. The court has had in the past and there is every reason to suppose that it will have in the future the hearty co-operation of a bar that is not only able but ready and willing to do all that lies in its power to promote greater efficiency in the administration of justice.