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PERSONAL INJURY DAMAGE VERDICTS: SUPREME COURT RULINGS SINCE THE POWERS RULE

HORACE W. WILKIE*

In the *Powers* case,¹ the Wisconsin Supreme Court ruled:

. . . that where an excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of trial, the plaintiff should be granted the option of remitting the excess over and above such sum as the court shall determine is the reasonable amount of plaintiff's damages, or of having a new trial on the issue of damages.²

In that case a jury had returned a verdict of \$1,500 for pain and suffering and \$5,000 for permanent injuries. The trial court found that there was no proper expert medical testimony to support the finding of permanent injury and reduced that figure to zero. On appeal, the supreme court held that the medical testimony was sufficient to support the finding of permanent injury but concluded that the award of \$5,000 was excessive. The court stated:

Based upon a careful review of all the pertinent evidence bearing upon permanent disability, we determine that \$3,000 is a reasonable sum to award to the plaintiff for permanent disability. Therefore, the plaintiff should be accorded the option of accepting judgment for such sum, together with the sum of \$1,500 awarded for pain and suffering, or a total of \$4,500, or of having a new trial confined to the issue of damages.³

In adopting this rule, the court went back to the earlier rule of *Corcoran v. Harran*⁴ and *Baker v. Madison*.⁵ It overturned the prior practices that had developed where awards were found to be excessive, under which the trial court could follow one of three alternatives: (1) The court could set aside the verdict as excessive and determine the least amount a properly instructed jury could find, and then give plaintiff an option to either get a new trial or take the reduced amount;⁶ or (2) the court could determine the largest amount

*Justice, Wisconsin Supreme Court

¹ *Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78, 102 N.W. 2d 393 (1960).

² *Id.* at 91, 102 N.W. 2d at 400.

³ *Id.* at 92, 102 N.W. 2d at 400.

⁴ 55 Wis. 120, 12 N.W. 468 (1882).

⁵ 62 Wis. 137, 22 N.W. 141 (1885). See Ghiardi, *Personal Injury Damages—Excessive or Inadequate Awards*, Wis. Continuing Legal Ed., Vol. 1, No. 2, pp. 27-53, at 34 (1961).

⁶ *Stangarone v. Jacobs*, 188 Wis. 20, 205 N.W. 318 (1925); *Peterson v. Western Casualty & Surety Co.*, 5 Wis. 2d 535, 93 N.W. 2d 433 (1958).

that such a jury could find and grant defendant an option to pay that amount or get a new trial;⁷ or (3) it could grant alternative options if plaintiff does not exercise his option then defendant may and if neither does then there is a new trial.⁸

The same three alternatives were available where a verdict was found to be inadequate.⁹

The *Powers* rule had been anticipated by a dissent by Justice Thomas Fairchild in the case of *Genrich v. Schrank*,¹⁰ where he stated:

But where there has been no error or perversity, there would be no injustice to defendant in giving plaintiff an option of a new trial or judgment for an amount fixed by the court as a fair and reasonable award under the evidence. Such a rule would give greater protection to the plaintiff. While he could still choose a new trial, his alternative would be more liberal to him than under the present rule. It would sufficiently protect the defendant from the excessive award.¹¹

Following *Powers*, there was much concern about what the decision would mean in terms of the number of jury verdicts, reassessed and modified. Plaintiffs feared that there would be an avalanche of cases in which defendants sought and the courts ordered reductions in jury verdicts. Defendants anticipated that verdicts would be increased. The purpose of this article is to analyze every Wisconsin Supreme Court case since *Powers* which in any way has involved any question of the excessiveness or inadequacy of a personal injury damage verdict and any action by a trial court or the supreme court with respect thereto. In substance, the article inquires into what has been the effect of *Powers* and what have the related supreme court rulings been since that important decision.

