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State Highway Comm'n v. Schmidt, 391 P.2d 692 (Mont. 1964)

Gary L. Davis

could hold a religious belief as making a person incompetent, could not the state then actually circumvent the constitutional ban on interfering with the belief itself? The concept of the state stepping into a person's religious life "for his own good" is repugnant to the spirit of the first amendment.

As the law stands today, there is no legal justification for this kind of interference, and the expansion of any of the doctrines discussed, in any general way, would be an excessive infringement upon the personal liberties of the individual guaranteed under the first amendment.

RICHARD L. BEATTY.

ADDITUR, AS A MEANS OF MODIFYING A JURY DAMAGE AWARD, NOT RECOGNIZED IN MONTANA.—The State of Montana, acting through its State Highway Commission, plaintiff, condemned land belonging to the defendant. The commission appointed by the parties to appraise the land awarded defendant $50,000, and plaintiff appealed. A jury awarded defendant $30,000 in district court, whereupon defendant appealed, deeming the award inadequate. Finding a new trial justified on the grounds of inadequacy,[1] the trial court judge gave plaintiff the option of either consenting to entry of judgment in the sum of $37,897.45, in which event defendant's motion for a new trial would be denied, or granting the motion for retrial. Plaintiff appealed, contending the court had no authority to compel such an election. *Held,* the trial court abused its discretion in attempting to exercise the power of additure. *State Highway Comm'n v. Schmidt,* 391 P.2d 692 (Mont. 1964).

Additur is the procedure by which the trial court, with the consent of the defendant, increases the amount of an inadequate jury award, as a condition to denying plaintiff's motion for a new trial.[2] Remittitur is the analogous practice used to decrease the amount of a jury verdict. The two procedures are employed *only* when the court is in a position to

[1]REVISED CODES OF MONTANA, 1947 § 93-5603 enumerates the grounds for a new trial: ". . . (5) Excessive damages, appearing to have been given under the influence of passion or prejudice; (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law. . . ." While excessive damages is a ground (subdivision 5), the party who wishes to appeal an inadequate award must move on the ground of "insufficiency of the evidence to justify the verdict," under subdivision 6. Flaherty v. Butte Electric Ry. Co., 42 Mont. 89, 111 Pac. 348 (1910). This anomaly is a product of the common law and is discussed in a California decision, Phillips v. Lyon, 109 Cal. App. 264, 292 Pac. 711 (1930). REVISED CODES OF MONTANA are hereinafter cited R.C.M.

[2]For purposes of this discussion, it will be assumed that sufficient grounds exist for a new trial. Also, the terms "additur" and "remittitur" will be defined in the conditional sense, *i.e.,* one party is given the option to consent to a modification of the award, or submitting to a new trial. The option is given to defendant if plaintiff moves for a new trial, and to plaintiff if defendant so moves. Attempts to go beyond conditional use and arbitrarily modify damage awards without either party's consent have been declared unconstitutional. *E.g.,* Kennon v. Gilmer, 131 U.S. 22 (1889); Bourne v. Moore, 77 Utah 184, 292 Pac. 1102 (1930); Borowicz v. Hamann, 193 Wis. 324, 214 N.W. 431 (1927).

grant a new trial because the award is inadequate or excessive. If the motion for retrial is based on another ground, additure or remittitur may not be used.

Remittitur and additur, founded on the court's discretionary power to grant a new trial, are the result of a historical trend characterized by increased control over jury verdicts. The earliest procedure altering a verdict was "attaint," appearing in the fifteenth century.[3] After attaint was abandoned, the courts assumed the power to grant a new trial when an excessive award reflected jury prejudice.[4] Later the requirement of prejudice was discarded.[5] The inadequate award, however, was approached with great reluctance, and not until 1843 was a new trial allowed on this ground.[6] Once the English courts became accustomed to granting new trials when verdicts were unsatisfactory, remittitur,[7] and then additur,[8] were approved. The House of Lords terminated the use of both procedures on constitutional grounds in 1905.[9]

In the United States today, remittitur is recognized in federal[10] and most state courts.[11] The validity of additur, however, has been hotly disputed, and its status remains uncertain.[12] A statistical listing of the jurisdictions allowing its use is of little value in view of the confused con-

[3]The dissatisfied litigant assembled a grand jury of twenty-four knights to review the decision, and the first jury was harshly punished if the verdict was changed. McCORMICK, DAMAGES § 6, at 25 (1935 ed.). The members of the first jury were declared infamous, sent to prison, their goods and possessions confiscated, houses destroyed, woods felled, and meadows plowed up. 3 BLACKSTONE, COMMENTARIES * 404.

