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Abolishment of Remittitur: A Response to the Missouri Supreme Court, The

G. Stanton Masters

NOTES

THE ABOLISHMENT OF REMITTITUR: A RESPONSE TO THE MISSOURI SUPREME COURT

Firestone v. Crown Center Redevelopment Corporation[1]

On the evening of July, 17, 1981, the four-story lobby of Kansas City's Hyatt Regency Hotel was transformed into a grand ballroom. Fifteen-hundred people were dancing and socializing when, without warning, two concrete walkways suspended above the crowd came crashing down.[2] In all, one hundred-thirteen people died.[3] But before the multitude of resulting lawsuits could be tried and settled, the Hyatt disaster claimed one more casualty—the practice of remittitur.[4]

Remittitur is a procedural tool used by judges to control jury verdicts which over-compensate a plaintiff. This practice may occur at two stages of litigation. In the trial court, remittitur provides the successful plaintiff with a choice: voluntarily remit a specified portion of the excessive verdict or face a new trial.[5] Appellate judges employ remittitur in a similar fashion. The appellate court may choose to affirm a lower court's judgment only if the plaintiff agrees to remit a portion of the excessive verdict.[6] If the plaintiff refuses, the appellate court will reverse the judgment and remand the action for another trial.[7] Despite its usefulness in avoiding multiple trials, the Missouri Supreme Court abandoned remittitur in *Firestone v. Crown Center Redevelopment Corporation.*[8]

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1. 693 S.W.2d 99 (Mo. 1985) (en banc).
2. McGrath, Schlinkmann, and Foote, *Death Trap in Kansas City*, NEWSWEEK, July 27, 1981, at 30.
3. Blyskal, *Claim Jumpers in Three-Piece Suits*, FORBES, December 7, 1981, at 40.
4. Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. 1985) (en banc).
5. *See, e.g.*, Carver v. Missouri K.T.R.R., 362 Mo. 897, 916, 245 S.W.2d 96, 105 (1952). Although opinions often spoke of courts "ordering" a remittitur, a plaintiff was always entitled to refuse. The court, in effect, ordered the plaintiff to choose between remittitur and a new trial. *See infra* notes 81-82 and accompanying text.
6. *See, e.g.*, Sanders v. Illinois Cent. R.R., 364 Mo. 1010, 1019, 270 S.W.2d 731, 738 (1954) (en banc).
7. *Id.*
8. 693 S.W.2d at 110.

Firestone was one of the many lawsuits brought by injured survivors of the Hyatt disaster. Prior to the disaster, the plaintiff, Sally Firestone, was an active 34 year old woman, who divided her time between a well-paying job and a variety of social interests.[9] As a result of the Hyatt skywalk collapse, Sally Firestone suffered serious injuries, including a fractured spine, a severed spinal cord, scalp lacerations, two broken legs, and severe blood loss.[10] Firestone underwent many painful treatments while hospitalized and suffered severe complications as a result of her injuries.[11] After seven months of hospitalization and rehabilitation, Sally Firestone was released.[12] Sally Firestone is now a quadraplegic requiring 24-hour attendance and special equipment, as well as continuing physical and emotional therapy.[13]

In Firestone's suit against Crown Center Redevelopment Corporation,[14] only the issue of compensatory damages was litigated.[15] The jury returned a verdict for the plaintiff in the amount of $15,000,000.[16] The trial judge, believing the verdict to be unsupported by the evidence, ruled that unless the plaintiff remitted $2,250,000 a new trial would be ordered.[17] The plaintiff complied, and judgment was entered in the amount of $12,750,000.[18]

The defendant appealed, alleging that the trial was marked by error[19]

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9. *Id.* at 108.

10. *Id.* at 108-09.

11. *Id.* The treatment of Sally Firestone's extensive injuries required several blood transfusions, attachment to a mechanical breathing apparatus, and the insertion of a catheter into her pulmonary artery to measure cardiac functions. She was placed in traction by fastening tongs to her skull. A device measuring intercranial pressure was inserted through holes drilled into Sally Firestone's skull. Her neck injuries required "grueling neurological testing" and surgery for neck stabilization. During her treatment, Sally Firestone suffered complications including respiratory distress syndrome, frequent clogging of her airway passage, a gastric hemorrhage, bladder infections, and pneumonia. *Id.*

12. *Id.* at 109.

13. *Id.* Because of her spinal injuries, Sally Firestone has no movement below her shoulders with the exception of limited movement in her biceps. *Id.*

14. Crown Center Redevelopment Corp., a subsidiary of Hallmark Cards, Inc., owned the Kansas City Hyatt Regency Hotel. The Hyatt Corp. managed the property and hotel operations. McGrath, Schlinkmann, and Foote, *supra* note 2, at 31.

15. Prior to trial, the parties entered into a settlement agreement which provided that the defendants would not contest liability for damages and the plaintiff would introduce no evidence of the defendants' conduct. Furthermore, the agreement made provision for the payment of punitive damages from a special fund established by the defendants. As a result, the only issue remaining at trial was the issue of compensatory damages, and the jury was instructed accordingly. *Firestone*, 693 S.W.2d at 104-05.

16. *Id.* at 101.

