Marquette Law Review

Volume 27
Issue 2 *February 1943*

Article 5

1942

# Code Practice - New Trial - The Granting of Options by the Trial Court in Lieu of a New Trial

Robert T. McGraw

# THE GRANTING OF OPTIONS BY THE TRIAL COURT IN LIEU OF A NEW TRIAL

Where the jury returns a verdict in a case and the trial court deems the damages awarded to be either inadequate or excessive, it is necessary in order to preserve the constitutional right to a trial by jury that the court award a new trial?

It is the purpose of this note to show how this problem has been handled by the Wisconsin courts and by the Federal courts, and also to point out the various alternatives to granting a new trial that have been adopted and applied by the Wisconsin court.

The problem arises when the trial court is faced with a verdict which in its opinion is either inadequate or excessive; should it grant a new trial, which would necessarily mean additional expense to the litigants and an additional burden on the court, or is there any other means by which the rights of the litigants can be protected and justice promoted?

The Wisconsin court has apparently reached its answer to this problem by using the "option" system, that is the court sets a sum which is the lowest or the highest sum which an impartial jury properly instructed could award, and gives either the Plaintiff or the defendant an option to accept the amount set or to submit to a new trial. The first time the "option" plan came before the Wisconsin Supreme Court appears to have been in the case of *Nudd* v. *Wells*[1]; where in an action to recover damages for the non-delivery of a box of machinery the jury returned a verdict for the Plaintiff for $1,087. The defendant moved to set this verdict aside as excessive, the trial court held the verdict was excessive and ordered the plaintiff to remit the excess to the defendant or it would grant the motion for new trial. On appeal to the Wisconsin Supreme Court the court held, "If the excess was clearly ascertainable and the proper amount of damages might be readily fixed by the application of a settled rule of law to the evidence, perhaps the practice adopted by the court below of allowing the Plaintiff to remit the excess and then refusing a new trial, would be proper. . . . But we are unable to see how such a practice can be sustained in such cases (as this) without doing the very thing which they profess not to do; that is allow the court to substitute its own verdict for a wrong verdict of the jury, and on the Plaintiff's accepting that refusing a new trial." Altho the "option" plan did not receive a warm welcome by the Wisconsin court in its first appearance or in its second appearance[2] the court soon began to recognize the practibility of such a plan and in the

[1] Nudd v. Wells, 11 Wis. 407 (1860).
[2] Potter v. Chicago & North Western Ry. Co., 22 Wis. 615 (1868).

cases of *Mauson* v. *Robinson*;[3] and *Corcoran* v. *Harran*[4] the "option" system was formally adopted by the court. The *Mauson* case was an action in contract wherein the Plaintiff alleged the defendant was indebted to him in the sum of $350 with interest; the jury returned a verdict for $692.12. The defendant moved to set the verdict aside because excessive, the trial court denied the motion. On appeal the Wisconsin Supreme Court held, "The motion for a new trial, if denied should have been denied only upon condition that the respondent enter a remittitur of the excess." The *Corcoran* case carried the court one step farther, that is to include tort cases within the "option" powers of the trial court. This was a civil action for assault and battery, the jury's verdict gave the Plaintiff $200, the defendant moved for a new trial and the lower court allowed the Plaintiff to remit $100 of the verdict and then denied motion for new trial. On appeal the Supreme Court held, "In actions of tort as well as contract, where the damages are clearly excessive, the trial judge may either grant a new trial absolutely or give the plaintiff the option to remit the excess and in case he does so order the verdict to stand for the residue. *Clearly the practice will tend to promote justice and lessen the expense to litigants and the public.*" In commenting on the effect of such a practice on the defendant the court said, "It is evident that the defendant has no complaint since the reduction was a favor to him, 'certainly a party against whom a judgment has been recovered cannot reverse it on the ground that it is less than it should have been'." So by these two cases the foundation was laid for the trial court to grant an option to the Plaintiff to remit the excess of an excessive verdict or stand a new trial. However the courts were still faced with the contention that such an option violated the constitutional right to a trial by jury. This contention was first answered by the court in rather broad general terms the court saying that this practice didn't constitute an invasion of the province of the jury but rather, "indicated that our jurisprudence is still developing towards that ideal of perfection where the administration of the law is truly the administration of justice."[5] It was in the case of *Heimlich* v. *Tabor*[6] that the court first stated the rule as to granting an option in a case where the verdict is excessive as we know it today, and it was in this case that the court gave the first logical answer to the contention that such options violated the right to a trial by jury. The court said the rule concerning excessive verdicts allowed the court ". . . to permit the Plaintiff to terminate the controversy without the expense of a new trial by consenting to take judgment for an amount sufficiently