[4]Wood v. Gunston, 82 Eng. Rep. 867 (K.B. 1655). "Windham on the other side pressed for a new trial, and said it was a packed business, else there could not have been so great damages."

[5]Wilford v. Berkeley, 97 Eng. Rep. 472 (K.B. 1758). The court said the jury was outrageous in giving damages greatly exceeding the injury.

[6]Armytage v. Haley, 114 Eng. Rep. 1143 (Q.B. 1843).

[7]Belt v. Lawes, 12 Q.B. Div. 356, 358 (1884), (Brett, M.R.): "Divisional Court can grant or refuse a new trial without the consent of the defendant, if the plaintiff consents that the verdict should be reduced to an amount which the court does not think would be excessive if it had been given by the jury."

[8]Additur was at first given approval in dicta only. See *Belt v. Lawes, supra* note 7, at 250. "But I am by no means prepared to say that the court might not, under certain circumstances, refuse to grant a new trial if a defendant would consent that the verdict would stand for larger damages than the jury had given." In *Armytage v. Haley, supra* note 6, plaintiff was awarded one farthing and obtained a rule to show cause why a new trial should not be had, unless defendant would consent to the damages being increased to 101*l.* 5s. 6d. No conclusion can be reached as to whether additur was ever fully accepted at common law. See majority and minority opinions in *Dimick v. Schiedt, infra* note 21. Additur was granted absolutely at common law in cases involving (1) mayhem, upon view of the wound, (2) upon writ of inquiry, (3) debt, where plaintiff's demand was certain. *Dimick v. Schiedt, infra* note 21, at 477.

[9]Watt v. Watt, [1905] A.C. 115, 119. "[T]he court has no jurisdiction to fix the amount of damages without the consent of both of the parties."

[10]Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889).

[11]McCORMICK, *supra* note 3, § 19, at 78 n.10.

[12]"The most accurate summary of the decisions involving the question under annotation [additur] is that no broad general rules can safely be formulated." See Annot., 56 A.L.R.2d 213, 219 (1957).

dition of the law in this regard.[13] Most jurisdictions allowing additur confine its use to cases where the amount in question is undisputed or liquidated.[14] In New York, for example, additur is allowed, but the increased award must be set at the maximum amount the jury could find as a matter of law.[15] A variation of the New York procedure is used in Wisconsin, where a new trial is granted unless plaintiff consents to a judgment for the least amount the jury could find, or the defendant consents to judgment for the greatest amount the jury could award.[16] This system seems the most reasonable as it gives either party the power to prevent a new trial.[17] After many years of upholding additur, California condemned it in a personal injury action,[18] though it is still accepted where damages are liquidated[19] as well as in eminent domain proceedings.[20]

The leading decision in the United States, which was heavily relied upon in the instant case, is *Dimick v. Schiedt*.[21] In that case, decided in 1935, the Supreme Court held that federal courts, bound by the seventh amendment,[22] were restricted to the common law existing at the time the Constitution was adopted. Finding no precedent in the common law

[13]Comparison is made impossible by the myriad of fact situations presented and the uncertainty of the legitimacy of additur in different jurisdictions. Under certain circumstances, a majority seems to sanction additur. Some of the circumstances which effect the allowance of additur are: (1) whether the damages are liquidated or unliquidated, (2) whether additur is used to correct an error in computation, or a typographical or clerical error, (3) whether a particular instruction to the jury may have been omitted by the court, (4) whether the jury violated an instruction from the court, (5) whether the appellate court has the same power of additur as the trial court. Annot., 56 A.L.R.2d 213 (1957).

