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Robert Tarnoff

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Finally, is a law such as the Armstrong Act dispositive of the problem? Has the Illinois legislature borne its fair share of responsibility in providing for study and alleviation of the problem? Devising schemes to effectively remedy situations of racial isolation has been the subject of continued study.¹⁰² In light of the amount of research required before a meaningful determination can be made as to the effects and possible elimination of racially imbalanced schools, a single-paragraphed order, absent a legislative finding of any sort as to de facto segregated schools, with no provisions for administration or enforcement, seems a feeble effort to solve a vastly complex problem. Compared with the efforts of Massachusetts and Pennsylvania, the Armstrong Act appears to be but a token gesture.

Howard Emmerman

¹⁰² See, e.g., 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 115-184 (1967); U.S. COMM'N ON CIVIL RIGHTS, EDUCATION PARKS (Clearinghouse Pub. No. 9, 1967).

EVIDENCE—SUFFICIENCY FOR DIRECTED VERDICTS—CAN A JUDGE HOLD A CANDLE TO TWELVE REASONABLE MEN?

On December 7, 1960, Raymond Pedrick and his wife were injured when their automobile collided with one of defendant's trains at a railroad crossing in Pekin, Illinois. In an action brought by Pedrick and his wife against the railroad, the only allegation of negligence submitted to the jury was that defendant company negligently permitted its train to operate through the intersection without activating the red flasher warning signals. Testifying on behalf of plaintiffs were Raymond and Cleo Pedrick and a passenger in their automobile, who had a separate lawsuit pending against the defendant. Five of defendant's employees and two disinterested witnesses testified on behalf of defendant. A jury in the Circuit Court of Tazwell County rendered a verdict for plaintiffs and judgment was entered thereon. Defendants appealed. The Third District Appellate Court of Illinois reversed without remanding for a new trial. On appeal, the Supreme Court of Illinois affirmed the appellate court's decision, holding that evidence on the issue of whether crossing flasher signals were operating at the time of the accident so overwhelmingly flavored the defendant that no contrary verdict based on the evidence could ever stand, and therefore, defendant's motion in the trial court for a directed verdict should have been allowed. The Court further announced the rule that "verdicts ought to be directed and judgments n.o.v. [*sic*] entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors

movants that no contrary verdict based on that evidence could ever stand." *Pedrick v. The Peoria and Eastern Railroad Company*, 37 Ill. 2d 494, 229 N.E.2d 504 (1967).

The rule set forth in this case is especially significant not only because it alters existing Illinois law regarding circumstances under which directed verdicts and judgments notwithstanding the verdict may be entered, but also because it could effect an important change in the function of the judge and the jury. This case note will examine the rule in *Pedrick* in light of the *stare decisis* of the Illinois, federal, and sister state courts, and discuss its effect on the guarantee of a jury trial under the Illinois Constitution.¹

In modern practice, a directed verdict is a device by which a trial judge may take a case from the jury when the proof presents no factual question for the jury's consideration.² The same basis for directing a verdict is used post-trial for entering a judgment notwithstanding the verdict.³ As pointed out by Judge Underwood in *Pedrick*,⁴ the problem arises as to what circumstances must exist before a judge may, as matter of law, rule that the proof presents no factual question, or conversely, when has the plaintiff or defendant put forth the evidence necessary for his case to go to the jury. Initially, the *Pedrick* court finds itself in basic agreement with the established distinction,⁵ reverting to the time-honored statement of Judge Buller in *Company of Carpenters v. Hayward*.⁶ "Whether there be any evidence is a question for the judge. Whether sufficient evidence is for the jury." The flexibility arises in interpreting what is "any" evidence. The courts of various jurisdictions have evolved four different tests in dealing with this basic question.

The common law rule was that "a mere scintilla of evidence" was sufficient to constitute "any" evidence and send a case to the jury.⁷ The scintilla concept is still followed in Alabama where it was recently held that: "In civil cases, the question must go to the jury if the evidence, or reasonable

¹ ILL. CONST. art. II, § 5 provides: "The right to trial by jury as heretofore enjoyed shall remain inviolate, . . ." The right to a jury trial in the Federal courts is found in the U.S. Constitution, Amendment VII. "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

² Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, at 560 (1950).

³ *Guthrie v. Van Hyfte*, 36 Ill. 2d 252, 222 N.E.2d 492 (1966), *City of Monticello v. Le Crone*, 414 Ill. 550, 111 N.E.2d 338 (1953).