[3] Mauson v. Robinson, 37 Wis. 339 (1875).
[4] Corcoran v. Harran, 55 Wis. 120 (1882).
[5] Baxter v. Chicago & North Western R. Co., 104 Wis. 307, 80 N.W. 644 (1899).
[6] 123 Wis. 565 (1905).

under that named by the jury to cure such error in the judgment of the court; and also to permit the defendant in such situations to terminate the litigation whether plaintiff is willing or not, by consenting to judgment for a sum sufficiently less than the verdict to, in the judgment of the court cure the error." Thus we see that the court recognized the possibility of not only giving the plaintiff an option to take a lesser sum but also the possibility of giving the defendant an option to take a lesser sum. The court went on to say that the requirement concerning these options to be free from the charge of judicial invasion of the right of jury trial is simply this, "Require the sum imposed upon the defendant, whether he consents or not; giving the option to the plaintiff, to be as small as an unprejudiced jury would probably name; and the sum to be imposed upon the plaintiff whether he consents or not, giving the option to the defendant, to be large as an unprejudiced jury on the evidence would probably name." The rule laid down in the *Heimlich* case as to the sum which must be set by the court, that is it must be the lowest amount which an unprejudiced jury would award when the option is given the plaintiff; and the highest amount which an unprejudiced jury would award when the option is given the defendant, was followed by the Wisconsin court and is the law today.[7]

Although since the *Heimlich* case the power of the trial court to grant options in case the verdict is excessive seemed firmly entrenched, several other interesting questions have arisen concerning the use of this power. One such question arose in the case of *Urban* v. *Anderson*[8] where it was contended that the trial court was limited in its use of options to cases where the excessiveness was due to prejudice, passion, ignorance or bias of the jury. The Wisconsin Supreme Court held, "The court may deal with the matter whether the error is attributable to perversity or the amount found by the jury is not supported by the evidence in the case."

Another question arising under the use of options by the trial court, which was faced with an excessive verdict, is the situation where the trial court does not regard the verdict to be excessive but the Supreme Court does. Must the Supreme Court order a new trial or may it impose an option? The case of *Secord* v. *John Schroeder L. Co.*[9] is an example of the Supreme Court imposing an option. Here the jury returned a verdict for the plaintiff of $5,500 the Supreme Court held, "We are inclined to hold in case of another trial a jury properly instructed would probably not assess the damages at less than $4,000."

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[7] Stangarone v. Jacobs, 188 Wis. 20 (1925); West v. Johnson, 202 Wis. 416 (1930); Muska v. Apel, 203 Wis. 389 (1931); Malliet v. Super Products Co., 218 Wis. 145 (1935); Urban v. Anderson, 234 Wis. 280 (1940).
[8] 234 Wis. 280 (1940).
[9] 160 Wis. 1 (1915).

The court then reversed and remanded the case with an option to the plaintiff to take judgment for $4,000 and costs within twenty days after filing of the remittur or have a new trial.

Thus in Wisconsin at least when the trial court has a verdict before it which it deems excessive it may either grant a new trial; or it may set the *lowest* sum which a properly instructed jury would award giving the *plaintiff* the option to accept that amount or have a new trial; or it may set the *highest* sum which a properly instructed jury would probably award, giving the option to the *defendant.*

We have seen that the Wisconsin court has recognized the principle that the trial court may use this "option" plan in connection with excessive verdicts, but what about verdicts where the damages awarded are inadequate, may the court use a similar option plan in such cases? The answer, at least in the Wisconsin court is yes.