[14]*E.g.*, Shaffer v. Great American Indem. Co., 147 F.2d 981 (5th Cir. 1945).

[15]O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E.2d 883 (1956). If the modified award is set at the highest amount recoverable by law, the issue is transformed from one of fact to one of law. In this way, the right to jury trial objection is circumvented.

[16]Risch v. Lawhead, 211 Wis. 270, 248 N.W. 127 (1933). For example, the jury might return a verdict of $600. Plaintiff, objecting to the award as too small, moves for a new trial. The court estimates the lower and upper limits within which the jury could have found as $700 and $1000, respectively, and gives plaintiff the option of accepting $700, and defendant the option of paying $1000. If neither accepts, a new trial is granted.

[17]In deciding whether to consent, each party takes into account the amount of the disputed award, the upper and lower limits set by the court in offering additur, and the probable expense of retrial. One of the parties is likely to find consent advantageous. As a criterion, the Wisconsin courts set the limits at the highest and lowest "sum an unprejudiced jury would probably find." *Risch v. Lawhead, supra* note 16, 248 N.W. at 130. At first impression, this standard might seem to wrest more authority from the jury. However, courts are not only more experienced at estimating possible awards to fit particular fact situations, but in setting limits for additur, the courts are exercising no more control over the jury than they do in granting a new trial when an award is inadequate.

[18]Dorsey v. Barba, 38 Cal. Rptr.2d 350, 240 P.2d 604 (1952).

[19]Pierce v. Schaden, 62 Cal. 283 (1882).

[20]Adamson v. Los Angeles County, 52 Cal. App. 125, 198 Pac. 52 (1921).

[21]293 U.S. 474 (1935); Annot., 95 A.L.R. 1150 (1935).

[22]"In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." U.S. Const. amend. VII.

which unequivocally permitted additur,[23] federal courts were precluded from its use.[24] Rejecting the argument that additur is a corollary of remittitur, the Court distinguished the two procedures:

> Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess . . . and that the remittitur has the effect of merely lopping off an excresence. 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 in the verdict.[25]

A powerful dissenting group composed of Chief Justice Hughes, and Justices Stone, Brandeis and Cardozo, strongly urged the acceptance of additur on the ground of its analogy to remittitur:

> The defendant, who has formally consented to pay the increased amount cannot complain. The plaintiff has suffered no denial of a right because the court, staying its hand, has left the verdict undisturbed, as it lawfully might have done if the defendant refused to pay more than the verdict . . . in neither case does the jury return a verdict for the amount actually recovered, and in both the amount of the recovery was fixed, not by the verdict, but by the consent of the party resisting the motion for a new trial.[26]

Conceding that the common law contained no precise rule on the subject, the minority felt that no injustice would be done by applying the principle of remittitur to an inadequate award.

It appears unfortunate that the Montana Supreme Court has adopted the least progressive view because (1) the *Dimick* rule is not binding, (2) should the *Dimick* rule be binding, it would not be applicable to the principal case, and (3) the decision in the instant case might have been better reasoned.

First, in deciding the instant case, the Montana Supreme Court appeared to rely solely on *Dimick v. Schiedt*. The *Dimick* holding does not bind Montana in its appraisal of additur, for the seventh amendment applies only to federal courts[27] and has not been incorporated under the

[23]See note 8, *supra*.

[24]Indicating disapproval of both remittitur and additur, the Supreme Court criticized the former as "a practice which has been condemned as opposed to the principles of the common law by every *reasoned* English decision . . . . [I]f the question of remittitur were now before us for the first time, it would be decided otherwise." *Dimick v. Schiedt, supra* note 21, at 484.

[25]*Id.* at 486. The majority was composed of Justices Sutherland, Devanter, McReynolds, Butler and Roberts.

[26]*Id.* at 494.

