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NEW TRIALS ON THE ISSUE OF DAMAGES ALONE

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Only recently has the general public awakened to a real danger threatening our economic system today. Jury verdicts in damage suits have become increasingly, and in the writer's opinion, alarmingly, higher. Verdicts of $150,000 to $250,000 are not uncommon in some jurisdictions. While such verdicts are still the exception in most jurisdictions, many verdicts of much smaller amounts, if excessive, soon add up to a staggering total.

In the last few years a drive for a "more adequate award" has been made by some plaintiffs' attorneys. Newspapers have inadvertently assisted in teaching prospective jurors to return exorbitant verdicts by publicizing the fact that a suit has been instituted for large damages. If a large verdict is returned this receives headlines. If the defendants obtain a verdict there is no mention of it in the paper or if there is it is usually buried on page 34 near the obituaries. Newspaper reporters seem to feel that the fact the defendant is successful in a damage suit is not news.

Many young attorneys, and unfortunately some older ones, file damage suits wherein they seek damages of several hundred thousand dollars when they know that a verdict of $10,000 might well be excessive. But, newspapers will publicize the filing of a suit demanding $100,000, whereas they are apt not to mention a suit for $10,000. This appears to be a sign of the times; just one of the evils of our "something for nothing" age.

Insurance companies are now attempting to combat this situation through an educational program such as advertisements calling the public's attention to the fact that in the long run it is the individual citizen who pays the bill through an increase in his insurance premiums. Magazines have now started to run articles attempting to educate the public along this line.

We are hopeful that some day newspapers will report on the defense verdicts as they do on the plaintiffs' verdicts. An example of this reporting comes to the writer's mind. Recently two doctors were sued for $50,000 damages because, as the plaintiff alleged, they performed a vasectomy upon the plaintiff instead of a circumcision. The suit made the front page of the daily paper on several occasions, including large headlines when the jury returned a verdict in favor of the plaintiff in the sum of $33,700.00. Some months later the Supreme Court reversed the lower Court with instructions to enter a judgment of dismissal. Did this appear on the front page? Of course not. A small four-paragraph article appeared on one of the inside pages.

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Unfortunately, this thought of large damages in these days of inflation, has affected some of our courts. We do not mean to infer that the courts have intentionally done anything wrong but we do feel that some judges have been guilty of improper thinking; that they have been unconsciously led or pushed into approving methods for obtaining or allowing large damages which are not sound in factor or theory.

In line with the present-day thinking, an instruction to the jury advising them that in arriving at the amount of their verdict they may take into consideration the present purchasing power of the dollar and that such purchasing power is clearly lessened at the present time has been approved by many courts.[1] Just one more example of ways to obtain "the more adequate award."

With all of the above problems facing the defense attorney, plus the ever-present problem of the jury knowing that an insurance company is probably the "real party in interest," it would seem that he has his work well cut out for him. There is, however, still another ever-present danger which faces the defense attorney. It is a danger which many attorneys do not appreciate until after they have been struck by it. We refer to the danger of a jury returning a verdict for the plaintiff for inadequate damages so that either the trial or appellate court grants a new trial on the issue of damages alone.

We know of no more helpless feeling than to hear the trial court advise the second jury that the issue of liability has been determined in a prior suit and that the only question they will be called upon to determine is the amount of damages to be awarded the plaintiff. One has not suffered the "tortures of hell" until he has gone through such a trial.

We assume that such a situation would not usually arise in states which now have comparative negligence statutes (Georgia, Mississippi, Nebraska, South Dakota and Wisconsin). If the verdict in one of these states was for less than the amount of the proven damages, we assume the court would feel that the jury had arrived at its figure on the basis of comparative negligence. We have not studied the law in these comparative negligence states. However, in most of the rest of the states where contributory negligence is a complete bar to recovery, the problem has often arisen. As we will point out hereafter, we make no criticism of the granting of a new trial on the issue of damages alone in the proper case, but in our opinion such a case should be the exception rather than the general rule as it now seems to be. New trials on the issue of damages alone are being granted in alarmingly increasing numbers.

The granting of a new trial on the issue of damages alone is not a new procedure. At common law, there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, then a new trial was directed as to all issues.

[1] New Amsterdam Casualty Co. v. Soilean, 167 F. (2d) 767 (1948); Dabareiner v. Weisflog, 253 Wis. 23, 33 N.W. (2d) 220, 12 ALR (2d) 605 (1948).

However, even before the court rules so provided, the rule became well established that in a proper case an appellate court had the power at common law, upon reversing a case, to grant a new trial on the issue of damages alone.[2]

The authority to grant a new trial is now given by statute in most states. Rule 59 of the Federal Rules of Civil Procedure provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues * * *

There being no dispute as to the court's right to grant a new trial on the sole issue of damages, the only question remaining is when is it proper to grant same?