Apparently the first time the court applied the "option" plan to inadequate verdicts was in the case of *West* v. *The Mil., Lake Shore and Western Ry. Co.,*[10] where the lower court erroneously made the direction not to allow interest in the judgment. The Supreme Court reversed this holding saying, "The defendant is authorized at his option within 30 days after filing the remittitur, to serve upon the opposite party and file with the clerk a stipulation authorizing the Plaintiff to take judgment for the amount of the verdict with interest thereon at 7% from the time of the rendition of said award to the entry of such judgment, in which case the plaintiff will be entitled to judgment for the amount of such verdict with interest." The court went on to say, "Upon principle, we see no difference in allowing a party against itself voluntarily to add to the verdict the amount so improperly excluded, and then authorize judgment for the amount of such verdict and additur and the remission of part of an excessive verdict." The court then remanded the case for a new trial subject to the option to the defendant given above. This principle was affirmed in the case of *Molzahn* v. *Christensen,*[11] which was an action on a building contract, the trial court found that the defendant's claim for unfinished work on the manure pit was undetermined, having been omitted from the verdict and on this account that the defendant was entitled to a new trial if he desired one, and therefore, it gave the defendant the right to elect to have a new trial on account of this error or submit to judgment against him on the balance due the plaintiff according to the verdict. The defendant elected to have judgment awarded against him for such amount. This was affirmed on appeal.

[10] 56 Wis. 318 (1882).
[11] 152 Wis. 520 (1913).

The next problem which seems to have arisen in connection with the court's use of options in connection with inadequate verdicts was the contention that in case the trial court gave no option to allow judgment for a sum fixed by the court or to accept a new trial that the Supreme Court should do so. But in the case of *Reuter* v. *Hickman, Lauson & Diener Co.*[12] the Supreme Court held that these options were a matter of discretion with the trial court, and the Supreme Court would not interfere unless there had been an abuse of discretion. In discussing just what sum should be fixed on by the trial court in case it decides to use this method the court said, "In fixing such a sum the maximum amount that in the judgment of the court any jury would be warranted in assessing would have to be fixed on (if the option given to defendent). If such option is given to the plaintiff the minimum amount any jury would be likely to assess would be fixed on."

The Wisconsin court has been faced with the contention that these options granted by the trial court in cases where the verdict is inadequate constitute a violation of trial by jury, just as they were in options used where the verdict was excessive. The first real answer to such a contention was made by the court in *Campbell* v .*Sutliff.*[13] In discussing these options the court said, "When the court grants the option to take judgment for the sum which the court determines to be the least amount which a jury could assess under the proof, the plaintiff cannot complain that he has been deprived of his right to trial by jury because he cannot question a judgment which has been entered because he elected to accept judgment for that amount. . . . The defendant's constitutional rights are not invaded because the judgment is reduced to the least amount which the plaintiff may recover as determined by the court that has the power to fix the minimum amount that may be recovered—the smallest verdict which the court will permit to stand."

"Conversely neither party can complain when the defendant elects to consent to the entry of judgment for the sum which the court determines to be the largest amount which a jury could assess under the proof. The defendant cannot question the judgment because he has elected to have it entered. The plaintiff cannot question it because it is for the largest amount which the court will permit the jury to assess under the proof of the case. . . . The right to a jury trial on the question of damages can be waived like any other right guaranteed by the constitution. It is waived by the party that elects to have judgment entered in accordance with the option given him by the court . . ." To the same effect is the court's holding in the case of *Risch* v. *Lawhead*[14] where the court said "Where in a case involving unliquidated damages,

[12] 160 Wis. 284 (1915).
[13] 193 Wis. 370, 214 N.W. 374 (1927).
[14] 211 Wis. 270, 248 N.W. 127 (1933).

the amount found by the jury is deemed by the court wholly inadequate it seems clear that the trial court may grant a new trial unless the plaintiff consents to take judgment for such increased amount found by the court to represent the least amount that an unprejudiced jury would probably fix. Since the court finds the 'least amount' plaintiff must be given an option to consent to the amount of damages found by the court. In such a situation the defendant may not complain because the court has only increased the damages to the least amount which it will permit to stand in lieu of granting a new trial."