⁴ *Pedrick v. The Peoria and Eastern Railroad Co.*, 37 Ill. 2d 494, 498, 229 N.E.2d 504, 507 (1967).

⁵ *Id.* at 498, 229 N.E.2d at 507.

⁶ *Company of Carpenters v. Hayward*, 1 Dougl. 375, 99 Eng. Rep. 241 (K.B. 1780).

⁷ WIGMORE, EVIDENCE, § 2494, at 296 (3d ed. 1940).

inferences arising therefrom, furnish a mere gleam, glimmer, the least particle, the smallest trace, a scintilla, in support of the theory."⁸ The "scintilla" rule has been abandoned by most state courts,⁹ the federal courts,¹⁰ and Illinois.¹¹

In qualifying the "any evidence" test, the courts of Illinois had evolved certain standards to determine whether there was sufficient evidence put forth to have a claimant's case go to the jury. These standards are best summarized in *Mesich v. Austin*,¹² which shortly preceded *Pedrick*, and designated the following as "firmly established principles of Illinois law:"

- (1) The testimony favorable to the plaintiff must be regarded as true in determining whether there is any evidence which tends to prove the material elements of the plaintiff's case;
- (2) in a jury trial the credibility of the witnesses and the weight to be given their testimony is for the jury to determine;
- (3) there should not be a directed verdict if there is any evidence, or reasonable inference from the evidence upon which a jury could base a verdict for the party against whom the motion is directed.¹³

A third widely accepted test has at times been used by the Illinois Supreme Court in negligence actions. This test requires that when all of the evidence is viewed in the light most favorable to the party against whom the court would rule, and the court still finds that "reasonable minds" could not reach a different conclusion, a verdict should then be directed for the movant.¹⁴

The court in *Pedrick* rejects the "reasonable man test" in the context of having a trial or reviewing court judge state what reasonable minds would conclude, since the purpose of having a jury in court is specifically to determine what a reasonable mind would conclude from the facts.

The fourth concept is the "overwhelming" test as enunciated in *Pedrick*. There is no precedent to be found in Illinois cases, but precedent may be found in the U.S. Supreme Court and in the Supreme Court of Minnesota. In the United States Supreme Court case of *Pennsylvania Railroad v. Chamberlain*, Justice Sutherland asserted that: "where the evidence is so

⁸ *Scott v. Southern Coach & Body Co.*, 280 Ala. 670, 676, 197 So. 2d 775, 779 (1967).

⁹ *Supra* note 7.

¹⁰ *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333, 343 (1933).

¹¹ *Shevlin v. Jackson*, 5 Ill. 2d 43, 124 N.E.2d 895 (1955); *Greenlees v. Allen*, 341 Ill. 262, 173 N.E. 12 (1930).

¹² *Mesich v. Austin*, 70 Ill. App. 2d 334, 217 N.E.2d 574 (1966).

¹³ *Id.* at 339-40, 217 N.E.2d at 576. *Accord*, *Heffernan v. Rosser*, 419 Pa. 550, 215 A.2d 655 (1966); *State Farm Life Ins. Co. v. Spidel*, 246 Ind. 458, 202 N.E.2d 886 (1964).

¹⁴ *Jines v. Greyhound Corp.*, 33 Ill. 2d 83, 210 N.E.2d 562 (1962); *Zank v. Chicago R.I. & Pac. R.R.*, 17 Ill. 2d 473, 161 N.E.2d 848 (1959). A substantial number of jurisdictions use this "reasonable man test." *See, e.g.*, *Peters v. B & F Transfer Co.*, 7 Ohio St. 2d 143, 219 N.E.2d 27 (1966); *Blum v. Fresh Grown Preserve Corp.*, 292 N.Y. 241, 54 N.E.2d 809 (1944).

overwhelmingly on one side as to leave no room to doubt what the fact is the court should give a peremptory instruction to the jury."¹⁵ While *Chamberlain* has never been expressly overruled, more recent decisions of the Supreme Court have tempered the *Chamberlain* rule, holding that: "We need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."¹⁶ Thus, the Supreme Court by implication has overruled *Chamberlain* and has returned to a test similar to the standards heretofore used in Illinois.¹⁷

In accord with *Pedrick* and *Chamberlain*, in 1966 the Supreme Court of Minnesota in *Johnson & Employers Mutual Casualty Company v. Moore* held that: "If the evidence as a whole so overwhelmingly preponderates in favor of a party as to leave no doubt as to the factual truth, he is entitled to a directed verdict as a matter of law even though there is some evidence which, if standing alone, would justify a verdict to the contrary."¹⁸

In the quest to determine what amount of evidence is necessary to send a case to the jury, it can be seen that we find that our state and federal courts demand anything from the plaintiff merely showing a scintilla of evidence to the requirements of *Pedrick*, *Chamberlain*, and *Johnson & Employers Mutual Casualty Co. v. Moore* where even if there is *some evidence* to support plaintiff's claim, his case will not go to the jury if the defendant's evidence is overwhelming.