Modification of Spleas Case

It is important to note that *Powers* deals only with questioned verdicts where there is no finding of perversity or where the excessive or inadequate verdict is in no way due to error occurring during the course of trial. Now comes the very recent case of *Spleas v. Milwaukee & Suburban Transport Corp.*,¹² in which the supreme court speaking through Justice Gordon modified the *Powers* rule so as to

⁷ *Risch v. Lawhead*, 211 Wis. 270, 248 N.W. 127 (1933); *Murphy v. Hotel Pfister*, 245 Wis. 211, 13 N.W. 2d 927 (1944); *Landrath v. Allstate Ins. Co.*, 259 Wis. 248, 48 N.W. 2d 485 (1951); *Dittman v. Western Casualty & Surety Co.*, 267 Wis. 42, 64 N.W. 2d 436 (1954).

⁸ *Brown v. Montgomery Ward*, 221 Wis. 628, 267 N.W. 292 (1936); *Blaisdell v. Allstate Ins. Co.*, 1 Wis. 2d 19, 82 N.W. 2d 886 (1957); *Butts v. Ward*, 227 Wis. 387, 279 N.W. 6 (1938).

⁹ *Goscinski v. Carlson*, 157 Wis. 551, 147 N.W. 1018 (1914); *Reuter v. Hickman, Lauson & Diener Co.*, 160 Wis. 284, 151 N.W. 795 (1915); *Risch v. Lawhead*, *supra* note 7; *Bohlman v. Nelson*, 5 Wis. 2d 77, 92 N.W. 2d 345 (1958).

¹⁰ 6 Wis. 2d 87, 93 N.W. 2d 876 (1959).

¹¹ *Id.* at 94, 93 N.W. 2d at 879.

¹² 21 Wis. 2d—, 124 N.W. 2d —, (1963).

apply the rule even where there is prejudicial error committed on the trial, but where such error is related directly to damages and where any prejudice affecting the jury award can be accommodated by applying the *Powers* rule. In that case a plaintiff was awarded \$15,000 by a jury for his permanent injuries, pain and suffering and future medical expense. The supreme court ruled that there was prejudicial error in the trial court's instructions on allowing damages for future medical and hospital expense. The court stated:

We have concluded that even though the excessive verdict may be the result of a prejudicial error committed during the course of the trial, the *Powers* rule may nevertheless be employed where such error directly relates to damages.¹³

Procedure for Applying Rule in Trial Court

The exact procedure to be followed by a trial court where it is contended that a verdict is excessive and the court so finds under the *Powers* rule was spelled out in detail in *Lucas v. State Farm Mut. Automobile Ins. Co.*,¹⁴ where the court outlined the following steps:

1. On motions after verdict the trial court should enter his decision which includes a determination that the jury award is excessive but not due to perversity or prejudice, and is not the result of error occurring during the course of the trial. The decision should also include a determination by the trial court of what amount he considers reasonable. The decision should direct a new trial on the issue of damages unless the plaintiff elects to take judgment for the lesser amount.
2. A formal order should then be entered by the trial court setting aside the verdict (rather than changing the jury's award in the verdict) and granting a new trial on the issue of damages, but providing that the plaintiff, in lieu thereof may have a judgment entered for the reduced amount if he notifies the court within the time specified by the court of his election to take the reduced amount and remits the difference between the reduced amount and the jury award. Such an order may provide for an extension of the option by a specified time after remittitur in the event an appeal is taken.
3. The plaintiff may then appeal from this order; if he so desires and if it is necessary the plaintiff should first ask the trial court to extend the time for exercising his option to cover the period of his appeal.
4. If no appeal is taken and the plaintiff does not elect to take judgment for the lesser amount, the case will proceed in the normal course of events to a new trial.
5. If an appeal is taken the supreme court will enter its decision thereon and remit the cause either affirming the new trial order with accompanying option or reversing or modifying it.

¹³ *Id.* at —, 124 N.W. 2d at —.

¹⁴ 17 Wis. 2d 568, 117 N.W. 2d 660 (1962).

6. If no appeal is taken and the plaintiff does elect to take judgment for the reduced amount, judgment shall then be entered accordingly and the defendant may either appeal from that judgment or seek to satisfy it.¹⁵

The Rule of Plesko

In *Plesko v. Milwaukee*,¹⁶ a personal injury case has been appealed by the defendant. In that case the supreme court ruled that on an appeal by the defendant, plaintiff on motion for review was entitled to raise the question of damages even where the plaintiff has already accepted the option given by the lower court to take a reduced amount for damages. The court said:

In *Burmek v. Miller Brewing Co.* (1961), 12 Wis. 2d 405, 417, 107 N.W. 2d 583, we held that where a plaintiff is given an option to accept a reduced amount of damages or a new trial limited to damages, his acceptance of the reduced damages precludes his seeking a review of the trial court's determination of the damage issue.