[27]Walker v. Sauvinet, 92 U.S. 90 (1876).

due process clause of the fourteenth amendment.[28] Also, the Montana Constitution has omitted the phrase "no fact tried by jury shall otherwise be re-examined . . . than according to the rules of the common law" which is found in the United States Constitution.[29] Therefore, Montana is not restricted by either common law precedent, or its own constitution in considering additur.[30]

Second, authority exists that the principle of *Dimick v. Schiedt* is not applicable in an eminent domain proceeding if the condemnor agrees to additur. In *United States v. Kennesaw Mountain Battelfield Assn.*,[31] a federal court of appeals distinguished the *Dimick* rule in affirming an award increased by additur. The court noted that the seventh amendment does not apply to condemnation proceedings since condemnation was unknown to the common law. Also, since there is no right to jury trial, there can be no objection to additur as infringing on the jury province. Thus, the *Kennesaw* decision approving additur, which California follows,[32] seems much more applicable to the facts of the instant case.[33]

Third, the holding puts Montana in the incongruous position of condoning remittitur and condemning additur.[34] To support its decision, the Montana Supreme Court employed the reasoning found in *Dimick v. Schiedt:* in remittitur the final award is part of a larger sum set by the jury, whereas additur is an addition of something new. Such reasoning appears fallacious, for in neither case is the final award that set by the jury. In both instances it is the judge who, with the consent of one litigant, substitutes his determination of the damages for that of the jury.[35] The objection that the application of additur invades the jury province as finder of fact appears questionable if remittitur is to be accepted. Also, judges constantly determine fact issues in admitting and excluding evidence, in determining the court's jurisdiction, in passing on pleadings, and in interpreting documents.[36]

By the instant holding, the Montana Supreme Court has rejected the opportunity to adopt an expedient method of cutting trial expense and

[28]Hawkins v. Bleakly, 243 U.S. 210 (1917).

[29]MONT. CONST. art. III, § 23 provides, "The right of trial by jury shall be secured to all, and remain inviolate . . . ."

[30]Montana courts may be precluded from this line of reasoning since it has been held that the right guaranteed by article III section 23, is the same as that guaranteed by the seventh amendment to the Federal Constitution. Chessman v. Hale, 31 Mont. 577, 79 Pac. 254 (1905).

[31]99 F.2d 830 (5th Cir. 1938).

[32]*Adamson v. Los Angeles County, supra* note 20.

[33]There is no right of jury trial in condemnation proceedings in Montana. *In re* Valley Center Drain Dist., 64 Mont. 545, 211 Pac. 218 (1922).

[34]Chief Justice Harrison and Justice Castles, concurring in the principal case at 696, express the opinion that additur might be used in certain situations.

[35]Another distinction offered is that in remittitur, plaintiff, free of contributory negligence, is given the option; in additur, a negligent defendant is given the option. Comment, 32 N.Y.U.L. REV. 186.

[36]Justice Traynor, dissenting in *Dorsey v. Barba, supra* note 18, at 613 also points out that in equity, admiralty, probate, divorce, bankruptcy, and administrative cases, there is no right of jury trial at all.

limiting litigation. Moreover, the effect of the decision is to aggrevate the plight of the litigant who objects to an inadequate award. His only recourse is an entire new trial, since under Montana law a party is precluded from a retrial on the issue of the damages alone.[37] However, partial retrials on damages are allowed in federal courts and some state courts which utilize the same rules of civil procedure as are presently used in Montana.[38] No reason exists why Montana could not interpret Rule 59[39] of the Montana Rules of Civil Procedure in the same manner, especially if additur is denied. Therefore, though Rule 59 does not sanction additur,[40] it might be employed to remand on the issue of damages alone.

It appears that a contrary result could have been reached in the principal case if the court had recognized that remittitur and additur are analogous procedures, the merit of additur as a device for ending litigation and saving expense, and the invalidity of objections on a constitutional basis if the defendant consents. Where there is no right to a jury trial in the first place, the reason for denying additur seems even more unrealistic.

It is submitted that the use of remittitur is justified, especially in light of the widespread acceptance of remittitur. In order to resolve the inconsistency of denying additur and permitting remittitur, the court might modify the rule of the instant case and permit additur in Montana. In accord with the practice in other jurisdictions, additur could be employed in certain circumstances, for example:

[37]The Montana Supreme Court has held that where there is but one cause of action, "the verdict . . . is a single entity which must stand or fall as a whole." Seibel v. Byers, 136 Mont. 39, 45, 344 P.2d 129, 133 (1959). English courts also hold that a judgment is indivisible. 39 AM. JUR. *New Trial* § 21 (1942).

