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REMEDIES FOR EXCESSIVENESS OR INADEQUACY OF VERDICTS:

NEW TRIAL ON SOME OR ALL ISSUES, REMITTITUR AND ADDITUR*

*Fleming James, Jr. ***

DAMAGE VERDICTS IN GENERAL

The practice of granting new trials because the verdict is excessive was well established at common law when our constitutions were adopted.¹ Where the damages are liquidated or can be ascertained by the application of fixed rules of law to any given set of facts, a verdict which awards more than the legal rules would yield (under

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1. Wood v. Gunston, Sty. 462, 466, 82 Eng. Rep. 863, 864, 867 (K.B. 1655); Chambers v. Robinson, 2 Str. 691, 93 Eng. Rep. 787 (K.B. 1726); Clerk v. Udall, 2 Salk. 649, 91 Eng. Rep. 552 (K.B. 1702). In Bright v. Eynon, 1 Burr. 390, 97 Eng. Rep. 365 (K.B. 1757) Mansfield, J. indicated that new trials had been granted on the basis of excessive verdicts prior to 1655: "The reason why this matter cannot be traced further back is that the old report books do not give any accounts of determinations made by the courts upon motions." 1 Burr. at 394, 97 Eng. Rep. at 367.

Although the course of decision was clear, it was not uniform. See, e.g., Townsend v. Hughes, 2 Mod. 150, 86 Eng. Rep. 994 (C.P. 1677) (Atkins, J. dissenting, citing Wood v. Gunston *supra*); Roe v. Hawkes, 1 Lev. 97, 83 Eng. Rep. 316 (K.B. 1664). Compare cases note 4 *infra*.

Under the eighteenth century English practice such motions were determined not by the trial judge at nisi prius, but by the court sitting en banc at Westminster. Nothing of constitutional significance, however, should turn on this difference from the modern practice, except possibly that it may justify appellate review of the trial judge's decision. See Dagnello v. Long Island R.R., 289 F.2d 797 (2d Cir. 1961); Hinton, *Power of Federal Court to Review Ruling on Motion for New Trial*, 1 U. OF CHI. L. REV. 111 (1933).

any finding of facts justified by the evidence) appears to be wrong as a matter of law and should clearly be set aside.²

Greater difficulty was encountered where the damages are to be measured in whole or in part by the discretion of the jury as in the case of personal torts. Here the fixing of damages is part of the essence of the jury's function.³ Courts were therefore much more reluctant to interfere with verdicts in such cases on the ground of excessiveness.⁴ An English writer in 1792 reviewed the cases, found doubt upon the point, and concluded that a new trial should not be awarded on this ground "unless the Damages are such as do appear at the first Blush to be quite outrageous."⁵ There were, however, several tort cases in which new trials had been granted because the verdict was excessive⁶ and a great many more in which the court, while denying a new trial, acknowledged the court's power to grant one where the largeness of the damages affords "internal Evidence of the Prejudice and Partiality of the Jury,"⁷ or is "outrageously disproportionate, either to the Wrong received, or to the Situation and Circumstances,"⁸ or "monstrous and enormous indeed."⁹ In 1813, Lord Manfield recognized that in all types of actions ". . . if the

2. These principles were fully discussed in *Duberley v. Gunning*, 4 T.R. 651, 100 Eng. Rep. 1226 (K.B. 1792), in which a majority of the court felt that they were powerless to interfere, on the ground of excessiveness, with a jury's verdict for £5000 in an action for criminal conversation. See generally 3 GRAHAM AND WATERMAN, NEW TRIALS 1127-1130 (1855) (hereinafter cited as GRAHAM & WATERMAN); GRAHAM, AN ESSAY ON NEW TRIALS 409-410 (1834).

3. See *Duberley v. Gunning*, *supra* note 2; MAYNE, DAMAGES 452 (2d ed. 1872).

4. *E.g.*, *Leith v. Pope*, 2 W. Black 1327, 96 Eng. Rep. 777 (C.P. 1780) (malicious prosecution); *Fabrigas v. Mostyn*, 2 W. Black 929, 96 Eng. Rep. 549 (C.P. 1774) (trespass and false imprisonment); *Huckle v. Money*, 2 Wils. 205, 207, 95 Eng. Rep. 768, 769 (K.B. 1763) (trespass, assault and imprisonment. ". . . it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages."); *Wilford v. Berkeley*, 1 Burr. 690, 97 Eng. Rep. 472 (K.B. 1758). See generally 1 GRAHAM & WATERMAN 409-410 (1855).

5. SAYER, DAMAGES 221 (1792).

6. See, *e.g.*, *Wood v. Gunston*, Sty. 462, 466, 82 Eng. Rep. 863, 864, 867 (K.B. 1655); *Chambers v. Robinson*, 2 Str. 691, 93 Eng. Rep. 787 (K.B. 1726); *Clerk v. Udall*, 2 Salk. 649, 91 Eng. Rep. 552 (K.B. 1702); *Jones v. Sparrow*, 5 T.R. 257, 101 Eng. Rep. 144 (K.B. 1793) (distinguishing *Duberley v. Gunning supra* note 2, as "a case sui generis.")

7. *Leith v. Pope*, 2 W. Black 1327, 1328, 96 Eng. Rep. 777, 778 (C.P. 1780).

8. *Ibid.*

9. *Beardmore v. Carrington*, 2 Wils. K.B. 244, 250, 95 Eng. Rep. 790, 793 (K.B. 1764). Other cases are described in SAYER, DAMAGES 210-221 (1792) and MAYNE, DAMAGES 457-462 (2d ed. 1872). See generally, GRAHAM, AN ESSAY ON NEW TRIALS, Ch. XII (1834).

damages are clearly too large, the Courts will send the inquiry to another jury."¹⁰

The practice of granting new trials because of inadequacy of the verdict was not well settled in England at this time.¹¹ Sayer found in 1792 that "no case is to be met with, in which a new Trial has in Fact been granted on Account of the Smallness of the Damages."¹² In many American states, however, it became a recognized ground for granting a new trial that the verdict was for a smaller amount than would be called for by the applicable rule of law to any version of the facts which might be found from the evidence.¹³ And this was just as true in tort actions (where, for example, the verdict was for less than the actual pecuniary loss clearly shown or admitted) as in those for breach of contract.¹⁴ Other states denied the propriety of ordering a new trial for inadequacy of the verdict in some or all classes of personal tort actions.¹⁵

10. *Hewlett v. Cruchley*, 5 Taunt. 277, 281, 128 Eng. Rep. 696, 698 (C.P. 1813).

11. See, e.g., *Barker v. Dixie*, 2 Str. 1051, 93 Eng. Rep. 1027 (K.B. 1736); *Hayward v. Newton*, 2 Str. 940, 93 Eng. Rep. 955 (K.B. 1733). Compare *Woodford v. Eades*, 1 Str. 425, 93 Eng. Rep. 612 (K.B. 1720).

