

1935

Constitutional Law: Trial by Jury: Excessive or Inadequate Damages

Robert P. Harland

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Robert P. Harland, *Constitutional Law: Trial by Jury: Excessive or Inadequate Damages*, 19 Marq. L. Rev. 199 (1935).

Available at: <https://scholarship.law.marquette.edu/mulr/vol19/iss3/5>

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 editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

RECENT DECISIONS

CONSTITUTIONAL LAW—TRIAL BY JURY—EXCESSIVE OR INADEQUATE DAMAGES.

—The plaintiff, in an action to recover for personal injuries, moved for a new trial on the ground that the award of the jury, \$500, was inadequate. The trial court ruled that should the defendant consent to increasing the award to \$1,500, a new trial would be denied the plaintiff. The defendant consented to the increase and judgment was entered for \$1,500. Plaintiff appealed. The Circuit Court of Appeals, reversing the trial court, held that the conditional order violated the Seventh Amendment in respect to the right of trial by jury. [70 F. (2d) 558 (C.C.A. 1st, 1934)]. On review before the United States Supreme Court, *Held*, judgment affirmed. *Dimick v. Schiedt*, 55 Sup. Ct. 296 (1935) (Justices Stone, Hughes, Brandeis, and Cardozo dissenting).

In actions at law in the federal courts any right to have facts determined by a jury, as to the amount of damages recoverable, is based upon the Seventh Amendment; but where such a right exists in a state court its foundation must lie in a state constitutional provision. *Pearsons v. Yewdale*, 95 U.S. 294, 24 L.ed. 436 (1877); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 171 Wis. 586, 178 N.W. 9 (1920), *rev'd on other grounds*, 262 U.S. 544, 43 Sup. Ct. 636, 67 L.ed. 1112 (1923). In cases where the damages are unliquidated the jury by virtue of these provisions has more or less discretion in arriving at the proper figure. However, grossly inadequate or excessive damages may be indicative of a biased and prejudiced jury and it becomes the duty of the court to say whether the record presents such bias or prejudice, and to set aside such a verdict and grant a new trial where it so finds. *McNamara v. McNamara*, 108 Wis. 613, 84 N.W. 901 (1901); *cf. Tommisk v. Lanferman*, 206 Wis. 94, 238 N.W. 857 (1931). But where the damages are deemed excessive or inadequate *merely*, the court may (1) grant a new trial on all issues, *Lehner v. Berlin Publishing Co.*, 211 Wis. 119, 246 N.W. 579 (1933) (damages excessive); *Emmons v. Sheldon*, 26 Wis. 648 (1870) (award inadequate), or (2) grant a re-trial on the issues of damages only, *Amore v. Di Resta*, 125 Cal. App. 410, 13 P. (2d) 986 (1932); (1934) 22 Cal. L. Rev. 579, or (3) permit a remission of the excess where the court deems the award excessive, *Blunt v. Little*, Fed. Cas. No. 1,578 (C.C. Mass. 1822); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 9 Sup. Ct. 458, 32 L.ed. 854 (1889); *Bushee v. Wright*, 1 Pin. 104 (Wis. 1840); Note (1932) 16 Minn. L. Rev. 185. But when the court determines that a certain portion of the award is excessive (or that something must be added because the award is inadequate), and a new trial is denied one of the parties when the other party consents to accept the modified verdict, some authorities insist that this is an invasion by the court into the exclusive province of the jury. *Tunnel Mining & L. Co. v. Cooper*, 50 Colo. 390, 115 Pac. 901 (1911); Notes (1912) 39 L.R.A. (N.S.) 1064; *Watt v. Watt*, [1905] A.C. 115. See *Dimick v. Schiedt*, 55 Sup. Ct. 296, 300 (1935) to the effect that if the question of remitting an excessive award was presently before the court for the first time the court would decide against the practice of scaling down the verdict without a new trial. The court, however, conceded that the scheme had been observed in the federal courts for so long that the Supreme Court would acknowledge it as accepted practice. Following *Blunt v. Little*, *supra*, remission of excessive awards was permitted in *Northern Pac. Ry. Co. v. Herbert*, 116 U.S. 642, 6 Sup. Ct. 590, 29 L.ed. 755 (1886); *Arkansas Valley Land & Cattle Co. v. Mann*, *supra*; *Gila Valley, Ry. Co. v. Hall*, 232 U.S. 94, 34 Sup. Ct. 229, 58 L.ed. 521 (1913). See *Corcoran v. Harran*, 55 Wis. 120, 12 N.W. 469 (1882) (the early practice in Wisconsin);