Upon further consideration of the matter a majority of this court conclude that this rule announced in the *Burmek Case* should be limited to the situation where the party awarded damages appeals. The majority further hold that when an opposing party appeals, the party who has accepted the option to take judgment for such a reduced amount of damages may nevertheless have a review on appeal of the trial court's determination of the damage issue. If it is determined on such review, however, that no error was committed by the trial court's disposition of the damage issue, such party's prior acceptance of judgment for the reduced amount will be affirmed unless the result of the principal appeal requires otherwise.¹⁷

On the other hand, in a case where the plaintiff has accepted an option and where no appeal has been taken by the defendant, there can be no appeal then by the plaintiff and no supreme court review of the lower court's reduction in damages.

Does the Powers Rule Violate the Constitutional Rights of Either the Defendant or Plaintiff to a Trial by Jury?

This precise question has been considered by the Wisconsin Supreme Court. As to the defendant's rights, the court held there was no violation in the *Powers* case itself.¹⁸

In the *Lucas* case,¹⁹ the court held there was no violation of the plaintiff's constitutional rights.

¹⁵ *Id.* at 577, 117 N.W. 2d at 665.

¹⁶ 19 Wis. 2d 210, 120 N.W. 2d 130 (1963).

¹⁷ *Id.* at 220, 120 N.W. 2d at 135.

¹⁸ *Powers v. Allstate Ins. Co.*, *supra* note 1.

¹⁹ *Lucas v. State Farm Mut. Automobile Ins. Co.*, *supra* note 14.

In *Powers* the court upheld the constitutionality of the Powers procedure and stated:

The United States Supreme Court in a unanimous opinion by the first Mr. Justice Harlan held in *Arkansas Valley Land & Cattle Co. v. Mann* (1889), 130 U.S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854, that such practice of granting the plaintiff the option to remit the excess amount by which a verdict is determined by the court to be excessive does not violate the right to trial by jury guaranteed by the Seventh amendment of the United States constitution. A number of the state courts have directly passed upon the constitutional issue and have upheld the rule of basing the amount to be remitted upon the excess over and above a reasonable amount. Among the cases so holding are: *Sewell v. Sewell* (1926), 91 Fla. 982, 109 So. 98; *Burdick v. Missouri Pacific R. Co.* (1894), 123 Mo. 221, 27 S.W. 453; and *Alter v. Shearwood* (1926), 114 Ohio St. 560, 151 N.E. 667.

As previously mentioned herein, it was acknowledged that courts had the power to set aside excessive verdicts and grant new trials long before either the federal or state constitutions were adopted. If a court has the power to hold a verdict for a certain amount excessive, it necessarily follows that it has the power to determine an amount which is not excessive. As the Missouri court well stated in *Burdick v. Missouri Pacific R. Co.*, *supra* (p. 242), "If it possesses the power to say the one thing, it possesses the power to say the other." Therefore, when a court determines that a certain amount is a reasonable amount to allow for plaintiff's unliquidated damages, it is the equivalent of holding that such amount is not excessive.²⁰

In *Lucas*, the trial court found a jury verdict of \$8,000 to be excessive and determined that \$4,300 would be a fair award. In reply to the plaintiff's contention that his constitutional right to a trial by jury had been denied, the court said:

. . . It happens that, in form, the trial court did order a change in the amount of the award made by the jury. In substance, however, the trial court gave plaintiff the choice between a new trial and accepting the court-determined figure. Plaintiff was free to have a second jury make an award if she so desired. No right of plaintiff to trial by jury was violated by the judge's determining that \$4,300 was a fair award because plaintiff was free to reject it. Plaintiff was deprived of the award made by one jury, but that award was found by the court to be excessive. Plaintiff's right to have a second jury make a new award was protected. The power of a court to set aside a jury verdict for damages because of being excessive has been recognized since long before the adoption of the federal or state constitution, and does not violate plaintiff's right to a trial by jury.²¹

²⁰ *Powers v. Allstate Ins. Co.*, *supra* note 1, at 91.