12. SAYER, DAMAGES 201 (1792). See generally GRANT, SUMMARY OF THE LAW RELATING TO NEW TRIALS 209-211 (1817). MAYNE, DAMAGES 455 (2d ed. 1872) ("The alleged reason [that new trials were not granted on the basis of inadequate damages] is, that new trials came only in the room of attaints, as being an easier and more expeditious remedy, and no attaint would lie for giving too small damages.") Compare, *Russel v. Ball*, Barnes 455, 94 Eng. Rep. 1001 (K.B. 1745) (no attaint for finding too small damages, but where demand is certain verdict will be set aside on this ground).

13. See generally, *Rawle v. McIlhenny*, 163 Va. 735, 177 S.E. 214, 98 A.L.R. 930 (1934); *Wilson*, *The Motion for New Trial Based on Inadequacy of Damages Awarded*, 39 NEB. L. REV. 694 (1960).

14. E.g., *Seddon v. Hill*, 5 N.J. Misc. 1008, 139 Atl. 428 (1927); *Toledo Ry. and Light Co. v. Mason*, 81 Ohio 463, 91 N.E. 292, 28 L.R.A. (N.S.) 130 (1910); *Leavitt v. Dow*, 105 Me. 50, 53, 72 Atl. 735, 736 (1908) ("By the general common law rule, new trials were not granted upon the ground of inadequate damages in actions of trespass and perhaps in all actions of tort. * * * But this rule has been relaxed, and it is now held both in England and in courts of the United States that no reason can be given for setting aside verdicts because of excessive damages, which does not apply to setting them aside for inadequacy of damages."); *Tathwell v. City of Grand Rapids*, 122 Iowa 50, 97 N.W. 96 (1903); *Emmons v. Sheldon*, 26 Wis. 648, 650 (1870) ("The general power of the court to grant a new trial on motion of the plaintiff, in actions of this character, [for recovery of damages due to personal injuries caused by defendant's servant] on the ground of too small damages was not seriously questioned upon the argument."); *McDonald v. Walter*, 40 N.Y. 551 (1869). See generally 66 C.J.S., New Trial § 77 (1950).

15. See, e.g., *Colyer v. Huff*, 6 Ky. (3 Bibb) 34 (1813); *Pritchard v. Hewitt*, 91 Mo. 547, 4 S.W. 437 (1887); *Edwards v. Missouri Ry. Co.*, 82 Mo. App. 478, 484 (1899); *Shoff v. Wells*, 1 Neb. 168 (1871). The Shoff case arose under a statute forbidding new trials because of the "smallness" of damages "in any

With the tremendous growth of personal injury litigation during the present century the superintending power of the courts over the size of verdicts has been increasingly invoked and increasingly exercised.¹⁶ However, such action has posed the following difficult questions.

a. *What Formula Should the Trial Judge Apply in Exercising This Power?*

Where there are no applicable rules which supply a mathematical formula, or something like it, the jury's wide discretion must be recognized.¹⁷ The court can only set the outer bounds of this discretion, and in doing so must itself exercise the same kind of discretionary judgment which the jury has exercised.¹⁸ The test must necessarily, therefore, be stated in broad terms and be such as to remind the court of the breadth of the jury's sphere. Typical formulations of the rule today do not depart very far from those which we saw used in the eighteenth century.¹⁹

action for an injury to the person or reputation," or in any other action where the verdict "shall equal the actual pecuniary injury sustained." Such statutes were once not uncommon but they have now largely disappeared. Wilson, *The Motion for New Trial Based on Inadequacy of Damages Awarded*, 39 NEB. L.REV. 694, 696, 697 (1960); and cf. *Smith v. Bailly*, 311 Ky. 118, 223 S.W.2d 582 (1949); *Carpenter v. City of Red Cloud*, 64 Neb. 126, 89 N.W. 637 (1902); *Dolen v. Beatrice Restaurant Co.*, 137 Neb. 247, 289 N.W. 336 (1939). Wilson concludes that the attitude reflected in the earlier cases and statutes ". . . probably was the early American notion that the jury not only possessed the power but the right to decide cases contrary to the trial court's instructions and the feeling that compromise verdicts . . . were not such terrible things after all." Wilson, *op. cit. supra*, at 696,697.

Most of the cases cited at the beginning of this note dealt with verdicts for plaintiff in *nominal* amounts (e.g. one cent, or one dollar). Such cases may be distinguishable from those in which the verdict is substantial but inadequate. See note 31, *infra*.

16. Compare 37 CENT. DIG. New Trial Key 150-156 (15 columns of reported cases "from earliest times to 1896") with 24 SIXTH DEC. DIG. New Trial Key 74-76 (43 columns of reported cases for decade 1946-1956).

17. See, e.g., *White v. Chicago, M. & P. S. Ry. Co.*, 49 Mont. 419, 143 Pac. 561 (1914) (citing 1 GRAHAM & WATERMAN 451); *Remmenga v. Selk*, 152 Neb. 625, 42 N.W.2d 186 (1950); *Simons v. Kidd*, 73 S.D. 306, 42 N.W.2d 307 (1950); *E. I. Dupont De Nemours v. Taylor*, 124 Va. 750, 98 S.E. 866 (1919). See note 3 *supra*.

18. See, e.g., *Humble v. Union Pac. Ry.*, 90 Cal. App. 2d 276, 277, 202 P.2d 791, 792 (1949) ("The trial judge sits as a thirteenth juror . . ."); *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 Pac. 1083 (1928); *In re Hollis' Estate*, 235 Iowa 753, 16 N.W.2d 599 (1944); *Bartley v. Phillips*, 317 Mass. 35, 57 N.E.2d 26 (1944).

19. Compare *Gorman v. County of Sacramento*, 92 Cal. App. 656, 667, 268 Pac. 1083, 1088 (1928) (refusal of appellate court to disturb decision of jury and

b. *To What Extent Is the Trial Court's Ruling Reviewable?*

In the federal courts it is not entirely clear whether the trial judge's order granting or denying a new trial on this ground is reviewable at all, even in cases where the damages are ascertainable with some degree of precision.²⁰ In *Fairmont Glass Works v. Cub Fork Coal Co.*,²¹ the evidence showed that if plaintiff was entitled to any recovery at all for breach of contract, the minimum sum he should have—after making the maximum allowance for defenses and counter-claims—was about \$18,000. The jury brought in a verdict for plaintiff of one dollar. The trial court denied plaintiff's motion to order a new trial because of the inadequacy of the verdict. In upholding this action, the Supreme Court reasoned that the jury may have (1) found the issues for the defendant (which would have been permissible under the evidence) but (2) brought in a verdict designed to free plaintiff from the payment of costs (an error of which *plaintiff* could not complain). This reasoning would not necessarily support the proposition that a trial court has unreviewable discretion to grant or deny a new trial where damages are *substantial*

trial judge. “. . . unless the verdict is so plainly and outrageously excessive as to suggest at first blush passion, prejudice, or corruption on the part of the jury”); *Dedman v. McKinley*, 238 Iowa 886, 892, 29 N.W.2d 337, 340 (1947) (appellate court will not set aside a verdict as excessive and grant a new trial unless “. . . it [the verdict] is so excessive as to shock the conscience * * *”) with rule enunciated in cases cited in notes 5, 6, and 7 *supra*.