17. *Id.*

18. *Id.*

19. In addition to the excessive verdict, the defendants alleged errors which

and that the judgment, despite the remittitur, was excessive.[20] The defendant sought a reversal and a new trial or, in the alternative, a further remittitur of $7,500,000.[21] Pursuant to Missouri Supreme Court Rule 78.10,[22] the plaintiff cross-appealed for restoration of the original $15,000,000 verdict.[23] The court of appeals affirmed the lower court judgment, but transferred the case to the Missouri Supreme Court.[24] In its decision, the supreme court found no trial errors, reinstated the original $15,000,000 verdict, and abolished the use of remittitur in Missouri courts.[25]

With the decision in *Firestone*, Missouri judges lost a valuable tool. Remittitur provided a useful alternative to costly litigation and a means of affecting uniformity among jury verdicts. In its brief discussion of remittitur,[26] the court set out its reasons for abolishing the practice. The balance of this Note is directed toward a thorough examination of the reasons given by the court.

The court began its attack on remittitur by noting that the doctrine was not established in Missouri by statute or rule.[27] While this fact is undisputably true, the practice of remittitur was sufficiently established in Missouri procedure to warrant discussion in the rules regarding new trials, at least with respect to appeals.[28] Regardless of whether remittitur was recognized expressly or by implication in Missouri, remittitur has long been established as an acceptable element of the common law.

Some evidence of remittitur can be found in English common law before

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included the following: failure to grant a change of venue, admission of evidence concerning the defendants' conduct in violation of the settlement agreement and the court's in limine rulings, admission of evidence presenting plaintiff in an impoverished condition, admission of evidence designed to solicit a charitable verdict, and admission of evidence concerning court costs and attorney's fees. *Id.* at 101-07.

20. *Id.* at 101.

21. *Id.*

22. Mo. Sup. Ct. R. 78.10 provides:

> Consenting to a remittitur as a condition to the denial of a new trial does not preclude the consenting party from asserting on appeal that the amount of the verdict was proper or that the amount of the remittitur is excessive. A party consenting to a remittitur may not initiate the appeal on that ground but may raise the same on the other party's appeal.

23. *Firestone*, 693 S.W.2d at 101.

24. *Id.*

25. *Firestone*, 693 S.W.2d 99.

26. The court devoted to the abolishment of remittitur less than one page of its eleven-page opinion. In that small portion, the court succinctly stated its justifications for abolishing remittitur, but provided little analysis to explain its abrupt change of position. *See id.* at 110.

27. *Id.*

28. Mo. Sup. Ct. R. 78.10, *supra* note 22.

the adoption of the U.S. Constitution.[29] English judges occasionally decreased a plaintiff's damages, although the practice was neither widespread nor favored.[30] The case of *Blunt v. Little*[31] introduced remittitur in the courts of the United States. In *Blunt*, the plaintiff sued for malicious prosecution, and the jury returned a verdict for $2,000.[32] United States Supreme Court Justice Joseph Story, acting as circuit justice, recognized the validity of the plaintiff's claim, but considered the verdict excessive. Declaring remittitur to be "reasonable," Justice Story ordered the plaintiff to remit $500 or face a new trial.[33] The plaintiff consented, and the motion for new trial was denied.[34] Since the decision in *Blunt*, the Supreme Court has upheld the use of remittitur in federal courts.[35]

Missouri courts similarly embraced remittitur at an early date in the state's history. In 1831, the Missouri Supreme Court recognized in *McAllister v. Mullanphy*[36] that a plaintiff could voluntarily offer to remit a portion of his damages in order to avoid a new trial.[37] A voluntary remittitur differs from the usual practice of remittitur in that the plaintiff, rather than the court, proposes the remittitur to avoid a new trial.[38] Early Missouri opinions also cite with approval trial court orders conditioning the denial of a new trial on the remittitur of an excessive verdict.[39] In *Ellis v. Mackie*,[40] a case decided before the turn of the century, the court stated, "Where the objection is one which goes to the amount of the recovery alone, trial courts have *always* been accorded the right to order a remittitur . . . in order to avoid the necessity of a retrial."[41] Because of its long acceptance in Missouri, pre-

29. Dimick v. Schiedt, 293 U.S. 474, 482-85 (1935). In *Dimick*, the Court addressed the use of additur, a practice similar to remittitur whereby a denial of a new trial is conditioned upon the defendant's consent to an increase in the plaintiff's verdict. The petitioner contended that because remittitur was permitted in federal court, additur should be permitted also. The Court concluded that unlike remittitur, additur was not employed by common law courts at the time the Constitution was written. As a result, additur was held to be unconstitutional. *Id.*

30. *Id.* at 476-83.

31. 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578).

32. *Id.*

33. *Id.* at 762.

34. *Id.*

35. Dimick v. Schiedt, 293 U.S. 474, 483 (1935); *see, e.g.*, Northern Pac. R.R. v. Herbert, 116 U.S. 642, 647 (1886); Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 73-74 (1889).

36. 3 Mo. 38 (1831).

37. *Id.* The plaintiff in *McAllister* voluntarily offered to remit a portion of his verdict when the defendant moved for a new trial. The trial court accepted the remittitur and entered judgment for the balance. *Id.*

38. *See* Aut v. St. Louis Pub. Serv. Co., 238 Mo. App. 1136, 1147, 194 S.W.2d 753, 759 (1946).

39. *See* Loyd v. Hannibal & St. Joseph R.R. Co., 53 Mo. 509, 514 (1873).

40. 60 Mo. App. 67 (1894).

41. *Id.* at 69 (emphasis added).