²¹ *Lucas v. State Farm Mut. Automobile Ins. Co.*, *supra* note 14, at 576.

*Does Powers Rule Apply to Inadequate as Well as
Excessive Verdicts?*

Since *Powers*, there has been no case in which the supreme court has found a questioned jury verdict to be inadequate and has increased the award and applied the *Powers* rule to the additur. Neither has there been such an additur by any trial court in any case appealed to the supreme court. However, the court has declared that in a proper case the *Powers* rule should apply to an inadequate verdict just as well as to an excessive verdict. Thus in *Cordes v. Hoffman*,²² the court stated:

The plaintiffs contend the damages awarded Mary E. Cordes were inadequate and ask this court under *Powers v. Allstate Ins. Co.* (1960), 10 Wis. 2d 78, 102 N.W. 2d 393, to extend an option for an additur to the defendants in the amount determined by this court. If this court agreed with the plaintiffs that the amount of damages was inadequate it could exercise its power to determine the reasonable amount of damages under the *Powers* case and grant a new trial with an option to the defendants to accept judgment against them for such amount. See *Rupp v. Travelers Indemnity Co.* (1962), 17 Wis. 2d 16, 115 N.W. 2d 612.²³

In *Podell v. Smith*,²⁴ the plaintiff suffered a painful monkey bite of her hand with accompanying disability and resulting surgery. The supreme court ruled that the jury's award of \$650 for this personal injury was "woefully inadequate" noting that there was prolonged disability that not only interfered with her business but also prevented her from doing her housework and from caring for her personal needs. Under the court's discretionary power of reversal under section 251.09 of the Wisconsin statutes, the court ordered a new trial on damages.

*Does Powers Rule Apply to Punitive Damages as Well
as Compensatory Damages?*

The court so ruled in the *Malco* case.²⁵

*Experience Since the Powers Case: Supreme Court Rulings on
Contested Personal Injury Damage Verdicts*

All of the cases in which a jury verdict for personal injuries has been questioned in the trial court on the grounds that the verdict is either inadequate or excessive, and where there has been an appeal to the supreme court in which the issue of excessiveness or inade-

²² 19 Wis. 2d 236, 120 N.W. 2d 137 (1963).

²³ *Id.* at 241, 120 N.W. 2d at 140. See also *Wendel v. Little*, 15 Wis. 2d 52, 112 N.W. 2d 172 (1961); *Dodge v. Dobson*, 21 Wis. 2d 200, 124 N.W. 2d 97 (1963); *Hernke v. Northern Ins. Co.*, 20 Wis. 2d 352, 122 N.W. 2d 395 (1963).

²⁴ 11 Wis. 2d 583, 106 N.W. 2d 332 (1960).

²⁵ *Malco v. Midwest Aluminum Sales*, 14 Wis. 2d 57, 109 N.W. 2d 516 (1961).

quacy of damages is presented may be categorized to show the extent to which the *Powers* rule has been applied to such cases.

(1) Cases where the jury award was found to be excessive by the trial court and a reasonable amount was determined by the trial court with the option given to the plaintiff to receive a new trial or to take the reduced amount and the supreme court affirmed.²⁶

(2) Cases where the jury award was found to be excessive by the trial court and a reasonable amount was determined by the trial court with the option given to the plaintiff to receive a new trial or take the reduced amount and the supreme court reversed, and reinstated the jury verdict.²⁷

(3) Cases where the jury award was affirmed by the trial court against the claim that it was excessive and the supreme court affirmed.²⁸

(4) Cases where the jury award was affirmed by the trial court but the supreme court found the verdict excessive and, applying *Powers* rule, determined a reasonable amount.²⁹

In *Powers*, the supreme court said the jury verdict was excessive "in that the evidence will not support the same."³⁰

The supreme court noted in *Beijer v. Beijer* that it was the trial court's opinion "that the damages were so high that he was astonished at the amount and still the amount did not shock the conscience of the court."³¹ The court considered the jury's award of \$4,250 to the plaintiff for permanent injuries sustained by her and stated:

²⁶ Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W. 2d 163 (1959); Burmek v. Miller Brewing Co., 12 Wis. 2d 405, 107 N.W. 2d 583 (1961); Gustafson v. Bertschinger, 12 Wis. 2d 630, 108 N.W. 2d 273 (1961); Lucas v. State Farm, 17 Wis. 2d 568, 117 N.W. 2d 660 (1962); Plesko v. Milwaukee, 19 Wis. 2d 210, 120 N.W. 2d 130 (1963); La Vallie v. General Ins. Co., 17 Wis. 2d 522, 117 N.W. 2d 703 (1962); Lee v. Milwaukee Gas Light Co., 20 Wis. 2d 333, 122 N.W. 2d 374 (1963).

²⁷ Makowski v. Ehlenbach, 11 Wis. 2d 38, 103 N.W. 2d 907 (1960); DeLong v. Sagstetter, 16 Wis. 2d 390, 114 N.W. 2d 788 (1962); O'Brien v. State Farm, 17 Wis. 2d 551, 117 N.W. 2d 654 (1962).

²⁸ Rude v. Algiers, 11 Wis. 2d 471, 105 N.W. 2d 825 (1960); Reddick v. Reddick, 15 Wis. 2d 37, 112 N.W. 2d 131 (1961); Springen v. Ager Plumbing & Heating, Inc., 19 Wis. 2d 487, 120 N.W. 2d 692 (1963); Jansa v. Mil. Auto Mut. Ins. Co., 18 Wis. 2d 145, 118 N.W. 2d 49 (1962); Rogers v. Adams, 19 Wis. 2d 141, 119 N.W. 2d 349 (1963); Borowske v. Integrity Mut. Ins. Co., 20 Wis. 2d 93, 121 N.W. 2d 287 (1963); Thompson v. Nee, 12 Wis. 2d 326, 107 N.W. 2d 150 (1961); Dwyer v. Jackson Co., 20 Wis. 2d 318, 121 N.W. 2d 881 (1963); Bleyer v. Gross, 19 Wis. 2d 305, 120 N.W. 2d 156 (1963); Erdmann v. Milwaukee Auto. Mut. Ins., 20 Wis. 2d 439, 122 N.W. 2d 430 (1963); Girtz v. Owen and Carriers Ins. Exchange, —Wis. 2d—, —N.W. 2d— (1963).

²⁹ Powers v. Allstate Ins. Co., 10 Wis. 2d 78, 102 N.W. 2d 393 (1960); Beijer v. Beijer, 11 Wis. 2d 207, 105 N.W. 2d 348 (1960); Teufel v. Home Indemnity, 15 Wis. 2d 67, 111 N.W. 2d 893 (1961); Freuen v. Brenner, 16 Wis. 2d 445, 114 N.W. 2d 782 (1962); Albers v. Herman Mut., 17 Wis. 2d 385, 117 N.W. 2d 364 (1962); Spleas v. Milwaukee & Suburban Transport Corp., 21 Wis. 2d—, 124 N.W. 2d— (1963).

³⁰ Powers v. Allstate Ins. Co., *supra* note 1, at 87.

³¹ Beijer v. Beijer, *supra* note 29, at 212.

A careful review of the record indicates that the evidence does not warrant the amount of damages awarded by the jury for the permanent injuries sustained by Mrs. Beijer and that the same is excessive.³²

The court went on to determine that \$3,000 was a reasonable sum.

The court, in *Teufel v. Home Indemnity*, determined that \$12,600 was "excessive in that the evidence will not support the same."³³ The court determined \$3,000 as a reasonable sum.

In *Freuen v. Brenner* the court concluded that an award of \$40,000 was excessive and determined that \$30,000 "would be a reasonable and just amount."³⁴

In *Albers v. Herman Mut.*, the court determined that the award of \$10,000 "made for plaintiff's past and future pain, suffering, and discomfort is excessive in that the evidence will not support the same."³⁵ The court determined that \$6,000 would be a reasonable sum.

