Marquette Law Review

Volume 44
Issue 3 *Winter 1960-1961*

Article 9

Practice: Option to Plantiff to Take Reasonable Verdict as Alternative to New Trial Excessive Damages

Joseph P. Jordan

was inapplicable, and that *Mac Mahon v. Bergeson* constitutes "new" law. Would this mean that recovery, within the field of ordinary negligence, is dependent upon whether plaintiff's pre-existing impairment is physical or mental? Does this case support the proposition that liability may attach to defendant's ordinary negligence toward "physically" subnormal plaintiff *A*, but "mentally" subnormal plaintiff *B* is *damnum absque injuria?* "The utter relativity of the suggested norms would seem to augur considerable uncertainty for future cases of this kind in Wisconsin."[32]

FREDERIC N. SPIDELL

Practice: Option to Plaintiff to Take Reasonable Verdict as Alternative to New Trial for Excessive Damages—Plaintiff, appellant, was a passenger in one of two automobiles involved in an accident. The jury found the drivers of both automobiles causally negligent and fixed damages at $1,500 for pain and suffering and $5,000 for permanent injuries. The trial court found that there was not proper medical testimony to support a finding of permanent injury and changed the jury's answer to the question relating to permanent injury from "yes" to "no." Judgment was entered in favor of the plaintiff for $1,500. The Supreme Court, in *Powers v. Allstate Insurance Co.*,[1] held that it was error on the part of the trial court to change the jury's verdict and that there was sufficient medical testimony to support a finding of permanent injury but that the damages assessed were excessive. The Supreme Court then stated:

> Heretofore, in such a situation it has been customary to fix the lowest amount an unprejudiced jury, properly instructed, might award for damages, and then grant to the plaintiff the option of taking such amount or having a new trial.[2]

The Supreme Court now adopts the rule that, "where an excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of the 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."[3] The court thus overruled *Heimlich v. Tabor*[4] and *Campbell v. Sutliff*[5] in so far as they held that such a rule violated defendant's constitutional right to a trial by jury. The court granted to the plaintiff the option of taking either $3,000 for permanent injury or a new trial on the issue of damages.

---

[32] GHIARDI, AIKEN & CORMAN, PERSONAL INJURY COMMENTATOR, 1958 Annual, ed. note p. 88.
[1] 10 Wis. 2d 78 (1960).
[2] *Id.* at 87.
[3] *Id.* at 91.
[4] 123 Wis. 525, 102 N.W. 10 (1905).
[5] 193 Wis. 307, 214 N.W. 374, 53 A.L.R. 771 (1927).

The question which will be primarily dealt with here is whether the rule of the *Powers* case invades the right to trial by jury which is protected by the Wisconsin Constitution.[6] There can be no question but that such a rule does not violate the "due process" clause of the Fourteenth Amendment of the United States Constitution.[7] This discussion will therefore be restricted to the effect of the ruling upon the Wisconsin Constitution.

An inquiry into the constitutionality of a remittitur is pertinent only when the court declares the verdict to be excessive or inadequate and then allows an option which if exercised will avoid a new trial without the consent of one of the parties, and if the consent lacking is that of the plaintiff's, allows a recovery for less than the greatest sum a reasonable jury could find or, if the defendant's consent is lacking, allows a recovery for more than the least sum a reasonable jury could find. The rule of the *Powers* case is in the latter category. Thus, if both parties are given an election between a court fixed sum and a new trial and the consent of both is required to avoid a new trial, no injury is done to either party. Likewise, if the verdict be found excessive and the plaintiff be allowed his option of a new trial or the lowest amount a reasonable jury could have found,[8] the defendant has no right to complain because any verdict below the lowest amount a reasonable jury could return, would be set aside by the court as inadequate.

But what is this right to trial by jury which is protected by the Wisconsin Constitution and how is it effected by the rule in the *Powers* case? The constitutional right to trial by jury requires that questions of fact be decided by the jury.[9] The question of damages, when they are unliquidated, is an issue of fact and an issue which the jury must determine.[10] Therefore, if there were nothing further to consider, it could be said that if the court sets the amount of damages and one of the parties is not given an opportunity to object, that party's right to trial by jury has been violated.

The Wisconsin Supreme Court, however, pointed out in support of its ruling that : 1) this right to trial by jury is that right as it existed

---

[6] WIS. CONST. Art. 1, §4: "The right to trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, but a trial by jury may be waived by the parties in all cases in the manner perscribed by law."

[7] A right to trial by jury is not an essential part of due process and since the Fourteenth Amendment guarantees no particular form of procedure a statute may retain or abolish juries. Walker v. Sauvient, 92 U.S. 90 (1876); Heimlich v. Tabor, 123 Wis. 565, 102 N.W. 10 (1905).

[8] *Supra* notes 4 and 5.

[9] "When an issue of fact be made in a cause, it must be tried by the jury." Haskin v. Wilson, 5 Wis. 106 (1856); U.S. v. Standard Oil Co., 24 F. Supp. 575 (W.D. Wis. 1938).