Firestone commentators concluded that the power to order a remittitur was "conclusively established"[42] and beyond serious challenge.[43]

By the time *Firestone* was decided, long usage refined remittitur and limited its application. Missouri courts limited remittitur by distinguishing "excessive" verdicts from "grossly excessive" verdicts.[44] An excessive verdict occurred when a jury made an "honest mistake" in weighing the evidence and fixing the amount of damages.[45] A trial court could correct an excessive verdict by remittitur.[46] When a verdict was "grossly excessive," indicating bias or prejudice on the part of the jury, a trial court was precluded from entering a remittitur.[47] Remittitur could not be demanded as a matter of right, but was left to the broad discretion of the trial judge.[48] On appeal, an order of remittitur was disturbed only upon finding an arbitrary abuse of discretion by the trial court.[49]

Appellate remittitur was not as quickly accepted in Missouri as its trial court counterpart. While early cases discuss its use,[50] appellate remittitur was the source of much disagreement.[51] Throughout the 1890's, the divisions of the supreme court[52] engaged in a running battle regarding appellate remittitur, with the court en banc vacillating on the question of its permissability.[53]

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42. Kinder, *Appellate Remittitur*, 33 Mo. L. REV. 637 (1968).

43. Coburn, *The Missouri Remittitur Practice*, 14 J. Mo. BAR 214 (1958).

44. Skadal v. Brown, 351 S.W.2d 684, 689 (Mo. 1961); Jones v. Pennsylvania R.R., 353 Mo. 163, 172, 182 S.W.2d 157, 159 (1944); Sofian v. Douglas, 324 Mo. 258, 264-65, 23 S.W.2d 126, 129 (1929).

45. Skadal v. Brown, 351 S.W.2d 684, 689 (Mo. 1961).

46. *Id.* at 689-90.

47. *Id.* This distinction, requiring a new trial and prohibiting remittitur for grossly excessive verdicts, was justified on the grounds that bias and prejudice constituted misconduct sufficient to vitiate the entire verdict, liability as well as damages. *Id.*

48. Aut v. St. Louis Pub. Serv. Co., 238 Mo. App. 1136, 1144, 194 S.W.2d 753, 757 (1946).

49. Lewis v. Envirotech Corp., 674 S.W.2d 105, 113 (Mo. Ct. App. 1984).

50. *See, e.g.*, *Ellis*, 60 Mo. App. at 69.

51. The disagreement centered on the compatibility of appellate remittitur with the right to trial by jury and the jury's function of weighing the evidence. *See, e.g.*, Burdict v. Missouri Pac. Ry., 123 Mo. 221, 27 S.W. 453 (1894) (en banc).

52. In the 1890's, the Missouri Supreme Court was divided into two divisions. The divisions excercised the same powers and jurisdiction as the court en banc. Cases decided by either division could be transfered to the court en banc for a decision. Mo. CONST. of 1875, amend. of 1890, §§ 1, 3, and 4; Mo. CONST. of 1875, art. VI, § 3. Missouri employs a similar practice today. Mo. CONST. art. V, § 7.

53. *See* Furnish v. Missouri Pac. Ry., 102 Mo. 438, 13 S.W. 1044 (1890) (en banc) (approving appellate remittitur); Gurley v. Missouri Pac. Ry., 104 Mo. 211, 16 S.W. 11 (1891) (Division 2) (renouncing appellate remittitur); Burdict v. Missouri Pac. Ry., 123 Mo. 221, 27 S.W. 453 (1894) (en banc) (permitting appellate remittitur); Rodney v. St. Louis S.W. Ry., 127 Mo. 676, 30 S.W. 150 (1895) (en banc) (rejecting

In *Cook v. Globe Printing Co.*,[54] the supreme court settled the issue. In *Cook*, a politician sued a newspaper for libel. The jury found for the plaintiff and awarded him $150,000.[55] The defendant contended that a new trial was required because the large verdict was clearly based on passion and prejudice.[56] The supreme court concluded that although the verdict was excessive, it was not based on jury misconduct and, as a result, did not require a new trial.[57] The court conditioned its affirmance of the lower court judgment on the remittitur of $100,000.[58] Until *Firestone*, remittitur continued to be recognized as a legitimate alternative for appellate courts,[59] although opponents occasionally argued against it.[60]

At the time of the *Firestone* decision, the rules of appellate remittitur were well established. Unlike a trial court, appellate courts did not weigh the evidence.[61] Instead, appellate courts approached the issue of excessiveness as a matter of law[62] and examined the evidence in a light favorable to the plaintiff, disregarding contradictory evidence.[63] If substantial evidence was

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appellate remittitur); Chitty v. St. Louis, I.M. & S. Ry. Co., 166 Mo. 435, 65 S.W. 959 (1901) (Division 1) (appellate remittitur); and Coburn, *supra* note 42, at 215-16 (a well written analysis of the above cases).

54. 227 Mo. 471, 127 S.W. 332 (1910) (en banc).

55. *Id.* at 539, 127 S.W. at 352.

56. *Id.*

57. *Id.* at 551, 127 S.W. at 356.

58. *Id.*

59. *See, e.g.*, Worley v. Tucker Nevils, Inc., 503 S.W.2d 417, 423-24 (Mo. 1973) (en banc); Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49, 64 (Mo. Ct. App. 1981).

60. In Effinger v. Bank of St. Louis, 467 S.W.2d 291 (Mo. Ct. App. 1971), the St. Louis Court of Appeals held that remittitur could not be ordered where the verdict was approved by the trial court. *Effinger* was overruled by Worley v. Tucker Nevils, Inc., 503 S.W.2d 417, 423-24 (Mo. 1973) (en banc). *But see Worley*, 417 S.W.2d at 424 (Donnelly, C.J., concurring) (reserving the right to question the use of remittitur in an appropriate case).