Undoubtedly the outstanding and most cited case on this question is that of *Simmons v. Fish*,[3] decided in 1912. This case recognized that there could "be no doubt as to the power of the court at common law to set aside a verdict as a whole for insufficient as well as for excessive damages" and then further held that under its "inherent judicial authority" it could exercise its power and limit the new trial to "specific points in case where the error committed at the trial was so limited in character as with justice to both parties to be separable from the other issues determined by the first verdict." The court sets forth the important part of the rule by stating:

> It is a power which ought to be exercised with great caution with a careful regard to the rights of both parties, and only in those infrequent cases where it is certain and plain that error which has crept into one element of the verdict by no means can have affected its other elements.

While *Simmons v. Fish* is repeatedly cited by other courts as authority for their granting a new trial on the issue of damages alone, it is interesting to note that the court did not grant such a new trial in that case. The court in that case recognized the fact that the low amount of damages awarded indicated a compromise by the jurors on the question of liability and therefore the questions were not separable. The court noted that the liability was contested at the trial and that the low amount of damages awarded the plaintiff "could have been reached only by certain of the panel conceding their conscientious belief that the defendant ought to prevail upon the merits in order that a decision might be reached." The court warns of the danger and injustice, which unfortunately has entered into many later decisions, with the following remarks:

> 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

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[2] Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 75 L. Ed. 1188 (1931); Simmons v. Fish, 210 Mass. 563, 97 N.E. 102 (1912).

[3] *Supra*, note 2.

> closed against him when it is obvious that no jury had ever decided that issue against him on justifiable grounds.

Another case cited almost as much as the *Simmons v. Fish* case as authority for granting a new trial on the issue of damages alone is that of *Norfolk v. Southern Railroad Co.*[4] In this case, the United States Supreme Court, while affirming the Supreme Court of South Carolina in allowing such a new trial, observed:

> Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of injury.

The court ends by stating that they "recognize that the practice is not to be commended."

Irrespective of this warning by the court in these two leading cases, the various state and Federal Courts proceed to grind out decision after decision granting new trials on the issue of damages alone and assuming that the issues of liability and damages were severable and that the jury came to a final conclusion on the issue of liability before ever considering the question of damages.

Time will not permit us to examine and digest all of the cases on this question. A hurried examination of cases in various jurisdictions indicates that the appellate courts are more and more assuming that the issues of liability and damages are separable. For those interested, an excellent annotation including a citation of many cases may be found following the opinion in *Gasoline Products Co. v. Champlin Refining Co.*[5] We do desire to take one of the state supreme courts and follow its line of thinking. We select the Supreme Court of Colorado as a typical court in this respect.

As early as 1909 the Colorado Supreme Court recognized the rule that if the amount of damages was not consistent with the evidence, a new trial should be granted, but granted such new trial on all issues.[6]

The first personal injury suit where the question of inadequate damages arose was where the jury awarded the plaintiff $1. The Court granted a new trial on all issues and remarked that the verdict "must have been rendered under the influence of passion or prejudice or by some misconception of the law or the evidence."[7] It apparently never occurred to the court that this might have been a compromise among the jurors on the question of liability.

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[4] 238 U.S. 269, 59 L. Ed. 1303 (1915).

[5] *Supra*, note 2.

[6] Burns-Moore Mining & Tunnel Co. v. Watson, 45 Colo. 91, 101 Pac. 332 (1940).

[7] Ferrari v. Brooks-Harrison Fuel Co., 53 Colo. 259, 125 Pac. 125 (1912).

The next decision is most amazing.[8] The court relies upon *Simmons v. Fish* for its authority and we are sure that Mr. Chief Justice Rugg, author of the opinion in the *Simmons v. Fish* case, could never be convinced that his opinion was authority for the decision reached by the Colorado Court. The facts in this case [8] were that the suit was originally tried in the County Court to the judge without a jury who returned a judgment for the plaintiff in the sum of $453. Thereafter the case was appealed to the District Court and as a trial *de novo* was tried by a jury. The jury, after lengthy deliberation, sent a note to the trial judge signed by its foreman which read:

> There is no possibility of the jury agreeing in this case.

The judge then gave the jury an additional instruction as to the desirability of them reaching a verdict and thereafter the jury returned a verdict for the plaintiff in the sum of $1. The plaintiff in support of a motion for a new trial, attached an affidavit from the foreman which read:

> The verdict reached in the above case did not represent the true beliefs of the members of said jury as to the merits of the case, but was a compromise arrived at in accordance with the wishes of the court that the jury agree; that the amount of damages found did not, in the opinion of the jury, represent the true damages, but was an arbitrary award made for the purpose of a compromise verdict.