While the *Pedrick* court gives lip service to the time-honored distinction that the judge determines the existence of factual issue and the jury determines sufficiency of the evidence, the main thrust of *Pedrick* is that the court will actually no longer look at the evidence in order to see merely if there is any issue as to the facts, but will look at the evidence in *comparison* to defendant's evidence and then determine its sufficiency. The *Pedrick* court, in defense of this position, quotes Blume in *Origin and Development of the Directed Verdict*:

As the light from a lighted candle in a dark room seems substantial but disappears when the lights are turned on, so may weak evidence fade when the proof is viewed as a whole.¹⁹

¹⁵ 288 U.S. 333, 343 (1933).

¹⁶ *Wilterson v. McCarthy*, 336 U.S. 53, 57 (1949). *Accord*, *Berry v. United States*, 312 U.S. 450, 452-453 (1941). *See also*, *Pennington v. U.M.W.*, 325 F.2d 804 (6th Cir. 1963); *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1961). For full discussion on directed verdicts in the federal courts, *see Bagalay, Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 TEXAS L. REV. 1253 (1964).

¹⁷ *Supra* note 12.

¹⁸ 275 Minn. 292, 146 N.W.2d 599, 605 (1966).

¹⁹ Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. at 570-77, *quoted in Pedrick, supra* note 4 at 504, 229 N.E.2d at 510.

It is in this area of having the "lights turned on" where *Pedrick*, in determining the overwhelming weight of the evidence, could have its most serious impact. It not only walks treacherously on the province of the jury's role to weigh the facts of a case, but could, in all practicality, eradicate the remanding of a case for a new trial in situations where errors in law have been committed at the trial level.

Almost half a century before *Pedrick*, the possibility of the "overwhelming evidence" rule invading the historical role of the jury was foreseen in *Mirich v. Forschner Contracting Co.* which held:

It has always been recognized that for a trial court to weigh and determine conflicting evidence and direct the jury what verdict to render would be a direct violation of the constitutional right of trial by jury. The parties are entitled, under the Constitution, to have the facts passed on by a jury.²⁰ [Emphasis added.]

The probability of the judges having to weigh the evidence when using the "overwhelming" test was succinctly pointed out by Justice Black in his dissent in *Galloway v. United States* in which Justices Douglas and Murphy concurred. Justice Black stated:

New and totally unwarranted formulas, which should be eradicated from the law at the first opportunity were added as recently as 1929 in *Gunning v. Cooley*, . . . which, by sheerest dictum, made new encroachments on the jury's constitutional functions. There it was announced that a judge might weigh the evidence to determine whether he, and not the jury, thought it was "overwhelming" for either party, and then direct a verdict.²¹ [Emphasis added.]

Since the same test is applied to decide a motion for a directed verdict as a post-trial motion for a judgment notwithstanding the verdict, the second possible effect of *Pedrick* is to practically eliminate the situation requiring reversing of a jury's decision by a remandment for a new trial. It has been unanimously held in the Illinois courts that the courts may reweigh the evidence to determine if the evidence is "manifestly," "contrary," or "decidedly" against the weight of the evidence and thus order a new trial.²² The Court in *Pedrick* stated that it was not their intention to change the evidentiary situation which will require a new trial [manifest weight] and that situation justifying a directed verdict [overwhelming evidence] since "a more nearly conclusive evidentiary situation ought to be required before a verdict is directed than is necessary to justify a new trial."²³ However, as can be clearly seen, the distinction of having a "more nearly conclusive evi-

²⁰ 312 Ill. 343, 356, 143 N.E. 846, 851, 33 A.L.R. 1, 8 (1924).

²¹ 319 U.S. 372, 404-405 (1942).

²² *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 126 N.E.2d 836 (1955). *Hunt v. Vermilion County Children's Home*, 381 Ill. 29, 44 N.E.2d 609 (1942).

²³ *Supra* note 4, at 509-510, 229 N.E.2d at 513.

dentiary situation" is a fine distinction and sets practically no guidelines for future courts to follow. It will be very interesting to note when a defendant asks for a directed verdict at the close of all the evidence, whether a judge can in all practicality discern between whether the evidence justifies a directed verdict because the defendant's evidence is "overwhelming" or whether the defendant's evidence only "manifestly outweighs" the plaintiff's so as to allow the case to go to the jury. This problem will, of course, reoccur on a post-trial motion for judgment notwithstanding the verdict.