61. Sanders v. Illinois Cent. R.R., 364 Mo. 1010, 1019, 270 S.W.2d 731, 738 (1954) (en banc). Juries, as fact-finders, are entitled to weigh the evidence. They are free to adversely determine the credibility and value of testimony even if it is unimpeached and uncontradicted. Buckner v. Pillsbury Co., 661 S.W.2d 626, 627 (Mo. Ct. App. 1983). A trial court may also weigh the evidence when examining the amount of a jury verdict by considering conflicting evidence and evaluating the evidence offered by both sides. Grayson v. Pellmounter, 308 S.W.2d 311, 313 (Mo. Ct. App. 1957). The power of trial courts to weigh the evidence has not been removed by the *Firestone* decision, although courts must now order a new trial rather than remittitur when the verdict is excessive. *Firestone*, 693 S.W.2d at 110.

62. Sanders v. Illinois Cent. R.R., 364 Mo. 1010, 1019, 270 S.W.2d 731, 738 (1954) (en banc).

63. Hart v. City of Butler, 393 S.W.2d 568, 580 (Mo. 1965). In examining the evidence supporting the verdict, appellate courts "order[ed] remittitur only when the verdict [was] clearly for an amount in excess of the very most that proof of damages could reasonably sustain . . . ." Allen v. Bi-State Dev. Agency, 452 S.W.2d 288, 293

found to support the verdict, the appellate court affirmed the lower court's ruling.[64] If the lower court awarded greater damages than the evidence supported, and no other errors existed in the record, appellate courts were free to order the plaintiff to remit a portion of the excessive verdict or face a new trial on remand.[65] To be excessive as a matter of law, the verdict had to shock the conscience of the reviewing court and demonstrate an abuse of discretion in the lower court.[66] An appellate court could order a remittitur regardless of whether or not one had previously been required by the trial court.[67]

The fact that remittitur was not founded on a statute or rule should not be considered a significant justification of the *Firestone* decision. First, remittitur was firmly established in Missouri law by decision and tradition. Second, continuous use prior to *Firestone* refined and limited remittitur just as a statute would have done. Finally, although not originating by statute, the practice of remittitur was mentioned in and governed by other procedural rules.[68] As a result, the absence of specific legislative adoption of remittitur should not justify its abolishment.

The second argument raised in *Firestone* concerned the relationship between remittitur and juries. Specifically, the court leveled three accusations against the practice of remittitur. First,the court argued that remittitur, as applied by trial courts, constituted "an invasion of the jury's function by the trial judge."[69] Next, the court branded appellate remittitur as "an invasion of a party's right to trial by jury."[70] Finally, appellate remittitur was also attacked as being "an assumption of a power to weigh the evidence, a function reserved to the trier(s) of fact."[71] An examination of the relationship between remittitur and juries will reveal that these accusations are unfounded.

(Mo. Ct. App. 1970). The primary distinction between the trial court and appellate court approaches was that the former considered conflicting evidence and the latter only evidence supporting the verdict below.

64. Koehler v. Burlington N., Inc., 573 S.W.2d 938, 945-46 (Mo. Ct. App. 1978).

65. *Id.* at 946. Because the decision to order a new trial or a remittitur to correct an excessive verdict was a discretionary matter for a trial court, an appellate court's determination that the judgment below was excessive necessarily required a finding that the trial judge abused his discretion. *See* Sanders v. Illinois Cent. R.R., 364 Mo. 1010, 1019, 270 S.W.2d 731, 738 (1954) (en banc).

66. Koehler v. Burlington N., Inc., 573 S.W.2d 938, 946 (Mo. Ct. App. 1978).

67. *See* Carver v. Missouri K.T.R.R., 362 Mo. 897, 245 S.W.2d 96 (1952) (further remittitur required after a remittitur in the trial court); Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49, 49 (Mo. Ct. App. 1981) (remittitur ordered in the appellate court only).

68. *See supra* note 28 and accompanying text.

69. *Firestone*, 693 S.W.2d at 110.

70. *Id.*

71. *Id.*

The court argued that remittitur in the trial court invaded the jury function of setting damages.[72] Juries are employed in courts of law to decide questions of fact.[73] The issue of damages falls within a jury's fact-finding duties.[74]

Juries, however, are not infallible. Inexperience, emotion, or mistake may cause a jury to award an excessive sum.[75] While the court must always respect the prerogatives of the jury, it is the court's duty to protect parties from "improper verdicts"[76] and take "appropriate action."[77]

When the trial court concludes that a verdict is excessive, the appropriate action involves some degree of intervention by the judge, whether he grants a new trial or orders a remittitur. The court in *Firestone* expressed its clear preference for intervention by new trial.[78] Intervention through remittitur, however, does not intrude upon the functions of the jury.[79] Instead, remittitur is the natural extension of the court's authority to determine that a verdict is excessive.[80]

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72. *Id.* Although the *Firestone* decision did not reveal how trial court remittitur intruded on jury functions, the intrusion feared by the court must have been the judge's determination of the plaintiff's damages. Remittitur, as applied prior to *Firestone*, can be separated analytically into two distinct steps. First, the trial court weighed the evidence to determine if the verdict was excessive. Once step one was completed, trial judges were required in step two to decide whether to establish the plaintiff's damages via remittitur or submit the issue to a new jury. Step one could not have been the subject of the court's concern since trial judges must still determine excessiveness before ordering a new trial. *See supra* note 61. As a result, the focus of the court's concern must have been step two, where a trial judge could set the plaintiff's damages.