A distinction should be noted between the standards applied by a trial court and those applied by an appellate court in considering a challenge to a verdict because of excessiveness or inadequacy. See, *e.g.*, *Bartley v. Phillips*, 317 Mass. 35, 57 N.E.2d 26 (1944) and other cases cited in note 18 *supra*. Compare also the comments of L. Hand, J., in *Miller v. Maryland Cas. Co.*, 40 F.2d 463, 465 (2d Cir. 1930) (“We must in effect decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements.”)

20. See *Neese v. Southern Ry.*, 350 U.S. 77 (1955). Compare cases cited in n. 24 *infra*.

See generally *Dagnello v. Long Island R.R.*, 289 F.2d 797 (2d Cir. 1961) and sources cited therein at 806; Comment, 28 *FORDHAM L. REV.* 500 (1959), and Note, 98 *U. OF PA. L. REV.* 575 (1950).

21. 287 U.S. 474 (1933), discussed in Hinton, *Power of Federal Appellate Court to Review Ruling on Motion for New Trial*, 1 *U. OF CHI. L. REV.* 111 (1933). (Concluding: “It is to be regretted that the majority opinion should strain the doctrine of discretion to limit the power of appellate review, when the absence of a court in banc has deprived the litigant of an important common law safeguard.” p. 114).

(and asserted to be either excessive or inadequate)²² but the rule has been declared to be that broad.²³ Recent rulings and statements, however, suggest that federal appellate courts will review the trial court's exercise of discretion in extreme cases, where the verdict is grossly *excessive*.²⁴ These rulings would seem to justify appellate intervention also, *at least in theory*, where the verdict is substantial but demonstrably *inadequate*.²⁵ Only one decision, however, has actually gone that far.²⁶

In most states appellate courts have exercised considerably greater supervision over the size of verdicts than have federal courts.²⁷ In

22. See discussion and cases cited in Wilson, *The Motion for New Trial Based on Inadequacy of Damages Awarded*, 39 NEB. L. REV. 694, 716-726 (1960). And compare note 15, *supra*.

23. *Caloric Stove Corp. v. Chemical Bank & Trust Co.* 205 F.2d 492, 497 (2d Cir. 1953) ("... it was less irrational to award somewhat lower damages than the lowest that the evidence justified, than it was to award only nominal damages when substantial damages were the necessary consequence of a verdict for the plaintiff."); *New York, N. H. & H. R. R. v. Zermani*, 200 F.2d 240, 245-6 (1st Cir. 1952). See also *Dean v. Century Motors*, 154 F.2d 201, 202 (D.C.Cir. 1946); *Green Constr. Co. v. Chicago, R.I. & P. Ry.*, 65 F.2d 852, 853 (10th Cir. 1933).

24. In a few cases the order of a trial court denying a new trial has been reviewed on the ground that the verdict was grossly or monstrously excessive. *Virginian Ry. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948) (errors also found in charge on damages, but error found "quite apart from the error in the charge."); *Cobb v. Lepisto*, 6 F.2d 128 (9th Cir. 1925); cf. *Boyle v. Bond*, 187 F.2d 362 (D.C. Cir. 1951) (damages for breach of contract).

In a greater number of cases the power of the appellate court to reverse on this ground has been declared, but the trial court's ruling nevertheless affirmed because the verdict was not found grossly or monstrously excessive. See *e.g.*, *Ballard v. Forbes*, 208 F.2d 883, 888 (1st Cir. 1954); *Dagnallo v. Long Island R. R.*, 289 F.2d 797 (2nd Cir. 1961); *Brest v. Philadelphia Transp. Co.*, 216 F.2d 331 (3rd Cir. 1954); *Bucher v. Krause* 200 F.2d 576 (7th Cir. 1952); cert. den. 345 U.S. 997 (1953), pet. for reh. den., 345 U.S. 842 (1953); *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir. 1951); *Ziegler v. Akin*, 261 F.2d 88, 93 (10th Cir. 1958).

In *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96, 101 (1950), the Supreme Court said that the Court of Appeals was right in refusing to interfere with a verdict as excessive because it agreed "that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case." This language has been thought to suggest that a court of appeals has the power of reversal where the amount of damages is "monstrous." See, *e.g.*, *Southern Pac. Co. v. Guthrie*, *supra*, at 931; *Bucher v. Krause*, *supra*, at 587.

25. See *Wooley v. Great A. & P. Tea Co.*, 281 F.2d 78, 80 (3d Cir. 1960).

A good ground for distinguishing inadequate from excessive verdicts may be spelled out from the text at notes 33-40 *infra*. And cf. note 15 *supra*.

26. *Reisberg v. Walters*, 111 F.2d 595 (6th Cir. 1940). See discussion of this case in Wilson, *op. cit supra*, note 13, at 720-1.

27. See, *e.g.*, List of Verdicts Exceeding \$50,000 in 28 N.A.C.C.A.L.J.498-528 (1962) (showing many remittiturs ordered by state appellate courts). *Com-*

substantially all jurisdictions the trial court is said to have a wide discretion in the matter,²⁸ but many appellate courts have been more ready than the federal courts to set limits to it.²⁹

c. *Where a Verdict Is Challenged as Inadequate, Does the Trial Court Have Discretion to Let a Compromise Verdict Stand?*

A verdict for substantially less than plaintiff claims may often be explained as reflecting a rational rejection of some claimed items of damage; it may not therefore be legally inadequate.³⁰ A verdict is inadequate, as the word is used here, only when it fails to cover the admitted or clearly proven damages to which plaintiff is legally entitled if he deserves recovery at all. A verdict for the out of pocket expenses, or less, in a serious and painful personal injury case would furnish an example.³¹

Where the jury believes that defendant is liable, it may nevertheless award plaintiff an inadequate verdict because of prejudice or bias against him, or for some other improper reason. Such conduct on

pare cases cited in note 1 of opinion in *Dagnello v. Long Island R.R.*, 289 F.2d 797 (2d Cir. 1961) at 799, *with* discussion in *Dagnello* opinion at 798-802, 805-6.

28. See, e.g., *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933); *Burke v. Reiter*, 241 Iowa 807, 42 N.W.2d 907 (1950); *Colacurcio Contracting Corp. v. Weiss*, 20 N.J. 258, 119 A.2d 449 (1955); *City of Blackwell v. Murduck*, 202 Okla. 216, 212 P.2d 135 (1949); *Lupi v. Keenan*, 396 Pa. 6, 151 A.2d 447 (1959).