[10] Assessment of damages in an action for personal injuries is peculiarly for the jury. Nelson v. Deluth St. Railway Co., 127 Wis. 28, 121 N.W. 388 (1928); Schmidt v. Reiss, 186 Wis. 574, 579, 203 N.W. 362 (1925).

at the time of the adoption of the Constitution;[11] 2) decisions in other jurisdictions advocate the same rule;[12] and 3) "If the 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."[13] From these premises the court comes to the conclusion that, ". . . when a court determines that a certain amount is a reasonable amount to allow for the plaintiff's unliquidated damages, it is equivalent to holding that such an amount is not excessive."[14] Each of these reasons will now be considered separately to determine whether any one of them taken alone or all of them taken collectively is sufficient to lift the bar of seeming unconstitutionality which the Wisconsin Constitution places before any restriction of an individual's right to trial by jury.

I. "The right to trial by jury preserved by this provision of the constitution is the right as it existed at the time of the adoption of the constitution in 1848."[15] The term "trial by jury" standing alone would be ambiguous. It is to be defined as it was defined in 1848. Thus if this practice had been recognized at the time of the adoption of the Constitution, it could not now be unconstitutional because it would have been incorporated into the definition of "trial by jury" which the Constitution adopted. The court relies upon *Corcoran v. Harrian*[16] and *Baker v. The City of Madison*[17] in support of its position that the early Wisconsin rule is the same as the rule laid down by the *Powers* case. However, the court bypasses the earlier cases which hold that such a rule is not valid. In *Nudd v. Wells*[18] the court stated that the verdict was clearly excessive.

> But 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 the refusing of a new trial, would be proper.[19]

After giving examples of instances where remittitur would be allowed because damages were fixed, the court states:

> But it ought not to be construed so far as to allow the court, when a jury has obviously mistaken the law, or the evidence, and rendered a verdict which ought not stand, *to substitute its judgment for theirs,* and after determining upon the evidence what

---

[11] Campbell v. Sutliff, *supra* note 5.
[12] *Supra* note 1, at 91.
[13] *Id.* at 90.
[14] *Ibid.*
[15] *Supra* note 5.
[16] 55 Wis. 120, 127, 12 N.W. 486 (1882).
[17] 62 Wis. 137, 22 N.W. 121 (1884).
[18] 11 Wis. 426 (1859).
[19] *Id.* at 434.

> amount ought to be allowed, allow the plaintiff to remit the excess and then refuse a new trial.[20] (Emphasis ours.)

Therefore, it seems clear that in the cases which immediately follow the adoption of our Constitution that the practice of remittitur not only was not adopted but was specifically disapproved.

II. The court found that other jurisdictions allow the use of remittitur under a process similar to that advocated in the *Powers* case. However, both of the law review articles cited[21] by the court suggest that the Wisconsin Rule under the *Campbell v. Sutliff*[22] decision is the better reasoned rule. The practice of remittitur which has long been established in the federal courts in *Northern Pacific R.R. v. Herbert*[23] was put in a somewhat doubtful light by the Supreme Court in the case of *Dimick v. Schiedt*[24] when that court said: "It therefore may be that if the question of remittitur were before us for the first time, it would be decided otherwise."[25] In effect the court appears to be saying that one of the principal reasons that the practice of remittitur has been sustained is the long line of decided cases which have sanctioned the practice. It would seem that this long line of precedent can be traced back to Mr. Justice Story's opinion in the case of *Blunt v. Little*.[26] The decision in that case has been criticized because no attempt was made, when deciding it, to ascertain the common law rule on the subject.[27] It also appears that Mr. Justice Story himself may have

---

[20] *Ibid.;* see also: Bushee v. Wright, 1 Pin. 104 (1840). A remittitur was allowed but the action was upon a note and the damages were liquidated; Bichard v. Booth, 4 Wis. 67 (1855), action for assault and battery. The court refused to even set aside the verdict unless the verdict were so excessive as to show marks of passion, prejudice, or corruption; Potter, Adm'r, v. Chicago & Northwestern Railway Co., 22 Wis. 615 (1868), in action for the death of a ten yr. old girl, the court said at 620: "this court has adopted it (remittitur) . . . where a portion of the judgment was illegal, but which however was readily assertainable by the record. But it has decided that when such is not the case, *it would not substitute its judgment for that of the jury* and allow the part to remit accordingly, and then affirm the judgment." (emphasis ours). In Goodnow v. The City of Oshkosh, 28 Wis. 300 (1871), an action for personal injuries, the court refused to allow a remittitur but granted a new trial and indicated the amount beyond which the verdict would be excessive. They specifically refused to adopt "the New York Rule"; In Zitske v. Goldberg, 38 Wis. 216 (1875), an action for replevin and damages to a horse, the court indicated that it would grant a remittitur where damages were allowed in excess of the jurisdiction of the court, the amount of such remittitur being clearly ascertainable.

[21] *Remittitur and Additur,* 44 Yale Law Journal 318, 325 (1934); *Remittiturs and Additurs,* 49 W. Va. Law Quarterly 1 (1946).

[22] *Supra* note 5.

[23] 116 U.S. 642, 646 (1885).