73. Robinson v. Riverside Concrete, 544 S.W.2d 865, 872 (Mo. Ct. App. 1976).

74. Sanders v. Illinois Cent. R.R., 364 Mo. 1010, 1019, 270 S.W.2d 731, 737 (1954) (en banc).

75. *See* J. MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH 5 (5th ed. 1973).

76. H. WILLIS, PRINCIPLES OF THE LAW OF DAMAGES § 24 (1910).

77. Curtis Publishing Co. v. Butts, 351 F.2d 702, 718 (5th Cir.), *aff'd*, 388 U.S. 130 (1965), *reh'g denied*, 389 U.S. 889 (1967).

78. *Firestone*, 693 S.W.2d at 110.

79. Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318, 320 (1934).

80. *Id.*

> The power of the court to determine whether the damages awarded are excessive is said necessarily to imply authority to determine an amount that would not be excessive. Consequently, in giving the plaintiff an option to remit the excess or submit to a new trial, the judge is not usurping the function of the jury by arbitrarily fixing the amount of recovery, but is merely indicating the greatest amount which could have been allowed to stand.

Id.

Limitations upon the practice of remittitur prior to *Firestone* protected jury functions from intrusion by the trial court. First, remittitur was employed only where the court was satisfied with the other factual findings of the jury.[81] In this way, the intervention was limited to correcting the excessive damages awarded, while other elements, such as liability, remained undisturbed. Second, remittitur in Missouri was founded on the notion of consent.[82] A court could not compel remittitur, but could only offer the plaintiff an opportunity to remit.[83] The existence of remittitur as an option did not intrude on the jury's function because the plaintiff was always free to choose a new trial. Finally, opinions regarding remittitur repeatedly cautioned trial judges that awarding damages was primarily within the province of the jury and that prudence should guide the ordering of remittitur.[84] Indeed, courts developed specific lists of factors to be considered when they were confronted with a potentially excessive verdict.[85] By requiring courts to act prudently and to consider specific factors, Missouri courts limited the use of remittitur to those instances when the verdict was clearly excessive.

In *Blunt v. Little*,[86] the first remittitur case in federal courts, Justice Story struggled with the same argument offered by the *Firestone* court, that remittitur invaded traditional jury functions. Justice Story concluded that although remittitur went "to the very limits of the law," it did not exceed those limits.[87] Justice Story's conclusion is still sound today. The practice of remittitur in a trial court does not invade jury functions.

The court attacked appellate remittitur as a violation of the right to trial by jury. The right to trial by jury is protected by the Missouri Constitution

81. 4 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 1331 (9th ed. 1912); *see, e.g.*, Hunter v. Karchmer, 285 S.W.2d 918 (Mo. Ct. App. 1955). In *Hunter*, an action for malicious prosecution, the jury found for the plaintiff. The trial court twice denied the defendant's motion for directed verdict, but the court ordered a remittitur of a portion of the jury's verdict. Finding that substantial evidence had not been presented on the element of causation, the appellate court overturned the lower court decision and remanded for entry of judgment in the defendant's favor. *Id.* at 931.

82. Carver v. Missouri K.T.R.R., 362 Mo. 897, 916, 245 S.W.2d 96, 105 (1952).

83. *Id.* The plaintiff's alternative was a new trial, complete with increased costs and time delays.

84. *See* Lindsey v. Williams, 260 S.W.2d 472, 478 (Mo. 1953), *cert. denied*, 347 U.S. 904 (1954); Aut v. St. Louis Pub. Serv. Co., 238 Mo. App. 1136, 1146-47, 194 S.W.2d 753, 759 (1946).

85. *See, e.g.*, Fravel v. Burlington N.R.R., 671 S.W.2d 339 (Mo. Ct. App. 1984) (F.E.L.A. action), *cert. denied*, 105 S. Ct. 907 (1985). "Factors which help determine the appropriateness of the award include plaintiff's age, the nature and extent of his injuries, his losses, diminished earning capacity, inflation, the permanency and degree of disability, the amount of pain and suffering, plaintiff's education, and awards in similar cases." *Id.* at 344.

86. 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578).

87. *Id.* at 762.

of 1945, which provides "That the right to trial by jury as heretofore enjoyed shall remain inviolate . . . ."[88] This guarantee existed in each of Missouri's three prior constitutions.[89] This provision has been interpreted to mean that the right to trial by jury is protected as it existed at common law, subject to the limitations of common-law procedure.[90]

In *Creve Coeur Lake Ice Co. v. Tamm*,[91] the supreme court construed the trial by jury provision of the Missouri Constitution of 1875.[92] In *Creve Coeur Lake Ice Co.*, the parties demanded a jury trial, but the court appointed a referee to try the case. The court based its action on a statute first enacted in 1845 which permitted a court to transfer to a referee, without the consent of the parties, any action requiring the examination of a long account. [93] The constitutionality of the statute was twice challenged under prior constitutions, but in both cases the supreme court concluded that the right to trial by jury was not violated.[94]

The court concluded in *Creve Coeur Lake Ice Co.*, as a result of the earlier construction, that the statute did not violate the right to trial by jury under the Missouri Constitution of 1875.[95] In reaching its decision, the court stated:

> These references had been sanctioned by the statutes and opinions of the supreme court many years before that constitution was framed, and, when the people adopted it, they ratified the provisions as to jury trial as it had been enjoyed previously thereto—that is to say, they adopted it with the construction already placed upon it, otherwise, the words 'as heretofore enjoyed' are utterly meaningless.[96]

By analogy, apellate remittitur should not be construed to violate the right to trial by jury under the present constitution.[97] Like the statute in *Creve Coeur Lake Ice Co.*,[98] appellate remittitur was established long before the

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88. Mo. CONST. art. I, § 22(a).