Contra, ORE. CONST. art. VII, § 3 (forbidding re-examination of a verdict "unless the court can affirmatively say there is no evidence to support" it.); and *Van Lom v. Schneiderman*, 187 Ore. 89, 210 P.2d 461, 11 A.L.R.2d 1195 (1949). See *Lusk, Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 OREGON L. REV. 1 (1955) and *Tongue, In Defense of Juries As Exclusive Judges Of The Facts*, 35 OREGON L. REV. 143 (1956).

29. See cases cited in *Dagnello v. Long Island R.R.*, *supra* note 27.

30. See, e.g., *Green Constr. Co. v. Chicago, R.R. & P.R.R.*, 65 F.2d 852 (10th Cir. 1933); *Smith v. Bailey*, 311 Ky. 118, 223 S.W.2d 582 (1949). *Cf.* *Courtney v. Apple*, 345 Mich. 223, 76 N.W.2d 80 (1956) (verdict for funeral expenses in action for death of 3 year old boy upheld since jury may have found that cost of maintaining him would equal or exceed pecuniary value of his services up to 21).

31. As in *Reisberg v. Walters*, 111 F.2d 595 (6th Cir. 1940); *Smith v. Webber*, 282 S.W.2d 346 (Ky. 1955); *Simmons v. Fish*, 210 Mass. 563, 97 N.E. 102 (1912); *Dolen v. Beatrice Restaurant Co.*, 137 Neb. 247, 289 N.W. 336 (1939); *Vaughan v. Bartell Drug Co.*, 56 Wash.2d 162, 351 P.2d 925 (1960).

A distinction is often made between a nominal verdict and a substantial though inadequate verdict. A nominal verdict for plaintiff is frequently allowed to stand against *plaintiff's* objection, where a defendant's verdict would be upheld on the ground that it is in effect a perversely expressed finding for the defendant. See discussion of *Fairmont Glass Works v. Cub Fork Coal Co.* at note 21 *supra*; *Wilson, op. cit. supra*, note 13, at 700-714.

the jury's part is hard to justify on any basis and when the court is satisfied that it has occurred it would no doubt be an abuse of discretion to deny a new trial.³² But the commonest explanation of the inadequate verdict is that it represents a compromise on the jury's part of the issues of liability and damages together. Such a compromise is of course theoretically improper.³³ The jurors are supposed to divorce considerations of liability from those of damages (except under proportional negligence statutes) and so some courts hold that the trial judge abuses his discretion if he denies a new trial where the verdict is demonstrably inadequate.³⁴ But this point of view seems too narrow and doctrinaire. One of the great values of jury trial, it is submitted, is its ability to reflect the community sense of overall fairness, and this may not in all cases coincide with the written law and the instructions which the court must give.³⁵ Where the judge who has presided at the trial is willing to give his stamp of approval to a compromise verdict, it is unfortunate indeed for appellate courts to feel powerless to let his judgment stand.³⁶

A good many courts reject the notion that reversal must be automatic in such cases and insist on examining the evidence to see whether there is a clear preponderance for either party on the issue

32. See, e.g., *Rosa v. City of Chester*, 278 F.2d 876 (3rd Cir. 1960); *Blacktin v. McCarthy*, 231 Minn. 303, 42 N.W.2d 818 (1950); *Wilson*, *op. cit. supra*, note 13, at 710.

33. See *Southern Ry. v. Madden*, 235 F.2d 198, 204 (4th Cir. 1956); *Simmons v. Fish*, 210 Mass. 563, 571-2, 97 N.E. 102, 106 (1912).

34. *Foster v. Dukes*, 301 Ky. 752, 193 S.W.2d 159 (1946); *Gomes v. Roy*, 99 N.H. 233, 108 A.2d 552 (1954); *Sherer v. Smith*, 85 Ohio App. 317, 88 N.E.2d 426 (1949); *Whitney v. City of Milwaukee*, 65 Wis. 409, 27 N.W. 39 (1886).

35. See HOLMES, COLLECTED LEGAL PAPERS 237-238 (1921); Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910); Traynor, *Fact Skepticism in the Judicial Process*, 106 U. OF PA. L. REV. 635, 639-640 (1958); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1286 (1952); James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315, 342-344 (1959).

36. The Pennsylvania Supreme Court has recognized this quite frankly. In *Karcesky v. Laria*, 382 Pa. 227, 235, 114 A.2d 150, 154 (1955), it affirmed the action of the trial court in denying a motion for a new trial where the verdicts for two plaintiffs were manifestly inadequate if there was liability. In the course of an excellent opinion the Court said, "Where the evidence of negligence or contributory negligence, or both is conflicting or not free from doubt, a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict . . ." Cf. also the language from *Simmons v. Fish*, quoted in the text at note 70, *infra*, which suggests that a trial judge might properly allow an inadequate verdict to stand if he would not have set aside a defendant's verdict.

If the action of a federal trial judge in refusing to set aside a verdict as inadequate is unreviewable (see notes 21-26, *supra*, and text), then such a judge also has the power to let a compromise verdict stand where he is satisfied of its substantial justice.

of liability. If this favors defendant, a new trial is not required; if it favors plaintiff the denial of a new trial will be reversed.³⁷ In the common case where a jury may fairly find either way and doubts are pretty evenly balanced, the compromise verdict may well be defended, yet here some courts refuse to let the trial judge approve it.³⁸

Even this attempt to classify cases by measuring preponderance of evidence is, it is submitted, too rigid. It overlooks the fact that the jury's dispensing power is often more sorely needed where legal rules are laggard than where knotty questions of conflicting evidence are to be resolved. The harsh rule, for instance, that *any* contributory negligence of the plaintiff bars all recovery for injuries caused by defendant's negligence, however great, is tolerable only because juries generally disregard it and illicitly apply a rule of comparative or proportional fault.³⁹ Surely it would be unfortunate to set aside

37. In *Rawle v. McIlhenny*, 163 Va. 735, 177 S.E. 214 (1934), the court attempted to classify situations according to the strength of the evidence on the issue of liability. It found five categories. Among them are the two situations mentioned in the text. In *McDowell v. City of Portsmouth*, 184 Va. 548, 35 S.E.2d 821 (1945), the Court sustained the trial court's refusal to set aside an apparently inadequate verdict where the evidence clearly preponderated against liability "though there [was] evidence to support a finding by the jury that the defendant is liable." To similar effect is *Young v. Great No. Ry.*, 80 Minn. 123, 83 N.W. 32 (1900).

In *Fischer v. St. Louis*, 189 Mo. 567, 88 S.W. 82 (1905), the trial court's refusal to set aside a nominal verdict for plaintiff was reversed on her appeal where "there was persuasive evidence of . . . negligence . . ." and ". . . little or no evidence showing a want of due care" on plaintiff's part. To similar effect is *Fleming v. Gemein*, 168 Mich. 541, 134 N.W. 969 (1912).