[24] 293 U.S. 474 (1934).

[25] *Id.* at 484.

[26] 3 Mason 102 (1822).

[27] "It is however, remarkable that in none of these cases was there any real attempt to assertain the Common Law rule upon the subject. Mr. Justice Story, in the Blunt Case, cited two English cases antedating the Constitution in support simply of his conclusion that the court had the power to grant a new trial for excessive damages and then announced without more that unless

reconsidered his opinion in that case.[28] However, it is certain that the practice of remittitur is firmly established in the Federal Courts, but that the Supreme Court of the United States did not favor the practice enough to extend its scope to include additur.[29] The Court distinguished additur from remittitur on the grounds that when the jury returns a verdict which is excessive and the court requires a remittitur,

> . . . what remains is included in the verdict along with the unlawful excess—in that sense . . . it has been found by the jury—and the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included by the jury.[30]

This distinction has been criticized[31] and the important distinction seems to be that remittitur has long been allowed while additur has not.[32] Furthermore the English courts have abandoned the practice.[33]

III. The power to set aside a verdict gives the power to determine the exact amount of the verdict. This is based upon the proposition that the court could, from the time of the adoption of the Wisconsin Constitution, set aside a verdict.[34] The court can, of course, set aside a verdict as excessive but only when so excessive as to "shock the judicial conscience."[35] Thus the court cannot say simply that it does not agree with the jury and on that ground set aside the verdict.[36] The power to set

---

the plaintiff should be willing to remit $500 of his damages the case would be submitted to another jury. For the latter conclusion no authority whatever was cited." *Supra* note 24, at 484.

[28] Savanah, Florida, & Western Ry. v. Harper, 70 Ga. 119, 126 (1883), the Georgia Court said: "In another case 2 Ib., 670, 671, he laid down the rule: In no case will the court ask itself whether, if it had been substituted instead of the jury, it would have given precisely the same damages, but the court will simply consider whether the verdict is fair and reasonable, and in the exercise of its sound discretion, under all of the circumstances of the case, it will be deemed so, unless the verdict is so excessive or outrageous with reference to those circumstances as to demonstrate that the jury have acted against the rules of law or have suffered their passion or prejudice or perverse disregard of justice, to mislead them."

[29] *Supra* note 24.

[30] *Ibid.*

[31] *Supra* note 21.

[32] *Supra* note 24.

[33] Watt v. Watt, L.R. (1905) A.C. 115; The court expressly repudiated the doctrine which was sanctioned in Belt v. Lawes, L.R. 12 Q.B. Div. 365 (1905).

[34] *Supra* note 1, at 89.

[35] "Since it is for the jury and not for the court to set the amount of 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 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. 15 Am. Jur., Damages §625 at 622. This rule is adopted in Wisconsin by the cases of Bethke v. Duwe, 256 Wis. 378, 384, 41 N.W. 2d 277 (1949); Parr v. Douglas, 253 Wis. 311, 34 N.W. 2d 229 (1948).

[36] *Ibid.*

aside as excessive only gives the power to determine the limits within which a verdict is neither excessive or inadequate, limits which in the case of personal injury might include a wide range of possible verdicts. The power to control does not give the power to find a verdict. "Like the executive veto, it arrests, but does not by its exercise give the power to enact."[37] Thus the court in the *Powers* case is, in effect, saying that it cannot and will not set aside a verdict as excessive unless it is clearly excessive, that is, it will not set aside a verdict because it is one dollar too much, but that this power to set aside a verdict when clearly excessive gives the court the power to determine the exact amount of the verdict. It is a very different thing to say that a verdict is clearly excessive than it is to say that the verdict shall be this particular amount. It is very similar to the difference between saying that you will not pay more than $100 for a particular article and saying that you will pay $50 for it.

The court adopted the practice that it did in the *Powers* case for a pragmatic reason, namely, that such a remittitur would expedite litigation and lessen the expense thereof. That this end would be accomplished can hardly be doubted. Nor can it be doubted that such an end is a desirable one. It would seem unfortunate, however, that the court would abandon a practice which has been in effect in this state for over a half a century, on these grounds. It is to be desired that when the question of additur is presented to the court it will follow the decision of the United States Supreme Court in *Dimick v. Schiedt*[38] and refuse to extend the rule any further. This would have the merit of bringing Wisconsin into line with the Federal law on the question. However, it would seem even more desirable if the court would reconsider its position on the question of remittitur.

JOSEPH P. JORDAN

Federal Income Taxation—Deductions: Corporate Expenditures Not Incurred in Carrying On a Trade or Business—Petitioner, a closely-owned corporation, was engaged in the brewery supply business, and also owned rental property. It purchased certain lakeshore residential property and added extensive improvements so that the property was usable as a summer residence and for entertainment. The officers and stockholders of the corporation, all closely related, lived on the premises for about three months each summer, paying $9,000 rent annually. The expenses deducted by petitioner for the depreciation and maintenance of this property amounted to approximately $35,000 a year. The Commissioner allowed the corporate taxpayer a deduction of only $9,000 each year, that is, to the

[37] *Supra* note 28.
[38] *Supra* note 24.