89. Mo. CONST. of 1875, art. II, § 28; Mo. CONST. of 1865, art. I, § 17; and Mo. CONST. of 1820, art. XII, § 8.

90. State *ex rel.* Pulitzer Publishing Co. v. Coleman, 347 Mo. 1238, 1255, 152 S.W.2d 640, 645 (1941) (en banc) (construing the language of Mo. CONST. of 1875, art. II, § 28 which is identical to Mo. CONST. art. I, § 22(a)).

91. 138 Mo. 385, 39 S.W. 791 (1897).

92. *Id.*

93. Mo. REV. STAT. § 2138 (1889). This statute was first enacted in Mo. REV. STAT. § 24 (1845) and was retained through several recodifications.

94. *See* Edwardson v. Garnhart, 56 Mo. 81 (1874); Shepard v. Bank of Mo., 15 Mo. 144 (1851).

95. *Creve Coeur Lake Ice Co.*, 138 Mo. at 388-89, 39 S.W. at 792.

96. *Id.*

97. Coburn, *supra* note 43, at 217.

98. The fact that *Creve Coeur Lake Ice Co.*, 138 Mo. 385, 39 S.W. 791, dealt with a statute and appellate remittitur is not founded on a statute or rule is not a significant distinction. The supreme court has given similar treatment to a non-statutory practice which pre-dated a constitution. *See* State *ex rel.* Pulitzer Publishing

adoption of the Missouri Constitution of 1945.[99] The practice of appellate remittitur was also upheld as constitutional under similar trial by jury provisions of a prior constitution.[100] Consequently, the Missouri Constitution of 1945, with its provision protecting the right to trial by jury as "heretofore enjoyed," was adopted with the construction previously placed on that provision approving the use of appellate remittitur. As a result, appellate remittitur did not violate the right to trial by jury in the Missouri Constitution.[101]

Contrary to the accusations of the *Firestone* court, appellate courts did not weigh the evidence when determining whether a verdict was excessive.[102] Appellate courts decided, as a matter of law, the maximum damages supported by the evidence.[103] Indeed, the courts applied the same standard used to determine when, as a matter of law, a submissible case was made.[104] Damage awards, like other issues of fact, were affirmed if supported by substantial evidence.[105] Because this standard is acceptable for determining whether a submissible case is made, it is inconsistent to hold that appellate remittitur constitutes an improper weighing of the evidence.[106]

Turning from its multiple "jury function" arguments, the *Firestone* court next justified the abolition of remittitur on the grounds that remittitur

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Co. v. Coleman, 374 Mo. 1238, 1255, 152 S.W.2d 640, 645-46 (1941) (en banc) (longstanding practice denying jury trial in contempt proceedings held not to violate constitutional right to jury trial).

99. *See supra* notes 53-60 and accompanying text.

100. *See* Chitty v. St. Louis, I.M. & S. Ry., Co., 148 Mo. 64, 49 S.W. 868 (1899); *Cook*, 227 Mo. 471, 127 S.W. 332 (1910) (citing *Chitty* with approval).

101. Appellate remittitur does not violate the right to trial by jury conferred by the U.S. Constitution because the Seventh Amendment, unlike the bulk of the Bill of Rights, does not apply to the states. Walker v. Sauvinet, 92 U.S. 90, 92 (1875). Using similar reasoning, however, the United States Supreme Court has concluded that because the practice of remittitur pre-dated the Bill of Rights, it does not violate the right to trial by jury in civil cases. Dimick v. Schiedt, 293 U.S. 474, 484-85 (1935).

102. Sanders v. Illinois Cent. R.R., 364 Mo. 1010, 1019, 270 S.W.2d 731, 738 (1954) (en banc); *see supra* note 61.

103. Counts v. Thompson, 359 Mo. 485, 502-03, 222 S.W.2d 487, 495 (1949); *see supra* note 63.

104. "But of course, the case is not to be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence . . . . The question of whether the evidence in a given case is substantial is one of law for the courts." Houghton v. Atchison, T. & S.F.R.R., 446 S.W.2d 406, 409 (Mo. 1969) (en banc) (quoting Probst v. Seyer, 353 S.W.2d 798, 802 (Mo. 1962)); *see also* Hunter v. Karchmer, 285 S.W.2d 918 (Mo. Ct. App. 1955). "This court has a duty to determine as a matter of law whether there is substantial evidence to sustain this issue of fact. In determining the issue of submissibility we consider all evidence favorable to plaintiff as true and give him the benefit of every inference of fact . . . ." *Id.* at 928.

105. Morris v. Israel Bros., 510 S.W.2d 437, 447 (Mo. 1974). As a result, remittitur was permissible if the verdict was not supported by substantial evidence.

