1001 NEGLIGENCE: FAULT: ULTIMATE FACT VERDICT

[NOTE: The instruction which follows is for use with a verdict which inquires about the ultimate fact of fault in regard to each party rather than asking about negligence and causation. This form of verdict may be used only if the parties stipulate to its use. Baierl v. Hinshaw, 32 Wis.2d 593, 601, 146 N.W.2d 433 (1966).]

Questions 1 and 2 of the verdict inquire whether the parties to the collision were at fault. "Fault," as used here, involves two elements – negligence and cause. To establish legal fault, the conduct under consideration must be negligent, and it must be a cause of the injury and damages.

(Wis. JI-Civil 1005 Negligence).

In addition to this general definition of negligence, there are rules of law, as well as statutes enacted by the legislature, for the safe operation of motor vehicles, violation of which establishes negligence.

(Here add appropriate instructions on specific kinds of negligence.)

In considering "cause" as an element of fault, you will consider it from the standpoint of relationship of cause and effect between the negligence of either or both parties, if found by you, and the collision and the resulting injuries and damages.

[Give Wis. JI-Civil 1500 Cause]

Before you can find either party at fault, you must be satisfied first, that the party was negligent, as that term has been defined for you, and, second, that such negligence was a substantial factor in producing the collision and the natural results thereof. If you can be so satisfied that either or both parties were at fault, then you will so find – otherwise not.

After determining whether these parties were or were not at fault, under the instructions I have given you, you will consider and determine what percentage of the fault of each, if found, contributed to the collision and the natural results thereof. Total fault is based on 100%. If you find only one party at fault, then of course, that person's contribution to the collision and the results would be 100%. If you find both parties at fault, then you will consider the fault of each party, weigh its contribution in producing the collision and the results, and fix it in such percentage of the total fault which is proved to be attributable to the person named in the question.

Questions 1 and 2 are to be answered in terms of percentages if the party inquired about is found to be at fault, as that term has been defined to you.

The burden of proof on either question is upon the party who claims another is at fault.

[Wis JI-Civil 200 Burden of Proof]

COMMENT

This instruction was approved by the Committee in 1972. The comment was updated in 1982 and 2003. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The Committee recommends that this instruction be given only if all parties to the action consent to its use.

In Wisconsin, negligence and causation are separate inquiries. Fondell v. Lucky Stores, Inc., 85 Wis.2d 220, 226, 270 N.W.2d 205 (1978); Grunwald v. Halron, 33 Wis.2d 433, 147 N.W.2d 543 (1966); Baierl, supra.

In 1976, Wis. Stat. § 805.12 was adopted as part of the major revision to the civil procedure rules. This new legislation has raised some question as to whether it altered the rule announced in Baierl that it was error to submit a special verdict question combining negligence and causation into a single question. The court in Baierl relied upon the following statutory language from Wis. Stat. § 270.27 to justify its conclusion that negligence and causation could not be combined: "[The] court may submit separate questions as to the negligence of each party, and whether such negligence was a cause. . . ." (Emphasis added.)

The 1976 revision created Wis. Stat. § 805.12 which, according to the Judicial Council Committee note, was "generally based" on Wis. Stat. § 270.27. However, the above-quoted statutory language of § 270.27 which was cited in Baierl was deleted in the 1976 legislation. This deletion gave rise to speculation that the "net effect of redrafting section 805.12(1) appears to be a reversal of Baierl and a restoration of Wisconsin Jury Instruction-Civil Number 1001 as a proper method of submission, irrespective of consent of the parties." John A. Decker & John R. Decker, "Special Verdict Formulation," 60 Marq. L. Rev. 201, 213-14 (1977).

Subsequent to publication of that article, the state supreme court in 1978 adhered to its earlier holdings that "negligence and causation are separate inquiries." Fondell, supra at 226. In a footnote supporting this proposition, the court in Fondell cited the following passage from Grunwald, supra:

> An important aspect of the instructions in a negligence case is the matter of proximate cause, for though there be negligence, liability may extend only for such damages that are proximately caused by the negligence. In a very recent case we held that it was error to submit a negligence case without a separate causation question. Baierl v. Hinshaw (1966), 32 Wis.2d 593, 146 N.W.2d 433. (Emphasis supplied.)

Later in its decision, the court in Fondell, supra at 228, stated that: "Cause and negligence are separable legal concepts predicated on distinct legal tests." The court in Fondell, however, did not engage in the same statutory analysis of § 805.12 and its predecessor § 270.27, as did the commentators in the 1976 article. In addition, the issue in Fondell did not specifically relate to the propriety of Wis JI-Civil 1001. Nevertheless, it can conservatively be stated that the court's preference for separate inquiries on negligence and causation is obvious.