38. See cases cited *supra*, note 34; *Wilson, op. cit. supra*, note 13, at 712-714. While *Wilson* deplors any ruling which would sanction a compromise verdict, he points out that there was once in this country a far greater reluctance to disturb inadequate verdicts than excessive ones. Compare note 15, *supra*. Cf. also *Raisin v. Mitchell*, 9 C. & P. 613, 173 Eng. Rep. 979 (C.P. nisi prius, 1839).

39. The "all or nothing" rule of contributory negligence is widely condemned as harsh by commentators. See, e.g., *Prosser, Comparative Negligence*, 51 MICH. L. REV. 465 (1953); *Turk, Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189, 304 (1950); *Cefler, The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946); *HARPER & JAMES, LAW OF TORTS* §§ 22.1, 22.3 (1956).

Defenders of the rule, on the other hand, claim that its harshness is purely theoretical and that in practice it is tempered by the power of juries to compromise. "Thus in actual practice the American jury has its own system of 'comparative negligence.'" *Powell, Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005, 1006 (1957). Cf. *Benson, Comparative Negligence—Boon or Bane*, 23 INS. COUNSEL J. 204 (1956). Proponents of the present rule, in other words, do not defend the way it would operate if the black letter law (and the judge's instructions) were taken literally. Rather they

a verdict which embodied such a compromise simply because the evidence clearly pointed to some contributory negligence.⁴⁰

d. *To What Extent May the Trial Court Condition a New Trial Upon a REMITTITUR or ADDITUR?*

Ordering a new trial is one way of avoiding the injustice of a mistaken verdict, and it preserves jury trial since the case is submitted to another jury for its verdict. But new trials are costly and time consuming and thereby impose a burden on parties and society. To avoid this burden courts devised the practice of granting a new trial conditionally where the verdict was excessive—i.e., granting it unless the party receiving the verdict consent to the reduction of damages to a specified amount (*nisi remittitur damna*).⁴¹

The constitutionality of this practice has been questioned, especially under those constitutions which expressly forbid re-examination of a jury's verdict except according to the course of common law.⁴² But the *remittitur* practice became so firmly established in

claim that the rule is defensible because juries see to it that it does not operate in fact the way it is supposed to in theory.

40. See *Karcesky v. Laria*, 382 Pa. 227, 234, 114 A.2d 150, 154 (1955), ("The doctrine of comparative negligence, or degrees of negligence, is not recognized by the Courts of Pennsylvania, but as a practical matter they are frequently taken into consideration by a jury.") This was said in the course of an opinion unholding the trial court's refusal to set aside a compromise verdict, *cf.* note 36, *supra*.

41. See cases collected in Annotations, 53 A.L.R. 779, 783-792 (1928); 95 A.L.R. 1163, 1166-68 (1935).

42. The argument against constitutionality runs thus: The *remittitur* practice was not firmly enough established in English common law when our constitution was adopted—at least in cases where damages were "at large," so to speak—to justify its constitutionality on historical grounds. To be sure the common law judge might set aside a verdict as excessive, and the power to do this necessarily included the power to determine the largest amount which he would permit to stand. But this order committed the actual fixing of the damages to another jury on a new trial. The court did not fix the damages and might upon the second trial accept a verdict as large as the one originally set aside. See, *e.g.*, *Clerk v. Udall*, 2 Salk. 649, 91 Eng. Rep. 552 (Q.B. 1702).

It may be, the argument continues, that the party receiving the verdict is not deprived of any rights by the condition since he is free to reject it and have a new trial, which is all the common law would give him. If he takes the reduced amount instead, he does so by his own consent. But the party who moved for a new trial is no party to this consent and will be held to damages fixed not by a jury but by the court's judgment and his adversary's acquiescence. There has therefore been an invasion of that party's right to jury trial. See, *e.g.*, *Carlin, Remittiturs and Additurs*, 49 W. Va. L. Q. 1 (1942); Note, 21 VA. L. REV. 672 (1935). And compare the misgivings in the Court's opinion in *Dimick v. Schiedt*,

both federal and state courts that it probably will not be overturned at this late date on questionable constitutional grounds.⁴³

The analogous practice of conditioning a new trial on defendant's failure to consent to an *additur*, where plaintiff complains of the inadequacy of the verdict, has enjoyed very little use and is of more recent origin. Some state courts have been willing to sanction the *additur* practice in cases where the amount of the increase can be established by definite rules of law (as by adding calculable interest omitted from the verdict)⁴⁴ and some have gone further and awarded *additurs* in personal injury cases.⁴⁵ The constitutional propriety of such an order by a federal court came before the Supreme Court in 1934, and the practice was condemned in a five to four decision on the ground that it was an unconstitutional invasion of the right of jury trial.⁴⁶ The analogy of *remittitur* was urged, but the court differentiated the practices on two grounds: (1) the existence of some—though inconclusive—English *remittitur* practice before 1791⁴⁷; (2) the fact that in the case of the *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."⁴⁸ In contrast, an *additur* is the "bald ad-

293 U.S. 474, 484-5 (1935). Compare *Dorsey v. Barba*, 38 Cal. 2d 350, 240 P.2d 604 (1952). But see note 60, *infra*.

In Note, 44 YALE L.J. 318 (1934), it is suggested that this constitutional difficulty is not so great under state constitutions which lack the "reexamination" provisions—as most of them do.

43. "[I]t, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. But, . . . the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late date." *Dimick v. Schiedt*, 293 U.S. 474, 484-485 (1935).

44. *Carr v. Miner*, 42 Ill. 179 (1866); *Marsh v. Kendall*, 65 Kan. 48, 68 Pac. 1070 (1902); *Clark v. Henshaw Motor Co.*, 246 Mass. 386, 140 N.E. 593 (1923).

45. *Gaffney v. Illingsworth*, 90 N.J.L. 490, 101 Atl. 243 (1917); *Bachmann v. Passalacqua*, 46 N.J. Super. 471, 135 A.2d 18 (1957); *O'Connor v. Papertsian*, 309 N.Y. 465, 131 N.E.2d 883 (1956); *Bodon v. Suhrmann*, 8 Utah 2d 42, 327 P.2d 826 (1958), noted 6 U.C.L.A. L. REV. 441 (1959).

46. *Dimick v. Schiedt*, 293 U.S. 474 (1935).

47. Ancient roots for it have been suggested in the early rule that a court might increase the jury's verdict in cases of mayhem, upon an inspection of the wound. But this practice had died out before the American constitutions were adopted, and it was never really parallel to the modern practice. For one thing the court needed no one's consent to increase the damages for mayhem. See *Burton v. Baynes*, 1 Barnes 153, 94 Eng. Rep. 852 (K.B. 1734).