"Believe it or not," the trial court granted a new trial on the issue of damages alone and the Supreme Court upheld such action, stating that "the question of liability had been fairly and without compromise adjudged against defendant, and that the submission to the second jury of the sole question of the amount of damages was without error." That decision was rendered some thirty-two years ago but if the defendant is still alive we will wager he has never been convinced that the question of liability was not compromised by that jury. It would seem apparent on its face that a verdict of $1 would in and of itself indicate a compromise as to liability.

May we deviate here to illustrate the danger a defense attorney is confronted with under a case such as the one just cited? The writer defended a dude rancher in a damage suit a few years ago. Suit was for some $110,000. The rancher had only $5,000 insurance so that he was faced with possible bankruptcy in the event of a large plaintiff's verdict. The injuries were very serious. The plaintiff had sustained a fractured skull and some permanent paralysis. The medical and hospital expense exceeded $6,000. After

[8] McCarty-Johnson Heating & Engineering Co. v. Franbel, 70 Colo. 330, 201 Pac. 36 (1921).

several hours' deliberation the jury returned a verdict for the defendant. Upon questioning the jury we found that all members of the jury were agreed that the defendant was not negligent but two of the jurors wanted to return a verdict for $1 in favor of the plaintiff so that the defendant's insurance company would pay plaintiff's court costs. We shudder to think what might have happened if the other jurors had acceded to that suggestion. A new trial on the issue of damages alone might well have been the result!

The next case follows the line of reasoning as followed in the *McCarty-Johnson* case.[9] In this case,[10] several attorneys acting as *amici curiae* attempted to get the court to change its views but of no avail. In this case, the appellate court again approved the trial court's granting of a new trial on the issue of damages alone although admitting that there was "considerable dispute as to just how the accident" occurred and in the face of affidavits from five jurors to the effect that the "issues of liability and damages were intertwined beyond the possibility of segregation." For authority the court again relied upon *Simmons v. Fish.*

There is a very able dissenting opinion in the *Belcaro* case in which the dissenting judge pointed out that the court had misapprehended the principle announced in *Simmons v. Fish* and that in the *Belcaro* case it was indisputable that "the verdict was an improper compromise between those convinced of liability and those not so convinced." However, this dissent went the way of all dissents.

The *Belcaro* case was decided in 1939. The question apparently did not again arise until about 1951 and 1952. In 1952 the Colorado Supreme Court again considered the question; this time as applied to the Colorado Rules of Civil Procedure which are practically identical with the Federal Rules. In a 1952 case,[11] the court failed to mention any of its prior decisions; stated that the application of rule 59 (a) was one of first impression and cited *Norfolk v. Southern Railroad Co., supra,* as authority for granting a new trial on the issues of damages alone. In a still later case [12] decided June 8, 1953, the court has stated that they are not disposed to depart from this rule of law. This apparently means that in any case where the damages awarded a plaintiff are inadequate the trial court can and should award a new trial on the issue of damages alone.

It appears to the writer that the reasoning of the courts in many cases is fallacious. The courts go upon the assumption that a jury first determines the issue as to liability and then considers the amount of damages. Any trial attorney knows that it just does not work that way. Jurors are not attorneys; they do not think as attorneys do. While comparative negligence is not the law in most of the states, jurors often apply it irrespective of the court's

[9] *Supra,* note 8.
[10] Belcaro Realty Inv. Co. v. Norton, 103 Colo. 485; 87 P. (2d) 1114 (1939).
[11] Murrow v. Whiteley, 125 Colo. 392, 244 P. (2d) 657 (1952).
[12] King v. Avila, 127 Colo. 538, 259 P. (2d) 268 (1953).

instructions. They often take into consideration facts in mitigation of the damages. Further, jurors usually compromise their differences and oftentimes this is reflected in the amount of the damages awarded.

If the courts would follow the rules set out in *Simmons v. Fish* [13] and *Norfolk v. Southern Railroad Co.*,[14] we would have nothing to complain of. Unfortunately, as pointed out, the tendency and trend is for the courts to assume that the issues of liability and damages were separable in each case and to consistently award a new trial on the issue of damages alone.

It seems to us that the time has come to put a halt to this abuse. How to effect this is a difficult question. Perhaps if enough defense attorneys continually remind the courts of the sound rule set forth in *Simmons v. Fish* and *Norfolk v. Southern Railroad Co.*, some judge will see the light and start getting back on the right track.

In the interim, the defense is still faced with the ever-present problem of the jury compromising the verdict and putting the defendant in the unfortunate position of being faced with a second trial on the issue of damages alone. How to avoid this is a real problem. One suggestion would be special interrogatories thus forcing the jury to make a specific finding on the question of liability. This is no solution, however, because it could still be a compromise, but with the special finding as to liability the court would have one more ground to insist that the questions of liability and damages were clearly separated.