Finally, in *Spleas*, the court declared:

. . . a fair appraisal of the nature and seriousness of Spleas' injuries does not warrant the damages assessed by the jury. From a review of the evidence, we determine that \$10,000 is a reasonable sum to award to the plaintiff for his damages in this case, including his pain and suffering.³⁶

The court also said:

While we recognize that the jury's appraisal of damages should not be disturbed in the absence of error, it is nevertheless our duty to evaluate the testimony, and if the award is excessive even when viewed in the light most favorable to the plaintiff, it is our responsibility to so find.³⁷

(5) Cases where the jury award was found by the trial court to be not inadequate and the supreme court affirmed.³⁸

(6) Cases where perversity or error in the trial was found by the trial court and the *Powers* rule was not applied, but the trial court ordered a new trial and the supreme court affirmed.³⁹

(7) Cases where the trial court did not have the opportunity to

³² *Id.* at 212, 105 N.W. 2d at 351.

³³ *Teufel v. Home Indemnity Co.*, *supra* note 29, at 73.

³⁴ *Freuen v. Brenner*, *supra* note 29, at 452.

³⁵ *Albers v. Herman Mut.*, *supra* note 29, at 391.

³⁶ *Spleas v. Milwaukee & Suburban Transport Corp.*, *supra* note 12, at—.

³⁷ *Id.* at —, 124 N.W. 2d at —.

³⁸ *Wendel v. Little*, 15 Wis. 2d 52, 112 N.W. 2d 172 (1961); *Cordes v. Hoffman*, 19 Wis. 2d 236, 120 N.W. 2d 137 (1963); *Dodge v. Dobson*, 21 Wis. 2d 200, 124 N.W. 2d 97 (1963); *Hernke v. Northern Ins. Co.*, 20 Wis. 2d 352, 122 N.W. 2d 395 (1963).

³⁹ *Dykstra v. Cudahy Brothers Co.*, 13 Wis. 2d 275, 108 N.W. 2d 526 (1961); *Bublitz v. Lindstrom*, 17 Wis. 2d 608, 117 N.W. 2d 636 (1962).

apply the *Powers* rule, and the supreme court therefore remanded to give the trial court opportunity to apply the rule.⁴⁰

(8) Cases where the supreme court exercised its discretionary power to call for a new trial under section 251.09 of the Wisconsin statutes where it was satisfied that the damages were inadequate, where there was other error, and where there probably would be a miscarriage of justice unless a new trial were granted.⁴¹

*Basic Rules Followed by Trial Court in Determining
Whether Verdict is Excessive*

The rules applied by the trial court in determining whether a jury verdict is excessive remain unchanged under the *Powers* rule.

(1) "In considering whether the jury's appraisal of damages for pain, suffering, and disability is excessive, we must of course view the evidence in the light most favorable to plaintiff."⁴²

(2) "In analyzing the testimony as to the existence of any permanency of the injury or the likelihood that the injured person will endure future pain and suffering before recovery may be allowed therefor, there should be competent objective medical findings and the unsupported subjective statements of the injured party are not sufficient."⁴³

(3) Is the verdict too large to be supported by the evidence? What sum will the evidence reasonably support?⁴⁴

In *Makowski v. Ehlenbach* the court stated:

Since it is for the jury, and not for the court, to fix the amount of the damages, their verdict in an action for unliquidated damages will not be set aside merely because it is large or because the reviewing court would have awarded less. Full compensation is impossible in the abstract, and different individuals will vary in their estimate of the sum which will be a just pecuniary compensation. Hence, all that the court can do is to see that the jury approximates a sane estimate, or, as it is sometimes said, see that the results attained do not shock the judicial conscience.⁴⁵

(4) "A jury may mistakenly assume (without supporting evidence) that there have been, or will be certain effects from an injury or fix compensation for sufficiently proved effects of injury at a figure which is beyond the range of reasonably debatable amounts. In a case where it is clear to the court that the amount awarded must necessarily reflect

⁴⁰ *Hansen v. Oregon*, 11 Wis. 2d 399, 105 N.W. 2d 815 (1960).

⁴¹ *Mainz v. Lund*, 18 Wis. 2d 633, 119 N.W. 2d 334 (1963).

⁴² *Kincannon v. National Indemnity Co.*, 5 Wis. 2d 231, 233, 92 N.W. 2d 884, 885 (1958).