48. *Dimick v. Schiedt*, *supra* note 46, at 486.

dition of something which in no sense can be said to be included in the verdict."⁴⁹

This last ground of distinction has been criticized by commentators who point out that the jury has rejected all smaller amounts in reaching the large verdict just as truly as they have rejected larger amounts in reaching the small verdict.⁵⁰ And indeed this distinction does seem to rest on tenuous ground. But its rejection, often urged as a reason for doubting the *remittitur*, may be used equally well to justify the *additur*. In the case of the large verdict the jury may well be taken to have intended to award as much of it (up to the full amount) as is legally permissible. Jurors know of the superintending power of the court and may properly be regarded as having acted with a view to it. It is not accurate or realistic to say that their verdict involved a categorical rejection of *all* amounts included within it, though it would usually mean a rejection of such amounts which were less than the maximum allowed by law.⁵¹

Similarly an inadequate but substantial verdict may be viewed as a determination that plaintiff should recover, but only the amount fixed by the verdict or the smallest legally permissible amount if that should exceed the verdict. In both cases, then, the jury may be said to have exercised their judgment in fixing the amount subject only to the court's ruling on the legal question.

An objection to this reasoning would stress the improper functioning of the jury which rendered the challenged verdict and the consequent impropriety of using it as a basis for fixing damages. What is wanted, it is said, is the judgment of a properly functioning jury.⁵² This objection points up a caveat which should be observed in using either practice. This jury did not function entirely proper (according to its theoretical role) or else the verdict would be for a proper amount. Perhaps, then, it failed to perform its functions properly in other respects, as in deciding questions of liability. Where this possibility is great enough, the court, if it equates justice with the proper performance by the jury of the role assigned to it by theory in the case at hand, should indeed grant a new trial unconditionally and upon all issues. If on the other hand the trial judge feels that jury lawlessness in awarding an inadequate verdict has produced a just result in terms of permissible community sentiment in the case before

49. 293 U.S. at 482.

50. See Carlin, *op. cit. supra*, note 42, at 18, 24, 25; also see Note, 23 CAL. L. REV. 536, 537 (1935), and Note, 20 CORNELL L. Q. 342, 347-348 (1935).

51. See *Powers v. Allstate Ins. Co.*, 10 Wis.2d 78, 88, 102 N.W.2d 393, 398 (1960) (by its verdict "the jury has already indicated that it thinks that the plaintiff deserves the highest figure the evidence will sustain.")

52. See, *e.g.*, Carlin, *op. cit. supra* note 42, at 15, 18.

him, then he should let the verdict stand without *additur*.⁵³ There is also a third possibility. A jury's functioning in a given case need not be all good or all bad. The judge who has presided over the whole trial may be able to see that much of what a jury has done is proper and worth saving, though it has infirmities. Where the infirmity appears to be confined to the issue of damages, and where the jury's verdict may fairly be read in the way suggested above, then the *remittitur*—and less often the *additur*⁵⁴—may indeed be the sensible way to salvage the good out of what this jury has done without incurring the expense and delay of a new trial, and, it is submitted, without impairing the essence of the right to jury trial.

It remains to be considered how the amount of the *remittitur* or *additur* is to be determined. The above reasoning would justify so much of the large verdict as represents the maximum amount which a court would allow to stand and warrant a *remittitur* of only the excess over this amount;⁵⁵ the *additur* would be fixed in relation to the smallest amount which the court would allow to stand. In some jurisdictions these are the methods prescribed.⁵⁶ In other states,

53. Compare notes 33-40, *supra*, and text.

54. As we shall see, in discussing partial new trials, the inadequate verdict almost always indicates a compromise and should probably be taken as doing so unless there is something which points affirmatively and pretty strongly to a different explanation. If the verdict does represent a compromise then the *additur* is just as inappropriate as a new trial on the damages issue only. See text at notes 69, 70, *infra*.

55. Since it is a court function to determine whether a verdict is excessive it is also a court function to determine the point at which a verdict becomes excessive (i.e. to fix the limits of tolerable jury discretion). See, e.g., *Powers v. Allstate Ins. Co.*, 10 Wis.2d 78, 91, 102 N.W.2d 393, 400 (1960); Comment, 44 *YALE L.J.* 318, 320 (1934). The court does not, therefore, invade the jury's function in determining the greatest amount which the evidence would support. The verdict clearly cannot be sustained beyond this point; but up to this point it is either sustainable or so tainted as to affect the whole verdict and call for a new trial.

56. This appears to be the settled rule governing *remittiturs* in the federal courts. See *Rice v. Union Pac. R.R.*, 82 F. Supp. 1002, 1007 (D. Neb. 1949) (*remittitur* warranted of "the portion of the verdict and judgment found to be in excess of the highest appropriate recovery"); *Dunton v. Hines*, 267 Fed. 452, 455 (D. Me. 1920); *Tomljanovich v. Victor American Fuel Co.*, 227 Fed. 951, 952 (D. Me. 1915) (*remittitur* to be fixed with reference to "the largest amount which the testimony will support"); *Yurkonis v. Delaware, L. & W. R.R.*, 213 Fed. 537, 538 (E.D.N.Y. 1914) ("... where the testimony proves a certain limit as a maximum for the verdict then it would seem to be a matter of law that the balance of the verdict was not sustained by the testimony. A determination that a new trial would have to be granted, unless the verdict were entered at the greatest amount which the testimony would support, is but another way of exercising the discretion which the trial court undoubtedly has.") Cf. *Patton v. Baltimore & O. R.R.*, 120 F. Supp. 659, 666, 667 (W.D.Pa. 1954) (gross earnings to an amount which "the jury could conceivably have found" used as basis for computing *remittitur*.)

however, the trial judge is directed to ascertain the amount which a properly functioning jury would be likely to find and to order a *remittitur* of everything in excess of that amount.⁵⁷ This practice seems to be a clear invasion of the jury's sphere since it calls upon the court to fix damages as a jury would do without regard to what this (or any other) jury has in fact done.⁵⁸

Wisconsin developed, and recently abandoned,⁵⁹ a unique practice. Where the verdict is excessive a new trial would be ordered unless *defendant* consented to the *largest* permissible amount or (if defendant's consent was withheld) *plaintiff* consented to the *smallest* permissible amount. This practice may avoid some of the basis for de-

Florida East Coast Ry. v. Hayes, 67 Fla. 101, 109, 64 So. 504, 506 (1914) is in accord with the federal rule.

Most state opinions do not make it entirely clear how the *remittitur* should be computed, but they often imply that the test adopted by the federal courts should be applied. See, e.g., St. Louis, I. M. & So. R.R. v. Adams, 74 Ark. 326, 331, 86 S.W. 287, 288 (1905) (no invasion of jury function since court "is only naming an amount which, under the evidence, the court can see is clearly not excessive"); Hughes v. Hearst Publications, 79 Cal. App. 2d 703, 180 P.2d 419 (1947) (amount of judgment after *remittitur* to be reviewed on appeal "as if it had been returned in the first instance by the jury in the reduced amount"; and *remittitur* should be "of the portions of the award which the trial judge determines to be excessive.")