About the only practical solution is to argue most vociferously to the jury for a defense verdict, but also point out to the jury the amount you feel they should award the plaintiff in the event they should decide to return a plaintiff's verdict. This suggested amount should be the lowest amount counsel feels would stand up as being adequate damages.

We are afraid that we are a voice crying in the wilderness. However, if as a result of this article only one attorney is able to convince only one court of the correct rule as respects new trials, our effort has not been in vain. By this statement we do not wish to infer that all Courts have been taking the wrong approach to this problem. There is no question but what some of the Courts do recognize the situation and have been quite careful in granting new trials on the issue of damages alone. A very recent case in that respect is one decided in August of 1952. This is the case of *Leipert v. Honold*.[15] In that case the appellate court recognized the fact that the issue of liability was close and that where the issue of liability was close and other circumstances would indicate that the verdict was probably the result of prejudice, sympathy or compromise, and that the issue of liability had not been actually

[13] See note 3.
[14] See note 4.
[15] 39 Cal. (2d) 462, 247 P. (2d) 334 (1952).

determined, the new trial should be upon all issues and not on the issue of damages alone. It is interesting to note in that case that the Court took cognizance of the fact that the jury was out some thirteen hours, and that "the long deliberation could not have been caused by any dispute in regard to the nature and extent of Denny's injuries."

The most recent annotation on this question will be found in 29 ALR (2d) 1199, where the annotator discusses the more recent cases on this problem and points out the Courts who seem to have "seen the light."

As previously pointed out, it seems to us ridiculous for Courts to feel that in most cases when the damages awarded are inadequate that the jury has first determined the question of liability. Certainly any intelligent juror who reads the Court's instructions is not going to return a verdict for less than the actual damages, if the jury has first conscientiously determined the defendant is liable. It seems to us that all Courts should recognize that a verdict for the plaintiff for less than the actual proven damages indicates a compromise verdict or a verdict based upon sympathy, and that if a new trial is to be granted it should be upon all issues.

While probably not coming under the main heading of our article, we do not wish to close without mentioning briefly the fact that there have been cases in which verdicts have been set aside because of excessive awards. Probably the most recent of such cases is that of *Loftin v. Wilson.*[16] In that particular case the jury award was for $300,000.

The appellate court set aside the case and ordered a new trial on the issue of damages alone. The Court pointed out that the actual pecuniary loss, including loss of future earnings, amounted to approximately $92,000 and the balance of the jury award must have been for pain and suffering which was entirely too much. The Court in setting aside this verdict made the following interesting comment:

> To what amount of damages is the plaintiff in this case entitled? That is for a jury to decide, and not this court. A jury decision in such a case must mean, however, a decision free from sentimental or emotional considerations. An appellate court may sanction a verdict of a jury only when it has been reached by an unprejudiced and unimpassioned analysis of the evidence with a conscious desire to apply the law in the case to the true facts as shown by the evidence. Where a verdict is so excessive as to indicate that other considerations have influenced the jury, justice has been thwarted and the verdict cannot be sanctioned.

The general rule among the courts seems to be that a trial court should not interfere with a jury's verdict simply because it

[16] 2 CCH Automobile Cases (2d) 134.

is greater than its own estimate. That only where the verdict is so grossly excessive as to shock the conscience of the court, and it is clearly manifest that it was a result of caprice, passion, partiality, prejudice, corrupt or other improper motives, will the court intervene. In fact, the Federal Courts of Appeal have frequently invoked the rule that the question of excessiveness of damages being one of fact does not present a proper question for consideration on review where the issues are confined to matters of law.[17]

For those who are interested in this problem of excessive verdicts, we call their attention to an annotation in 16 ALR (2d) 3.

It would appear that the general recognized rule is that the amount of damages to be awarded for personal injuries is primarily a question of fact for decision by the jury and that the Courts will interfere on the ground of excessiveness only in exceptional cases. The trend seems to be that large verdicts by juries are generally not reversed by the appellate court, whereas verdicts awarding inadequate damages are set aside and unfortunately new trials are too often awarded on the issue of damages alone.

[17] Houston Coca-Cola Bottling Co. v. Kelly, 131 Fed. (2d) 627 (1942).

ANNUAL LAW DAY

The University of Colorado Law School's Annual Law Day program will be held on Saturday, April 24, 1954.

The subject of the panel discussion in the morning will be "Preparation and Trial of Tort Actions." There will be a luncheon in connection with the program at which Mr. S. Arthur Henry, of the Denver Bar, will speak. At the evening banquet Mr. Jean S. Breitenstein will make the principal speech.