Finally, the *Pedrick* court pointed out that the overwhelming test "is consonant with efficiency in our judicial system and with a fair and expeditious termination of litigation."²⁴ The rule will first eliminate the necessity of constantly remanding cases which satisfy the "any" evidence rule where the evidence so overwhelmingly favors one party that an opposite verdict would always be set aside irrespective of the number of times a jury has decided otherwise.²⁵ As precedent for reversing and not remanding for a new trial when a new trial would be *useless* the court cites *Heideman v. Kelsey*,²⁶ *Graham v. Deuterman*²⁷ and *City of Spring Valley v. Spring Valley Coal Co.*²⁸ Significantly the first two of these cases were will contests and the second is an action for indemnification for mob action decided in 1898. In *Heideman v. Felsey* the court refused to remand after the fourth trial and pointed out that the courts recognize a tendency of juries to hold invalid a will making unequal division of the testators property among his children.²⁹ An examination of Illinois cases, however, has not revealed any *negligence* action since the 1924 decision of *Mirich v. Forschner Contracting Co.*,³⁰ where the Illinois Supreme Court reversed without remandment when there was "any evidence," and specifically required the remandment for new trial of any case where there is to be found "any legitimate inference tending to prove plaintiff's case."³¹

Furthermore, in reference to efficiency the court points out that while it is questionable whether more appeals are likely, the current delay at the trial level is of greater social concern than are our appellate caseloads.³² The question of whether judges will or will not use the "overwhelming"

²⁴ *Supra* note 4 at 510, 229 N.E.2d at 513.

²⁵ *Supra* note 4.

²⁶ 19 Ill. 2d 258, 166 N.E.2d 596 (1960).

²⁷ 244 Ill. 124, 91 N.E. 61 (1910).

²⁸ 173 Ill. 497, 50 N.E. 1067 (1898).

²⁹ *Heideman v. Kelsey*, 19 Ill. 2d 258, 166 N.E.2d 596 (1960).

³⁰ *Supra* note 20.

³¹ *Supra* note 20.

³² *Supra* note 4.

test and direct more verdicts so as to substantially lighten the trial case load will only be answered by the acceptance and application of the new rule at the trial level. Even if the *Pedrick* rule is applied, the time saving factor is still questionable, as the time necessary to pick a jury and present the evidence have not been alleviated. The prospect of less people filing frivolous claims because they know the court will dismiss any claim not having substantial merit is also questionable, for if the person's claim is frivolous he has nothing to lose by filing suit and hoping for a settlement before the judge has a chance to dismiss.

In conclusion, the possible practical benefits of the rule in *Pedrick* concerning directed verdicts are outweighed by the susceptibility to encroachments on our right to a trial by jury. While the actual worth of a jury is a question men may debate, it is not a court's function to pass upon this question, but rather the people's choice via amendment to their state constitution. The long range effects of *Pedrick*, while seemingly harmless in the facts of the case itself, are best summarized by Judge Dempsey in *Mesich v. Austin* where he stated:

[B]ut we believe the time necessary to complete the case would have been a small price to pay for following the law . . . there is a temptation in a case such as this, where the evidence weighs heavily in one party's favor, to cut through the restraints imposed by those fundamental principles which protect the right of the opposite party to have a jury pass on his case. . . . Although it may appear desirable in a particular case to relax the time honored and hundreds-of-times confirmed principles it cannot be done without undermining them. . . . For a reviewing court to relax the long settled standards of proof in a hard case would encourage further relaxation; it would be an invitation to trial judges to weigh evidence and determine credibility.⁸³

Robert Tarnoff

⁸³ *Supra* note 12 at 343-44, 217 N.E.2d at 547, 578.

NEGLIGENCE—MEDICAL MALPRACTICE— THE LOCALITY RULE

On October 4, 1958, at St. Luke's Hospital in New Bedford, Massachusetts, Mrs. Theresa Brune gave birth to a baby. During the delivery, an anesthesiologist administered a spinal anesthetic to Mrs. Brune containing eight milligrams of Pontocaine.¹ Eleven hours later, attempting to get out of bed, she slipped and fell on the floor. She subsequently complained of numb-

¹ Trademark for preparations of tetracaine. The term tetracaine applies to a preparation used as a local anesthetic. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1564 (24th ed. 1965).