57. See, e.g., Allen v. Giuliano, 144 Conn. 573, 135 A.2d 904 (1957) (in fixing *remittitur*, "a fair appraisal of compensatory damages, and not the limit of legitimate generosity, is the rule.") Larrissey v. Norwalk Truck Lines, 155 Ohio 207, 98 N.E.2d 419 (1951) (trial court may, "with the assent of the plaintiff, reduce the verdict by remittitur to any amount warranted by the evidence.")

58. Cf. note 62 *infra*, and text.

59. This practice was introduced by Heimlich v. Tabor, 123 Wis. 565, 102 N.W. 10 (1905), and persisted through 1959. Gennrich v. Schrank, 6 Wis.2d 87, 93 N.W.2d 876 (1959). Fairchild, J., wrote a thoughtful dissent in the Gennrich case. The reasoning of the dissent was adopted by the court in Powers v. Allstate Ins. Co., 10 Wis.2d 78, 102 N.W.2d 393 (1960), in an opinion which reviews the history of the practice and concludes with an express overruling of Heimlich and its progeny.

Some of the early cases under the Heimlich rule, accorded the double option described in the text. See, e.g., Beach v. Bird & Wells Lumber Co., 135 Wis. 550, 116 N.W. 245 (1908). Later cases seem to have abandoned the defendant's option (which he would have little incentive to accept) and simply to have given plaintiff the choice of the smallest amount which a jury might properly find under the evidence. See, e.g., Rasmussen v. Milwaukee E. Ry. & Tr. Co., 259 Wis. 130, 47 N.W.2d 730 (1951). The former practice is treated in Note, 4 WIS. L. REV. 371 (1928). Its adoption elsewhere was recommended in Note, 16 MINN. L. REV. 185, 195 (1931). Now that Wisconsin, after half a century of experience with it, has rejected the rule, it is to be hoped that this recommendation will attract few followers.

The present Wisconsin practice contains an ambiguity. The plaintiff is to be given a choice to remit "the excess over and above such sum as the court shall determine is the reasonable amount of plaintiff's damages." 10 Wis.2d at 92, 102 N.W.2d at 400. But reasonableness covers a wide range and, as the

defendant's possible objections to the orthodox rule,⁶⁰ but it is likely to result in giving plaintiff far less than the jury can be said, by any stretch of the imagination, to have fixed.⁶¹ Nor can the practice be properly defended on the ground that plaintiff was given the choice of consenting or having a new trial. A new trial is expensive, dilatory, and of uncertain result. While a court may have power to impose this burden on the parties and on society in the interest of ultimate substantive justice, this does not justify it in using the burden as leverage to induce consent to a condition which would invade a party's jury trial right if it were imposed unconditionally.⁶²

court itself points out quoting the dissenting opinion of Fanchild, J., in Gennrich, "There is no reason, where the range is wide, for requiring the court to fix a low figure when the jury has already indicated that it thinks the plaintiff deserves the highest figure the evidence will sustain." 10 Wis.2d at 88, 102 N.W.2d at 398. But no later decision has yet clarified the question whether the trial judge must take the highest figure in that range, as he apparently did in Gustafson v. Bertschinger, 12 Wis.2d 630, 108 N.W.2d 273 (1961), or whether he is free to pick *any* sum within the range of reasonableness as Ohio trial courts are apparently free to do. Cf. note 57, *supra*.

60. Solicitude for the defendant on this point seems to be misplaced. If the excessiveness of the verdict, or anything else in the record, indicates a taint which permeates the whole verdict, defendant is entitled to a new trial without *remittitur*. Defendant may always argue that this is the case. A *remittitur* will be ordered only when defendant has lost that argument and the court has found that the verdict is justifiable in all respects except for its excessiveness. What further cause has defendant for complaint if the verdict is sustained to the full extent that it is justifiable?

61. One reason given by the Wisconsin court for abandoning the older practice was that it offered plaintiffs so little that they often chose the dilatory and expensive new trial instead. See Powers v. Allstate Ins. Co., 10 Wis.2d at 88, 102 N.W.2d at 399.

62. In answer to this it might be urged that in the case supposed the trial court has decided to grant a new trial for excessive damages if there is to be no *remittitur*, so that the option of an excessive *remittitur* makes plaintiff's lot no worse than it would be without any choice of *remittitur* at all.

It is not clear that this reasoning would constitute a valid answer even if its factual premise is accepted. It has not been so held in other situations. A state may, for example, exclude a foreign corporation from doing any business within its borders, but it may not impose unconstitutional conditions upon its entry, and this, presumably, whether or not these conditions are more onerous than the exclusion. See, e.g., Terral v. Burke Construction Co., 257 U.S. 529 (1922).

In addition, any such contention would probably rest on a false factual premise. It assumes that, in the absence of a *remittitur* practice, a trial court would grant an unconditional new trial in all cases where it now orders a *remittitur*. This is extremely doubtful. To be sure the reasoning which would justify a *remittitur* would also justify a new trial. But the area is one of large discretion. The reports show that the *remittitur* practice is widely used, and further that remittiturs often represent a relatively small fraction of the original verdict (e.g. ranging from under 10% to 25%). See cases reported in 28

e. Should a New Trial be Granted Only Upon the Issue of Damages?

The advantages of such partial new trials are obvious. Where issues have been fully and fairly tried and determined nothing meritorious is to be gained from making the parties try them over again (although the loser will usually want to take another chance), and both society and the parties lose from the added expense, effort and delay which the retrial entails. All this is true, though perhaps in diminished degree, where there must be a new trial on one of the issues so that the saving is only partial. These advantages of limiting the new trial to some issues only are widely recognized.

The common law tradition regarded a jury verdict in a damage action as an indivisible thing. If it were set aside at all, it was entirely out of the case, and the new trial had necessarily to dispose of all the issues. This requirement was recognized as a formal one. Lord Mansfield said, "for form's sake we must set aside the whole verdict."⁶³ However, American courts generally have not found any unconstitutional invasion of jury trial in the ordering of partial new trials in appropriate cases. In *Gasoline Products Co. v. Champlin Refining Co.*,⁶⁴ the Supreme Court declared that the Seventh Amendment to the Federal Constitution did not forbid such an order, but added that the practice "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separate from the others that a trial of it alone may be had without injustice."⁶⁵

Although the partial new trial has escaped serious constitutional attack, the older common law concept of the verdict as indivisible has some continued existence, notably in New York.⁶⁶ In the great majority of American states, however, the power of a trial court to order a new trial, in appropriate cases, on the issue of damages only

N.A.C.C.A. L.J. 498-528 (1962); annotation 16 A.L.R.2d 3 (1951), and supplements thereto. It is widely recognized that the limits of tolerance for unliquidated damages are in many cases far from precise. In many cases where *remittiturs* are now used, therefore, it is likely that if the trial court were faced with the stark choice between ordering a new trial and letting the verdict stand, it would choose the latter course.