So the trial court may grant an option to the plaintiff or to the defendant to accept a fixed amount or submit to a new trial in a case where the court deems the damages awarded by the jury to be inadequate as well as a case where the damages awarded are excessive, and this remains the law of Wisconsin today.[15]

Therefore the Wisconsin court makes use of the option system both in cases involving excessive verdicts and in cases involving inadequate verdicts. The question then is as to what variations of this option system may be used. The options which may be used by the Wisconsin courts can be divided into six classes:

1) In a case where the damages are inadequate the court may give an option to the defendant to have judgment entered against him for the *maximum* amount which a properly instructed jury could award, or to submit to a new trial.

2) Also in a case where the damages are deemed inadequate the court may give an option to the *plaintiff* to accept judgment for the *minimum* amount which a jury properly instructed could award or to submit to a new trial.

3) Or where the damages are inadequate the court may combine the options number one and number two above; and first give the defendant the option and then give the plaintiff an option and if neither elects then the court will grant a new trial.

4) In case the damages awarded are excessive the court may give an option to the *plaintiff* to accept the *lowest* amount which any reasonable jury properly instructed could award, or to submit to a new trial.

5) In a case where the damages are excessive the court may also give an option to the *defendant* to pay the *maximum* amount which a reasonable jury, properly instructed could award, or to submit to a new trial.

6) In a case where the damages are excessive the court can combine the two options given in number four and five above and first give the

[15] Tollander v. Bonneville, 3 N.W. (2d) 679 (Wis. 1942)

plaintiff an option and then give the defendant an option and if neither elects to accept the option then the court will grant a new trial.

The Federal courts do not seem to be in accord with the holdings of the Wisconsin court in this matter of allowing the trial court to fix options where the verdict is inadequate or excessive. Although the United States Supreme Court started out on the same line of reasoning as did the Wisconsin court they failed to go to the length of the Wisconsin holdings. For example in the case of *Northern Pac R. Co.* v. *Herbert*,[16] where the jury found for the plaintiff in the sum of $25,000, the defendant made a motion for new trial because the damages were excessive. The lower court ordered that a new trial be granted unless plaintiff remitted $15,000 of the verdict and in case he did so that the motion for new trial would be denied. The Supreme Court held this was proper saying, "The exaction as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the reliquishment of so much damages as in its opinion the jury had improperly awarded."

This decision was apparently followed without question for some time[17] and the Supreme Court had even declared that such an option did not violate the right to trial by jury.[18] However with the case of *Dimick* v. *Schiedt*[19] the U. S. Supreme Court adopted the rule in regard to these options in place of granting a new trial which stands as the federal rule today. This was an action to recover damages for personal injuries resulting from the alleged negligent operation of the defendant's automobile. The jury returned a verdict in favor of the plaintiff for $500; the plaintiff moved for a new trial on the ground that the damages awarded were inadequate. The trial court ordered a new trial unless the defendant would consent to an increase of the damages to the sum of $1,500. The defendant consented to this option and the motion for new trial was denied. However on appeal to the Circuit Court of Appeals this judgment was reversed on the ground that this conditional order violated the 7th. amendment of the United States Constitution in respect to the right of trial by jury. The Supreme court of the United States affirmed the holding of Circuit Court of Appeals saying, ". . . no federal court so far as we can discover has ever undertaken

[16] 116 U.S. 642, 6 Sup. Ct. 590, 29 L.Ed. 755 (1886).
[17] Arkansas Cattle Co. v. Mann, 130 U.S. 69 (1888); Kennon v. Gilmen, 131 U.S. 22, 29; Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41, 52; German Alliance Ins. Co. v. Hale, 219 U.S. 307, 312; Gila Valley S. & N. Ry. Co. v. Hall, 232 U.S. 94, 103-5.
[18] Arkansas Cattle Co. v. Mann, 130 U.S. 69 (1888).
[19] 293 U.S. 474, 55 Sup. Ct. 296, 79 L.Ed. 603 (1935).