106. *See* Coburn, *supra* note 43, at 218.

was incapable of providing uniformity of verdicts.[107] Before the turn of the century, the Missouri Supreme Court noted that jurors often erred unintentionally and jury verdicts were often inconsistent.[108] Time has not abated these problems. The popular press has recently expressed concern about inconsistent jury verdicts.[109] As a result of inconsistencies, courts have stressed the importance and value of uniformity.[110] Uniformity is important because public policy stresses that a similar recovery should be provided for similar injuries.[111] Even the *Firestone* court recognized uniformity as a "worthy purpose."[112]

Contrary to the opinion in *Firestone*, however, remittitur is a sound procedure to correct inconsistency in verdicts because it is employed with regard to "reason and precedent."[113] In establishing the proper amount of damages, due regard must be given to awards in similar cases.[114] Judges, unlike juries, can draw on experience and observation of other cases when considering the measure of damages. Thus, they are better able to assure uniformity.[115] In *Worley v. Tucker Nevils, Inc.*, the supreme court praised remittitur and noted:

> The remittitur doctrine has long proved to be a useful device for both the trial and appellate courts of this state in keeping awards from exceeding the upper limit of fair and reasonable compensation. It is said to be a desirable doctrine because it tends to hold verdicts within uniform limits . . . .[116]

Abolishing remittitur will make the quest for uniformity considerably more difficult.

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107. *Firestone*, 693 S.W.2d at 110.

108. Burdict v. Missouri Pac. Ry., 123 Mo. 221, 242, 27 S.W. 453, 458 (1894) (en banc).

109. *Unsettling Awards in Products Liability*, FORTUNE, June 25, 1984, at 8-9. Inconsistency in products liability awards is a growing concern for corporations. This concern is fueling a drive for stricter laws making it more difficult to recover. *Id.*

110. In Jones v. Pennsylvania R.R., 353 Mo. 163, 175, 182 S.W.2d 157, 161 (1944), the court stated:

> All courts hold the recovery is measured by that which is 'fair and reasonable compensation' . . . . Fair and reasonable compensation in each case must rest upon the foundation of the facts of the case. Yet some consideration must be given to the amounts of award which have been held to be fair and reasonable compensation where plaintiffs have suffered similar injuries. There should be reasonable uniformity as to the amounts of verdicts.

Id.

111. *See* Coburn, *supra* note 43, at 218; *see also* O'Brien v. Rindskopf, 334 Mo. 1233, 1249-50, 70 S.W.2d 1085, 1093 (1934).

112. *Firestone*, 693 S.W.2d at 110.

113. SEDGWICK, *supra* note 81, at 1331.

114. Jones v. Pennsylvania R.R., 353 Mo. 163, 175, 182 S.W.2d 157, 161 (1944).

115. Burdict v. Missouri Pac. Ry., 123 Mo. 221, 242, 27 S.W. 453, 458 (1894) (en banc).

116. Worley v. Tucker Nevils, Inc., 503 S.W.2d 417, 423 (Mo. 1973) (en banc).

In an argument closely related to uniformity, the *Firestone* court contended that a new trial provided adequate means to control jury verdicts.[117] After *Firestone* abolished remittitur, a court's response to an excessive verdict is now limited to the granting of a new trial.

Efficiency is an important consideration in controlling jury verdicts. Because parties are forced to relitigate their disputes, one commentator concluded that new trials are "extravagantly wasteful."[118] New trials impair judicial efficiency with delays and increased costs.[119] The result of a new trial is "to wear out the parties rather than to recompense the plaintiff for the damages that he has actually suffered."[120] Remittitur is desirable because it allows a party "to avoid the expense, delay and prolongation of litigation incident to a new trial . . . ."[121] Unlike the *Firestone* court, some courts see a more valuable role for remittitur in the future. In *Baxter v. Fairmont Foods Co.*,[122] the New Jersey Supreme Court stated:

> We have no misgivings about the remittitur practice, long in effect in this jurisdiction, and increasingly valuable to the modern administration of justice, confronted as the courts are today by unprecedented litigation caseloads . . . . [T]he practice should be encouraged at both trial and appellate levels to avoid the unnecessary expense and delay of new trial.[123]

The move away from the efficiency of remittitur is particularly inopportune given the current state of the American judicial system. The costs of going to court have increased dramatically. Taxpayers pay $8,000 for the average civil jury trial, while the cost to the parties involved is generally eight to ten times greater.[124] Costs are increasing so rapidly that the American Bar Association considers costs to be of "critical concern."[125] Like costs, delays are also increasing. Today, as compared to 1960, the number of civil cases which will require more than twenty days to try has increased fivefold.[126] Many

117. *Firestone*, 693 S.W.2d at 110. The court supported this conclusion by noting that, pursuant to Mo. SUP. CT. R. 78.01, a new trial could be granted for good cause shown, to all or any party, for all or part of the issues. *Id.* The court also noted that its decision continued the trial court's authority, under Mo. SUP. CT. R. 78.02, to grant one new trial on the grounds that the verdict is against the weight of the evidence. *Id.*

118. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 19 (1935).

119. Comment, *supra* note 79, at 318.

120. Note, *Judicial Administration-The Power of the Trial Court to Reduce Excessive Damages*, 18 IOWA L. REV. 404, 404 (1933).

121. Carlin, *Remittiturs and Additurs*, 49 W. VA. L.Q. 1, 3-4 (1942).

122. 74 N.J. 588, 379 A.2d 225 (1977).

123. *Id.* at 595, 379 A.2d at 228-29.

124. *Law by the Numbers*, FORBES, January 30, 1984, at 66.

125. Gest, *Soaring Legal Costs: Even Lawyers are Worried*, U.S. NEWS & WORLD REP., August 13, 1984, at 30.

126. Kaufman, *The Verdict on Juries*, NEW YORK TIMES MAGAZINE, April 1, 1984, at 49.

cases will remain in the courts five years before being concluded.[127] More than ever before, the efficiency of remittitur should be encouraged, not abolished.