Heddles v. Chi. & N. W. Ry. Co., 74 Wis. 239, 42 N.W. 237 (1889) (remitting the "unreasonable excess"). The Wisconsin court has conceded that this practice might result in impairing the defendant's right to a trial by jury guaranteed under the state constitution. *Heimlich v. Tabor*, 123 Wis. 365, 102 N.W. 10 (1904). And the accepted practice in Wisconsin now seems to be for the court to set the upper and lower limits within which the court would permit a jury to fix the amount, and to give the plaintiff the option to accept the lowest figure and to deny the defendant a new trial, [*Stangarone v. Jacobs*, 188 Wis. 20, 205 N.W. 318 (1925); *Foreman v. Milw. Elec. Ry. & Light Co.*, 214 Wis. 259, 252 N.W. 588 (1934)], and at the same time to give the defendant the option, in lieu of a new trial, of consenting to an entry of a judgment against him in an amount equal to the highest figure as set by the court. *Risch v. Lawhead*, 211 Wis. 270, 248 N.W. 127 (1933); *Guth v. Fischer*, 213 Wis. 323, 251 N.W. 223 (1933); see, *Ruepping v. Chicago & N. W. Ry. Co.*, 123 Wis. 319, 326, 101 N.W. 710 (1904). The verdict may be further modified by the appellate court but that court must always give the party so prejudiced the option of a re-trial. *Campbell v. Sulliff*, 193 Wis. 370, 214 N.W. 374 (1927); *Borowicz v. Hamann*, 193 Wis. 324, 214 N.W. 374 (1927). The practice in Wisconsin may result in a denial of a retrial as to damages. However the court, at the same time, is careful to have placed the party affected in the most favorable position in which a jury on re-trial would be permitted to have placed him. In cases where the damages are unliquidated, as in the principal case, an assessment (or guess) by the jury between limits determined by the court, (see *Arkansas Valley Land & Cattle Co. v. Mann*, (*supra*), is the essence of the constitutional guarantee. In the instant case the record does not disclose the extent of the injuries sustained by the plaintiff; there is nothing in the record to show that the abridged award represented the greatest sum a jury in its discretion might be permitted to award and in fact constituted an invasion by the trial court into the province of the jury.

ROBERT P. HARLAND.

CARRIERS—VALIDITY OF LIMITATION CLAUSE.—Three shipments of cherries, in all 4,266 barrels, were loaded in Italian ports and shipped with the defendant carrier, consigned to the plaintiff in New York. Due to improper stowage, the cargo arrived in bad condition. One hundred and sixty-two barrels were a total loss and there was damage to the others amounting to an entire loss of 581 barrels. The remaining portion of the cargo was sold for a price exceeding the value stated in the invoice plus the freight. This claim is made for the damaged portion of the cargo. The defendant carrier resists liability for damage to this portion because of a stipulation in the bill of lading which provided "that if, after deduction of all loss and damage, the remaining cargo, in its then condition, is worth more at destination than the entire cargo was worth at the time and place of shipment, the carrier should be exonerated from liability for the damaged portion." *Held*, the valuation clause here employed is unreasonable and contrary to public policy even if supported by a valid consideration. *The Ansaldo San Giorgio I*, 55 Sup. Ct. 483 (1935).

At the common law carriers were held to the strictest degree of liability, being responsible for loss and damage of goods carried except in the case of destruction by Acts of God or the public enemy. *Coggs v. Bernard*, 2 Ld. Raym. 908, 92 Eng. Rep. 107 (1702). The late Justice Holmes disputes the assumption that this rule was settled prior to Lord Holt's decision. See Holmes, THE COM-