[38]Annot., 29 A.L.R.2d 1199 (1953). The partial new trial is strictly limited to cases where the issue of damages is distinct from other issues, and there is no possibility that the inadequate award is the result of jury compromise with the question of liability.

[39]MONT. R. CIV. P. 59(a) provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the State of Montana. On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct the entry of a new judgment.

[40]In the principal case, the defendant's contention that MONT. R. CIV. P. 59, *supra* note 39, vested Montana courts with the power of additur was without authority and properly discredited by the court. It has been noted that additur, when allowed, follows plaintiff's motion for a new trial. Rule 59 does not purport to govern new trials, but refers expressly to R.C.M. 1947, § 93-5603, which enumerates the grounds for a new trial, and has not been altered by the adoption of the new rules of civil procedure. Thus, no part of Rule 59 can be construed as extending the power of the court to effect additur, adversely or beneficially. Although the phrase "amend or make new findings of fact and conclusions of law" does appear in the rule, these powers are confined to actions tried without a jury. Since additur alters a jury finding, Rule 59 has no connection with additur. The Federal Rules of Civil Procedure have been interpreted in a like manner. Federal courts have held that Federal Rule 59 does not set forth the grounds for a new trial, but merely affirms prior law. 35B C.J.S. *Federal Civil Procedure* § 1061 (1960). Aerated Products Co. of Los Angeles v. Aeration Processes, 95 F. Supp. 23 (S.D. Cal. 1952). Further, the enactment of the federal rules has had no impact on the earlier decisions dealing with remittitur. Rice v. Union Pacific R.R. Co., 82 F. Supp. 1002 (D. Neb. 1949).

1. Allow additur if the increased award is set at the highest amount a jury could award, similar to the New York procedure;[41]
2. Adopt the Wisconsin practice of giving both parties the option —the defendant to pay the highest amount, or plaintiff to accept the lowest amount the jury could award as a matter of law;[42]
3. Allow additur only in cases involving liquidated damages;
4. Permit additur only in action in which there is no constitutional right of jury trial, such as condemnation proceedings.[43]

If additur is to be denied altogether, the court should consider the possibility of new trials on the issue of damages alone under Rule 59 of the Montana Rules of Civil Procedure.

In view of the historical trend toward increasing supervision of the courts over jury verdicts, and the almost universal acceptance of remittitur, it is difficult to justify rules which favor correction of an excessive award but not of an inadequate award. When wisely used in civil actions, additur avoids the delay and expense of a new trial, and furthers the legitimate objective of bringing litigation to a speedy and expeditious end.

GARY L. DAVIS.

PRIVILEGE TO DEFAME: THE UNITED STATES SUPREME COURT HAS ESTABLISHED A NEW AND IMPORTANT AREA OF CONSTITUTIONAL LAW.— Petitioner, the New York Times, carried a full page advertisement on March 9, 1960, entitled, "Heed Their Rising Voices."[1] The advertisement made several false and defamatory statements of fact concerning the activities of the Montgomery, Alabama police. Respondent, the commissioner of police in Montgomery, brought an action for defamation in Alabama state court, alleging that the statements referred to him in his official capacity. The trial court found the publication "libelous per se" and upon proof that the statements were "of and concerning" him, the respondent was awarded $500,000, the full amount for which he sued.[2]

[41] *Supra* note 15.
[42] *Supra* note 16.
[43] *Accord, Kennesaw* decision, *supra* note 31.

[1] This was an editorial advertisement submitted by a group of civil rights advocates for the purpose of raising money for the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. See appendix of majority opinion for full text of the advertisement. New York Times Co. v. Sullivan, 84 S. Ct. 710 (1964).

[2] At the time this decision was handed down, there were pending in the state courts of Alabama eleven suits against the respondent in which the aggregate damages sought were $5,600,000. *New York Times Co. v. Sullivan, supra* note 1, at 734.