The inefficiency of the *Firestone* approach can be mitigated to a degree. Missouri Rule 78.01 permits a new trial to be limited to specific issues.[128] If a jury verdict is excessive, therefore, the judge may limit the new trial to the issue of damages only. A limited new trial is still less desireable than remittitur for several reasons. In *Firestone*, a limited new trial would not have saved time or money because the original trial was limited to the issue of damages.[129] Regardless of the limits imposed, the parties are still sent back into court and forced to bear its costs and the inconvenience of its delays.

In *Burdict v. Missouri Pac. Ry.*, the supreme court said, "The law is a practical affair, and ought to be administered in a practical way, so as to work out substantial justice . . . ."[130] The procedure left in the wake of the *Firestone* decision is impractical. A court is forced to correct a jury mistake as to damages by ordering a costly and inefficient new trial. A system which retains remittitur with its efficiency is a decidedly better alternative.

The *Firestone* court's final justification for abolishing remittitur concerned the rules for appeal.[131] The court believed that where a remittitur had been entered to correct an error it was improper for either party to appeal or to charge that the amount of remittitur was incorrect.[132] Missouri Rule 78.10 provided that a plaintiff consenting to a remittitur could question the amount of the remittitur on cross-appeal.[133] Contrary to the court's belief, this rule was both workable and equitable.

Rule 78.10 and similar practices in other states were enacted to correct the inequities of the common law.[134] At common law, a plaintiff consenting to remittitur was denied appeal on the ground that one could not appeal that to which he had agreed.[135] When a defendant appeals, the plaintiff loses part of the benefits of remittitur.[136] Under the common law rule, the defendant had much to gain but little to lose by appealing. Under the new rule, however, an appeal offers not only advantages to the defendant, but also disadvantages to be considered before filing an appeal. First, should the appellate court find an abuse of discretion below, the defendant risks having the original

127. Gest, *supra* note 125, at 31.
128. *See supra* note 117.
129. *See supra* note 15 and accompanying text.
130. 123 Mo. 221, 242, 27 S.W. 453, 458 (1894) (en banc).
131. *Firestone*, 693 S.W.2d at 110.
132. *Id.*
133. *See supra* note 22.
134. See Note, *Remitting Parties' Right to Cross-Appeal*, 49 N.C. L. REV. 141 (1970), for a discussion of cross-appeal provisions similar to MO. SUP. CT. R. 78.10.
135. *Id.* at 142-43.
136. *Id.*

verdict reinstated.[137] Second, because the plaintiff can raise his argument only on a cross-appeal, the defendant determines whether the plaintiff will be afforded an opportunity to have his verdict reinstated.[138] The new rule is more equitable than the common law because the defendant is forced to assess the risks before appealing.

If the court believed Rule 78.10 to be improper despite its fairness, the court could have altered the procedure for appeals rather than abolishing remittitur. Missouri applied the common law rule prior to the adoption of Rule 78.10,[139] and remittitur flourished. Indeed, the federal courts deny a remitting plaintiff the right to appeal, although they are bound to the notion of remittitur.[140] A remittitur practice without the right of cross-appeal is still more desireable than the new trial procedure adopted in *Firestone*.

In *Firestone v. Crown Center Redevelopment Corporation*, the Missouri Supreme Court balanced the merits of remittitur against the merits of a new trial. In all fairness, it must be recognized that a new trial may offer benefits that remittitur does not. In a new trial, twelve impartial jurors determine the proper amount of damages rather than a single judge or appellate tribunal.[141] Also, the verdict of the second jury may sustain or increase the plaintiff's damages,[142] while a judge can only reduce a plaintiff's verdict.[143] Prior to *Firestone*, the advantages of both new trial and remittitur were available to the plaintiff. The plaintiff could evaluate both and select the option most suitable to his needs.[144] With *Firestone*, however, the supreme court has taken away a valuable option of the plaintiff.

The tragedy of the *Firestone* decision is that the court did not have to chose one option over the other. By abolishing remittitur, the Missouri Supreme Court went far beyond that which was necessary to decide the case. Given the nature, extent, and permanence of Sally Firestone's injuries, the court could

137. *Id.* at 143.

138. *Id.* at 145.

139. *See, e.g.*, Carver v. Missouri K.T.R.R., 362 Mo. 897, 917, 245 S.W.2d 96, 105-06 (1952).

140. Donovan v. Penn Shipping Co., 429 U.S. 648, 650 (1977) (per curiam).

141. Selecting a new trial over remittitur may, however, subject the plaintiff to increased costs of litigation and additional delays in the termination of litigation. *See infra* notes 117-27 and accompanying text.

142. The second jury may also award a verdict lower than the original award reduced by remittitur.

143. Missouri does not permit additur. King v. Kansas City Life Ins. Co., 350 Mo. 75, 88, 164 S.W.2d 458, 465 (1942) (en banc).

144. Requiring a plaintiff to weigh the risks and select a new trial or remittitur is not unfair or burdensome. Such a decision is similar to the decision a party makes at the initiation of a suit on whether to exercise or waive his right to jury trial. *See* State *ex rel.* Cunningham v. Luten, 646 S.W.2d 67, 68 (Mo. 1983) (en banc) (right to trial by jury is a personal right which can be waived); Mo. SUP. CT. R. 69.01 (right of trial by jury and waiver of right).

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easily have ruled that the trial court abused its discretion in ordering a remittitur and reinstated the $15,000,000 verdict. The court chose instead to abolish remittitur for reasons which pale in the face of practicality, tradition, and reason. By abolishing remittitur, the court has denied a useful and valuable tool to Missouri judges and deprived plaintiffs of the right to select the procedure best suited for their particular needs.

G. STANTON MASTERS