⁴³ *Lucas v. State Farm Mut. Auto Ins. Co.*, 17 Wis. 2d 568, 572, 117 N.W. 2d 660, 662 (1962). See also *Diemel v. Weirich*, 264 Wis. 265, 58 N.W. 2d 651 (1962).

⁴⁴ *Makowski v. Ehlenbach*, 11 Wis. 2d 38, 103 N.W. 2d 907 (1960); *Blong v. Ed. Schuster & Co.*, 274 Wis. 237, 79 N.W. 2d 820 (1956); *Blaisdell v. Allstate Ins. Co.*, 1 Wis. 2d 19, 82 N.W. 2d 886 (1957).

⁴⁵ *Makowski v. Ehlenbach*, *supra* note 44, at 42.

an allowance for the effects of injury not sufficiently proved or reflect a rate of compensation which is beyond reason, the court will declare the damages excessive. Where the question is a close one, it should be resolved in favor of the verdict."⁴⁶

(5) Each case must be considered on its own facts and record and great care must be exercised in considering other cases with comparable injuries.

Likewise, a comparison with other verdicts at best can only be an imperfect analogy affording some guidelines to the solution but not necessarily determining the result.⁴⁷

(6) Medical opinions must be expressed at least in terms of probabilities, not mere possibilities.⁴⁸

*Additional Rules Followed by Supreme Court Reviewing
Verdicts Declared Excessive by a Trial Court and Where a
Reasonable Amount has been Determined*

In addition to all of the above rules for reviewing personal injury verdicts the supreme court has one additional rule for reviewing a verdict which the trial court has found to be excessive and in turn has fixed what it considers to be a reasonable amount.

Where a trial judge has reviewed all of the evidence and has found a jury verdict awarding damages to be excessive and has fixed a reduced amount therefor, and has determined that there should be a new trial on damages unless the plaintiff takes his option for a judgment on the reduced amount, this court will reverse his directions "only if we find an abuse of discretion on the part of the trial court." *Makowski v. Ehlenbach* (1960), 11 Wis. 2d 38, 44, 103 N.W. 2d 907; *Boughton v. State Farm Mut. Automobile Ins. Co.* (1959), 7 Wis. 2d 618, 97 N.W. 2d 401; *Puhl v. Milwaukee Automobile Ins. Co.* (1959), 8 Wis. 2d 343, 99 N.W. 2d 163.⁴⁹

Conclusions

In summary, several conclusions may be drawn from the supreme court decisions since *Powers*.

(1) Since *Powers*, the supreme court has not been asked to review damage verdicts any more frequently than before the rule.

(2) The supreme court changes a verdict only very infrequently and the number of times the court has done so is no greater since *Powers* than before.

⁴⁶ *Id.* at 42, 103 N.W. 2d at 911.

⁴⁷ *Springen v. Ager Plumbing & Heating, Inc.*, 19 Wis. 2d 487, 493, 120 N.W. 2d 692, 695 (1963).

⁴⁸ *Estate of Kitz*, 13 Wis. 2d 49, 108 N.W. 2d 116 (1961); *Hintz v. Mielke*, 15 Wis. 2d 258, 112 N.W. 2d 720 (1961); *Bleyer v. Gross*, 19 Wis. 2d 305, 120 N.W. 2d 156 (1963).

⁴⁹ *Lucas v. State Farm Mut. Auto Ins.*, *supra* note 14, at 571, 117 N.W. 2d 660, 662 (1962).

(3) The supreme court gives great weight to a careful analysis of the award by the trial court and most often goes along with the trial court when he has made such an analysis.

(4) Since *Powers* there undoubtedly are fewer new trials on damage questions because the trial court decision and the current practice of setting a reasonable figure is much more likely to be acceptable to the parties than the former practice where the figure was either too low to please the plaintiff or too high to please the defendant.⁵⁰

⁵⁰ Commenting on the practice since *Powers* and the effect of the rule, supreme court said in *Spleas v. Milwaukee Suburban Transport Corp.*, *supra* note 12, at —: "We have found the *Powers* rule to be a valuable tool, both in this court and in trial courts, to avoid unnecessary retrials."