63. *Eddie v. East India Co.*, 1 W. Black 295, 298, 96 Eng. Rep. 166, 167 (K.B. 1761).

64. 283 U.S. 494 (1931).

65. *Id.* at 500. The Court went on to hold that a partial new trial was not appropriate in the case before it.

66. *Schroeder v. Syracuse Tr. Co.*, 9 A.D.2d 1012, 194 N.Y.S.2d 244 (4th Dept. 1959); *Hylar v. Heyer*, 177 Misc. 68, 29 N.Y.S.2d 223 (Sup. Ct. Westchester Co., 1941); *cf. Goodsell v. Western Union Tel. Co.*, 109 N.Y. 147, 16 N.E. 324 (1888). See also *Watt v. Watt* [1905] A.C. 115 (H.L.). The New York decisions do not turn on any constitutional question but rather on the point that legislation has not to date altered the common law practice.

is accepted.⁶⁷ This, of course, raises the question of what cases, or kinds of cases, are appropriate for such an order.

The generally accepted test is the one quoted above from the opinion in *Gasoline Products*.⁶⁸ Its application to cases of inadequate verdicts has been more often examined critically by courts than its application to cases of excessive verdicts. The chief stumbling block here is the suggestion of compromise which an inadequate verdict carries. All courts agree that where a jury has in fact arrived at a compromise verdict by improperly compounding the issues of liability and damages together, it is error and an abuse of discretion to order a new trial on the issue of damages only.⁶⁹ In a leading case, the Massachusetts Court said of such a situation:

It is possible that a trial judge might let such a verdict [compromise] stand, for various reasons: as, for instance, if on the whole it should appear to him that a verdict for the defendant ought not to have been set aside. But it would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new trial with the issue of liability closed against him when it appears obvious that no jury had ever decided that issue against him on justifiable grounds.⁷⁰

The virtual unanimity upon this point, in theory, has not, however, produced uniform results in practice. Some jurisdictions regard a seriously inadequate verdict as practically conclusive evidence of an improper compromise unless defendant's liability is very clear and some other notable explanation for the inadequate award is made to appear affirmatively.⁷¹ Such an explanation was found by a Court

67. See cases collected in annotations, 98 A.L.R. 941 (1935); 29 A.L.R.2d 1199 (1953).

68. See text at note 71, *infra*.

69. *Rosa v. City of Chester*, 278 F.2d 876 (3d Cir. 1960); *Southern Ry. v. Madden*, 235 F.2d 198 (4th Cir. 1956); *Haug v. Grimm*, 251 F.2d 523 (8th Cir. 1958); *Leipert v. Honold*, 39 Cal.2d 462, 247 P.2d 324 (1952); *Smith v. Webber*, 282 S.W.2d 346 (Ky. 1955); *Kinsell v. Hawthorne*, 27 Ill. App.2d 314, 169 N.E.2d 678 (1960); *Simmons v. Fish*, 210 Mass. 563, 97 N.E. 102 (1912); *Blacktin v. McCarthy*, 231 Minn. 303, 42 N.W.2d 818 (1950); *Caine v. Collins*, 194 Pa. Super. 230, 166 A.2d 675 (1960); *Farr v. Fisher*, 107 Vt. 331, 178 Atl. 883 (1935); *Zerr v. Spokane City Lines*, 58 Wash.2d 196, 361 P.2d 752 (1961).

70. *Simmons v. Fish*, 210 Mass. 563, 572, 97 N.E. 102, 106 (1912).

71. Thus in *Simmons v. Fish*, note 70, *supra*, the court said that a grossly inadequate verdict "... itself is almost conclusive demonstration that it was the result, not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision." 210 Mass. at 572, 97 N.E. at 106.

A similar attitude seems to underlie the opinions in *Rosa v. City of Chester*; *Southern Ry. v. Madden*; *Caine v. Collins*, all note 69, *supra*; *Kralyevich v. Magrini*, 172 Cal. App.2d 784, 342 P.2d 903 (1959).

of Appeals in *Rosa v. City of Chester*,⁷² a wrongful death action wherein questions asked by the jury showed that they had found liability but probably minimized decedent's earning capacity because of improper evidence of his buying whiskey on the evening of his death.

Other courts seem inclined to accept the trial court's judgment that an inadequate verdict did *not* represent an improper compromise of liability even where there is nothing in the record to suggest an alternative explanation.⁷³ These courts, it is submitted, are either being unrealistic or are willing to let the plaintiff have the best of both possible worlds.

Where a verdict is excessive, a different explanation must be sought; it surely does not suggest a compromise. Rather, "[T]he excessive verdict suggests that it was a product of mistake, partiality, passion, or prejudice. Then, the crucial inquiry in each instance is whether the taint permeated the whole verdict or only the 'quantum of damages.'"⁷⁴ Here again where the record shows no specific explanation of the jury's action (such as improper evidence or an erroneous instruction, bearing only on damages) there is substantial likelihood that the "taint" may have "permeated the whole verdict," at least unless liability is pretty clear from the evidence. This likelihood is probably not as strong in the case of excessive verdicts as the likelihood of compromise is where the verdict is inadequate. This is attested to by the far greater number of *remittiturs* than of *additurs*, for the same problem underlies all devices for avoiding a new trial on all issues.

If liability is conceded, a new trial may of course be confined to the issue of damages. *Kovacovich v. Phelps Dodge Corp.*, 62 Ariz. 193, 156 P.2d 240 (1945); *Swartz v. Smokowitz*, 400 Pa. 109, 161 A.2d 330 (1960). And if liability is clear enough this may perhaps indicate that the error was confined to the issue of damages even where there is no other affirmative showing that this was the case. See, e.g., *Whiteside v. Harvey*, 124 Colo. 561, 239 P.2d 989 (1952); *Martin v. Donohue*, 30 Cal. App.2d 219, 85 P.2d 913 (1938); *Vaughan v. Bartell Drug Co.*, 56 Wash.2d 162, 166, 351 P.2d 925, 928 (1960) (partial new trial only "where liability is clearly shown").

Under a comparative or proportional negligence statute where the jury is invited to consider issues of negligence and contributory negligence in assessing damages, a partial new trial would never be proper. *Hanisch v. Body*, 77 S.D. 265, 90 N.W.2d 924 (1958).

72. 278 F.2d 876 (3d Cir. 1960). Cf. also *Blacktin v. McCarthy*, 231 Minn. 303, 42 N.W.2d 818 (1950) (liability clear and court believed jury improperly swayed by fact that plaintiff was unemployed and had spent the "evening with defendant at various night clubs or places of entertainment").

73. *Lilly v. Boswell*, 362 Mo. 444, 242 S.W.2d 73 (1951); *Farr v. Fisher*, 107 Vt. 331, 178 Atl. 883 (1935).

74. *Rommell v. United States Steel Corp.*, 66 N. J. Super. 30, 49, 168 A.2d 437, 447 (A.D. 1961).