similarly to increase the damages although there are numerous cases where motions for new trials have been made and granted on the ground that the verdict was inadequate. . . . When we consider the great length of time mentioned, the federal courts were constantly applying the rule in respect to the remission of excessive damages, the circumstance that the practice here in question in respect of inadequate damages was never followed, or, apparently its approval even suggested, seems highly significance as indicating a lack of judicial belief in the existence of the power." The court went on to say that in fact if the question of granting such an option even in cases where the damages were excessive were originally before it it would not hesitate to deny the existence of such a power in the trial court in such cases as well as in cases where the verdict was inadequate. In commenting more specifically on the use of such a power by the trial court and a denial of the right to a trial by jury, the court in the *Dimick* case said: "When therefore the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing in additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed on either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept an assessment partly made by a jury which has acted improperly, and partly by a court which has no power to assess."

So the Federal rule seems to be, that the trial court can within its discretion in lieu of unconditionally granting a new trial for excessiveness of damages, grant a new trial unless the plaintiff remits the excessive portion of his damages. But the trial court does not have the power to increase an inadequate verdict for the plaintiff, though the defendant consents thereto, the only course open being to grant a new trial.

One more point should be mentioned in connection with the federal holdings on this question, and that is, that apparently the rule in the *Dimick* case is restricted to common law actions.[20] In the case of *United States* v. *Kennesaw Mountain Battlefield Ass'n.*,[21] the Circuit Court of Appeals held that the lower court was empowered to give the defendant an option to consent to a verdict which had been raised because inadequate, or to submit to a new trial in a condemnation case. The District court in the *Kennesaw* case in discussing the option said, "Verdicts have often been set aside as excessive unless written down to an amount fixed by the judge. I know of no precedent for refusing

[20] United States v. Kennesaw Mountain Battlefield Ass'n., 99 Fed. (2d) 830 (C.C.A. 5th, 1938).
[21] *Supra,* note 20.

one to be written up as a condition of refusing a new trial. I see no difference in principle. In both cases the judge thinks the verdict wrong in amount and will set it aside unless the party who desires to maintain the verdict will voluntarily correct it rather than suffer a new trial." The Circuit Court in discussing the District Court's opinion said, ". . . We agree with the District judge that *Dimick* v. *Schiedt* is not controlling. We agree with the reason he gives that the complained of action in requiring an additur and refusing a new trial was not taken in a common law action within the 7th. amendment as it was in the *Dimick* case, but in a condemnation proceeding to which the guarantees of the 7th. amendment do not apply." Another Circuit Court of Appeals case seems to strengthen the view that the restriction set up in the *Dimick* case is confined to common law actions.[22] The court saying, "Under the 7th. amendment the national courts are without power to add to a verdict in a common law action. . . . "

It seems to the writer that the position taken by the Federal Court in adopting the option system when the verdict in question is excessive but refusing to adopt it in reference to verdicts where the amount awarded is deemed inadequate, is not logical. In the writer's opinion the position taken in the *Kennesaw Mountain*[23] case and of the dissent in the *Dimick*[24] case, that there is no distinction between granting an option in a case, where the damages are excessive, and granting the option in a case where the damages are inadequate, is the correct one. The Wisconsin court seems to have had good success with this system and their answer to the contention that any such option violates the right to trial by jury seems a complete and logical one. Moreover, as the Wisconsin court says, "Clearly the practice will tend to promote justice and lessen the expense to litigants and the public."[25]

ROBERT T. MCGRAW.

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[22] Mutual Ben. Health & Accident Ass'n. v. Thomas, 123 Fed. (2d) 353 (C.C.A. 8th, 1941).
[23] *Supra,* note 20.
[24] *Supra,* note 19.
[25] Corcoran v. Harran, 55 Wis. 120 (1882).